Federal Court of Australia

Vincentia MC Pharmacy Pty Ltd v Australian Community Pharmacy Authority [2020] FCAFC 163

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| Appeal from: | *Choice Pharmacy Vincentia Pty Ltd v Australian Community Pharmacy Authority* [2020] FCA 93  *Choice Pharmacy Vincentia Pty Ltd v Australian Community Pharmacy Authority (No 2)* [2020] FCA 363 |
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| File number: | NSD 348 of 2020 |
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| Judgment of: | **PERRY, STEWART AND JACKSON JJ** |
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| Date of judgment: | 30 September 2020 |
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| Catchwords: | **ADMINISTRATIVE LAW** – statutory construction –  decisions of Australian Community Pharmacy Authority to recommend to approve, and of Secretary to approve, application to supply pharmaceutical benefits under s 90 of *National Health Act 1953* (Cth) – whether primary judge erred in adopting narrow construction of “for at least 70 hours each week” for purposes of definition of “large medical centre” in s 5(1) of *National Health (Australian Community Pharmacy Authority Rules) Determination 2011* (Cth) – significance of weeks which include a public holiday to proper construction of “each week” – interpretation of subordinate or delegated legislation pursuant to s 13 of the *Legislation Act 2003* (Cth) and s 15AA of the *Acts Interpretation Act 1901* (Cth) *–*  legislative definition framed as substantive enactment –  appeal allowed – outstanding judicial review grounds remitted to primary judge for determination |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15AA  *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5  *Federal Court of Australia Act 1976* (Cth) s 37M  *Federal Court Rules 2011* (Cth) r 30.01  *Judiciary Act 1903* (Cth) s 39B  *Legislation Act 2003* (Cth) s 13  *National Health Act 1953* (Cth) ss 87, 90, 90A, 99, 99J, 99K, 99L  *National Health (Australian Community Pharmacy Authority Rules) Amendment Determination 2009* (Cth)  *National Health (Australian Community Pharmacy Authority Rules) Amendment Determination 2015 (No 1)* (Cth)  *National Health (Australian Community Pharmacy Authority Rules) Determination 2006* (Cth)  *National Health (Australian Community Pharmacy Authority Rules) Determination 2011* (Cth) s 5, Sch 1 (item 136) Sch 2 (items 211, 212)  *National Health (Australian Community Pharmacy Authority Rules) Determination 2018* (Cth) |
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| Cases cited: | *ACCC v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243  *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27  *Berenguel v Minister for Immigration and Citizenship* [2010] HCA 8; (2010) 84 ALJR 251  *Cabell v Markham* (1945) 148 F (2d) 737  *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384  *Dang v Administrative Appeals Tribunal* [2019] FCAFC 220  *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628  *Kastrinakis v Australian Community Pharmacy Authority* [2013] FCA 995; (2013) 215 FCR 452  *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216  *Lo v Australian Community Pharmacy Authority* [2013] FCA 639  *Master Education Services Pty Ltd v Ketchell* [2008] HCA 38; (2008) 236 CLR 101  *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214  *Minister for Immigration & Multicultural Affairs v Seligman* [1999] FCA 117; (1999) 85 FCR 115  *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29  *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; (2016) 260 CLR 232  *O'Brien v Komesaroff* (1982) 150 CLR 310  *Perez v Minister for Immigration and Border Protection* [2017] FCAFC 180  *Pharmacy Guild of Australia v Australian Community Pharmacy Authority* (1996) 70 FCR 462  *Pharmacy Restructuring Authority v Chatfield* (1993) 43 FCR 418  *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 335  *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13  *San v Rumble (No. 2)* [2007] NSWCA 259  *Saraswati v The Queen* (1991) 172 CLR 1  *Simjanovska v Department of Human Services* [2019] FCA 499  *Slopen Main Pty Ltd (Trustee) v Hope* [2017] FCAFC 203; (2017) 256 FCR 156  *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287  *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362  *Walkerden v Wodonga Pharmacy Pty Ltd* [2015] FCA 273; (2015) 230 FCR 243 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 123 |
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| Date of hearing: | 6 August 2020 |
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| Solicitor for the Second Respondent: | Mr M Flaherty |
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| Counsel for the Third Respondent: | The Third Respondent filed a submitting notice |

ORDERS

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|  | | NSD 348 of 2020 |
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| BETWEEN: | VINCENTIA MC PHARMACY PTY LTD ACN 617 467 366  Appellant | |
| AND: | AUSTRALIAN COMMUNITY PHARMACY AUTHORITY  First Respondent  CHOICE PHARMACY VINCENTIA PTY LTD ACN 605 545 462  Second Respondent  THE SECRETARY, DEPARTMENT OF HEALTH  Third Respondent | |

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| order made by: | PERRY, STEWART AND JACKSON JJ |
| DATE OF ORDER: | 30 September 2020 |

THE COURT ORDERS THAT:

1. The appeal is upheld.
2. The orders of the primary judge are set aside and replaced with the following orders:
   1. Grounds 1, 2 and 2A of the amended originating application for judicial review are dismissed.
   2. The applicant is to pay the third respondent’s costs of the determination of these grounds of review.
3. The second respondent is to pay the appellant’s costs of the appeal.
4. The matter is remitted to the primary judge for the purposes of determining the remaining grounds of judicial review.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRY AND STEWART JJ:

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##### INTRODUCTION

1. The appellant, Vincentia MC Pharmacy Pty Ltd (**MC Pharmacy**), applied on 30 March 2017 to the third respondent, the Secretary of the Department of Health (the **Secretary**), for approval under s 90 of the *National Health Act 1953* (Cth) (the **NHA**) to supply pharmaceutical benefits from premises at the Vincentia Medical Centre in Vincentia, New South Wales. Approval was granted by the Secretary (the **Approval**) following a recommendation by the first respondent, the Australian Community Pharmacy Authority (the **Authority**), that the application be approved on the basis that the prescribed criteria were met (the **Recommendation**). Those criteria included relevantly item 136(1) of Sch 1 to the *National Health (Australian Community Pharmacy Authority Rules) Determination 2011* (Cth) as amended by *National Health (Australian Community Pharmacy Authority Rules) Amendment Determination 2015 (No.1)* (PB 89 of 2015) (Cth) (the **2015 Amendment Determination**). Save where otherwise indicated, a reference to the **2011 Rules** is a reference to those rules as amended in 2015.
2. The Recommendation and the Approval decisions were challenged by the second respondent, Choice Pharmacy Vincentia Pty Ltd (**Choice Pharmacy**). Choice Pharmacy is the proprietor of a pharmacy business which is approved to supply pharmaceutical benefits from premises in Vincentia Marketplace in Vincentia. It is located approximately 150 m from the MC Pharmacy and has operated its business since 2015.
3. Choice Pharmacy sought judicial review of the Recommendation and Approval in the Federal Court on the ground that the Authority erred in law in finding that the premises for the MC Pharmacy were located in a “*large medical centre*” as defined in s 5(1) of the amended 2011 Rules. As a result, Choice Pharmacy contended that the Authority wrongly formed the view that the objective jurisdictional requirement in item 136(1) of Sch 1 to the 2011 Rules was met. That contention was upheld by a single judge of this Court in *Choice Pharmacy Vincentia Pty Ltd v Australian Community Pharmacy Authority* [2020] FCA 93(***Choice Pharmacy (No. 1)***). After affording the parties an opportunity to make submissions as to the appropriate orders to give effect to her Honour’s reasons in *Choice Pharmacy (No. 1)*, the primary judge made final orders setting aside the Recommendation and the Approval decision and referring the matter back to the respondents for determination according to law: *Choice Pharmacy Vincentia Pty Ltd v Australian Community Pharmacy Authority (No 2)* [2020] FCA 363 (***Choice Pharmacy (No. 2)***)*.* These orders have been stayed pending the hearing and resolution of this appeal: *Vincentia MC Pharmacy Pty Ltd v Australian Community Pharmacy Authority* [2020] FCA 438.
4. MC Pharmacy argued on appeal that the primary judge misconstrued paragraphs (b) and (c) of the definition of “*large medical centre*” in s 5(1) of the 2011 Rules, as alleged in ground 1 of the notice of appeal. At the hearing of the appeal, the appellant accepted that grounds 2 to 7 inclusive of the notice of appeal ultimately depended on ground 1 being upheld, while ground 8 was abandoned at the hearing. Ground 9 and grounds 10 and 11 raise discrete issues.
5. The Authority made submissions before the primary judge and on the appeal confined to matters bearing upon the interpretation and operation of the NHA and the 2011 Rules which in its view were not sufficiently raised by MC Pharmacy and might not be addressed by Choice Pharmacy: see *Lo v Australian Community Pharmacy Authority* [2013] FCA 639 at [73]; *Walkerden v Wodonga Pharmacy Pty Ltd* [2015] FCA 273; (2015) 230 FCR 243 (***Walkerden****)* at [8]. The limited scope of the Authority’s involvement in the proceeding was appropriate given that the matter may potentially be remitted to it for redetermination according to law and that Choice Pharmacy had legal representation: *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36. The Court also acknowledges that the Authority’s submissions were of particular assistance.
6. We agree for the reasons given by Jackson J that grounds 9, 10 and 11 must be dismissed. However, in our view, the appeal should be allowed on ground 1 for the reasons set out below. The primary judge, with respect, erred in her Honour’s construction of “*large medical centre*” in s 5(1) of the 2011 Rules and therefore in quashing the Authority’s Recommendation and Approval on the ground that they were vitiated by legal error based upon that construction. The matter must therefore be remitted to the primary judge in order to deal with the remaining grounds of review which her Honour did not determine in circumstances which are later explained.

##### BACKGROUND

###### Statutory framework

Applications for approval for the supply of pharmaceutical benefits from particular premises under the National Health Act

1. Division 2 (ss 85-98AC) of Pt VII of the NHA deals with the supply of “*pharmaceutical benefits*” by the Commonwealth. Section 90(1) of the NHA confers power on the Secretary to grant approval on application for a pharmacist to supply pharmaceutical benefits at particular premises. Approval requires the pharmacist to supply certain drugs at set prices to consumers offset by a Commonwealth subsidy. Specifically, s 87 of the NHA controls the amount which an approved pharmacist may charge a person for the supply of a pharmaceutical benefit, while s 99 provides, relevantly, that only an approved pharmacist who has supplied a pharmaceutical benefit is entitled to a payment from the Commonwealth in relation to the supply of the pharmaceutical benefit. In short, as the primary judge observed in *Choice Pharmacy (No. 1)*:

19. … As noted by the Court in *Slopen Main Pty Ltd (Trustee) v Hope* [2017] FCAFC 203; 256 FCR 156 (***Hope FC***)at [4] (Griffiths, Mortimer and Bromwich JJ), pharmaceutical benefits facilitate the supply of pharmaceutical products to consumers at a reduced price, subsidised under the Pharmaceutical Benefits Scheme (**PBS**). While a pharmacist (and therefore a pharmacy) can supply pharmaceutical products without approval by the Secretary, a pharmacy cannot supply pharmaceutical benefits without that approval.

1. Section 90(3D) however proscribes the giving of approval by the Secretary in certain circumstances as follows:

The Secretary must not grant approval under this section to a pharmacist in respect of particular premises if the Secretary is satisfied that on or after the day the approval would otherwise be granted:

(a) the pharmacist would be unable to supply pharmaceutical benefits at the premises; or

(b) the premises would not be accessible by members of the public for the purpose of receiving pharmaceutical benefits at times that, in the opinion of the Secretary, are reasonable.

1. The Authority is a statutory authority established under s 99J of the NHA. Its functions include making recommendations to the Secretary as to whether applications made under s 90 of the NHA for approval to supply pharmaceutical benefits at a particular premises should be approved and, if approval is recommended, making recommendations as to conditions (if any) to which the approval should be subject (NHA, s 99K(1)). Subject to exceptions not presently relevant, an application for approval must be referred to the Authority (NHA, s 90(3A)). Section 90(3B) provides that:

An approval may be granted under this section in respect of an application that has been referred to the Authority under subsection (3A) or (3AF) ***only*** if the Authority has recommended the grant of the approval, but the Secretary may refuse to grant an approval even if the grant has been recommended by the Authority.

(emphasis added)

1. It follows that “*an approval recommendation is indispensable for obtaining approval from the Secretary*”: *Slopen Main Pty Ltd (Trustee) v Hope* [2017] FCAFC 203; (2017) 256 FCR 156 at [5] (the Court).
2. This statement is subject to a caveat, namely, that the Minister has a discretion under s 90A of the NHA on request by the pharmacist to substitute a decision granting approval for a decision by the Secretary to refuse it on the basis of non-compliance with the relevant rules under s 99L. The Minister may exercise this discretion only if satisfied that the Secretary’s decision would leave the community without reasonable access to pharmaceutical benefits and it is in the public interest to approve the pharmacy. The discretion is exercisable only by the Minister personally and the Minister has no duty to consider whether or not to exercise the discretion: see s 90A(4)(b) and (5).

The 2011 Rules

1. In making recommendations under s 90, the Authority must comply with relevant rules determined by the Minister under s 99L of the NHA (NHA, s 99K(2)). It is here that much of the substantive content governing the approval and non-approval of applications under s 90 is to be found, as Mortimer J observed in *Walkerden* at [12].
2. It was not in issue that the relevant rules made under s 99L in effect when the Authority recommended, and the Secretary's delegate approved, MC Pharmacy’s application were the 2011 Rules as amended by the 2015 Amendment Determination: *Choice Pharmacy (No. 1)* at [23]. The 2011 Rules replaced the *National Health (Australian Community Pharmacy Authority Rules) Determination 2006* (Cth) (the **2006 Rules**) and were in turn repealed and replaced by the *National Health (Australian Community Pharmacy Authority Rules) Determination 2018* (Cth) on 3 October 2018.
3. Relevantly, s 10(b) of the 2011 Rules provided that:

The Authority ***must*** recommend that an applicant be approved under section 90 of the Act in relation to particular premises if:

…

(b) for any other application [i.e. not an application involving cancellation of an approval]:

(i) the application states that it is one of the kinds mentioned in column 2 of an item in Part 2 of Schedule 1; and

(ii) all the requirements set out in column 3 of that item are met; and

(iii) all the requirements set out in Schedule 2 are met.

(emphasis added)

1. Conversely, s 11 of the 2011 Rules provides that the Authority must recommend that an applicant ***not*** be approved under s 90 of the NHA in the following circumstances:

The Authority must recommend that an applicant not be approved under section 90 of the Act in relation to particular premises if:

(a) a requirement, under paragraph 10(a) or (b), that applies in relation to the application is not met; or

(b) an application involves the cancellation of an existing approval and that existing approval is subject to a recommendation by the Authority that an applicant be approved under section 90 of the Act.

1. Part 2 of Sch 1 sets out the criteria for seven different kinds of applications for approval for proposed premises under s 90 which do not involve the cancellation of an existing approval, namely: for proposed premises located 1.5 km or 10 km from the nearest approved premises (items 130-132); and for proposed premises in certain kinds of facilities, that is, a small shopping centre, a large shopping centre, a large private hospital, or a large medical centre (items 133-136 respectively). In turn, items 211 and 212 of Sch 2 to the 2011 Rules set out general requirements which applied to all of these kinds of applications. Those requirements were as follows:

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| **Item** | **Requirements** |
| 211 | The Authority is satisfied that at all relevant times:  (a)  the proposed premises are not approved premises; and  (b)  the applicant has a legal right to occupy the proposed premises on or after the day the application was made; and  (c)  the proposed premises:  (i)  could be used for the operation of a pharmacy under applicable local government and State or Territory laws relating to land development; and  (ii) would be accessible by the public.  … |
| 212 | The Authority is satisfied that:  (a)  within 6 months after the day on which the Authority makes a recommendation in relation to the application, the applicant will be able to begin operating a pharmacy at the proposed premises; and  (b)  the proposed premises are not directly accessible by the public from within a supermarket. |

1. The application by MC Pharmacy was for approval for premises in a large medical centre as provided for by item 136 of Sch 1 to the 2011 Rules. That item specified the following criteria:

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| **Item** | **Kind of**  **application** | **Requirements** |
| 136 | New pharmacy in a facility (large medical centre) | 1. ***The proposed premises are in a large medical centre.***  2. There are no approved premises in the large medical centre.  3. If the medical centre in which proposed premises are located is  (a) in a small shopping centre, a large shopping centre or a private hospital, the proposed premises are at least 500 m, in a straight line, from any approved premises, other than approved premises located in a different small shopping centre, large shopping centre, or private hospital; or  (b) not in a small shopping centre, a large shopping centre or a private hospital, the proposed premises are at least 500 m, in a straight line, from any approved premises, other than an approved premises located in a small shopping centre, large shopping centre, or private hospital.  4. The Authority is satisfied that, during the 2 months before the day on which the application is made and until the day the application is considered by the Authority, the number of PBS prescribers at the medical centre is equivalent to ***at least 8 full-time PBS prescribers***, of which at least 7 PBS prescribers must be prescribing medical practitioners.  5. The Authority is satisfied that the applicant will make all reasonable attempts to ensure that the operating hours of the proposed premises will meet the needs of the patients of the medical centre. |

(emphasis added)

1. Importantly for the purposes of the present appeal, s 5(1) of the 2011 Rules defines “*large medical centre*” to mean:

…a medical centre that:

(a) is under single management; and

(b) operates ***for at least 70 hours each week***; and

(c) has one or more prescribing medical practitioners at the centre f***or at least 70 hours each week.***

(emphasis added)

1. While item 136 had its origins in item 112 of Sch 1 to the 2006 Rules, there were a number of differences:
2. unlike item 136, an application for a pharmacy to be located in a large medical centre could be made under item 112 only where it involved the cancellation of an existing approval;
3. a “*large medical centre*” was initially defined in s 6(1) of the 2006 Rules as a medical centre under single management “*that operates for at least 55 hours each week*”; and
4. the definition of “*large medical centre*” in the 2006 Rules was amended by the *National Health (Australian Community Pharmacy Authority Rules) Amendment Determination 2009 (No.1)* (PB 14 of 2009) (Cth) (the **2009 amendment determination**) so as to require instead that the medical centre “*(b) operates for at least 70 hours* ***a*** *week; and (c) has prescribing medical practitioners providing general practice services at the centre for at least 70 hours* ***a*** *week*” (emphasis added).

(For reasons we later explain, Choice Pharmacy placed emphasis upon the change in wording from “***a*** *week*” in the definition of “*large medical centre*” under the 2006 Rules as amended in 2009, to “***each*** *week*” in the 2011 Rules in support of its narrow construction.)

1. It was not in issue that once approval was granted under s 90 of the NHA, the approval would not expire provided that the pharmacy continued to operate. As such, even if, for example, the opening hours of the medical centre were to change as a result of which the medical centre no longer met the definition of a large medical centre, there was no provision in the 2011 Rules for approval to be withdrawn.
2. Finally, the focus of the inquiry under the 2011 Rules was upon the appropriateness of a new pharmacy in the particular location proposed, as is illustrated by item 136 and as Mortimer J observed in *Walkerden* at [13]. As her Honour further explained:

13. … As part of that focus, consideration is given to the location of other pharmacies. But the principal focus, in my opinion, is on the community’s need for adequate and sustainable access to pharmaceutical benefits and a new application is to be assessed according to criteria designed to advance that objective.

###### The application by MC Pharmacy for approval

1. On 30 March 2017 MC Pharmacy applied for approval to supply pharmaceutical benefits at 5 Halloran Street, Vincentia, New South Wales (the **Premises**). The application relied relevantly upon the following evidence:
2. MC Pharmacy’s sub-lease to 31 December 2021 (with options to renew for a first further term of three years and a second further term of three years, ending 31 December 2027) of the Premises, which comprise a ground floor section of a building in which the Vincentia Medical Centre (**Medical Centre**) operates;
3. a statutory declaration by Greg Davis, the Chief Executive Officer of the Medical Centre, dated 30 March 2017 that:
   1. the Medical Centre is open 70.5 hours per week on Monday to Thursday 7.30am to 8.00pm, Friday 7.30am to 6.00pm, and Saturday and Sunday 9.00am to 2.00pm, save that the Centre is “*only open on selective public holidays*”; and
   2. there is one or more prescribing medical practitioners under the Pharmaceutical Benefits Scheme (**PBS** **prescribers**) providing general practice services at the Medical Centre for at least 70 hours per week, and the equivalent of at least eight full-time (i.e. 38 hours) PBS prescribers practising at the Medical Centre as evidenced in Attachment 1 of the general practitioners’ rosters for 30 January 2017 to 31 March 2017);
4. statutory declarations by Mr Davis dated 4 May 2017 and 31 May 2017 attaching rosters for the periods from 27 February 2017 to 4 May 2017 and 1 May 2017 to 8 June 2017 respectively;
5. a “*trading hours agreement*” being an undertaking signed by the director of MC Pharmacy agreeing that the trading hours of the proposed pharmacy would be the same as the opening hours of the Medical Centre and agreeing to trade for longer hours should the Centre extend its hours of operation; and
6. a copy of a brochure about the Medical Centre setting out its opening hours and giving details of an after-hours GP Hotline.
7. On 9 June 2017, the Authority decided under s 99K(1) of the Act to recommend to the CEO of Medicare in the CEO’s capacity as the Secretary’s delegate that the application be approved (the **Recommendation**). Following a request from Choice Pharmacy, the Authority provided a statement of reasons for the Recommendation.
8. In its reasons, the Authority first listed all of the evidence before it and then addressed each of the requirements under item 136 seriatim, finding as follows.
9. With respect to item 136(1), based upon Mr Davis’ statutory declarations and the attached rosters the Authority was satisfied that the proposed premises are in a “*large medical centre*”, finding that:
   1. the proposed premises are in the Medical Centre;
   2. the Medical Centre is under single management; and
   3. the Medical Centre “*operates for at least 70 hours each week, and has one or more prescribing medical practitioners at the Centre for at least 70 hours each week*”

(at [25], [27], [30]-[31]).

1. With respect to item 136(2), the Authority found, relevantly, that there were no other PBS approved premises in the Medical Centre (at [32]-[34]).
2. With respect to item 136(3), the Authority found that:
   1. the Medical Centre was not in a small or large shopping centre or a private hospital;
   2. the nearest approved pharmacy was the Choice Pharmacy approximately 150 m away in a small shopping centre; and
   3. the proposed premises were at least 500 m in a straight line from any approved premises other than (relevantly) an approved premises in a small shopping centre (at [35]-[41]).
3. With respect to item 136(4), the Authority was satisfied on the basis of Mr Davis’ statutory declarations and annexed rosters for the Medical Centre that the number of PBS prescribers at the Medical Centre was equivalent to at least eight full-time PBS prescribers, of which at least seven PBS prescribers were prescribing medical practitioners (at [42]-[46]).
4. Finally, with respect to item 136(5), the Authority was satisfied on the basis of the trading hours agreement that MC Pharmacy would make all reasonable attempts to ensure that the operating hours of the proposed premises would meet the needs of the patients of the Medical Centre (at [47]-[49]).
5. The Authority’s reasons do not contain any discussion of the proper construction of the definition of “*large medical centre*” for the purposes of item 136(1) of the 2011 Rules or refer to the evidence that the Medical Centre was not open on certain public holidays.
6. The Authority was also satisfied that the requirements in item 211 of Sch 2 were met, including that: MC Pharmacy had a legal right to occupy the proposed premises; the proposed premises would be accessible by the public; and MC Pharmacy would be able to begin operating a pharmacy at the proposed premises within six months of the day on which the Authority made its recommendation (at [58], [62], and [67]). As such, the Authority recommended that MC Pharmacy’s application be approved.
7. MC Pharmacy commenced operating at the Premises on 1 November 2017 and supplying pharmaceutical benefits from the Premises on 4 December 2017 following approval by the Secretary on the same day.

###### The application for judicial review before the primary judge

1. By its amended originating application, Choice Pharmacy sought orders quashing the Authority’s Recommendation and the Approval by the Secretary pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) and s 39B of *Judiciary Act 1903* (Cth). The amended originating application challenged the Recommendation on the basis that the Medical Centre was not a “*large medical centre*” as defined in the 2011 Rules because it did not operate for at least 70 hours each week or have one or more prescribing medical practitioners at the centre for at least 70 hours each week. As a result, Choice Pharmacy alleged that the decision by the Authority to make the recommendation:
2. was not authorised by the NHA (ADJR Act, s 5(i)(d));
3. was an improper exercise of the power and/or involved an error of law (ADJR Act, ss 5(1)(e) and (2)); and/or
4. was based on the existence of a particular fact, namely that the proposed premises were located in a large medical centre as defined in the NHA, when that fact did not exist (ADJR Act, ss 5(1)(h) and (3)(b)).

(Grounds 1, 2 and 2A respectively).

1. In addition, the amended originating application alleged that the Authority’s recommendation decision was induced or affected by fraud (ground 3) as pleaded in paragraphs 3 to 11 inclusive. While not in issue on the appeal for reasons we shortly explain, we note that the pleadings of fraud manifestly did not comply with the strict requirements for the pleading of such a serious matter and were therefore potentially liable to be struck out. In this regard, it was recently explained in *Simjanovska v Department of Human Services* [2019] FCA 499 with respect to the allegations of fraud, bias and the like, made in that proceeding:

88. Despite their seriousness, none of these allegations has been pleaded in accordance with the strictures applying to the pleading of fraud and similar allegations of misconduct: *Banque Commerciale SA (en liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 285 (Mason CJ and Gaudron J). Yet such allegations are not lightly to be made. It is well established that a court is careful not to find fraud, bias, bad faith or other forms of misconduct unless they are distinctly pleaded and proved: *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at [15] (the Court); see also FCR rule 16.42, and *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 247 CLR 486 at [26] (French CJ, Gummow, Hayne and Kiefel JJ). Thus, it is not sufficient to allege facts from which fraud, for example, might be inferred but which are also consistent with innocence: *Davy v Garrett* [1877] 7 Ch D 473 at 489 (Thesiger LJ).

1. By an interlocutory application dated 14 December 2018, Choice Pharmacy sought an order pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth) for questions to be heard and determined separately from any other questions, namely whether the Medical Centre was a “*large medical centre*” for the purposes of the 2011 Rules and the consequences if it were not. Further, in the event that the Authority had wrongly found that the Medical Centre was a “*large medical centre*” and the Authority’s decision was therefore vitiated by a jurisdictional error or based on a fact which did not exist, the interlocutory application sought an order that the orders sought in the amended originating application be granted.
2. The primary judge does not appear to have ruled specifically on the interlocutory application. Rather, on 30 January 2019 the primary judge made orders listing the matter for what was described as a “*partial hearing… limited to grounds 1, 2 and 2A of the amended originating application*”. Her Honour explained the circumstances in which that occurred in *Choice Pharmacy (No. 2)* at[11]-[13].

###### The decision in *Choice Pharmacy (No. 1)*

1. In *Choice Pharmacy (No. 1)*, the primary judge upheld grounds 1, 2 and 2A of the amended originating application. Her Honour’s reasons may be briefly summarised as follows.
2. The primary judge identified (at [18]) two central issues:
3. the proper construction of the words “*at least 70 hours each week*” in ss 5(b) and (c) of the 2011 Rules; and
4. whether the requirements in ss 5(b) and (c) of the 2011 Rules are jurisdictional facts in the narrow sense, such that the Court could decide for itself whether the requirements were met.
5. In this regard, MC Pharmacy conceded that the rosters in evidence before the Authority established that the Medical Centre was not open on public holidays falling within the period 30 January 2017 to the first week of June 2017 (**evidence period**) (primary judge at [11]). Those public holidays were the Easter public holidays on 14 to 17 April 2017 (inclusive) and the Anzac Day public holiday on 25 April 2017. As such, MC Pharmacy conceded that in the weeks on which those public holidays fell, fewer than 70 hours were in fact worked at the Medical Centre.
6. In answering the first issue, the primary judge accepted ***first*** that the term “*operates at least 70 hours each week*” in paragraph (b) of the definition of “*large medical centre*” in s 5(1) “*is capable of bearing more than one meaning* *and is, to some extent, evaluative*” (at [63]). Her Honour further considered that “*at least 70 hours each week*” in paragraph (c) of the definition also “*requires some evaluation, although it is arguably clearer in its requirement*…” (at [64]).
7. ***Secondly***, after referring to a number of indicia said to be indicative of an intention that “*at least 70 hours each week*” be read strictly as submitted by Choice Pharmacy, her Honour held that:

67. In the Court’s view, the meaning to be derived from “at least 70 hours each week” in ss 5(a) and (b) [sic] is a requirement that the ***ordinary and habitual hours*** in which the medical centre operates and a prescribing medical practitioner will be in attendance are ***at least 70 hours*** ***in each consecutive period of seven days***. This is what the evidence before the Authority should demonstrate, for whatever period the Authority elects to receive evidence. This interpretation serves the purpose of Item 136 by ensuring that in each week, the medical centre operates with the services of a prescribing medical practitioner during extended business hours. The purpose of creating a category for approvals related to “large medical centres” is to meet the demand for dispensing of PBS medicines that such centres generate. That purpose would be undermined if the “at least 70 hours each week” criterion is not strictly interpreted.

68. A stated intention to operate on some “selected” public holidays, when the usual hours are only 70.5 per week, has the result that on up to eight weeks in a year the medical centre will not operate at least 70 hours each week where (as here) there is no intention expressed to make up the lost hours at other times during the relevant weeks and no evidence that those lost hours were in fact made up in the weeks in which public holidays fell during the evidence period. It demonstrates that the Medical Centre’s operating hours are not ordinarily or habitually at least 70 hours each week or that its intended operation is to have at least one prescribing medical practitioner at the Medical Centre for that period each week, even though it may often do so. In the Court’s view, it would be necessary for there to be express words in the 2011 Rules addressing public holidays to produce the result contended for by MC Pharmacy.

(emphasis added)

(We note that the reference at [67] to ss 5(a) and (b) was plainly intended to be a reference to ss 5(b) and (c), as the words “*at least 70 hours each week*” do not appear in s 5(a).)

1. The parties were agreed that the references by the primary judge to “*ordinary*” and/or “*habitual*” hours of operation in these passages were superfluous. Rather, they correctly submitted that her Honour’s reasons are properly understood as accepting Choice Pharmacy’s submission that the words “*each week*” in ss 5(b) and (c) of the definition meant that the medical centre must in fact operate for 70 hours “*in each consecutive period of seven days*” for 52 weeks a year without exceptions for those weeks in which there were one or more public holidays. In so holding, her Honour rejected the submission by MC Pharmacy that this would involve reading the words “*and every*” into ss 5(b) and (c) of the definition. Rather, her Honour held that this construction accorded with “*their plain meaning in circumstances where there is nothing in the National Health Act or the 2011 Rules which suggests that some other meaning should be adopted*” (at [69]). Nor did the primary judge accept that this interpretation would frustrate the intention of item 136 that “*there be a pharmacy available where a medical centre of a particular kind operates outside normal business hours consistent with the 70 hours each week requirement in ss 5(b) and (c) of the 2011 Rules*” (at [69]).
2. ***Thirdly***, the primary judge inferred from the Authority’s statement of reasons that (at [72]):

… the Authority did not take into account the relevant consideration that the Medical Centre did not operate for at least 70 hours in weeks with a public holiday during the evidence period and that management of the Medical Centre had expressed an intention that the Medical Centre would generally not be open on public holidays. The absence of comment about public holidays in the statement of reasons indicates that the Authority failed to appreciate the significance of the evidence concerning public holidays because it misconstrued the statutory test in ss 5(b) and (c).

1. The primary judge therefore held that the Authority had made an error of law by reason of its misconstruction of the definition of “*large medical centre*” for the purposes of item 136(1) and, as a consequence, in failing to recommend that MC Pharmacy’s application not be approved given the evidence that the Medical Centre did not operate for at least 70 hours each week (at [72]). Equally and for the same reasons, her Honour held that there was no evidence justifying the Authority’s finding that the Medical Centre operated at least 70 hours each week (at [73]-[74]). In those circumstances, the primary judge held that ground 2A was made out and it was not necessary for the Court to determine whether the requirements in ss 5(b) and (c) of the definition of “*large medical centre*” were jurisdictional facts (at [74]-[75]).

###### The decision in *Choice Pharmacy (No. 2)*

1. In *Choice Pharmacy (No. 1)*, the primary judge ordered that the parties provide agreed draft orders “*reflecting these reasons and with respect to relief and costs*” or, if not agreed, draft orders “*which the party contends reflecting [sic] these reasons*”together with submissions in support of their draft orders. Her Honour ultimately received, with respect, little assistance from the two pharmacies in this regard. Choice Pharmacy provided draft orders with respect to relief and costs, but no orders reflecting the reasons in *Choice Pharmacy (No. 1)* (*Choice Pharmacy (No. 2)* at [4]). MC Pharmacy provided draft orders said to reflect the reasons but not in relation to relief and costs on the basis that *Choice Pharmacy (No. 1)* did not substantially dispose of the case because the fraud allegations raised by MC Pharmacy in ground 3 should be clearly addressed and disposed of given their seriousness and an opportunity should be afforded to make submissions on the discretion to grant relief (*Choice Pharmacy (No. 2)* at [5]).
2. The Authority provided draft orders on the ground that the orders made would potentially affect the administration of the NHA and the 2011 Rules. Its submissions on relief were limited to supporting MC Pharmacy’s submission that any orders quashing the Recommendation and the Approval decisions should take effect 21 days after the orders were made pursuant to s 16(1)(a) of the ADJR Act in order to avoid the significant practical inconvenience and legal complexity that would arise if the relief rendered the decisions under review *void ab* initio:  *Choice Pharmacy (No. 2)* at [8].
3. The primary judge did not accept the MC Pharmacy’s submission that it was necessary to hear ground 3 of the amended application before making final orders on the basis that grounds 1, 2 and 2A were established; nor did her Honour accept MC Pharmacy’s rationale for not making submissions on relief and costs because it would give the erroneous impression that it had acquiesced in the orders, finding that the rationale was misconceived (at [11]-[15]). Rather the primary judge held that relief and costs should follow the Court’s finding that Choice Pharmacy had established grounds 1, 2 and 2A and found that to hear ground 3 in those circumstances “*would defeat the purpose of the partial hearing”* (*Choice Pharmacy (No. 2)* at [16]). As such, her Honour made final orders setting aside the Recommendation and Approval decisions and remitted the Application for approval to the Authority and the Secretary for further consideration according to law, with MC Pharmacy to pay Choice Pharmacy’s costs as agreed or taxed. No order for costs was made with respect to the Authority in line with the Authority’s submissions and those of Choice Pharmacy (at [18]).

##### CONSIDERATION

###### Relevant principles of statutory construction

1. ***First***, the 2011 Rules are legislative instruments for the purposes of the *Legislation Act 2003* (Cth) (**Legislation Act**). As such, they must be construed in accordance with the Legislation Act and the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**): *Berenguel v Minister for Immigration and Citizenship* [2010] HCA 8; (2010) 84 ALJR 251 at [15] (the Court).Specifically, s 13(1) of the Legislation Act provides that:

(1) If enabling legislation confers on a person the power to make a legislative instrument or notifiable instrument, then, unless the contrary intention appears:

(a) the *Acts Interpretation Act 1901* applies to any instrument so made as if it were an Act and as if each provision of the instrument were a section of an Act; and

(b) expressions used in any instrument so made have the same meaning as in the enabling legislation as in force from time to time; and

(c) any instrument so made is to be read and construed subject to the enabling legislation as in force from time to time, and so as not to exceed the power of the person to make the instrument.

1. No contrary intention was said to exist for the purposes of subs (1); nor can any be discerned.
2. ***Secondly***, the 2011 Rules, being subordinate or delegated legislation, are to be construed in accordance with ordinary principles of statutory construction:  *Master Education Services Pty Ltd v Ketchell* [2008] HCA 38; (2008) 236 CLR 101 at [19] (the Court). This requires, that they be placed in their statutory context including, relevantly, the NHA pursuant to which they were made, in line with s 13(1)(c) of the Legislation Act (ibid).
3. ***Thirdly***, the relevant principles of statutory construction are well-established. In *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 335 (***Project Blue Sky***), McHugh, Gummow, Kirby and Hayne JJ explained that:

69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined “by reference to the language of the instrument viewed as a whole”. In *Commissioner for Railways (NSW) v Agalianos* [(1955) 92 CLR 390 at 397], Dixon CJ pointed out that “the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed”. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

1. The importance of starting with the statutory context and text was recently emphasised by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 in the following passage:

14. The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose [citing *Project Blue Sky* with approval]. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

1. Context “*in its widest sense*”, as referred to in this passage, includes “*such things as the existing state of the law and the mischief which … one may discern the statute was intended to remedy*” *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (cited with approach in *SZTAL* at [14]). To have regard to context in this sense, as integral to the process of statutory construction irrespective of whether ambiguity or inconsistency exists in the literal text, accords with the mandate in s 15AA of the Acts Interpretation Act that the interpretation which best gives effect to the legislative purpose ***must*** be preferred to any other interpretation: *Mills v Meeking* [1990] HCA 6 (1990) 169 CLR 214 at 235 (Dawson J). As a result, as Dawson J also explained with respect to Victoria’s equivalent to s 15AA, the approach required by interpretive provisions of this kind “*allows a court to consider the purposes of an Act in determining whether there is more than one possible construction*” (ibid); see also the discussion in Pearce D, *Statutory Interpretation in Australia* (9th ed, LexisNexis Butterworths, 2019) (**Pearce, *Statutory Interpretation***) at [2.17]-[2.20]; Herzfeld P and Prince T, *Interpretation* (2nd ed, LawBook, 2020) (**Herzfeld and Prince, *Interpretation***) at [7.20]-[7.30]. That said, it must also be borne steadily in mind that, as Hayne, Heydon, Crennan and Kiefel JJ cautioned in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27, “*[h]istorical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention*”.

###### Resolution of the construction issue

1. Applying these principles, the submissions of Choice Pharmacy should be rejected. With respect, in our view, the primary judge erred in her construction of “*large medical centre*” for the purposes of item 136(1) of Sch 1 to the 2011 Rules.
2. ***First***, in terms of the general approach to the question of construction, we note that the different elements comprised in the phrase “*large* *medical centre*” under the 2011 Rules are set out in a general definitional provision, s 5(1) of the 2011 Rules. In this regard, it is generally accepted that the proper course is to “*read the words of the definition into the substantive enactment and then construe the substantive enactment - in its extended or confined sense - in its context and bearing in mind its purpose and the mischief that it was designed to overcome*”: *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 at [103] (McHugh J). Furthermore, as Campbell JA (Beazley and Ipp JJA agreeing) explained in *San v Rumble (No. 2)* [2007] NSWCA 259 (***Rumble***) at [52]:

… substituting a definiens [i.e. words or phrases comprising the definition] for a definiendum [i.e. the word or phrase defined] is not the only way of applying a statutory definition to a provision that is being construed. As Windeyer J said in *Council of the Municipality of Randwick v Rutledge*(1959) 102 CLR 54 (at 69):

“A statutory definition may be only ‘a mechanical device to save repetition’ …; or it may, by explanation rather than by synonymous expansion, indicate the particular sense in which a word or phrase is used.”

1. The statutory definition of *“large medical centre*” is not definitional in any of these senses. Its effect is to prescribe distinct criteria for the purposes of item 136(1) which must be met for the grant of approval under s 90 of the NHA. As such, its operation is substantive. It is true that generally speaking, a legislative definition should not be framed as a substantive enactment: *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635 (Barwick CJ, McTiernan and Taylor JJ). However, as Pearce, *Statutory Interpretation* at [6.14] explains, “*Drafters do occasionally include substantive material in a definition. This is poor drafting and can lead to error in the interpretation of the legislation because of the approach set out in Gibb’s case*”: see also Herzfeld and Prince, *Interpretation* at [3.10]. However, to so construe the definition in issue here best gives effect to the policy underlying the 2011 Rules and does not give rise to the kinds of difficulties which might arise where a so-called definition applies potentially to a number of different statutory provisions: see by analogy *Rumble* at [55]; and *ACCC v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243 at [113]-[114] (the Court). The “definition” here is relevant only to item 136(1). Nonetheless it is convenient given the location of the “*definition*” to refer to it as such.
2. ***Secondly***,Choice Pharmacy submitted that, construed in accordance with its plain and ordinary meaning, the word “*week*” in the “*definition*” refers ***only*** to an immutable measure of time, namely, a period of seven successive days. Similarly, in its submission, the phrase “*70 hours*” refers to an immutable measure of time, albeit that the 70 hours or more may be interspersed unevenly or otherwise across a number of days during the course of each week. It followed, in Choice Pharmacy’s submission, that if the Parliament had intended to make an exception for those weeks where there was a public holiday, it would have expressly so provided in the definition of “*large medical centre*”. Choice Pharmacy therefore denied the existence of any constructional choice.
3. It may be accepted that the meaning of “*week*” as defined, for example, in the *Macquarie Online Dictionary* accords with the meaning attributed to the word by Choice Pharmacy. However, the word “*week*” must be construed in its context as part of a phrase and in accordance with the purposes and objects of the 2011 Rules and the NHA. As Learned Hand J said in *Cabell v Markham* (1945) 148 F (2d) 737 at 739 in an oft quoted passage:

… it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

(Quoted with approval, for example, in *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 at [23] (the Court).)

1. In this regard, we agree with the primary judge at [63] that the phrase “*at least 70 hours each week*” is capable of bearing more than one meaning. Relevantly, one available meaning is that the phrase refers to each and every week occurring during the course of a calendar year, as the primary judge held and as Choice Pharmacy submits (the **narrow construction**). Alternatively it could require that the medical centre operate for 70 hours each ordinary week, that is, leaving aside those weeks in which a public holiday occurs in the particular State or Territory, as MC Pharmacy submits (the **broader construction**). That being so, s 15AA of the Acts Interpretation Act, as applied by s 13(1) of the Legislation Act, mandates that the interpretation which would best achieve the purpose or object of the 2011 Rules (whether or not expressly stated) must be preferred to any other interpretation.
2. ***Thirdly,*** both parties accepted that the general purposes or objects of the 2011 Rules were correctly identified by Mortimer J in *Walkerden*; see also the primary judge’s reasons at [49]-[56]. As Mortimer J explained in *Walkerden* at [61], the 2011 Rules were made under s 99L of the NHA as a result of the conclusion of the fifth Community Pharmacy Agreement. That Agreement, as her Honour also explained at [60], “*formed part of the settlement of a long-running policy dispute between the Federal Government and the Pharmacy Guild of Australia about remuneration for pharmacists dispensing prescriptions under the Pharmaceutical Benefits Scheme and the restructuring of the pharmaceutical industry in Australia*” (citing *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287 at 293-294 and 300-301 per Hill J; *Pharmacy Restructuring Authority v Chatfield* (1993) 43 FCR 418 at 429, 433 per French J). After setting out relevant passages from the fifth Community Pharmacy Agreement, Mortimer J correctly held that:

62. Clearly the objectives of the 2011 Rules, as set out in cl 1.2(d)(vi) of the fifth Agreement, are of principal relevance to the construction issues on this application. Those objectives have ***twin*** themes: a sustainable and viable community pharmacy network (which focuses at least as much on the interests of pharmacy owners as on the community) ***and*** access to pharmaceutical benefits (with a focus only on the community’s interests). In that sense, the location rules are an attempt to balance community access with commercial sustainability.

63. In my opinion, the most that can be gleaned from the objectives for the 2011 Rules as set out in the fifth Agreement is that the 2011 Rules sought to balance the commercial need for sustainable and viable pharmacies against the community’s need for access to pharmaceutical benefits. The 2011 Rules recognise, in my opinion, that sustainable and viable pharmacies are also of benefit to the community, in the continuity of supply of pharmaceutical benefits. How the 2011 Rules are contemplated to operate in relation to small shopping centres must be seen in that light.

(emphasis added)

1. It follows, as the primary judge held, that “*it would be a mistake to construe the 2011 Rules as if their purpose were the protection of commercial interests of existing pharmacies*” (at [57]).
2. The intended operation of the 2011 Rules in the context of a large medical centre for the purposes of item 136(1) must be understood in the same light. More specifically, the concept of a “*large medical centre*” under the 2011 Rules is concerned with extended hours of operation, being a minimum period of 70 hours each week, during which at least one prescribing medical practitioner is in attendance at the medical centre at any given time (item 136(1)). By comparison, a medical centre operating according to what might be described as normal business hours (for example, 9 am to 5 pm Monday to Friday and perhaps 9 am to midday on Saturday) would be open only for 40 or 43 hours per week. Furthermore, item 136(4) requires that for the period commencing two months before the application is made and until it is considered by the Authority (the **item 136(4) period**), there must be at least eight full-time PBS prescribers at the medical centre, of whom at least seven must be prescribing medical practitioners. Cumulatively therefore PBS prescribers must have been working at the medical centre for at least 304 hours each week over the item 136(4) period (see the definition of “*full-time*” as 38 hours per week in s 5(1), 2011 Rules). Finally, under item 136(5), the Authority must be satisfied that the applicant will make all reasonable attempts to ensure that the operating hours of the pharmacy will meet the needs of the patients of the medical centre, i.e., that the patients will be able access the pharmacy during the same, or essentially the same, extended hours as the large medical centre. In the present case, that requirement translated, by way of example, into the undertaking given by MC Pharmacy to which we have already referred at [22(4)] above.
3. The legislative premise underlying these criteria, coupled with the requirements that there be no approved premises in the centre (or within 500 m if the medical centre is in a shopping centre or private hospital), is therefore that:
4. the medical centre in question operates at a sufficient scale so as to generate a need for ready access by patients to a pharmacy which is open for essentially the same extended hours at the same location; and
5. that need is not currently being (adequately) met in circumstances where it is likely that existing pharmacies nearby are not open for extended hours.
6. The purpose of this category of approvals is therefore to address the specific needs of the patients of a specified medical centre, as well as the needs of the broader community as reflected in the general criteria specified by items 211(c)(ii) and 212(a) in Sch 2 to the 2011 Rules.
7. This is not to deny that the commercial viability and sustainability of any pharmacy in the vicinity of the proposed premises is also a purpose. However, the primary purpose in the case of an application for approval of premises within a large medical centre is plainly to ensure access by the public to pharmaceutical benefits for the duration of the extended hours of operation of the medical centre.
8. ***Fourthly***, this understanding of the purpose of item 136 is confirmed by the extrinsic material. In particular, the Explanatory Statement to the 2011 Rules as originally made explained that item 136 “*aims to facilitate timely and convenient access to the supply of pharmaceutical benefits for patients of large medical centres that operate extended hours*…” and, with respect to item 136(1), that:

… the intention of having a pharmacy in a large medical centre is primarily to meet the needs of medical centre patients outside normal business hours, when nearby pharmacies have closed.

(at p. 16)

1. In line with this, the Explanatory Statement further explained that item 136(6) was intended “*to ensure that, as far as is practicable, a majority of patients can access the pharmacy following a consultation by a doctor in that medical centre*” (at p. 17): see also the Explanatory Statement to the 2009 amendment determination which introduced a similar, but not identical, definition of “*large medical centre*” into the 2006 Rules.
2. ***Fifthly***, these purposes are promoted by a construction of the phrase “*at least 70 hours each week*” in the definition of “*large medical centre*” to refer to 70 hours in each ordinary week. A pharmacy will still, generally speaking, be open for the extended hours thereby facilitating timely and convenient access to the supply of pharmaceutical benefits by patients of the medical centre attending during extended hours, even if exceptions are made for weeks in which one or more public holidays fall. As the Authority submitted, access to pharmaceutical benefits in response to a medical centre operating for extended hours “*is more thoroughly catered for or promoted by a construction which is more permissive in terms of the circumstances in which a new pharmacy might open*”.
3. The same cannot, with respect, be said of the primary judge’s construction that a medical centre is not a “*large medical centre*” merely because it is closed for some or all public holidays declared under, or prescribed by, Commonwealth, State or Territory laws as applicable. Contrary to the purposes of item 136, that construction would mean that patients using a medical centre which closed on public holidays but otherwise operated for extended hours throughout the year would likely be deprived of timely and convenient access to pharmaceutical benefits during those extended hours. In other words, as the Authority submitted:

… an interpretation that confined the application pathway in item 136 only to pharmacies that are proposed to be located in medical centres which operate for 70 hours each and every week (including weeks in which public holidays fall (noting that in some weeks – for example at Christmas and Easter – there [are] multiple public holidays)) does not best achieve the purpose of facilitating timely and convenient access to the supply of pharmaceutical benefits of patients of medical centres which are operating extended hours and in circumstance[s] where it is likely that nearby pharmacies are closed.

(First respondent’s outline of submissions dated 16 July 2020 at [19])

1. That construction cannot be said to best promote the purposes of item 136 and therefore must be rejected under s 15AA of the Acts Interpretation Act in favour of the construction for which the appellant and the Authority contend. In line with s 15AA and the principles earlier set out, it goes without saying that the apparent ordinary meaning of words – in this case, “*each week*” – must on occasion give way to the legislative purpose: *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29 at [3] (Kiefel CJ, Nettle and Gordon JJ), [109] (Edelman J).
2. *In the* ***sixth*** *place*, it is no answer to submit that the difficulty in meeting the criteria in item 136 on the primary judge’s construction could be met by the medical centre adopting irregular hours to make up the shortfall in weeks where there is one or more public holiday, contrary to the submission by Choice Pharmacy. The hours during which a medical centre is open are likely to be outside the control of the pharmacist applying for approval under s 90 of the NHA and may be influenced by many considerations. These may include an assessment of what is financially viable, the perceived needs of the local community, employee entitlements with respect to public holidays, and what can be communicated sensibly to the community in terms of irregular hours of opening as MC Pharmacy submitted.
3. Nor, contrary to Choice Pharmacy’s submission, is there any indication in the extrinsic materials or otherwise that the Minister’s personal, non-compellable discretion to grant approval under s 90A was intended to address any “*unintended … or unforeseen consequences*” flowing from “*the rigidity and lack of subjectivity in relation to the rules*”. Indeed, if there were systemic unintended consequences such as those said to flow from the narrow construction, it is more likely that the Parliament intended that the rules themselves would be amended by the Minister under the process prescribed by s 99L of the Act.
4. In the ***seventh*** place, the broader construction is supported by the fact that the public holidays declared or prescribed under the various state and territory laws differ, as do the number of public holidays. This is because the broader construction avoids any complexity or unfairness which may arise by reason of such jurisdictional differences, with the result that the definition of “*large medical centre*” will apply in the same way to medical centres which are otherwise identical irrespective of the state or territory in which they are located.
5. ***Finally***, Choice Pharmacy submitted that the change from referring to “***a*** *week*” in the definition of “*large medical centre*” under the 2006 Rules as amended in 2009, to “***each*** *week*” in the 2011 Rules represented a deliberate tightening of the language intended to ensure that a medical centre would satisfy the definition only if it operated for at least “*each*”, as in “*every*”, week (see above at [19]). In our view, the Authority rightly submitted that no such intention could be discerned. It receives no support from the explanatory statements for the 2009 amendment determination and the 2011 Rules which are virtually identical in relevant respects and use the terms “*each*” and “*a*” in a manner suggesting that they were intended to be synonymous. This suggests that the change from “*a*” to “*each*” was not intended to be substantive but rather a choice in drafting style. The tightening in the language may also have been intended to put beyond doubt that the minimum weekly period of 70 hours could not be satisfied by a process of averaging out the hours for which the medical centre was open and a prescribing medical practitioner was present over multiple weeks, as the Authority submitted.
6. It follows that ground 1 of the appeal has been established.

##### CONCLUSION

1. It follows for these reasons that the appeal must be allowed. Contrary to the primary judge’s decision, the decision of the Authority and the Secretary is not tainted by error of law. They proceeded implicitly upon a correct construction of “*large medical centre*” for the purposes of item 136(1) of the 2011 Rules. The matter must be remitted to the primary judge in order to deal with the remaining grounds of judicial review. Choice Pharmacy should pay MC Pharmacy’s costs of the appeal as agreed or assessed and in the Court below.

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| I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Perry and Stewart. |

Associate:

Dated: 30 September 2020

**REASONS FOR JUDGMENT**

**JACKSON J:**

## Grounds of appeal 1 to 7

1. The first seven grounds in this appeal turn on the correct construction of the phrase 'for at least 70 hours each week' where it appears in the definition of 'large medical centre' in s 5(1) of the *National Health (Australian Community Pharmacy Authority Rules) Determination 2011* (Cth). For the reasons that follow I do not accept the construction advanced by the appellant, MC Pharmacy. In my view, the primary judge's construction is correct, so that in order to come within the definition of 'large medical centre', a centre must operate, and have at least one prescribing medical practitioner at the centre, for at least 70 hours in every week, whether or not the week contains a public holiday. I therefore respectfully disagree with Perry and Stewart JJ on this question. I gratefully adopt, however, their Honours' comprehensive description of the factual background, the legislative scheme and the relevant provisions, and I use their Honours' defined terms in these reasons.
2. For ease of reference I will set out the key definition here:

***large medical centre*** means a medical centre that:

(a) is under single management; and

(b) operates for at least 70 hours each week; and

(c) has one or more prescribing medical practitioners at the centre for at least 70 hours each week.

1. MC Pharmacy submits that in this context, 'week' refers to a 'week of the centre's regular, customary, normal or usual hours of opening'. It submits that if the centre's hours of opening during such weeks add up to at least 70 hours, it will fulfil the relevant criteria in the definition. If accepted, this would mean that in order for a medical centre to meet the definition, weeks containing public holidays need not be counted among the weeks where a medical centre observes those regular, customary, normal or usual hours.
2. In my view, however, the ordinary meaning of 'for at least 70 hours each week' in the definition means that to qualify as a large medical centre, the centre must operate, and have one or more prescribing medical practitioners at the centre, for 70 hours or more during every week, including weeks containing public holidays. That is because 'each' means 'every'. Contrary to a submission by MC Pharmacy, this does not involve adding to the phrase, so that 'each' is read to be 'each and every'. The latter is sometimes used by way of emphasis, but the ordinary meaning of 'each week' refers to every week.
3. That is confirmed by dictionary definitions of 'each'. The well‑known warning against making a fortress of the dictionary is a salutary one, but that does not mean that dictionaries must be shunned. They can still be useful tools provided it is always understood that a word defined in a dictionary is a word defined out of its context in the legislative instrument under consideration. The *Shorter Oxford English Dictionary* (6th ed) defines 'each', when used as an adjective, as:

Used before a sing. noun to give the same sense in relation to individuals as does *both* or *all* before the pl. noun in relation to the category or aggregate of them (almost = **EVERY**, but with reference rather to the separate members).

Similarly, the Macquarie Dictionary (8th ed) defines 'each' as:

every, of two or more considered individually or one by one: *each stone in the building*.

In my view, these definitions confirm the understanding of the meaning of the word which a reasonable speaker of English would have, when used in its context in the definition of 'large medical centre', in the place which that definition in turn occupies in the 2011 Rules.

1. In oral submissions, senior counsel for MC Pharmacy acknowledged that 'each' and 'every' could be synonyms. But she went on to submit that it is also necessary to understand what group of things the word 'each' is being applied to. Her submission was that here, it is necessary to identify 'which kind of week one is speaking of'. The difficulty I have with that submission is that in the absence of any contrary indication in the text, there is no need to identify any particular kind of 'week' to which the definition refers. The adjective used gives the answer already: it is speaking of *each* week, that is, every week. While a qualification to the ordinary meaning of 'week' could appear in the text expressly, or from the text by implication, here such qualification is not only absent, it is contradicted by the use of the word 'each'.
2. As a result I do not consider that the phrase 'for at least 70 hours each week' is reasonably capable of more than one meaning. That is so when the phrase is understood, as it must be, in its context in the 2011 Rules and the legislative scheme as a whole, and by reference to the purpose of the 2011 Rules, including as discerned from admissible extrinsic material.
3. This is not to deny that there may be constructional choices in the definition, considered in context and as a whole. For example there may be room for doubt about what 'operates' means in the context of the definition. That is reflected in the primary judge's acceptance (at *Choice Pharmacy (No 1)* at [63]) that the phrase 'operates at least 70 hours each week' is capable of bearing more than one meaning. There may also be room for doubt about what a 'week' means: does it mean a period of Monday to Sunday, or Sunday to Saturday, or any seven day period? But no such questions arise in this appeal. MC Pharmacy's position was that, whatever the answers to those questions were, the phrase 'for at least 70 hours each week' only captures a regular, ordinary or normal week, not being a week in which there were one or more public holidays.
4. I simply cannot identify that limitation anywhere in the text of the 2011 Rules. It is not express, implied or otherwise dictated by context. It is unlikely to have been the legislative intention, because if the appellant's construction is accepted, and the phrase 'for at least 70 hours each week' is taken only to capture a 'week of the centre's regular, customary, normal or usual hours of opening', then any week which contained one or more public holidays would be excluded from that definition. If so, then even a medical centre which closes for a whole week when the week contains a public holiday, and so may be closed for seven or more weeks a year, would still be a 'large medical centre'. If that is not the legislative intention, then some way of determining the minimum hours of opening in such 'non-regular' weeks must be ascertained. That no such minimum can be derived from the 2011 Rules suggests that the qualification to the meaning of 'each week' for which MC Pharmacy contends is also not inherent in the 2011 Rules.
5. Nor does the limitation emerge after consideration of the purpose of the 2011 Rules as a whole or the purpose of item 136 itself. In *Walkerden v Wodonga Pharmacy Pty Ltd* [2015] FCA 273; (2015) 230 FCR 243 at [62], Mortimer J identified the twin themes of the objectives of the 2011 Rules as being 'a sustainable and viable community pharmacy network (which focuses at least as much on the interests of pharmacy owners as on the community) and access to pharmaceutical benefits (with a focus only on the community's interests)'. But as Mortimer J went on to observe (at [62]‑[63]), the 2011 Rules attempt to balance community access with commercial sustainability. They are objectives which, at least sometimes, may be in tension. To permit many pharmacies to open near to each other in a particular area may by itself improve the community's access to pharmaceutical benefits. But to permit too many pharmacies to open in an area may adversely affect the commercial viability of some or all of those pharmacies and so jeopardise the continuity of supply of pharmaceutical benefits.
6. That tension is reflected in the text of the 2011 Rules. I agree with Perry and Stewart JJ that the definition of 'large medical centre' has a substantive operation. Its place in the 2011 Rules must be considered to ascertain what purpose or purposes it serves. It derives its operation from item 136. Part 2 of Sch 1 to the 2011 Rules, in which that item is found, contains various other items which set out how proposed premises can comply with what Mortimer J in *Walkerden* referred to as the location rules. The simplest of the requirements applicable to applications not involving cancellation of an existing approval, item 131, effectively means that proposed premises comply with the location rules, without more, if they are 10 km away by the shortest lawful access route from the nearest approved premises. The other items in Part 2 of Schedule 1 permit proposed premises to be approved even though they are closer to approved premises, if additional criteria are met.
7. It may be inferred from this that one purpose of the 2011 Rules is to support the commercial viability of suppliers of pharmaceutical benefits by ensuring a minimum distance between approved premises, thus avoiding what could be viewed as an excessive concentration of pharmacies in a given area. But there are various criteria which, if fulfilled, permit the reduction of the distance requirements as between two pharmacies, or lifting them altogether. The 70 hours each week criteria found in paragraphs (b) and (c) of the definition read with item 136 are instances of this. For example, if those criteria and all others are met, then the proposed premises may be approved regardless of how far away they are from approved premises in a small shopping centre (that being the situation here).
8. It follows that while the 70 hours per week criteria may be present in the 2011 Rules in order to promote community access to pharmaceutical benefits, in context the decision to set the threshold at 70 hours reflects a legislative choice about the balance to be struck between that and potentially competing purposes. The text thus confirms what Mortimer J also found in the extrinsic material relevant to the 2011 Rules, that 'the location rules are an attempt to balance community access with commercial sustainability' (*Walkerden* at [62]). This reflects the reality that legislation will often seek to balance competing purposes. In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; (2016) 260 CLR 232 at [92]‑[93] Gageler J observed (most citations removed):

The principle that beneficial legislation is to be construed beneficially is a manifestation of the more general principle that all legislation is to be construed purposively. Application of that more general principle to New South Wales legislation is mandated by the requirement of s 33 of the *Interpretation Act 1987* (NSW) that a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not. Neither in its general application nor in its particular manifestation can that principle be applied other than on the understanding that legislation 'rarely pursues a single purpose at all costs' and that '[u]ltimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling'.

Evidently employing 'legislative intent' as an orthodox expression of the constitutional relationship that exists between an enacting legislature and a court doing its best to extract and articulate the meaning of an enacted text, the Supreme Court of the United States warned of the danger of overzealous or insufficiently nuanced purposive construction when it stated in *Rodriguez v United States* (1987) 480 US 522 at 526 (emphasis in original):

Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice - and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

1. Even if the principal focus of the 2011 Rules is on 'the community's need for adequate and sustainable access to pharmaceutical benefits' (see *Walkerden* at [13]), it does not follow that anything that increases access promotes achievement of the objectives of the rules considered as a whole. I therefore consider that the ordinary meaning of the text of s 5 is a surer guide to the legislative purpose than any one of the twin themes, considered at a higher level of generality.
2. The prescriptive nature of the provisions of the NHA which give effect to the 2011 Rules, and of the 2011 Rules themselves, lend further support to the primary judge's construction. Section 90(3A) of the NHA provides that, subject to certain exceptions which are not relevant, an application to the Secretary under s 90 for approval to supply pharmaceutical benefits at particular premises must be referred to the Authority. Section 90(3B) gives the Secretary no discretion in favour of granting approval, as it provides that approval may be granted in respect of an application that has been referred to the Authority only if the Authority has recommended the grant of the approval. The Secretary may, however, refuse to grant an approval even if the grant has been recommended by the Authority.
3. In making a recommendation, the Authority must comply with the 2011 Rules: s 99K(2). The 2011 Rules themselves provide little apparent scope for the Authority to exercise discretion. Under s 10, the Authority must recommend that an applicant be approved if, relevantly, all the requirements of the relevant item in Sch 1 are met (and other requirements are met as well). Conversely, the Authority must recommend that an applicant not be approved if any such requirement is not met: s 11. If the Authority does recommend approval, however, it may also recommend conditions to which the approval should be subject: s 99K(1)(b)(ii).
4. The items in Sch 1 contain numerous specific requirements. For some of the requirements, the Authority need only be 'satisfied' of them, but for others the requirement is stated categorically. Item 136, the one in issue here, is an example: item 136(4) requires the Authority to be satisfied as to the number of PBS prescribers at the medical centre, whereas item 136(1) requires categorically that the premises are to be in a large medical centre.
5. There are many other instances in Sch 1 of such specific and categorical requirements. For example, if an applicant relies on item 134, which relates to proposed premises in a large shopping centre, it will be necessary to establish, among other things, that the centre has a gross leasable area of at least 5,000 m2 and that it contains at least 50 other commercial establishments: see the definition of 'large shopping centre' in s 5. While one may wonder why it would promote the purpose of access to pharmaceutical benefits to require the Authority not to approve an application for proposed premises in a shopping centre with a gross leasable area of 4,999 m2 and 49 other commercial establishments, the text leaves no room to permit such a minor departure from the criterion. There are also specific rules about what is, and is not, a 'commercial establishment' for the purposes of the definitions of 'small shopping centre' and 'large shopping centre' as used in items 133 and 134: s 7. So, for example, a 'bar, café, restaurant or takeaway' is a commercial establishment but a 'car wash or car parking facilities' are not.
6. There is no need to multiply the examples further. The prescriptive nature of the 2011 Rules does not, of course, determine the content of the definition of 'large medical centre'. But it does suggest that there is no intention to build flexibility into the definition. A construction of the definition of 'large medical centre' which requires 70 hours each week to be ascertained by the simple reckoning of standard measures of time, namely the hour and the week, is consistent with the approach reflected in the 2011 Rules as a whole.
7. The countervailing argument, that the apparent strictness of the 2011 Rules requires them to be read flexibly in order to avoid unreasonable consequences, cannot accommodate provisions like the shopping centre criteria described above. In my view there is much to be said for a submission advanced on behalf of the Choice Pharmacy that it is the discretion conferred on the Minister by s 90A of the NHA which provides for amelioration of the prescriptive rules if they operate harshly or lead to absurdity in particular cases.
8. In any event, no absurdity or harshness follows from the primary judge's construction of 'at least 70 hours each week' here. MC Pharmacy sought to demonstrate absurdity by pointing to the need for a medical centre to be open for 23.3 hours a day in a week containing Easter, assuming that contains four public holidays leaving only three opening days, or 17.5 hours a day if it contains three public holidays leaving four opening days. But that difficulty arises only if it assumed that the centre does not open on public holidays. There is no basis in the 2011 Rules to make that assumption. To the contrary, the intent of the definition, which is evident from its terms and confirmed by the Explanatory Statement which Perry and Stewart JJ quote at [61] above, is to provide access to pharmaceutical benefits in a large medical centre outside the ordinary business hours of other pharmacies that may be nearby. This suggests that opening on at least some public holidays may be necessary.
9. MC Pharmacy submitted that even where a medical centre closes for one public holiday in a week, it could meet the 70 hours each week requirement by opening for the irregular time of 11.6 hours each other day. This led to a submission that the only centre that would come within the definition, construed in the way favoured by the primary judge, would be one that is open on all public holidays or is open 24 hours a day, seven days a week. But that does not follow. For example, a centre that closes one day a week (public holiday or not) and is open 12 hours on the other six days would qualify. There is nothing irregular about those hours and there is no requirement in the 2011 Rules, or common sense, that the centre operate for precisely 70 hours and no more. Many more sensible combinations are possible. I do not accept MC Pharmacy's argument as to absurd and unintended consequences.
10. MC Pharmacy submitted that if the 70 hours a week requirement applies to every week, then the construction would need to take account of circumstances where the medical centre may need to close temporarily for unforeseen contingencies, for example if a practitioner at the centre contracts the novel coronavirus. That is correct. But the primary judge's construction accommodates such contingencies, not by reading in a qualification to the term 'each week', but by a proper understanding of what it means to say that the centre 'operates' (paragraph (b) of the definition) or 'has' one or more prescribing practitioners (paragraph (c)) for 70 hours per week. Using verbs of that kind which connote continuous states of affairs, and using them in present tense, directs attention to the present practice or intentions of the centre's management. It is not necessary for the purposes of this appeal to determine over what period of time the practice or intentions need to be assessed. Whatever the correct period, departures from the practice or intention of the centre's management for unavoidable contingencies will not mean that the practice and/or intention is not there at the time the Authority determines whether the application accords with the 2011 Rules. In my view, that is what the primary judge identified when, in *Choice Pharmacy (No. 1)* at [67], her Honour referred to the need for the evidence before the Authority to demonstrate the 'ordinary and habitual hours in which the medical centre operates and a prescribing medical practitioner will be in attendance'.
11. MC Pharmacy also developed a submission that the reference to hours per week had a 'trade meaning' which excluded public holidays. That was based on what MC Pharmacy said was a common understanding of ordinary hours of work for individuals, as excluding public holidays. But that is a different matter. The point of a public holiday is that it will be a holiday - time not spent at work - for a large subset of the public. It is therefore inevitable that concepts of ordinary working hours for individuals will need to accommodate public holidays. In contrast, the point of requiring a large medical centre to operate and have prescribing medical practitioners present for at least 70 hours per week is to ensure that it provides pharmaceutical benefits outside standard opening hours for most other businesses, and by extension outside normal working hours for individuals. That is confirmed by the Explanatory Statement. On any view, 70 hours is a substantial increase on 'normal' business hours of, say, 9.00 am to 5.00 pm, five days a week. Whether or not there is a general or 'trade' understanding of normal working hours, it does not assist in the construction of the definition of 'large medical centre' because the subject matter and purpose of the definition is different.
12. In my view, this is a case where the text of the key phrase is grammatically capable of only one meaning, neither the context nor any purpose of the legislation throws any real doubt on that ordinary meaning, and applying that meaning does not lead to any manifestly absurd or unreasonable result: see *Saraswati v The Queen* (1991) 172 CLR 1 at 22 (McHugh J). I would therefore dismiss ground 1. Since, as Perry and Stewart JJ have indicated, grounds 2 to 7 depend on ground 1 being upheld, I would dismiss those too.

## The remaining grounds of appeal

1. Ground 8 has been abandoned. Grounds 9 to 11 raise issues that are different to the question of construction raised by the first seven grounds. Those remaining grounds challenge, in different ways, the primary judge's decision in *Choice Pharmacy (No. 2)* to proceed from the answers her Honour gave to the question of statutory construction to orders setting aside the Recommendation of the Authority and the Approval of the Secretary on which it was based.
2. The relevant background is as follows. The application for judicial review brought by Choice Pharmacy raised a further ground in addition to the grounds that were addressed by the primary judge's reasons in *Choice Pharmacy (No. 1*). That additional ground (which has been referred to as ground 3 but is actually set out in paragraphs 3 to 11 of the amended originating application) alleged that the Recommendation of the Authority was induced or affected by fraud.
3. The primary judge made interlocutory orders listing the matter for a hearing limited to grounds 1, 2 and 2A (described by Perry and Stewart JJ at [28] above). After handing down her decision in relation to those grounds, finding that the Authority had erred, her Honour directed the parties to provide draft orders reflecting the reasons, and with respect to relief and costs. In the event that the parties could not agree on orders, they were to provide their separate orders with brief written submissions. This was to be done within 14 days. Her Honour indicated in the course of handing down the reasons that if any party sought a hearing as to relief and costs, they should say so in the written submissions.
4. The parties did not agree on the orders. MC Pharmacy filed draft orders framing grounds 1, 2 and 2A of the application as if they were questions on a case stated and providing answers consistent with the primary judge's reasons. But the draft orders made no provision for final relief or costs. MC Pharmacy's written submissions before the primary judge gave three reasons why no orders granting final relief should be made. The first was that the allegation of fraud was a serious one which, in fairness, needed to be clearly addressed and disposed of. The second reason was a suggestion, raised for the first time, that '[w]hether the validity of the Secretary's Decision is infected by any invalidity of the Authority's Decision needs to be addressed, as no discrete grounds are raised against [the Secretary]'. The third reason was that there was a substantial question as to whether the court should in its discretion decline to grant relief.
5. MC Pharmacy's submissions went on to say that these remaining matters should be programmed to a final hearing including directions for written submissions in the ordinary way. They said that '[i]n the absence of an appeal being allowed from orders made in the case stated, [MC Pharmacy] seeks that hearing.' They also said that '[i]n the absence of an appeal', MC Pharmacy sought 'a reasonable opportunity to make written and oral submissions in relation to the discretion to decline relief, on the basis of delay, acquiescence, futility, unreasonable prejudice and disproportionate inconvenience and injustice'.
6. However in the written submissions MC Pharmacy neither made any submissions about the proper exercise of the discretion, nor asked for more time within which to prepare them. Instead, MC Pharmacy noted that it intended to appeal from the orders giving effect to *Choice Pharmacy (No. 1)*, once made, and said that:

[f]or that reason, it is inappropriate for the Third Defendant [sic Respondent] to make submissions now on the remaining issues in the proceedings including relief, the discretion to decline relief, and costs. If the Third Respondent did so, it would give the erroneous appearance that the Third Respondent acquiesces in the order reflecting the Judgment in the case stated.

1. In *Choice Pharmacy (No. 2)* the primary judge rejected these arguments and made the orders which are the subject of this appeal, setting aside the Recommendation and the Approval, and requiring MC Pharmacy to pay Choice Pharmacy's costs. Her Honour did not accept that it was necessary to hold a hearing on the grounds of review in which fraud was alleged. Her Honour recounted how she came to order a separate hearing in relation to the other grounds. She referred to submissions made by respective counsel for the parties, in the course of determining whether to hold a separate hearing, from which it was clear that all parties had proceeded on the basis that if grounds 1, 2 and 2A were determined in favour of Choice Pharmacy, that would remove the need to deal with the substantially greater volume of evidence and cross examination of witnesses that the fraud grounds would require. Choice Pharmacy had also made it clear at the separate hearing that if it was successful on any of grounds 1, 2 or 2A, it would seek the relief claimed in its originating application.
2. The primary judge observed that while MC Pharmacy's rationale for not providing submissions as to relief and costs was misconceived, it had been given the opportunity to make those submissions and had declined to do so. That included declining to make submissions about the impact of delay and the other matters which it appeared to suggest were discretionary factors militating against relief. Her Honour considered that relief and costs should follow from her conclusion that Choice Pharmacy had established ground 1, 2 and 2A, and to hear the fraud grounds would defeat the purpose of the partial hearing.
3. In relation to the suggestion that the Secretary's decision could stand even if the Authority's decision were set aside, the primary judge referred to other decisions of the court setting aside the related decisions of both entities (*Pharmacy Guild of Australia v Australian Community Pharmacy Authority* (1996) 70 FCR 462; *Kastrinakis v Australian Community Pharmacy Authority* [2013] FCA 995; (2013) 215 FCR 452) and held that his was the appropriate approach. That was so even though Choice Pharmacy's application did not include a ground of review of the Secretary's decision, although it did seek an order setting that decision aside.
4. Against that background I will now indicate how, in my view, the remaining grounds of appeal should be determined.

### Ground 9

1. By ground 9, MC Pharmacy alleges that the primary judge erred in holding that the Secretary's Approval of the Authority's Recommendation was vitiated by any invalidity in the Recommendation. That is said to be because a valid recommendation is not a precondition for an exercise of power to approve under s 90(1) of the NHA. The ground also says that in a case where the Authority recommends approval, the Secretary has an independent discretion under s 90(1). MC Pharmacy's written submissions developed this by saying that since 'the Secretary may refuse approval where the Authority has recommended approval, it cannot be said that a valid recommendation is a precondition to approval'.
2. Sections 90(3A) and 90(3B) of the NHA contradict that submission. I have summarised those provisions above. Subject to irrelevant exceptions, the Secretary must refer an application for approval of proposed premises to the Authority. And the Secretary cannot grant approval in respect of any such application unless the Authority has recommended the grant of the approval. So a recommendation by the Authority in favour of approval is a statutory precondition to any grant of approval by the Secretary.
3. In oral submissions in the appeal the point was, however, put in terms that only a recommendation 'in fact' by the Authority was a precondition to approval by the Secretary. The suggestion seemed to be that even if that recommendation was based on a misunderstanding of the law, and so had no legal effect, the fact that it had been made was enough to authorise the Secretary to grant approval.
4. I do not accept that. The approvals regime which I have described expressly requires all relevant applications to be referred to the Authority, it expressly requires the Authority to comply with the 2011 Rules in making its recommendation, and it expressly prohibits the Secretary from granting approval if the Authority has not recommended it. It would be surprising if, in that context, the intention of the legislature was to nevertheless permit the Secretary to grant approval on the basis of a decision of the Authority that does not comply with the 2011 Rules. And while it is always a question of the proper construction of the particular statutory regime (see *Dang v Administrative Appeals Tribunal* [2019] FCAFC 220 at [28]), to hold that the Secretary may act on the basis of an incorrect and invalid recommendation would be contrary to the principle often applied, that a decision maker is only entitled to act on the basis of the opinion of another if it is an opinion of a kind authorised by the legislative regime: see *Minister for Immigration & Multicultural Affairs v Seligman* [1999] FCA 117; (1999) 85 FCR 115 at [66] and *Perez v Minister for Immigration and Border Protection* [2017] FCAFC 180 at [9]. All the more so when it is not an opinion of the Authority on which the Secretary's decision is based, but a recommendation where the Authority has been expressly required to comply with the 2011 Rules.
5. MC Pharmacy cited no authority for the submission it made and identified no error in the primary judge's process of reasoning. I am not persuaded that her Honour erred in proceeding on the basis that invalidity in the Secretary's decision flowed from error in the Authority's Recommendation, and that this was consistent with the scheme of s 90 of the NHA.
6. MC Pharmacy also submitted that the primary judge should not have set aside the decision of the Secretary when invalidity of that decision was not the subject of a ground of review. In my view this pleading point has no merit. The application for judicial review did seek an order setting aside the Secretary's decision. It was obvious that Choice Pharmacy would assert that this would follow from error vitiating the Authority's decision. It was a point of law and no further pleading or particularisation was required.
7. I would not uphold ground 9.

### Ground 10

1. In ground 10, MC Pharmacy alleges that the primary judge erred in holding that the grant of relief followed from her Honour's judgment in *Choice Pharmacy (No. 1)*, and in holding 'that the Court had no discretion as to whether relief should be granted'.
2. That misstates what the primary judge held in *Choice Pharmacy (No. 2)*. Her Honour did not hold that the court had no discretion as to whether to grant relief. Her Honour held that MC Pharmacy had been given the opportunity to make submissions as to why relief should be refused on discretionary grounds, and had declined to do so.
3. As it turns out, the correctness of that approach falls to be determined under ground 11 below. That is because the submissions advanced in support of ground 10 did not address the question of discretionary refusal of relief. Instead, they repeated the submission made before the primary judge that her Honour should have proceeded to hear and determine the allegation of fraud, even though Choice Pharmacy had succeeded in relation to the question of statutory construction.
4. Her Honour was correct to reject that submission for the reasons she gave. The question of statutory construction had been heard separately, with the assent of the parties, on the basis that if it were determined in favour of Choice Pharmacy, there would be no need to embark on the much more lengthy and expensive process of hearing the allegation of fraud. Choice Pharmacy having succeeded before her Honour on the point of construction, the fraud allegation remained just that: an unproven allegation. There was no need to embark on a potentially lengthy and expensive trial to determine the allegation, either before or after granting Choice Pharmacy the relief that appropriately followed from the reasons in *Choice Pharmacy (No. 1)*. To do so would have been inconsistent with the overarching purpose of the civil practice and procedure provisions to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible: *Federal Court of Australia Act 1976* (Cth) s 37M.
5. I would not uphold ground 10.

### Ground 11

1. By ground 11, MC Pharmacy claims that her Honour erred in failing to refuse relief on various discretionary grounds.
2. In my view, the primary judge was also correct to approach the question of discretionary refusal of relief in the way that I have indicated her Honour did. MC Pharmacy did decline to make submissions about the exercise of the discretion, as Her Honour said. A fair reading of its written submissions to her Honour reveals that while MC Pharmacy did make reference to a question as to whether the court should in its discretion decline relief, it went on to say that '[i]n the absence of an appeal' directions for further submissions and a hearing would enable the parties to be heard on the discretion to decline relief and other matters. It also said, in terms, that because it did intend to appeal, it was inappropriate for MC Pharmacy to 'make submissions now on the remaining issues in the proceedings including … the discretion to decline relief'.
3. The basis on which MC Pharmacy declined to make submissions - that by making them it would be taken to acquiesce in the orders that followed - was misconceived, as her Honour also said. But in any event MC Pharmacy was represented and advised by counsel at all material times. It should be held to the choice it made below. If it is not, MC Pharmacy will be permitted to proceed with a ground of appeal that was not agitated before the primary judge. Generally, leave to proceed with an appeal point of that kind will not be given unless it is a case where the facts are beyond controversy and it is expedient in the interests of justice that the question should be argued and decided: see *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319. Here, the facts are not beyond controversy. Choice Pharmacy says that on the issue of delay, for example, it could have adduced evidence explaining the delay. MC Pharmacy's contrary submission that there is no evidence that could have been sensibly put on in relation to the question of discretion cannot be accepted.
4. In the end, MC Pharmacy's position on ground 11 was based on the premise that it had submitted before the primary judge that relief should be denied on discretionary grounds. As I have explained, that is incorrect; it did not. In my view the appropriate way to reflect that is to determine that MC Pharmacy requires leave to proceed with ground 11 and that leave is refused.

## Conclusion

1. In my view, the appeal should be dismissed.

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| I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jackson. |

Associate:

Dated: 30 September 2020