FEDERAL COURT OF AUSTRALIA

Jadwan Pty Ltd v Rae & Partners (A Firm) [2020] FCAFC 62

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| Appeal from: | *Jadwan Pty Ltd v Rae & Partners (A Firm) (No 4)* [2018] FCA 968  |
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| File number: | TAD 28 of 2018 |
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| Judges: | **BROMWICH, O’CALLAGHAN AND WHEELAHAN JJ** |
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| Date of judgment: | 9 April 2020 |
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| Catchwords: | **NEGLIGENCE** – appeal by way of rehearing – where the primary judge dismissed the appellant’s applications against the respondent solicitors seeking damages for alleged professional negligence – duty of care owed by the first to fourth respondent solicitors and counsel in providing legal advice to the appellant nursing home operator – where the appellant, in respect of its Derwent Court nursing home in Hobart, faced Commonwealth government sanctions and the revocation of its approval as a Commonwealth funded nursing home operator under the *National Health Act 1953* (Cth), and sought advice from the first to fourth respondent solicitors and counsel – errors by primary judge – Full Court to decide for itself – whether the first to third respondents and counsel were negligent in failing to advise the appellant that it had grounds to challenge a decision of a delegate of the Minister to impose financial sanctions pursuant to s 45E of the *National Health Act* – whether the appellant would have acted on such advice – whether the first to fourth respondents and counsel were negligent in failing to advise the appellant of the enactment of the *Aged Care Act 1997* (Cth) and the transitional provisions in the *Aged Care (Consequential Provisions) Act 1997* (Cth) – whether the first to fourth respondents and counsel were negligent in failing to advise the appellant of the significance of that legislation to a proposed decision by a delegate of the Minister to revoke its nursing home approval pursuant to s 44(2) of the *National Health Act* – what advice did the exercise of reasonable care require – first to fourth respondents and counsel negligent in failing to identify new legislation – whether, if reasonable and prudent advice given, the appellant would have become an approved provider of aged care services upon the commencement of the *Aged Care Act* – characterisation of the appellant’s claim as one for its lost opportunity to become an approved provider under the new legislation and to conduct its nursing home business at new premises, or alternatively, to sell its Commonwealth approvals to another approved provider – formulation of the content of reasonable and prudent advice – causation involving proof of a past hypothetical in which circumstantial evidence was the dominant consideration, assessed prospectively and without the benefit of hindsight, on the balance on probabilities – finding that even if the appellant had been given reasonable and prudent advice by its solicitors and counsel, the appellant had not established that it would have become an approved provider of aged care services upon the commencement of the *Aged Care Act* and thereby have avoided the damage which it claimed – appeal dismissed.**APPEAL** – nature of appellate review – principles that guide appellate review of findings of fact – whether error of primary judge must be demonstrated as wrong by “incontrovertible facts or uncontested testimony” – statements of principle in appellate judgments should not be treated as if they were provisions of a statute – whether error if findings open on the evidence – duty of appellate Court – consideration of *Devries v Australian National Railways Commission*, *Fox v Percy* and *Robinson Helicopter Company Inc v McDermott*  |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 41(2)*Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 6, 11, 15, 16*Aged Care Act 1997* (Cth) Div 1, Part 2.1, Part 4.4, ss 7, 10‑2(1), s 14‑1, 16-1 to 16-11, 42-1, 42‑4, 54‑1, 54‑2, 66‑1, 67‑1 to 67-5, 68‑1, 68-3, 96‑1*Aged Care (Consequential Provisions) Act 1997* (Cth) ss 7, 20, 74, 75(1)(c), Schedule 1*Civil Liability Act 2002* (Tas) s 4*Constitution* s 75(v)*Evidence Act 1995* (Cth) s 140(1)*Federal Court of Australia Act 1976* (Cth) ss 23, 24(1)(a)*Judiciary Act 1903* (Cth) ss 39B(1), 80*National Health Act 1953* (Cth) ss 4, 39, 39A, 39AA, 39B, 40AA, 40AD, 44, 45D, 45DB, 45DC, 45E, 105AAB*National Health Regulations 1954* (Cth) Part 4, regs 8, 11, 12(1), 12(3), 12(11), 16, 19, 28*Supreme Court Rules 2000* (Tas)*Wrongs Act 1958* (Vic) s 66  |
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| Cases cited: | *Abalos v Australian Postal Commission* [1990] HCA 47; 171 CLR 167*AJH Lawyers Pty Ltd v Hamo* [2010] VSCA 222; 29 VR 384*Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; 261 FCR 301*Allesch v Maunz* [2000] HCA 40; 203 CLR 172*Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 5)* [1996] FCA 256; 64 FCR 73*Armory v Delamirie* (1722) 1 Str 505; 93 ER 664*AS Bannister v Sirrom Enterprises Pty Ltd* [2016] SASCFC 153*Ashby v Slipper* [2014] FCAFC 15; 219 FCR 322*Badenach v Calvert* [2016] HCA 18; 257 CLR 440*Bennett v Minister of Community Welfare* [1992] HCA 27; 176 CLR 408*Benning v Wong* (1969) 122 CLR 249*Birrell v Australian National Airlines Commission* [1984] FCA 419; 5 FCR 447*Boensch v Pascoe* [2019] HCA 49*Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1*Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424*Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336*Brunskill v Sovereign Marine & General Insurance Co Ltd* [1985] HCA 61; 62 ALR 53*Cassell & Co Ltd v Broome* [1972] AC 1027*Chambers v Jobling* (1986) 7 NSWLR 1*Chaplin v Hicks* [1911] 2 KB 786*Chappel v Hart* [1998] HCA 55; 195 CLR 232*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACCC* [2007] FCAFC 132; 162 FCR 466*Cousins v Cousins* [1991] ANZ Conv R 245*CSR Ltd v Della Maddalena* [2006] HCA 1; 224 ALR 1*Da Costa v Cockburn Salvage & Trading Pty Ltd* [1970] HCA 43; 124 CLR 192*Dearman v Dearman* [1908] HCA 84; 7 CLR 549*Devries v Australian National Railways Commission* [1993] HCA 78; 177 CLR 472*Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471*Dominic v Riz* [2009] NSWCA 216*Duchess of Argyll v Beuselinck* [1972] 2 Lloyd’s Rep 172*Edwards v Noble* [1971] HCA 54; 125 CLR 296*Firth v Sutton* [2010] NSWCA 90*Fox v Percy* [2003] HCA 22; 214 CLR 118*Grant v Sun Shipping Co Ltd* [1948] AC 549*Hawkins v Clayton* [1988] HCA 15; 164 CLR 539*Heydon v NRMA Ltd* [2000] NSWCA 374; 51 NSWLR 1*Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; 247 CLR 613*Jadwan Pty Ltd v Middletons (formerly Coltmans Price Brent)* [2007] TASSC 74; 17 Tas R 9*Jadwan Pty Ltd v Minister for Health and Family Services* [1998] FCA 715; 51 ALD 245*Jadwan Pty Ltd v Porter* [2004] TASSC 107; 13 Tas R 162*Jadwan Pty Ltd v Porter (No 2)* [2004] TASSC 126; 13 Tas R 219*Jadwan Pty Ltd v Secretary, Commonwealth Department of Health and Aged Care* [2002] FCA 1052*Jadwan Pty Ltd v Secretary, Commonwealth Department of Health and Aged Care* [2003] FCAFC 288; 145 FCR 1*Johnson v Perez* [1988] HCA 64; 166 CLR 351*Kakavas v Crown Melbourne Ltd* [2013] HCA 25; 250 CLR 392*Kitchen v Royal Air Force Association* [1958] 1 WLR 563*Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343; 77 NSWLR 205*Lee v Lee* [2019] HCA 28; 372 ALR 383*Lewis v Hillhouse* [2005] QCA 316*Louth v Diprose* [1992] HCA 61; 175 CLR 621*Luxton v Vines* [1952] HCA 19; 85 CLR 352*Malec v JC Hutton Pty Ltd* [1990] HCA 20; 169 CLR 638*McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)* [1904] HCA 51; 1 CLR 243*Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; 241 CLR 357*Mills v Mills* [1938] HCA 4; 60 CLR 150*Minister for Health and Family Services v Jadwan Pty Ltd* [1998] FCA 1549;89 FCR 478*Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541*Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507*Minister for Immigration, Local Government and Ethnic Affairs v Msilanga* [1992] FCA 44; 34 FCR 169*Murphy v Overton Investments Pty Ltd* [2004] HCA 3; 216 CLR 388*Northern Territory v Mengel* [1995] HCA 65; 185 CLR 307*Papaconstuntinos v Holmes à Court* [2012] HCA 53; 249 CLR 534*Paterson v Paterson* [1953] HCA 74; 89 CLR 212*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355*Provident Capital Ltd v Papa* [2013] NSWCA 36; 84 NSWLR 231*Purkess v Crittenden* [1965] HCA 34; 114 CLR 164*Riverside Nursing Care Pty Ltd v Bishop* [2000] FCA 434; 60 ALD 704*Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330*Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; 331 ALR 550*Rosenberg v Percival* [2001] HCA 18; 205 CLR 434*Scott v Pauly* [1917] HCA 60; 24 CLR 274*Sellars v Adelaide Petroleum NL* [1994] HCA 4; 179 CLR 332*SS* *Hontestroom v SS Sagaporack* [1927] AC 37*State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* [1999] HCA 3; 160 ALR 588*Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113*Tabet v Gett* [2010] HCA 12; 240 CLR 537*Thorne v Kennedy* [2017] HCA 49; 263 CLR 85*Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125*Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422*Voulis v Kozary* [1975] HCA 44; 180 CLR 177*Walsh v Law Society of New South Wales* [1999] HCA 33; 198 CLR 73*Warren v Coombes* [1979] HCA 9;142 CLR 531*Waterways Authority v Fitzgibbon* [2005] HCA 57; 221 ALR 402*Watt or Thomas v Thomas* [1947] AC 484*Wellesley Partners LLP v Withers LLP* [2016] Ch 529*Western Australia v Ward* [2002] HCA 28; 213 CLR 1*Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505*Yarrabee Coal Co Pty Ltd v Lujans* [2009] NSWCA 85; 53 MVR 187Commonwealth Gazette No GN 28 of 16 July 1997Commonwealth Gazette No GN 36 of 3 September 1997 |
|  |  |
| Dates of hearing: | 5, 6, 7 and 8 November 2018 |
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| Registry: | Tasmania |
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| Division: | General |
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| National Practice Area: | Other Federal Jurisdiction |
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| Category: | Catchwords |
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| Counsel for the Fifth Respondent: | Mr S McElwaine SC |
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| Solicitor for the Fifth Respondent: | Shaun McElwaine & Associates |

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| **Table of Corrections** |  |
| 19 April 2021 | In [318(4)(i)] the words “, to which we referred at [279] above” deleted and in [336(11)] amount “$20,000” replaced with “$25,000”. |

**ORDERS**

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|  | **TAD 28 of 2018** |
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| **BETWEEN:** | JADWAN PTY LTDAppellant |
| **AND:** | RAE & PARTNERS (A FIRM)First RespondentWILSON DOWD (A FIRM)Second RespondentTOOMEY MANING & CO (A FIRM) (and others named in the Schedule)Third Respondent |

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| **JUDGES:** | **BROMWICH, O’CALLAGHAN AND WHEELAHAN JJ** |
| **DATE OF ORDER:** | **9 april 2020** |

**THE COURT ORDERS THAT:**

1. The appeal be dismissed.

2. The parties file and exchange any submissions as to costs or other consequential orders, not to exceed three pages, by 4.00pm 4 May 2020.

3. If so advised, the parties file and exchange any submissions in reply, not to exceed three pages, by 4.00pm 11 May 2020.

4. The question of costs, and any consequential orders, shall be considered on the papers.

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

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THE COURT:

## Introduction

1 This is an appeal from orders made by a judge of this Court following the trial of a multi-faceted suit in negligence. The proceeding against the first to third respondents was commenced in the Supreme Court of Tasmania on 3 February 2003, and in that Court was consolidated with two other proceedings that were also commenced in 2003 against each of the fourth and fifth respondents. The consolidated proceeding was cross-vested to this Court on 12 August 2016. The primary judge dismissed the proceeding with costs. The unsuccessful applicant, Jadwan Pty Ltd (**Jadwan**), sought damages against its former solicitors for alleged professional negligence arising out of the revocation of its approval under the *National Health Act 1953* (Cth) as a Commonwealth-funded nursing home on 6 August 1997 by a delegate of the Minister for Health and Family Services. In the case of the fifth respondent, its negligence was in failing to serve a writ on a defendant to one of the proceedings before the time for service fixed by the *Supreme Court Rules 2000* (Tas) expired. Jadwan now appeals the primary judge’s decision. If successful on appeal, Jadwan seeks an order that the proceeding be remitted for the assessment of damages.

## Case overview

2 Jadwan is the trustee of the J.G. & J.I. Alexander Family Trust. Its directors at the relevant time were members of the Alexander family: Mr Jeff Alexander (who passed away in 2004); Mrs Joan Alexander; Ms Julie Alexander; and Mr Wayne Alexander. Unless indicated to the contrary, the references in these reasons for judgment to Mr Alexander are to Mr Jeff Alexander. From 1984 until 6 August 1997, Jadwan operated Derwent Court Nursing Home (**Derwent Court**) from a Victorian era, heritage listed, two-storey grand home to which a ground level extension had been added. Jadwan had purchased Derwent Court to operate as a nursing home. It was located only a short distance from central Hobart. Derwent Court’s mix of residents included a high proportion of vulnerable persons with dementia. Most were accommodated in shared rooms, the largest of which accommodated seven residents. Non-ambulant residents were, until the events the subject of the proceeding occurred, accommodated upstairs on the second floor.

3 Jadwan received benefits from the Commonwealth under the *National Health Act* in respect of its residents. For this purpose, it had approval for 51 beds, which approvals were referred to in the evidence as “bed licences”. When Jadwan’s Commonwealth approval as a nursing home was revoked in August 1997, it became ineligible to receive those benefits. In anticipation of the delegate’s decision to revoke approval, Derwent Court’s residents were relocated to other nursing homes and it ceased to provide nursing home care. Derwent Court has not operated as a nursing home since. At the time of trial, Jadwan remained the owner of the property from which Derwent Court had operated, which it leased to a third party unconnected to these proceedings.

4 In 1997, Jadwan retained the services, in turn, of each of the first respondent (**Rae & Partners**), the second respondent (**Wilson Dowd**), and the third respondent (**Toomey Maning & Co**), which were firms of solicitors in Hobart, to give it advice in relation to issues that had arisen concerning its nursing home approval. The scope of the retainers of those firms was in dispute, and we shall return to that issue. Although Jadwan retained the three Hobart firms, one solicitor, Mr Stephen Wicks, undertook the work as an employee of each of the firms. The reason for this was that in 1997 Mr Wicks moved from Rae & Partners, to Wilson Dowd, and then to Toomey Maning & Co, and as he moved firms he took Jadwan’s files with him.

5 Also in 1997, Jadwan retained the Melbourne firm Coltmans Price Brent to give it advice about the sale and transfer of its approvals. The late Mr John Hogan was a partner of that firm who undertook the work, and the fourth respondent is the executrix of his estate. The scope of Mr Hogan’s retainer was also in dispute.

6 The liability of the first to fourth respondents was alleged by Jadwan to have arisen out of their failure to advise Jadwan to take available steps in respect of the decision of a delegate of the Minister made on 6 August 1997 to revoke Derwent Court’s approval as a nursing home pursuant to s 44(2) of the *National Health Act*. Jadwan alleged that as a result of that decision it lost its entitlement to Commonwealth benefits in respect of the residents of Derwent Court, and that it was thereby disabled from becoming an approved provider of aged care services upon the commencement on 1 October 1997 of the *Aged Care Act 1997* (Cth). That disability arose because no approval was in place for any beds at Derwent Court on 30 September 1997, being the day before the commencement of the relevant provisions of the *Aged Care Act*, which was a necessary condition in order to engage the transitional provisions in the *Aged Care Consequential Provisions Act 1997* (Cth) (***Consequential Provisions Act***). In summary, Jadwan alleged that but for Mr Wicks and Mr Hogan failing in their respective duties as solicitors, they would have identified the significance of the provisions of both the *Aged Care Act* and the *Consequential Provisions Act*. Jadwan claimed that, had they not failed in their respective duties, each would have advised Jadwan of the urgent necessity of seeking interlocutory injunctive relief in the Federal Court of Australia to restrain the revocation of Derwent Court’s approval, so as not to forfeit Jadwan’s entitlement to become an approved provider in respect of Derwent Court under the *Aged Care Act* on 1 October 1997. Jadwan claimed that it would have given instructions to act in accordance with that advice, and that injunctive relief would have been granted by the Court.

7 Jadwan further alleged that had Mr Wicks and Mr Hogan not failed in their respective duties, they would have advised Jadwan that it needed to ensure that at least one Commonwealth-funded resident had to remain at the nursing home until 1 October 1997 to prevent Jadwan forfeiting its entitlement to become an approved operator of Derwent Court under the *Aged Care Act* beyond that date. Jadwan alleged that it could and would have taken that action.

8 Jadwan also alleged against the first, second, and third respondents that they were negligent in failing to advise Jadwan that it had grounds to, and should have challenged, an earlier decision made on 3 February 1997 by a delegate of the Minister to impose financial sanctions pursuant to s 45E of the *National Heath Act*. As a result of those sanctions, Jadwan alleged that it had been denied an entitlement to claim a Commonwealth benefit in respect of any new resident admitted to Derwent Court after the date of that decision.

9 In closing submissions at trial, Jadwan claimed loss and damage on two alternative bases. The first basis was that upon the hypotheses that Jadwan would have obtained remedies to set aside the decision of the Minister to revoke its approval, and that it would have achieved the lifting of the financial sanctions, Jadwan would have built a new 51 bed facility on a greenfields site in Hobart and operated a nursing home there, with the benefit of approval for 51 beds under the *Aged Care Act*. The second basis was that Jadwan alleged that it lost the chance to sell its 51 bed licences. The second basis was advanced on the premise that had Jadwan been provided with reasonable advice, it would have obtained a remedy to enjoin the proposed revocation decision. Having secured such a remedy, it would have left the nursing home industry in Tasmania. However, its exit then would have been on more advantageous terms because nursing home bed licences had a marketable value. If the Minister’s approval of Derwent Court as a nursing home had remained in place, Jadwan alleged that the Commonwealth would have permitted Jadwan to sell its bed licences.

10 On 23 July 1997, Mr Wicks retained Mr David Porter QC of the Tasmanian Bar to advise Jadwan. Mr Porter was named as a defendant to a proceeding that was commenced on 18 July 2003 in the Supreme Court of Tasmania against Coltmans Price Brent, Mr Porter, and one other defendant. The fifth respondent to this proceeding (**Worsley Darcey**) was a firm of solicitors that was engaged to act as Hobart agent for Jadwan’s then Victorian solicitors for the purpose of serving the writ in the proceeding on Mr Porter. The writ was not served on Mr Porter within the period prescribed by the *Supreme Court Rules 2000* (Tas), and Jadwan failed in an application to have time extended: see, *Jadwan Pty Ltd v Porter* [2004] TASSC 107; 13 Tas R 162; *Jadwan Pty Ltd v Porter (No 2)* [2004] TASSC 126; 13 Tas R 219. Worsley Darcey is alleged to be liable to Jadwan in negligence for the lost opportunity to pursue a claim against Mr Porter and to obtain judgment for damages against him. In relation to other issues that arose in relation to the commencement of the proceeding against Coltmans Price Brent, and the circumstances in which Mr Hogan became named as a defendant to that proceeding, see: *Jadwan Pty Ltd v Middletons (formerly Coltmans Price Brent)* [2007] TASSC 74; 17 Tas R 9.

11 Jadwan’s allegations in this proceeding against the respondents were made against the background that on 19 June 1998, the Federal Court of Australia had declared void the decision of the Minister to revoke the approval of Derwent Court on the ground that for the purposes of s 5(1)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) there had been a failure to observe procedures required by law: *Jadwan Pty Ltd v Minister for Health and Family Services* [1998] FCA 715; 51 ALD 245 (***Jadwan No 1***). On 4 December 1998, an appeal from that decision was allowed in part: *Minister for Health and Family Services v Jadwan Pty Ltd* [1998] FCA 1549; 89 FCR 478 (***Jadwan No 2***). The Full Court set aside the declaration that the Minister’s decision was void, and in its place ordered that the Minister’s decision be set aside on a different ground that had not been raised before the primary judge in *Jadwan No 1*. The order of the Full Court did not stipulate the date from which the order setting aside the decision was to operate. Later, in *Jadwan Pty Ltd v Secretary, Commonwealth Department of Health and Aged Care* [2002] FCA 1052 (***Jadwan No 3***), North J held that the Full Court’s order operated from the date of the order with the consequence that Jadwan did not have any approval in respect of a resident in place on 30 September 1997, which was immediately before the commencement of the operative provisions of *Aged Care Act*. An appeal from that decision was dismissed: *Jadwan Pty Ltd v Secretary, Commonwealth Department of Health and Aged Care* [2003] FCAFC 288; 145 FCR 1 (***Jadwan No 4***).

12 The consequences of Jadwan having no approval in force, and no Commonwealth benefit payable in respect of an approved resident immediately before the commencement of the operative provisions of the *Aged Care Act,* was that the transitional provisions in s 7(1)(a) of the *Consequential Provisions Act* were not engaged, and Jadwan was not taken to be an approved provider under the *Aged Care Act*.

## Commonwealth funding and regulation of nursing homes

13 Central to framing the allegations made by Jadwan at trial were relevant provisions of the legislation that regulated Commonwealth funding of places in private nursing homes. We have already referred to the three Acts that were relevant: the *National Health Act*; the *Aged Care Act*; and the *Consequential Provisions Act*. At the heart of Jadwan’s case at trial was the failure by Mr Wicks, Mr Hogan, and Mr Porter to advise it in the period from July to September 1997 of the enactment of the *Aged Care Act*, and the *Consequential Provisions Act*,and of the effect of material provisions of the new legislation on the ability of Jadwan to continue to receive Commonwealth benefits on account of patients residing at Derwent Court.

### National Health Act 1953 (Cth)

14 Prior to 1 October 1997, proprietors of nursing homes were entitled to receive benefits under the *National Health Act* in respect of each approved patient in the home. In order to be eligible for the benefits, the nursing home had to be an “*approved nursing home*”, and the patient had to be an “*approved nursing home patient*”.

15 There were limits on the number of approved beds in each State. Sub-sections 39AA(1) to (4) of the *National Health Act* made provision for the Minister by notice published in the Commonwealth Gazette to specify for a relevant period the maximum bed numbers for a State or Territory, and for a region within a State or Territory. By s 39AA(5) of the Act, the Minister was constrained in the exercise of powers to grant approvals for premises, or to approve an increase in the number of approved beds in an approved nursing home, by the maximum bed numbers specified for the purposes of s 39AA(1) to (4).

16 Section 40AA of the *National Health Act* provided that a proprietor of a nursing home could apply for approval of premises as an approved nursing home, and for the Minister to approve premises. Section 40AA(6)(ck) of the Act provided that the approval of premises as an approved nursing home was subject to a condition that the nursing home care provided in the home satisfied the standards determined under s 45D of the Act, which provided that the Minister could determine the standards to be observed in the provision of nursing home care in an approved home. Section 40AA(d) of the Act authorised other conditions determined by the Minister for the purpose of ensuring that the needs of qualified nursing home patients were satisfactorily provided for, and otherwise protecting the welfare of qualified nursing home patients.

17 Under s 45E(1) of the *National Health Act,* if the nursing home care provided in an approved nursing home did not satisfy the standards determined by the Minister, the Minister could by notice served on the proprietor declare that the home did not satisfy those standards, and under s 45E(2) by notice served on the proprietor determine that while the declaration remained in force, the Commonwealth benefit was not payable to the proprietor in respect of a patient admitted after the making of the determination. Sub-sections 45E(10) to (12) were also relevant to the circumstances of this case, and provided –

(10) The Minister shall not make a declaration under subsection (1) in respect of a nursing home unless:

(a) a Standards Review Panel has been established in the State or Territory in which the nursing home is situated; and

(b) the requirements of any regulations made for the purposes of this subsection have been satisfied.

(11) Without limiting the generality of subsection (10), regulations made for the purposes of that subsection may provide for:

(a) the giving, to the proprietor of a nursing home, of notice of the Minister’s intention to make a declaration under subsection (1) in respect of the nursing home;

(b) the reference to the Standards Review Panel in the relevant State or Territory, at the request of the proprietor, of the notice given by the Minister;

(c) the making by the Standards Review Panel of recommendations to the Minister, including:

(i) recommendations that a declaration should be made or should not be made; and

(ii) where the Panel recommends that a declaration be made, recommendations regarding the action that should be taken under subsection (2) or (3) following the making of the declaration.

(12) This section does not imply that the Minister may not, in circumstances where the Minister is satisfied of the matter referred to under subsection (1) (whether or not the Minister has taken any action under this section), suspend or revoke the approval of the nursing home concerned as an approved nursing home under section 44 if he or she considers that to be a more appropriate course of action.

18 These sub-sections had the effect that a declaration under s 45E(1) was dependent upon the requirements of any regulations in relation to Standards Review Panels being satisfied. Those regulations were the *National Health Regulations 1954* (Cth), to which we refer below.

19 Section 44(1) of the *National Health Act* provided that the Minister might at any time review the approval of a nursing home. Section 44(2)(b) of the Act provided that if the Minister considered that a condition applicable to the approved nursing home was not complied with, the Minister could vary the nature of the approval, or revoke or suspend the approval as the Minister considered justified in the circumstances of the case. Section 44(2A) of the Act provided that the Minister might give the proprietor of an approved nursing home notice of the Minister’s intention to revoke or suspend approval. And s 44(4) of the Act provided that such variation, revocation, or suspension was to be effected by notice in writing served on the proprietor.

20 Section 39B of the *National Health Act* provided, in an elaborate and indirect way, for the transfer of approved beds, from one nursing home to another with the approval of the Minister. It did so by providing (*inter alia*) for a request for revocation of approval or the reduction of beds of one nursing home, and for notice of an application for the approval of different premises or an increase in number of approved beds at different premises. The means by which the Minister gave approval was the grant, in the exercise of discretion, of a certificate in writing under s 39B(5) of the Act. Section 39B(5A) of the Act provided that the certificate was to be made subject to a specification that the nursing home, in relation to which one or more reduction requests was made, continue to be conducted in accordance with the conditions to which approval of the premises under s 40AA(6) was subject, and s 39B(5B) provided that a certificate must contain a statement to the effect that it was subject to the specification imposed by s 39B(5A).

21 Section 105AAB(2) of the *National Health Act* provided for a person affected by a “*reviewable decision*” of the Minister, or a delegate of the Minister, to request within 28 days reconsideration of the decision by the Minister. A “*reviewable decision*” included a decision under s 44 of the Act which, as noted at [19] above, empowered the Minister to revoke the approval of a nursing home. Under s 105AAB(4) of the Act, the Minister was required to reconsider the reviewable decision, and could affirm, revoke, or vary the decision. Section 105AAB(7) then provided for application to the Administrative Appeals Tribunal for review of any reviewable decision that had been affirmed or varied, or of a decision to revoke a reviewable decision. Decisions under the *National Health Act* were otherwise amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (***ADJR Act***), or in the exercise of jurisdiction under s 75(v) of the *Constitution*, including that conferred on the Court by s 39B(1) of the *Judiciary Act 1903* (Cth).

### National Health Regulations 1954 (Cth)

22 The composition of the Review Panels that were appointed for the purposes of s 45E of the *National Health Act* is material to the claims that were made in this proceeding. Part 4 of the *National Health Regulations* provided for a system of Standards Review Panels to review nursing home care provided in nursing homes and to report findings and to make recommendations to the Minister. Regulation 8 made provision for the Minister to establish Standards Review Panels in each State and Territory in which a nursing home was situated. Regulation 11 provided that the Minister might appoint as members of a Panel for a State or Territory –

 persons who have not less than 3 years’ experience in senior positions in the management of nursing homes, aged persons’ hostels or other establishments of that kind (reg 11(1)(a)); or

 persons who are members of not less than 3 years’ standing in professional or industrial organisations of persons who practise, or are employed, in nursing homes, aged persons’ hostels or other establishments of that kind (reg 11(1)(b)); or

 persons who have knowledge of, and experience in, consumer protection in a health or social welfare field (reg 11(1)(c)).

23 Regulation 12(1) provided that a panel was to consist of the following members –

(1) a Chairperson appointed by the Minister:

(2) a person appointed under paragraph reg 11(l)(a) (a person experienced in management);

(3) a person appointed under paragraph reg 11(1)(b) (a member of a professional or industrial association);

(4) a person appointed under paragraph reg 11(l)(c) (a person with knowledge of and experience in consumer protection); and

(5) an officer of the Department nominated by the Secretary.

24 Regulation 12(3) provided that the Minister must not appoint a person as a Chairperson unless the Minister was satisfied that the person had experience at a professional or senior management level in, or broad knowledge of, health care administration or the provision of nursing home care or care in aged persons’ hostels or other establishments of that kind.

25 Regulation 12(11) concerned vacancies, and provided that the exercise of a power or the performance of a function of a Panel was not affected by a vacancy in its membership.

26 Regulation 16 concerned disclosure of interests, and provided –

**16 Disclosure of interests**

(1) A Chairperson must give written notice to the Minister of all direct and indirect pecuniary interests that he or she has or acquires in:

(a) a nursing home; or

(b) a business that provides facilities, goods or services to nursing homes.

(2) If a Chairperson has or acquires an interest referred to in subregulation (1) or another interest that could conflict with the proper performance of his or her functions, the interest must be disclosed in any report resulting from the performance of those functions.

 (3) If a member (other than the Chairperson) has or acquires an interest that could conflict with the proper performance of his or her functions:

(a) he or she must disclose the interest to the Chairperson; and

(b) except with the consent of the Chairperson, he or she must not take part, or continue to take part, in the performance of his or her functions.

(4) If a member referred to in subregulation (3) takes part, or continues to take part, in the performance of his or her functions, the interest must be disclosed in any report resulting from the performance of the functions.

(5) If a Chairperson:

(a) becomes aware that another member has an interest referred to in subregulation (3); and

(b) considers that the member should not take part, or should not continue to take part, in the performance of his or her functions;

the Chairperson must give a direction to the member not to take part, or continue to take part, and the member must not take part, or continue to take part, accordingly.

27 Regulation 19 provided that at a meeting, the number of members constituting a quorum was the number of members constituting a majority of the members of the Panel.

### Aged Care Act 1997 (Cth)

28 The *Aged Care Act* was enacted on 7 July 1997 when it received Royal Assent. The Royal Assent was notified in Commonwealth Gazette No GN 28 dated 16 July 1997. Division 1 of the Act, concerning preliminary matters, commenced on the day that the Act received Royal Assent. The other provisions were to commence on a day to be proclaimed. By proclamation dated 3 September 1997 and published on 10 September 1997 in Commonwealth Gazette No GN 36 of 1997, the commencement date of the *Aged Care Act*, except for Division 1, was fixed as 1 October 1997. The primary judge noted at [158] that the Bills which were later enacted as the *Aged Care Act* and the *Consequential Provisions Act* (referred to below) had been introduced into the House of Representatives on 26 March 1997.

29 Under s 7-1 of the *Aged Care Act*, payments of Commonwealth subsidy could not be made to a person for providing aged care unless the person was approved under Part 2.1 of the Act as a provider of aged care. In addition, under s 42-1 of the Act, an approved provider could receive a residential care subsidy only in respect of a place which had been allocated to the provider and in respect of recipients for whom an approval was in force. The Act made detailed provision for the application by a provider for places, and for the allocation of places by the Minister. In addition, s 16-1 to s 16-11 of the Act made provision for the transfer of an allocated place from one person to another with the approval of the Secretary, who had to be satisfied that the transfer was justified, having regard to various matters specified in s 16-4.

30 Section 10-2(1) of the *Aged Care Act* provided that the approval of an aged care provider lapsed if it did not provide any aged care during a continuous period of six months. This provision could be waived by the Secretary, but the application for waiver had to be made at least 28 days before the end of the six month period. The relevance of this provision is that Jadwan had ceased providing any aged care services by the time of the commencement of the *Aged Care Act* on 1 October 1997, and did not resume the provision of such services.

31 Section 14-1(1) of the *Aged Care Act* provided that the Secretary might allocate places to an approved provider. But s 14‑1(2) provided that places must not be allocated if, under Division 7, a subsidy could not be paid to the approved provider in respect of the places, or if a sanction imposed under Part 4.4 of the Act was in force prohibiting allocation of places to the approved provider. Part 4.4 of the Act included s 66-1, which is referred to below.

32 The *Aged Care Act* contained provisions that corresponded to s 44, s 45D, and s 45E of the *National Health Act* relating to the establishment of and compliance with standards, the imposition of sanctions, and the revocation of approval –

(1) sections 54-1 and 54-2 provided that the responsibilities of approved providers included the provision of services as specified in “*Quality of Care Principles*” made by the Minister under s 96‑1, which principles might set out “*Residential Care Standards*” (that were applicable before the “*accreditation day*”) and “*Accreditation Standards*”, (that were applicable on and after the “*accreditation day*”); and

(2) section 66-1 provided that the Secretary may impose sanctions that included the revocation or suspension of the approved provider’s approval and restricting the provider’s approval to persons to whom the provider was providing care at the time that the sanction was imposed.

33 As indicated by s 54‑1 of the *Aged Care Act*, the Actcontemplated that different requirements and standards would apply in relation to the provision of aged care after the “*accreditation day*”, which was defined by s 42-4 of the Act to be the day specified in the Residential Care Subsidy Principles (which might be made by the Minister under s 96‑1), or if no such day was specified, 1 January 2001. The new requirement of accreditation under the *Aged Care Act* and the new standards were the subject of evidence at trial of Ms Kay Horgan, who was engaged by Jadwan to give expert opinion evidence.

### Aged Care (Consequential Provisions) Act 1997 (Cth)

34 The transitional provisions relating to the *Aged Care Act* were enacted by the *Consequential Provisions Act*. That Act also received the Royal Assent on 7 July 1997. The transitional provisions included s 7(1) of the Act, which provided –

**7 Approved operators and proprietors**

(1) A person who was an approved operator (within the meaning of Part V of the 1953 Act), or the proprietor (within the meaning of the 1953 Act) of an approved nursing home, immediately before the commencement day is taken, for the purposes of the new Act, to be an \*approved provider if either of the following applies:

(a) Commonwealth benefit (within the meaning of Part V of the 1953 Act) is or was payable to the person in respect of an approved nursing home patient, within the meaning of section 4 of the 1953 Act, for nursing home care received by the patient on the day before the commencement day;

(b) the person had been granted a certificate under section 39A of the 1953 Act, and the certificate was in force immediately before the commencement day.

35 In relation to the allocation of places, s 20 of the *Consequential Provisions Act* provided (*inter alia*) –

**20 Approvals of nursing homes**

(1) Subject to subsection (5), if an approval of premises as an approved nursing home under section 40AA of the 1953 Act was in force immediately before the commencement day, for the purposes of the new Act:

(a) the Secretary is taken, on that day, to have allocated under section 14-1 of the new Act, to the proprietor (within the meaning of the 1953 Act) of the nursing home, a number of \*places equal to the number of beds to which the approval related immediately before that day; and

(b) subject to subsection (4), the conditions to which the approval was, immediately before that day, subject under subsections 40AA(5A) and (6) of the 1953 Act are taken, on that day, to be conditions to which the allocation is subject under section 14-5 of the new Act; and

(c) the allocation is taken to be subject to a further condition under section 14-5 of the new Act that:

(i) the places are allocated in respect of the location at which the premises are situated; and

(ii) any \*care provided, in respect of the places, must be provided at that location; and

(d) the Secretary is taken, on that day, to have determined under section 15-1 of the new Act that the proprietor is in a position to provide care, in respect of those places, for which subsidy under Chapter 3 of the new Act may be paid.

(2) The allocation of places referred to in paragraph (1)(a) is taken to be in respect of \*residential care subsidy.

36 In relation to a declaration of non-compliance with standards made pursuant to s 45E(1) of the *National Health Act*, s 74 of the *Consequential Provisions Act* provided that the declaration was taken to be a notice of non-compliance under s 67‑2 of the *Aged Care Act*. And in relation to a determination amounting to a financial sanction under s 45E(2) of the *National Health Act*, s 75 of the *Consequential Provisions Act* provided that a determination in force under s 45E(2) was taken to be a sanction imposed under s 66‑1(c)(ii) of the *Aged Care Act* on the commencement day, and ending when the Secretary lifted the sanction under s 68‑3.

37 Schedule 1 of the *Consequential Provisions Act* effected extensive amendments to the *National Health Act* so as to give effect to the transition to the *Aged Care Act* in relation to the Commonwealth subsidy of proprietors of private nursing homes, in respect of approved places, for approved patients.

## Background

### The evidence at trial

38 The principal lay witnesses called at trial were Mrs Joan Alexander and Ms Julie Alexander (who were called by Jadwan), and Mr Wicks (who was called by the first to third respondents). As we have mentioned, Mr Hogan was deceased. Mr Porter was not called by any party.

39 There was a great deal of documentary evidence. During the course of his work for Jadwan, Mr Wicks had taken detailed notes of events, and of his thoughts, and his file notes were admitted as an exhibit. Mrs Joan Alexander had maintained a work diary in which she recorded notes of discussions, meetings, events, and her thoughts relevant to Jadwan’s affairs. Extracts from Mrs Alexander’s diary were admitted into evidence.

40 In relation to the principal lay witnesses, the primary judge made some general findings in relation to the credit of Mr Wicks and Mrs Joan Alexander. As to Mr Wicks, his Honour was satisfied that, unless good reason was established to the contrary in a particular instance, the Court was entitled to rely on Mr Wicks’s file notes as highly probative of what they recorded. However, his Honour stated that without the benefit of his notes and his file, Mr Wicks’s memory proved to be susceptible of error. His Honour also stated that under robust cross-examination, Mr Wicks showed some signs of discomfort, but these observations reinforced rather than undermined the judge’s confidence in Mr Wicks’s honesty. His Honour considered that Mr Wicks asserted a certainty about his recollection beyond that which his Honour found plausible, but found that when Mr Wicks gave such evidence he genuinely believed that his memory should be preferred. His Honour also found that in relation to some aspects of his evidence under cross-examination, Mr Wicks was too prone to make concessions, which his Honour characterised as a self-destructive willingness to make what appeared to be unnecessary concessions. His Honour thought that Mr Wicks’s over-confidence and willingness to make concessions were manifestations of a lack of insight and judgment, and not dishonesty. His Honour was satisfied that, without impugning Mr Wicks’s credibility, in respect of those occasions when Mr Wicks’s oral evidence diverged from his contemporaneous written notes, in the absence of a clear contextual reason or evidence to corroborate his evidence, the Court was entitled to proceed on the basis that what was recorded in his notes should be accepted as being more reliable.

41 As to Mrs Joan Alexander, his Honour found at [146] that she gave evidence of the truth as she recalled it, and noted at [141] that her credit was not put in issue. However, his Honour did not accept all of Mrs Alexander’s evidence where it was based upon her recollection. There were some instances where his Honour preferred contemporaneous notes to the evidence of Mrs Alexander’s recollection.

42 The primary judge made no general findings about the credit of Ms Julie Alexander, but his Honour did not accept her evidence on a number of issues.

43 Other lay evidence was given at trial, which included evidence from Ms Denise Callahan, who was the Acting Director of Nursing at the time Derwent Court’s approval was revoked, Dr Philip Timmins, a medical practitioner who visited Derwent Court frequently to attend upon patients who were resident there, Mr Ronald Manson, a retired officer within the Tasmanian Department of Health and Community Services, and some relatives of former residents.

44 Expert evidence was also given at trial, and the expert witnesses included –

(1) Ms Kay Horgan, a registered nurse and an expert in aged care and accreditation compliance, who gave evidence about Jadwan’s prospects of complying with applicable statutory standards after 1 October 1997;

(2) Mr Geoffrey Brown, who gave evidence about a number of issues, including the prospective value of the nursing home business conducted by Jadwan at Derwent Court at particular points in time;

(3) Mr David Ferrier, a chartered accountant engaged as an expert by Jadwan, who gave evidence about the value of the business conducted at Derwent Court and about the financial affairs of Jadwan and the trust of which it was trustee, and its capacity to fund relocation to a new site; and

(4) Mr Paul Davies, a chartered architect who also had qualifications in building conservation, who gave evidence about what steps Jadwan would have had to undertake to complete certain works at Derwent Court, including obtaining approvals.

### Background facts

#### 1984 to August 1996

45 Jadwan commenced operating Derwent Court in 1984. The home operated from an older building in which residents were located over two floors. The accommodation was dormitory accommodation. When at capacity, the home had 51 residents, all of whom were female. Most of them had some degree, if not a pronounced degree, of dementia. Some of the residents were ambulant, while others walked with aids. The nursing home was the subject of both State and Commonwealth regulation. The Commonwealth regulation arose as a result of the funding arrangements under the *National Health Act* to which we have referred*.*

46 One of the issues at trial was the extent to which at material times Derwent Court’s premises complied with fire safety standards. In June 1989, the Department of Health Services Tasmania sent Jadwan a copy of a Tasmania Fire Service building inspection report dated 2 June 1989. That report stated that the Tasmania Fire Service had no objection to the first floor of the home being occupied by non-ambulant patients. The report noted that a certificate was required confirming the completed installation of an alternative fire detection system, and recommended the testing and maintenance of a central emergency lighting system and illuminated exit signs. The covering letter from the Department of Health Services Tasmania confirmed that receipt of the report finalised the approval requirements for the relocation of residents for the purposes of “*State Private Medical Establishment Licence No. 151*”.

47 In about 1993, the Commonwealth government approved a grant to Jadwan of $106,938 for the purpose of the installation of a lift at Derwent Court. The grant was to be paid after the project was completed, with payments being made over 10 years. Jadwan accepted the allocation of the grant on these terms, but did not ever install a lift, and therefore did not receive the grant.

48 On 4 February 1994, a delegate of the Secretary published a statement in relation to Derwent Court pursuant to s 45DB of the *National Health Act*. The report noted that action was required in relation to the installation of a lift –

Although residents able to negotiate the stairs are monitored by staff, ACTION IS REQUIRED to ensure that the current layout of the home over two storeys does not limit the mobility of residents, especially frail residents housed upstairs. The team acknowledged that management of the home, with a commitment of financial assistance from HHLG&CS, plan to install a lift between floors.

49 On 29 June 1995, a routine visit was conducted at Derwent Court by Mr Manson of the Tasmanian Department of Health and Community Services for the purpose of assessing issues relating to its State licence. A note of that visit stated the following in relation to fire safety –

Fire safety:

The most recent full safety clearance for the building was in August 1989. More recent reports (eg. April 92 and October 93) have referred to approval of other fire safety matters at the facility.

50 The note also included some general observations that the overall atmosphere of the nursing home was comfortable, and that the general maintenance of the building was good –

General:

The overall ‘atmosphere’ of the nursing home was comfortable. It was noticeable during an inspection of all areas of the building (offered by Mrs Bensch) that staff were bright and cheery and had a good rapport with the residents.

The 1st floor section of the building is utilised to house non ambulant residents, many of whom were in their beds at the time of my visit (3PM).

The recently installed security panel at the front entrance (TFS approved) provides good protection from intrusion, and prevents residents who might wander from endangering themselves.

The general maintenance of the building is good.

51 However, Mr Manson also stated by way of conclusion –

Derwent Court is one of the older stock of non purpose built facilities, and in that context may have a limited medium to long term effective life when measured against outcome standard expectations and ongoing changes to building code requirements for residential care facilities.

52 On 16 April 1996, the Tasmania Fire Service sent a letter to the Director of Nursing at Derwent Court enclosing a document titled “*Summary of Fire Safety Status as at April 1996*”. That document noted the most recent major fire safety survey at Derwent Court as having been in June 1989, following a major upgrade that included approval to accommodate non-ambulant residents on the first floor. The report also listed more recent contact with the Tasmanian Fire Safety Division, namely between November 1991 and October 1993, and noted the most recent evacuation exercise as having taken place on 28 March 1996. Finally, the document and covering letter both confirmed the approval of a revised scheme of evacuation dated 16 April 1996.

#### The first Standards Monitoring Team

53 In August 1996, a Standards Monitoring Team from the Commonwealth Department of Health and Family Services (**Department**) visited Derwent Court and prepared a draft “*Statement on Standards*” that addressed the standard of care at Derwent Court. To distinguish this team from a later team, we shall refer to it as the first Standards Monitoring Team. The statement listed care standards as having been “*met*”, “*action required*” or “*urgent action required*”. The first Standards Monitoring Team found that Derwent Court met 18 of the 31 standards set out in the relevant Commonwealth policy, with nine standards requiring action so as to be met, and four standards requiring urgent action. Notably, the statement identified Objective 7.4, which related to fire safety, as having been “*met*”. The primary judge at [52] characterised the findings in the draft report as “*highly adverse findings*”. Some of the adverse remarks in the statement related to a suggestion that the residents who were located on the first floor of the home were isolated.

54 In evidence was an undated document prepared sometime after the statement of the first Standards Monitoring Team that provided a comparative analysis of the extent to which Derwent Court met standards of care over six different standards monitoring visits. Those visits took place in December 1988, May 1990, September 1991, November 1993, November 1994, and August 1996. The document indicated numerous standards having been recorded as requiring either action or urgent action after each visit, with 1991 showing the highest proportion of unmet standards requiring urgent action, at 13, as contrasted with the second-highest in 1996, at four, 1988 and 1993 at one, and 1990 and 1994 at nil. The document also noted that “*Following a visit on 24 September 1991 the home was considered a “Home of Concern” (HOC) and remained listed as such for a period of two years. Substantial improvement was found on the subsequent full visit in November 1993 which resulted in the HOC status being reviewed*”.

55 On 6 September 1996, a delegate of the Minister for Health and Family Services sent a letter addressed to Mr Alexander titled “*Notice of Intent to Make Declaration Under s 45E(1)*”. The letter referred to the visit of the first Standards Monitoring Team in August 1996 and to “*the subsequent discussion of findings on 8 August 1996*”. The letter enclosed the draft statement prepared by the first Standards Monitoring Team and notified Mr Alexander that, as a result of the findings in the draft statement, the delegate intended to make a declaration under s 45E(1) of the *National Health Act* that Derwent Court did not satisfy the standards determined by the Minister under s 45D of the Act, noting a failure to satisfy 14 of the 31 standards. The letter foreshadowed that sanctions might then be imposed under s 45E(2) of the Act, which could include non-payment of a Commonwealth benefit in respect of any residents of Derwent Court admitted after the date of imposition of the sanction. The letter referred to a right to request a review of the notice of intention by the Tasmanian Standards Review Panel.

#### The first Standards Review Panel

56 On 19 September 1996, Jadwan sought a review of the delegate’s intention to declare that Derwent Court did not meet Commonwealth standards. On 7 October 1996, Mr Alexander wrote to the delegate and attached a four-page schedule of comments relating to the first Standards Monitoring Team’s draft statement. The letter claimed that Derwent Court had been poorly treated, and requested that the delegate review the points raised with a view to amending claimed inaccuracies.

57 On 30 October 1996, the Tasmanian Standards Review Panel wrote to Mr Alexander advising that a Panel had been constituted. To distinguish this Panel from a later Panel, we shall refer to it as the first Standards Review Panel. The first Panel’s review resulted in a report dated 2 December 1996. The report recorded that there were five members of the first Panel, and that the first Panel attended Derwent Court on three separate occasions, with not all members of the first Panel attending on each occasion. The first Panel interviewed a number of people, including Mr Knight of the Tasmania Fire Service. The first Panel supported the findings of the first Standards Monitoring Team in relation to a number of standards not having been met, but went further and made additional adverse findings. In reviewing safety standards at Derwent Court, the first Panel found that while fire safety had not been identified as an issue by the first Standards Monitoring Team, this may have been due to an erroneous understanding of the effect of the Tasmania Fire Service approval in June 1989, to which we have referred at [46] above. The Panel stated that upon interviewing Mr Knight, the Panel became aware that the documentation “*did not have the effect of a[n] overall fire clearance, or approval from the fire service to locate frail and non ambulant resident[s] on the upper floor*”. The Panel stated that there was no overall assessment of fire safety at the premises, and therefore there was no current fire clearance for Derwent Court. The Panel stated that it held grave concerns about the ability to evacuate the 16 frail non-ambulant residents on the top floor in the case of a fire or other emergency. The Panel also stated in a general context that the lack of a lift at the premises severely restricted the ability to move anyone or anything between the two floors. The Panel stated that “*the culture prevailing at Derwent Court is characterised by a ‘penny pinching’ minimalist approach to the complex needs of 51 vulnerable residents*”. The Panel recommended that “*Derwent Court Nursing Home should be closed and appropriate alternative accommodation be secured for the current residents as a matter of urgency*.” It listed its reasons as including: (1) the inappropriate physical structure of Derwent Court and its lack of safety in the case of an emergency; (2) troubling funding circumstances and the lack of commitment of necessary financial resources by Jadwan to ensure an adequate physical environment; (3) a lack of an integrated culture of commitment towards residents; and (4) a history of inconsistent compliance with standards over the lengthy period of Derwent Court’s ownership, management and direction by Jadwan and its Director of Nursing, leading the Panel to have no confidence in there being potential for meaningful improvement. The Panel did not recommend that financial sanctions be imposed for the reason that these would “*unnecessarily prolong the operation of an inadequate Nursing Home*”.

58 At trial, Jadwan alleged that the first Standards Review Panel was not validly constituted under the Act, and that in carrying out its functions it breached the rules of natural justice. Jadwan maintained these submissions on appeal.

59 By letter dated 1 February 1997, Mr Dellar of the Department wrote to Mr Alexander in relation to the report of the first Standards Review Panel. The letter stated that the report raised serious concerns about the standard of care provided by Derwent Court, including fire safety. The letter attached a one-page report from a senior consultant to TasFire Building Safety (a division of the Tasmania Fire Service) which stated that the existing building did not comply with the intent of the Building Code, and that because of the standard of exits and fire separation of floors, the 16 residents on the first floor of the building could not be safely evacuated with the staff available without putting lives at risk. The report foreshadowed a complete fire safety survey that had been arranged for 4 February 1997. By his letter, Mr Dellar stated that the fire safety concern was regarded by the Department as very serious and significant and requiring immediate attention. The letter requested that Mr Alexander respond in writing by 6.00pm on Sunday, 2 February 1997, with information about his intentions to correct the problem.

60 Mr Alexander responded to Mr Dellar by letter dated 2 February 1997. In his response, Mr Alexander stated that a thorough review of fire safety of the entire Home was completed by the Tasmania Fire Service in 1988. Mr Alexander stated that without knowing what works were required, he could not provide an informed answer that weekend, that he had sent a fax to TasFire Building Safety, and that after receiving advice from TasFire Building Safety he would be in a position to evaluate the required changes.

#### The financial sanctions determination

61 By letter dated 3 February 1997 to Jadwan, Mr Dellar enclosed a copy of the report of the first Standards Review Panel. Mr Dellar advised that he had been appointed to act as delegate of the Minister, and had made a number of decisions. Mr Dellar informed Jadwan that he was –

(1) declaring, pursuant to s 45E(1) of the *National Health Act*,that Derwent Court did not satisfy the standards determined under s 45D of the Act;

(2) determining, pursuant to s 45E(2) of the *National Health Act*,that while that declaration remained in force, Commonwealth benefits would not be payable to Jadwan in respect of any patient entering the nursing home from 4 February 1997 (this was notwithstanding the recommendation of the Panel that financial sanctions not be imposed but that Derwent Court close); and

(3) giving notice pursuant to s 44(2A) of the *National Health Act* that, for the reason of standards satisfaction being a condition of nursing home approval, the serious fire risks reported at the facility, and the facility’s poor record of standards compliance, he intended to revoke the approval of Derwent Court under s 44(2) of the Act on 6 February 1997, unless Jadwan could show cause within three days as to why that should not take place.

62 On 4 February 1997, Mr Conor King, an Assistant Secretary of the Department, wrote to the directors of Jadwan and, with reference to Mr Dellar’s letter of 3 February 1997, stated that he had determined under s 45DC(8) of the *National Health Act* that there was an urgent need to advise the public of Mr Dellar’s action to protect the welfare or interests of persons who were or would become residents of Derwent Court. Mr King stated that information about Mr Dellar’s decision had been made available to the following groups, and attached copies of his correspondence to them –

 residents and residents’ representatives, Derwent Court Nursing Home;

 staff of Derwent Court;

 Health and Community Services Union;

 Australian Nursing Federation;

 the Department of Community and Health Services;

 Advocacy Tasmania; and

 Southern Aged Care Assessment Team.

63 Also on 4 February 1997, Ms June Templer of the Department sent to Mr Alexander a copy of a “final draft” report to the Department dated 4 February 1997 from Mr David Hoffman of Kerr Lewit Clark & Kidd, a firm of architects, which was made following inspections of Derwent Court on 31 January and 4 February 1997. The report listed 13 concerns in relation to fire safety arising from the inspection of the premises. The report stated as findings that fire safety and provision for evacuation on the first floor were not satisfactory for bed-fast residents or people with dementia, and that fire safety and provision for evacuation on the first floor would be reasonable and satisfactory for ambulant people without cognitive impairment if smoke separation between the ground and first floors at the main staircase and smoke seals at doorways in fire walls were installed.

64 On 5 February 1997, the Department sent to Mr Alexander the report of Mr Jeff Knight of the Tasmania Fire Service which had been foreshadowed and which followed an inspection of Derwent Court on 4 February 1997. The report comprised 31 pages and made many recommendations, including the installation of an automatic sprinkler system, a fire isolated exit from the first floor, an emergency warning and intercommunication (EWIS) system, and an emergency lift.

65 On 6 February 1997, Mr Alexander responded to Mr Dellar’s letter of 3 February 1997, and specifically to his direction to show cause. The reply letter was in the following terms –

I am responding to the requirement in accordance with Section 44(2A) of the National Health Act 1953 to show cause why Approval of Derwent Court Nursing Home should not be revoked.

I understand that cause must be shown in relation to fire safety and satisfying other standards.

In relation to fire safety, on behalf of Jadwan Pty Ltd I give the undertaking to complete the works listed below. The undertaking is given after consideration of the Kerr Lewit Clark and Kidd Report dated 4 February 1997, and the Survey Report following the Tasmania Fire Service fire safety inspection on 4 February 1997.

From the Tasmania Fire Service Survey Report the following works will be completed as soon as practicable and include all items marked ‘Requirements’ in the Report:

1. 100% test of all detectors.

2. Upgrade the Fire Indicator Panel Documentation.

3. Sound pressure test of warning devices.

4. All fire doors to be fitted with smoke seals.

5. Hole in smoke wall to be repaired.

6. Areas where services may have penetrated fire or smoke walls to be checked for compliance.

7. Inspection of emergency lighting system by a qualified person.

8. Existing self-luminous exit signs to be replaced with illuminated signs.

9. Relocate the hose reel to comply with the spindle height required.

10. Replace fire extinguishers as recommended.

11. Relocate fire blanket in kitchen to a recommended position.

12. Install a hose reel on the first floor at the front of the building.

13. Material stored in the undercroft to be reduced.

14. Inflammable material at the rear of the building to be removed.

15. Review of smoke detectors in living areas.

16. Installation of break glass alarms in liaison with Tasmania Fire Service.

The Kerr Lewit Clark and Kidd Report and Tasmania Fire Service Survey Report (Item 5) recommend either smoke or fire isolation (as appropriate) of the open stairs from the foyer. Pending clarification from both advisers, recommendations will be effected.

From the Kerr Lewit Clark and Kidd Report, these works will be completed without delay:

Cupboard in Sick Bay to be relocated, providing a further exit.

Fire Evacuation Procedures to be revised to include:

* Distinction between evacuation of building and evacuation to a fire protected area.
* Clarification of assembly areas for upstairs occupants and those downstairs.
* A procedure for evacuation of first floor occupants with respect to fire on ground floor.

All works to be carried out in liaison with Tasmania Fire Service.

The Directors are seriously considering the installation of a sprinkler system. It has not been possible, since receiving the Tasmania Fire Service Report last night, to gain the information necessary to make a decision. There are other considerations to this decision and I seek an early opportunity to discuss the matter in full with you.

With regards to the non-compliance of standards under Section 45D of the National Health Act 1953, the Director of Nursing and I undertake to thoroughly review all standards and seek outside assistance in our endeavours to satisfy the standards. Detailed information on the plans to achieve this outcome will be supplied within 28 days of any deferral of revocation of Approval.

The Directors believe the foregoing is proof of a genuine effort to satisfy the Department, and is a basis for deferral of the revocation of Approval.

66 It is to be noted that the undertakings in the above letter expressly did not extend to the installation of a fire sprinkler system, which was to be the subject of further consideration, and made no mention of the installation of an emergency lift, which had been a recommendation in Mr Knight’s report.

67 Also on 6 February 1997, Mr Alexander sent a further letter to Mr Dellar that enclosed a letter of 8 June 1989 from the Department of Health Services Tasmania and the attached Tasmania Fire Service report dated 2 June 1989, to which we referred at [46] above. Mr Alexander’s further letter was in the following terms –

Subsequent to our telephone discussion yesterday afternoon, faxed now is a copy of a letter from the Department of Health Services Tasmania dated 8 June 1989.

The Approval in the letter was granted only after significant fire safety installations to the fire detection system had been implemented, together with modifications to the interior of the building. A clearance was also required from Tasmania Fire Service before the Approval was given.

A letter, February 1997, over the signature block of Conor King, Department of Health and Family Services, notes the serious nature of standards breaches, in particular fire safety.

The confirmation of first floor fire safety by the Department of Health Services Tasmania has never been amended or revoked. In my opinion, Derwent Court Nursing Home should not be held in breach where no infringement has occurred.

These circumstances are brought to your attention as it appears you are considering the revocation of Approval under Section 44 of the National Health Act 1953.

68 On 7 February 1997, Mr Dellar responded to Mr Alexander’s letter of 6 February 1997, by which he sought to show cause. The substance of Mr Dellar’s response was that he was not satisfied that Mr Alexander had taken appropriate or adequate action to correct or address the fire safety problems identified in the various reports, and required a more detailed and comprehensive response pending which he would defer revocation of the approval for Derwent Court under s 44(2) of the *National Health Act* until 13 February 1997. Mr Dellar stated that if on 13 February 1997 he was satisfied that Mr Alexander was taking appropriate action to correct the fire safety problems, he would consider deferring the revocation of the approval of the home for a further period of 28 days, that is, up until 6 March 1997, during which time Mr Alexander would have the opportunity to show cause why Mr Dellar should not revoke on the basis of the failure to satisfy the remaining standards.

69 At about this time, Mr Dellar was in communication with another provider of aged care services, Southern Cross Homes (Tasmania) Inc with a view to the relocation of residents of Derwent Court. In a later letter from Mr Dellar to Southern Cross Homes dated 21 July 1997, Mr Dellar referred to a letter from Southern Cross Homes dated 7 February 1997 and to its agreement to consider employment of staff from Derwent Court, and to its offer to provide assistance with the transfer of residents to its service.

#### Jadwan’s retainer of Rae & Partners

70 Two other events of significance also took place on 7 February 1997. First, Mr Alexander sent a letter to Mr Wicks, who was then an employee solicitor of the first respondent, Rae & Partners. The letter referred to a telephone discussion between Mr Alexander and Mr Wicks in which he “*outlined a potential problem with the Commonwealth government and Derwent Court Nursing Home*”. The letter attached a number of documents, including the draft statement of the first Standards Monitoring Team, the later report of the first Standards Review Panel, and relevant correspondence passing between the Commonwealth and Jadwan. The material text of Mr Alexander’s letter to Mr Wicks was as follows –

I refer to an earlier telephone discussion with you when I outlined a potential problem with the Commonwealth government and Derwent Court Nursing Home.

Set out below is a brief background to our concerns. The paragraphs in the letter correspond with the numbers on the relevant attachments.

1. Copy of Draft Standards Report.

2. Formal notice of unsatisfactory Report.

3. The Action our Home is taking to correct problems and a letter and list setting out inaccuracies.

4. Department of Health and Family Services (DH&FS) response to 3.

5. Because DH&FS would not amend the Report, a review was applied for.

6. On Saturday 1st February 1997, a letter was delivered by hand by the State Manager of DH&FS stating serious fire safety concerns.

7. On Sunday 2nd February 1997, a letter of reply was collected by the Manager of DH&FS.

8. On Monday 3rd February 1997, a letter and report was hand delivered to us at 8.20 pm. The letter required a response by 6th February 1997.

9. Jadwan Pty Ltd response to 8. above.

10. On 6th February 1997, DH&FS was faxed with queries over approved fire safety and publishing of Derwent Court Nursing Home Action Plan.

11. On 6th February 1997 DH&FS faxed a reply.

12. From 4th February 1997, all staff, relations, unions and other were advised of DH&FS intentions.

As you will see our initial concern was what we perceived to be non-factual comments in the draft Standards Monitoring Team (SMT) Report. This report when published is available to anyone including the media. We believed segments of the Report were derogatory to our staff and the Home.

We believe it is prudent to seek initial advice in the early stages, but it is our hope that by genuine actions to satisfy the Department’s concerns, the matter will be resolved without legal involvement.

71 It is convenient to record at this point that Mr Wicks denied in evidence-in-chief that he ever received instructions from Jadwan to give any advice in respect of the sanctions determination recorded in the letter from Mr Dellar to Jadwan dated 3 February 1997 and which was an attachment to Mr Alexander’s letter of 7 February 1997 referred to above.

72 The second significant event that occurred on 7 February 1997 was that Mr Alexander met Mr Wicks. Mr Wicks made a six-page handwritten file note of that meeting, which records that Mr Alexander raised with him a number of matters, including the draft statement of the first Standards Monitoring Team, the fire safety concerns and remarks about staff contained therein, the notice of intention letter dated 6 September 1996, and the need for an action plan to address the Commonwealth standards in question. The primary judge, at [232], summarised the file note as follows –

Jadwan had initiated an “appeal” against earlier findings of a Commonwealth Standards Monitoring Team which had inspected the nursing home on 6 and 7 August 1996. Mr Wicks’s file note reads: “Appeal went bad – more found”.It also recorded Mr Jeff Alexander telling Mr Wicks of the following matters:

* that “Tasfire Building safety” had been called in and that Derwent Court “does not comply with Building Code – concern re evacuation”;
* that Jadwan could comply with most of the care standards “but limited by the nature of the building (size, age) as to what can be done re fire/evacuation etc”;
* that he had met with Mr Dellar that day: “no decision yet” (the Court infers that to have been a reference to the then threat of revocation of Derwent Court’s approval as a nursing home as referred to at [57] above);
* that in the past the Commonwealth had wanted a lift installed at Derwent Court. Mr Jeff Alexander had wanted a guarantee of funding if it was to be installed, but such a guarantee was “not forthcoming”;
* the 17 year history of the Alexander family’s ownership of nursing homes including one in Victoria and the legal structures of the companies through which that ownership was exercised;
* that there had been an earlier bad report in 1991 in which fire safety had not been a problem which he suggested had been politically motivated: “did much the same thing – they altered final report to [Jadwan’s] satisfaction”;
* that “staff have enlisted Fran Bladel, union etc to lobby to save home”;
* that the findings of the [Standards Review Panel] had not yet been published: “30 days [sic] time”;
* that Jadwan could sell its “beds” if approval attached: “you sell the licence for the bed – worth about $12,000 each in Tas in current climate”;
* the perceived “ulterior motive” and saying that he believed “June Templar is biased”;
* that the residents of Derwent Court were largely dementia patients.

73 Mr Wicks stated in cross-examination that Mr Alexander had explained to him in this first meeting that the legal assistance that he wanted was a law firm that could write letters on the company’s behalf as he required, and that he thought that all that Mr Alexander was really seeking was a letterhead. Mr Wicks later clarified that this meant that he would write within his instructions, but with some “free agency”, as opposed to a “cut and paste” of text supplied by Jadwan. And later still, Mr Wicks stated that he understood that Jadwan wanted him or the firm to be on standby, as necessary, to write on behalf of the company to the Department as the company required.

74 Beyond meeting Mr Alexander on 7 February 1997, Mr Wicks gave evidence that within days of meeting Mr Alexander, he visited Derwent Court, and that soon after he met Mr Alexander, he conducted some research at the Law Society library in Hobart and produced a five-page handwritten research note that referred to a number of provisions of the *National Health Act*, including s 45E relating to a declaration of non-compliance with standards, s 44(2A) relating to revocation of approval, and s 105AAB, relating to review by the Administrative Appeals Tribunal. Mr Wicks gave evidence that the office of Rae & Partners did not have a library apart from the odd textbook on the shelves, and that the firm used the Law Society library. Mr Wicks also stated in evidence that the firm did not have an Internet connection, and that he did not use email. In cross-examination, Mr Wicks said that it was not likely that after conducting the research that he had failed to appreciate the significance for Jadwan of those sections of the Act.

75 On 10 February 1997, Mr Dellar of the Department sent a letter by fax to Mr Alexander, referring to Mr Alexander’s earlier letter of 7 February 1997 where he advised that he would seek guidance from TasFire Building Safety as to “*which of their requirements and recommendations are most urgent, and on acceptable time frames for their completion*”. Mr Dellar confirmed that he had met with Mr Jeff Knight, Manager of TasFire, and attached some type-written notes of the meeting that were signed by Mr Dellar, and which stated that the notes had been discussed with Mr Knight, who endorsed their accuracy. The notes relevantly stated the following –

…

* As it presently stands, this facility is not safe. Mr Knight is not convinced that residents on the first floor in particular could be evacuated in the event of a fire. Mr Knight added that he is familiar with a large number of Nursing and Hostel facilities across Tasmania, and he knows no other which presents such safety concerns.

In order to bring the facility up to an acceptable standard of safety, there are three broad matters which would need to be addressed:

* Fire (or to a lesser extent, smoke) isolation horizontally across the building, including the fire/smoke isolation of the internal staircase;
* an effective evacuation plan, including a second fire-isolated escape route (stairs or a lift were discussed);
* sprinkler system.

…

In the short term, Mr Knight’s view was the most serious issue which needed to be addressed was an effective plan to evacuate all 51 residents, with particular emphasis on safely evacuating those on the first floor. Given the stress to residents that an actual evacuation would cause, Mr Knight’s view was that a substantial simulation of an evacuation, using volunteers in place of residents, would be the best approach. He felt sure that an exercise such as this would reveal aspects of the evacuation plan which would need attention.

On time frames, Mr Knight’s view was that the urgent issue was to ensure the immediate safety of the residents, and that the immediate first step in doing this would be to provide for adequate escape routes and evacuation procedures and investigate the installation of a Sprinkler system. He reiterated (as does the report) that the other matters would need to be attended to over time.

76 The notes then listed the order of priorities identified by Mr Knight –

FIRST Priority to be completed as soon as possible:

* Smoke and fire detection systems
* Means of escape
* Emergency lighting
* Exit signs
* Dangerous goods, noting this has largely been attended to already
* Emergency evacuation plan
* Sprinkler System

To be completed within a year

* Break glass alarms
* Fire and Smoke compartmentation
* Firefighting equipment

To be completed later

* EWIS (this may not be necessary at all)
* Smoke Hazard Management
* Water for firefighting

77 On 12 February 1997, Mr Wicks sent by fax a letter to Mr Dellar on behalf of Jadwan, a copy of which he forwarded to Mr Alexander later that day. This appears to have been the first communication by Mr Wicks with the Department on behalf of Jadwan. In his letter, Mr Wicks –

(1) stated that Rae & Partners acted for Jadwan, “*which has sought our advice regarding its present dealings with the Department*”;

(2) noted Mr Dellar’s notice of intention to revoke the approval of Derwent Court;

(3) stated that heasked Mr Dellar to advise what “*process and instrument or instruments* [by which] *the present Standards Review Panel was appointed*”, including seeking a “*copy of any relevant instrument of constitution or appointment*”, so as “*to assist with our consideration of this matter and the advising of our client*”;

(4) noted, “*by way of observation only at this point*”, that one member of the Panel, Mr Van der Schoor, was also the Executive Officer of Aged Care Tasmania Inc, an association of which a majority of aged care nursing homes in Tasmania were members, and who would be in a position to benefit from the revocation of Derwent Court’s approval and the reallocation of its residents, thus raising a conflict of interest; and

(5) while maintaining that the above comment was by way of observation only, expressed concern that Mr Alexander had “*learned that Mr [Van der Schoor] has mentioned to one or more members of Aged Care Tasmania that Derwent Court Nursing Home is about to close and the beds will shortly be available for allocation should members wish to apply for them*”, asserting the inappropriateness of that conduct if true and bearing out Jadwan’s concern as to Mr Van der Schoor’s position on the Panel.

78 Also on 12 February 1997, Mr Paul Morgan of Morgans Pharmacy wrote to Mr Dellar concerning Derwent Court. Mr Morgan commended the staff at Derwent Court and the level of care provided to residents. He also addressed concerns raised as to hygiene and drug administration by stating that he did not share those concerns. Mr Morgan wrote –

… I feel any decision to close Derwent Court Nursing Home would result in the loss of a valuable aged care facility. I feel it would be an unfair and incorrect reflection on the staff. In short, I feel it would be a wrong decision. It would also cause a lot of trauma to the existing residents.

79 On 13 February 1997, Mr Wicks and Mr Alexander spoke by telephone, in respect of which Mr Wicks’s file note records the following –

You getting a detailed list of what you’ve done/are doing to comply to go under our letterhead – you want a stay of the decision – only given notice late Monday (5.45) – Tues [illegible] – you started calling 8am yesterday.

80 Then, on 13 February 1997, Ms Julie Alexander sent to Mr Wicks by fax a document titled “*Draft Letter to Department*”. The draft letter identified contractors and agencies that had been contacted by Jadwan, and steps that Jadwan had in train, or proposed to take, in response to Mr Dellar’s letter of 10 February 1997.

81 The information in the draft letter prepared by Ms Julie Alexander was then substantially reproduced in a letter sent by Mr Wicks by fax on the same day to Mr Dellar of the Department. Mr Wicks’s letter requested a deferral of any decision by Mr Dellar to revoke the approval of Derwent Court “*pending further negotiations with our client over the meeting of the various standards and fire safety concerns recently raised*”. Then, in response to Mr Dellar’s letter of 10 February 1997, the letter listed a number of steps that Jadwan stated it proposed to take, and a summary of steps already taken. The letter asserted that the steps were those identified by Mr Knight in his meeting with Mr Dellar under the heading “First Priority”, referred to at [76] above. An exception was the sprinkler system and a means of escape which the letter stated required more detailed consideration. Mr Wicks’s letter stated in conclusion that –

We note that so far as the issue of fire safety is concerned, our client has been operating in good faith since June 1989 on an approval of the Tasmania Fire Service for the first floor of the Home to be used by non ambulant residents. We note also that in the five most recent standards monitoring visits by your Department over the period September 1991 to August 1996 the Home has been assessed as meeting the required standard for fire safety. Under the circumstances it would be most unfair for a revocation decision to be made without allowing our client reasonable opportunity to deal with the large number of matters arising from the most recent fire inspection report and the Standards Review Panel report.

82 It is relevant to note here that while Mr Wicks’s letter contained information that had been substantially reproduced from Ms Alexander’s draft letter, the opening two paragraphs and the final paragraph of Mr Wicks’s letter differed from those appearing in Ms Alexander’s draft, which in evidence, Mr Wicks accepted reflected his input at his initiative.

83 On 14 February 1997, Mr Dellar wrote to Mr Wicks in response to his letter of 13 February 1997. Mr Dellar treated the list of steps proposed by Jadwan as “undertakings”, and noted those of the proposed steps that had already taken place. Mr Dellar stated that he wished to be advised by 6.00pm 19 February 1997 of Jadwan’s intentions regarding other matters referred to in the letter, including sprinkler systems, and other structural changes, and improvements to the evacuation procedures, and relevantly stated the following –

As a result of your letter, and the undertakings it contains, I will not be revoking the approval of Derwent Court Nursing Home under section 44 of the National Health Act 1953 for the present. However, I still regard the care issues raised in the Outcome Standards review report, and the matters raised by the Standards Review Panel, including the fire safety issues as urgent and serious and I expect Jadwan Pty Ltd to continue to address these issues urgently.

84 Mr Dellar then referred to his letter of 7 February 1997, to which we referred to at [68] above, and stated that he expected to receive the further information in relation to care standards outlined in that letter by 6 March 1997. Mr Dellar stated that provided the undertakings on fire safety continued to progress, the action to revoke the approvals would be deferred to that time.

85 Also on 14 February 1997, Mr Dellar sent a letter to Mr Wicks that responded to his earlier faxed letter of 12 February 1997, to which we referred at [77] above. The response enclosed a copy of some extracts of the *National Health Regulations* that related to the operation of Standards Review Panels, and asserted that the composition of the Panel met the requirements of the regulations. Mr Dellar stated that he had consulted the Chair of the Panel, Ms Parr, and that she was satisfied that there was no conflict of interest for any member. In relation to Mr Alexander’s allegation that one panel member, Mr Van der Schoor, had mentioned to one or more members of Aged Care Tasmania that Derwent Court was about to close and that the beds would be shortly available for allocation should members wish to apply for them, Mr Dellar responded –

Mr Vanderschoor’s response to me has been that he has at no time acted improperly as a member of the panel and has not provided inappropriate information to any member of Aged Care Tasmania.

By way of clarification, you may find it helpful if I point out that I, together with officers of the Department have been exploring options for the alternative care of the residents of the Derwent Court Nursing Home if revocation of the home becomes necessary. This has involved discussion with a number of people including providers, the State Government and Mr Vanderschoor. Such action follows usual Departmental practice where revocation is being considered to protect the interests of residents in the home. In the case of Mr Vanderschoor, he had been asked by the Department to let us know of alternatives which might exist if it became necessary to find alternative care for up to 51 nursing home residents. Mr Vanderschoor has provided me with a number of helpful suggestions and it may be that in gathering that advice, he spoke to Aged Care Tasmania members. I did confirm to Mr Alexander that discussions of this nature were occurring, in the course of a conversation we had on February 4 1997.

86 On 19 February 1997, Mr John Calder of Tasmanian Building Services Pty Ltd wrote to Mr Alexander regarding fire safety requirements at Derwent Court, following an inspection conducted at the premises. That letter identified a number of items that the letter stated had been agreed with the Tasmania Fire Service and which, if carried out, would satisfy their requirements. The items that were listed included a sprinkler system, and a lift with stretcher capability. The letter stated that with respect to a sprinkler system, it had been agreed that if this was installed, a trade-off would be permitted for certain other items. The letter stated that at that stage, an accurate costing for the work could not be provided, but that a ball-park estimate was $250,000.

87 Also on 19 February 1997, Mr Wicks wrote to Mr Dellar in response to Mr Dellar’s request of 14 February 1997, to which we referred at [83] above, that Jadwan provide certain further information by 6.00pm that day. Mr Wicks addressed the topics of fire doors, smoke seals, sprinkler systems, structural changes, and improvements to evacuation procedures, and sought more time to provide detailed responses.

88 Additionally on 19 February 1997, Mr Dellar wrote to the residents of Derwent Court with reference to the letter from Mr King of 4 February 1997, to which we referred at [62] above. In the letter to the residents Mr Dellar stated –

The proprietors of Derwent Court Nursing Home provided the Department with information of action they are taking to resolve the fire safety issues which were identified and continue to urgently address the need to ensure the safety of all residents in the event of a fire. I have therefore delayed taking any further action to allow the proprietors of the nursing home the opportunity to formulate and implement an effective plan of action to resolve all other areas of concern. I intend to monitor the situation closely to ensure that the issues relating to standards of safety and care are properly resolved.

89 On 20 February 1997, Mr Dellar wrote to Mr Wicks in response to his fax of 19 February 1997. Mr Dellar stated that while there was evidence that Jadwan had commenced action on a number of items, there was still much that needed to be done. Mr Dellar noted that while there was reporting on initiatives that Jadwan was taking to obtain quotes, and details on items such as sprinkler systems and elevators, Jadwan had still not indicated its final intentions in relation to those matters, or any timetable to have them resolved. Mr Dellar stated that the Department would require a further report by 6.00pm on 24 February 1997 as to progress on unresolved fire safety issues. Mr Dellar also stated by way of reminder that Jadwan was required to report to him by 6 March 1997 with respect to the other standards issues that needed to be addressed.

90 On 25 February 1997, Wormald Fire Systems prepared a quotation for Jadwan for the design, supply, installation and commissioning of a sprinkler system at Derwent Court in the sum of $46,800.

#### 26 February 1997 meetings

91 On 26 February 1997, Mr Wicks, Mrs Joan Alexander, and Ms Julie Alexander attended a meeting with Mr Dellar and Mr Hargraves of the Department to discuss, among other things, the options available to Jadwan to address the safety concerns underpinning the financial sanctions determination made under s 45E(1) of the *National Health Act*. Mr Wicks met with Mrs Alexander and Ms Alexander both before and after the meeting with the Department and made a file note of the meetings.

92 As to the meeting with the Department, Mr Wicks gave evidence of his recollection that he was more or less an observer at this meeting, that he had no active role in negotiating on behalf of the company, and that he listened to what Mrs Alexander and Ms Alexander told the Department about what they were doing to meet the Department’s concerns in relation to care standards and building issues. Mr Wicks’s note of the meeting with the Department stated –

Conveyed to Dellar and Hargraves our concern that the subjective nature of the comments made particularly in the final page of the Standards Review Panel report and that their personal nature particularly against the Director of Nursing. He said he heard what we were saying and made the point that he has a discretion to publish or not publish that report and that the proprietors are able to make submissions as they wish on it and those submissions may be published by him.

Discussed also the problems the proprietors are having with obtaining quotes for work to be done at the Home and he said he understood. He made [it] clear though he needed to be satisfied by March 6th that the care standards had been substantially met or in the process of being dealt with.

Discussed the “de canting option” which might be available to the Alexanders namely to sell or transfer beds to other Homes thereby reducing the numbers accommodated on the first floor and making evacuation considerations less critical.

The Alexanders discussed in general terms the option of rebuilding and Mr Dellar mentioned the possibility of building at Rokeby had been mentioned by Jeff Alexander to him and he felt that there was a need in that area but pointed out the length of time from concept stage to completion and made the point that it would not be acceptable for the fire safety issues at Derwent Court to be left in abeyance over that period.

He also referred to the possibility of negotiation standards short of what the Code requires if the matter of sprinklers or lifts are being considered and suggested that if the option of those building works were to be pursued then the Alexanders should approach Tas Fire who would put them in touch with the Building Code of Australia Referent [sic] Committee.

Returning to the question of publication of the Standards Review Panel report, Mr Dellar did say that he would let us know whether he proposed to publish the report if at all.

Confirmed at the end of the meeting that he was awaiting further contact before 6th March before deciding what he would do in respect of the revocation decision.

We pressed the point of obtaining some sort of assurance with respect of compliance with standards in the future if the Home went ahead and installed a lift and sprinkler system. Discussed also the possibility of adding on at the back to create more room. Steven Dellar would and understandably could not commit himself in this regard.

We worked point by point through progress with meeting the other fire requirements and Dellar seemed generally happy with what has been done to date.

Alexanders to report back to him before 6th March with more information on their compliance with care standards and he said in this regard that date is a definite deadline.

93 After the meeting with the Department, Mr Wicks, Mrs Alexander, and Ms Alexander met and discussed “*future options*”. Mr Wicks made a file note of that discussion which stated –

On return to the office discussed at length with Mrs Alexander and Julie future options and said that I really can’t assist in any way because they need to make what in fact are basic commercial decisions as to how they will proceed but they should be mindful of the fact that if they cannot comply or cannot continue to comply or if they can’t get any assurance in this regard given the age and the manner of construction of Derwent Court then the ultimate option may only be to sell the beds and sell the real property and relocate all their efforts and funds back to Victoria where I understand the Nursing Home there is performing well. Mrs Alexander also mentioned the possibility that there could be a problem with the Director of Nursing, Sister Bench, and it would appear there was perhaps some truth in the Standards Review Panel comment about her having been too long in the job. It appeared from what Mrs Alexander was saying was that the Director of Nursing has not been keeping up with current trends and is one of the “old school” of nurses. I said this introduced another serious matter for them to consider that is whether compliance with care standards would come somewhat easier if fresh and more competent staff were employed in the place of the existing one[s].

There was little further I can do and I am not able to advise them on the commercial aspects of any of the options before them but they should consider them further and I would be happy to assist in any way possible. I did say that I felt that under the circumstances if a decision was made to revoke the approval then it may be difficult to challenge that decision through the appeal processes open unless they could clearly demonstrate that they did in fact meet the care standards and that the Standards Monitoring Team or the Review Panel were incorrect in the assessments of the premises. I said however there was no room for misinterpreting the question of fire safety it has to be dealt with in some meaningful way.

94 Ms Julie Alexander gave evidence in cross-examination about the later meeting with Mr Wicks on 26 February 1997. She said that at that time she was concerned that they were not receiving legal advice as to what they should be doing in relation to the financial sanctions determination, and that she conveyed that concern to Mr Wicks at the meeting. Ms Alexander gave evidence that Mr Wicks said that they “*couldn’t do anything legally unless Derwent Court was revoked and we could only make decisions on a commercial basis*”.

95 For his part, Mr Wicks gave evidence in examination-in-chief that he did not recall whether he was asked on that day by either Mrs Alexander or Ms Alexander to provide advice to Jadwan about anything. However, in cross-examination, Mr Wicks was taken to the note and accepted that it recorded advice that he had given Mrs Alexander and Ms Alexander in that conference.

#### Further correspondence

96 On 4 March 1997, Wormald Fire Systems prepared a quotation for the cost of the supply and installation of smoke seals on doors and frames at Derwent Court at $3,671. On the same day, another supplier, Parmic Pty Ltd, prepared a quotation for the design, fabrication and installation of a fire sprinkler system at $48,500, subject to adequate water supplies being available, and quoted the installation of smoke seals on doors at $5,600.

97 On 5 March 1997, Mr Wicks sent a fax to Mr Dellar of the Department attaching a submission prepared by Jadwan addressing the report of the first Standards Review Panel. The fax comprised a covering letter which again raised concerns about the composition of the first Panel, and the potential for bias on the part of one of its members. The letter also raised concerns that the members of the Panel were not properly qualified to evaluate Derwent Court, because they did not have sufficient experience in the management of dementia patients, and that the Panel members, in their inexperience, had been affected and unduly influenced by the sad and disturbing mental and physical condition of many of the residents. The letter stated by way of conclusion –

… we confirm the opinion of both ourselves and our client that the Standards Review Panel report contains a number of unfair inferences and inaccurate statements which are dealt with in the enclosed submissions. We believe it would be most unfair to our client and unnecessarily alarming to residents of the Home and their families for the Panel’s report to be published by you. Our client is doing all within its power to address the issues raised by both the Monitoring Team and the Review Panel as the enclosed Action Plan shows. We believe that in the circumstances it would be most unfair for the Home’s approval to be revoked, or for the Review Panel’s report to be made public.

98 In addition to attaching Jadwan’s submission, the letter also attached what was described as an “Action Plan” that addressed the standards issues raised in the Panel’s report, and a submission signed by the nursing staff at Derwent Court. Mr Wicks gave evidence that he had no input into the submission of Jadwan, the action plan, or the submission from the nursing staff.

99 By letter dated 6 March 1997, Jadwan itself wrote to Mr Dellar and made within the letter a five-page submission in response to Mr Dellar’s requirement in his letter to Jadwan of 7 February 1997 (referred to at [68] above) that Jadwan show cause why approval for Derwent Court should not be revoked on the basis of its failure to comply with standards. This submission was a separate submission from that sent by Mr Wicks the previous day, but covered similar topics. The submission addressed the topic of fire safety, but did not state what Jadwan’s proposals were in relation to a lift or a sprinkler system.

100 In addition to their efforts to attain compliance with Commonwealth safety standards at Derwent Court, there was evidence that the directors of Jadwan investigated the possibility of relocating Derwent Court to a new site. In a letter dated 28 July 1997 from Mr Alexander to Mr Hogan, Mr Alexander stated that at a meeting on 4 March 1997 with Mr Dellar, Jadwan undertook to relocate and rebuild, and that Mr Dellar’s response was that Jadwan was “*off the hook*”. Mr Wayne Alexander gave evidence of looking at new sites in 1996 and 1997 at Glenorchy, Sorell, and Clarence. Mrs Joan Alexander also gave evidence of looking at sites, and speaking to real estate agents, and stated that they looked at about eight blocks. Jadwan’s chronology filed in the appeal stated that on 12 March 1997, Mr Jeff Alexander and Mrs Alexander inspected properties at Sorell and Glenorchy, and Mr Wayne Alexander and Mrs Alexander inspected further properties on 15 and 16 March 1997.

101 At about this time, Mr Dellar of the Department was still in communication with Southern Cross Homes. In his letter to Southern Cross Homes dated 21 July 1997, to which we referred at [69] above, Mr Dellar referred to its “*revised proposal of 14 March 1997 responding to the possible relocation of residents of Derwent Court Nursing Home*”.

102 By letter dated 17 March 1997 to Mr Alexander, Mr Calder of Tasmanian Building Services Pty Ltd referred to “*our recent discussion*”, and provided an estimate, which was subject to some qualifications, for the construction of a 51 bed complex on a greenfields site in the amount of $3,152,760.00.

#### The second Standards Monitoring Team

103 On 12, 13, and 17 March 1997, a second Standards Monitoring Team headed by a senior interstate member attended Derwent Court for the purpose of conducting a further standards assessment.

104 On 25 March 1997, and prior to being notified of the outcome of the assessment by the second Standards Monitoring Team, Jadwan sent by fax to Mr Dellar of the Department a two-page letter to provide an “update on the progress of fire safety” at Derwent Court with respect to break glass alarms, fire hoses, smoke seals, smoke detectors, evacuation procedures, and care standards for nursing staff. No reference was made in this letter to any proposals for a fire sprinkler system or a lift.

105 The second Standards Monitoring Team prepared a draft “Statement of Information”, a copy of which was sent to Jadwan under cover of a letter dated 1 April 1997 from Ms Jane Halton, a First Assistant Secretary of the Department. Ms Halton stated in the letter that she had recently been appointed by the Minister as a delegate for the purpose of considering any action arising from Jadwan’s failure to satisfy standards determined under s 45D of the *National Health Act*. The draft statement of the second Standards Monitoring Team identified 31 standards, five of which were met. Action was required to meet one standard, and urgent action was required to meet 25 standards. Ms Halton invited Jadwan to consider the draft statement, and the reasons for the findings, and to forward any evidence that contradicted that set out in the statement for her consideration. Ms Halton advised that she had grave concerns about the level of care being provided at Derwent Court and Jadwan’s ability to implement changes that would lead to a sustainable improvement in outcomes for residents. For that reason, Ms Halton advised Jadwan of her intention, as a delegate of the Minister for the purposes of reg 26 of the *National Health Regulations*, to ask the Standards Review Panel of Tasmania to conduct a further independent review of the nursing home and to report to her on their findings. Of particular note is that Ms Halton stated that the second Standards Review Panel would not be provided with a copy of the Statement of Information attached to her letter –

Please note that in referring this matter to the Standards Review Panel, I will not be providing it with a copy of the Statement of Information arising from the assessment conducted in March 1997. This will ensure that the Panel acts as a truly independent review of the care you are providing and will approach its task without the benefit of the assessment by monitors from the Department. I will, however, provide the Panel with a copy of your submission dated 5 March 1997.

106 At the conclusion of the letter, Ms Halton directed any enquiries to Ms Lisa Paul of the Department.

107 Three days later, on 4 April 1997, Mr Alexander called Mr Wicks and told him that Derwent Court had had a visit from “*someone from Canberra*” on 12 and 13 March 1997. Mr Alexander told Mr Wicks that he was still attending to fire requirements.

#### 8 April 1997 meeting

108 On 8 April 1997, Mr Wicks and Mr Alexander held a further discussion. Mr Wicks prepared a file note of that discussion that relevantly stated –

Errors in statement (you can’t comment on nursing matters).

They are concentrating on policies, procedures and practices as per the new (draft) standards

Director of Nursing has resigned – [with effect from] 2 weeks (family reasons)

DDN will fill in short term

was the original SMT plus a head from Canberra

Bishop Davies Court rejected one

Nothing we can do at this stage

you’ll speak with Ms Paul – maybe SRP needn’t come through the place again – pointless challenging composition (bias) SRP anyway – clearly new SMT report is a further problem that needs to be dealt with – Department is obviously seeing that they ‘get it right’ so AAT review is less likely of their actions/decisions

109 The file note does not clearly state who made which comments recorded in it. Whilst initially Mr Wicks gave evidence that his notes were a record of what Mr Alexander said to him, he conceded in cross-examination that the statement, “*pointless challenging composition/bias SRP anyway*”, appeared to record a view that he conveyed to Mr Alexander, and accepted in cross-examination that his advice to Mr Alexander was that there was no point in challenging the report of the first Standards Review Panel. By way of explanation, Mr Wicks stated in cross-examination that it “*then appeared to me that the department could simply do it again and get it right*.” Despite Mr Wicks’s evidence in cross-examination, the primary judge held at [284] that he was not persuaded that the Court should attribute the statement that it was pointless challenging the composition of the first Standards Review panel to Mr Wicks, as in context it was equally possible that it was a conclusion expressed by Mr Alexander.

#### Other developments

110 As foreshadowed in Mr Wicks’s file note referred to at [108] above, on 9 April 1997, Ms Barbara Bensch, the longstanding director of nursing at Derwent Court, resigned, effective 1 May 1997. Ms Bensch stated in her letter of resignation that her husband had suffered ill health for a number of years, and that it had become necessary to spend more time with him. The Deputy Director of Nursing, Denise Callahan, assumed the position of Acting Director of Nursing after Ms Bensch left.

111 The next day, 10 April 1997, Mr Alexander wrote to the Program Manager, Aged and Disability Support Program at St John’s Park in New Town, Tasmania, to enquire whether an area might be available in the Carruthers Wing at premises at New Town to relocate 16 residents for three years while “*we rebuild a new Home*.” Mr Alexander subsequently visited the Carruthers Wing at St John’s Park on 21 April 1997, and sent a further letter dated 5 May 1997 to request a telephone call to discuss further details, such as various charges associated with taking up the accommodation. Later, on 30 May 1997, Mr Alexander was faxed details of the costs associated with occupancy of one floor of the Carruthers Building.

#### Practice fire drill

112 On 14 April 1997, a practice fire drill took place at Derwent Court that was observed by an officer of the Community Fire Safety Division of the Tasmania Fire Service. Subsequently, by letter dated 22 April 1997, the officer advised Mr Alexander that the evacuation was conducted in a professional and efficient manner, and that staff were to be congratulated on their efforts.

#### Jadwan’s response to the statement of the second Standards Monitoring Team

113 By a five-page letter dated 22 April 1997 addressed to Ms Lisa Paul of the Department, Ms Julie Alexander addressed some of the findings in the statement of the second Standards Monitoring Team that had been provided to Jadwan under cover of the letter from Ms Halton of the Department dated 1 April 1997, to which we referred at [105] above. Jadwan’s letter stated that the letter from the First Assistant Secretary had been received on 7 April 1997, and referred to a telephone discussion with Mr Alexander on 9 April 1997. Jadwan’s letter addressed the topics of “*Homelike Environment*” at Derwent Court, and fire safety. In relation to fire safety, Jadwan reported that evacuation of residents on the first floor was to be by ski-blanket, and that delivery of ski-blankets from the supplier had been completed on 26 March 1997. The letter also referred to an evacuation drill that had taken place on 14 April 1997, and foreshadowed a report from TasFire Building Safety as to their observations of the drill. Finally, the letter referred to a visit by the Standards Monitoring Team on 18 April 1997 and to “*a most informative session*”. On the second page of the letter, under the heading “Building” the letter stated –

At a meeting on the 4th March 1997, Mr Dellar was advised of Jadwan Pty Ltd intention to rebuild at a new location. Reasoning for the decision to relocate involved the likely adverse reaction by the National Trust to an installation of a sprinkler system in a heritage building, the effect of the integrity of the building for future functions if a full size lift was to be installed; and the unsuitability and layout of the Home in light of revised building standards.

Directors are actively seeking appropriate land for relocation of the Home.

114 However, as the Department was later to note, the response by Jadwan to the statement of the Standards Monitoring Team did not address all the findings. Indeed, most of the findings were not individually addressed. The findings of the Standards Monitoring team in its statement were set out in an organised, systematic way by reference to each of 31 nominated standards. Jadwan’s response stated in relation to the findings –

Many of the comments in the Findings could be challenged, but staff would rather look to the future by implementing a new approach in order to meet the standards. However there are two standards where the findings as stated would, we believe, leave a reader with unfair misconceptions. The following comments and evidence are submitted for consideration.

115 Jadwan then addressed two of the objectives, namely “*Homelike Environment – 4.1*”, and “*Fire Safety – 7.4*”. Jadwan concluded its letter as follows –

As a final comment, it is now eleven weeks since the threat of revocation of approval was imposed on Derwent Court. Over this time there has been, and still is, considerable uncertainty in the minds of residents, relatives and staff concerning the future of the Home. There are continuous questions from relatives and others for which we are unable to provide answers.

The loyalty of our staff has never been in doubt. Considering many staff could have gained more secure employment elsewhere, but have chosen to continue to offer their loyalty and services to our residents and to management in these difficult times, speaks for itself.

For the sake of peace of mind for more than one hundred and twenty residents, relatives and staff, we ask that early consideration be given to a decision concerning the future of Derwent Court.

#### The second Standards Review Panel

116 On 9 May 1997, the second Standards Review Panel, to which we shall refer further below, attended Derwent Court for the purposes of its review.

117 On 11 May 1997, Ms Paul of the Department, wrote to Jadwan in response to Jadwan’s letter of 25 March 1997, to which we referred at [104] above, and also in response to another letter from Jadwan dated 21 April 1997. In response to the latter letter, Ms Paul confirmed that Derwent Court remained subject to sanctions that had two aspects –

 Derwent Court would not be paid Commonwealth benefits for any resident admitted from 4 February 1997; and

 where Derwent Court chose to admit a resident after 4 February 1997, it was not able to charge that resident any more than it would have been able to charge if the Commonwealth benefit was being paid.

118 Ms Paul’s letter of 11 May 1997 also raised the topic of fire safety. It requested confirmation that a fire drill had occurred, and details of steps that Jadwan proposed to take to address any deficiencies in the fire drill. Ms Paul also stated that it concerned her that Jadwan’s letter of 25 March 1997 did not mention progress on providing a second form of egress for residents and staff on the first floor in the event of a fire on the ground floor. This topic had been raised with Jadwan on 10 February 1997 (see [75] above). Ms Paul requested that, within 14 days, Jadwan provide a detailed framework setting out the steps it would take to install a second egress. The letter foreshadowed that failure to provide such a framework to ensure that a second egress was installed within a reasonable time might lead to a recommendation that the nursing home approval be restricted to the ground floor of the building.

119 On 16 May 1997, while Jadwan awaited the outcome of the second Standards Review Panel’s site visit, Mr Alexander wrote to the Tasmanian Department of Community and Health Services to express interest in land at Glenorchy to build a “first class and accredited aged care facility in the Greater Hobart area.” The letter stated, “*recently the subject land was viewed briefly*”.

120 By letter dated 28 May 1997, Ms Paul of the Department sent Jadwan a copy of the report of the second Standards Review Panel, which was dated 26 May 1997. The covering letter stated that the second Panel’s report would be considered by Ms Halton of the Department in relation to the question of compliance with the standards determined under s 45D of the *National Health Act*, which included consideration of whether the approval of Derwent Court should be revoked under s 44. Ms Paul urged Jadwan to make a submission, and stated that it should do so within seven days of receipt of the letter.

121 Notwithstanding the terms of reg 12(1) of the *National Health Regulations*, to which we referred at [23] above, the second Standards Review Panel comprised only the Chairperson and two other members. Both of the members, Mrs Ethel Guy and Ms Janet Cooper, had been members of the first Standards Review Panel. The Panel’s report stated that a “*Commonwealth Department representative was not present*” (cf, reg 12(1)(e)), and that “*it was not possible to have a fourth member*”. As we discuss later, Heerey J held in *Jadwan No 1* that the second Panel was invalidly constituted for reasons including that Ms Cooper was ineligible for appointment to the panel.

122 Section 5 of the report of the second Standards Review Panel listed the documentation that the Panel considered, which notably included, “*Statement of Information: Standards Monitors Report 12-13-17 March 1997*”, the findings of which it referred to in its report, and which it also invited interviewees to address. The second Panel stated that it had also interviewed the three standards monitors who had conducted the March 1997 review. This was notwithstanding the statements in Ms Halton’s letter of 1 April 1997, to which we referred at [105] above, that she would not be providing the second Panel with the Statement of Information from the March review, so as to ensure that the review was truly independent. However, as the respondents submitted, the second Panel’s report did not say from whom it had received the report of the standards monitors.

123 We also note at this point that in the context of Ms Halton’s statement in her letter of 1 April 1997 that the second Panel would act as a “truly independent review”, two of the three members of the second Standards Review Panel, namely Mrs Guy and Ms Cooper, had been members of the first Standards Review Panel.

124 Amongst other things, the report of the second Panel stated that the Panel “*retains grave doubt about the ability to evacuate residents down the back staircase*”, and that “*[t]he proprietor stated that installation of a lift was not cost effective*”.The report recorded that Mr Alexander had stated his intention to rebuild the nursing home in the next two to three years, but that he anticipated difficulty in finding the two hectares of land that he would need.

125 The second Standards Review Panel found that 26 standards to which it referred required urgent action to address, and by way of conclusion identified four issues of major concern. The Panel stated that it did not have confidence that the substantial changes required for the nursing home to meet standards were understood, or would be implemented in an ongoing manner, and that the question of rebuilding or substantially upgrading the building with at least a lift had to be addressed. The Panel stated that in the absence of real evidence that change was going to take place, it concluded that the nursing home did not, and would not, meet standards. By way of summary, the Panel stated that –

(1) the nursing home care provided was not consistent with contemporary nursing home care practices;

(2) there was no systematic approach to care and other practices, including the absence of documented processes to provide evidence of consistently adhered to policies and procedures; and

(3) the actions set out in Jadwan’s submissions were inadequate and did not show a knowledge base that would support improved outcomes for residents.

#### The business plan

126 On 28 May 1997, representatives of Jadwan met two officers of the Department and Mr Jeff Knight from Tasmania Fire Service. At the meeting, there was a suggestion that Jadwan should draw up a business plan for rebuilding Derwent Court.

127 By a four-page letter dated 30 May 1997 addressed to Derwent Court, Mr Knight set out in a tabular form the position of the Tasmania Fire Service on aspects of its fire safety survey dated 4 February 1997, to which we referred at [64] above. The letter stated the following as having been discussed at a meeting held after the inspection, which we take to be the meeting on 28 May 1997 referred to above –

The Tasmania Fire Service will require the open stair to be smoke isolated to prevent the spread of smoke between the ground and first floors. All glass work associated with the smoke isolation is to be safety glass as defined by Australian Standard 1288, and required by the Building Code of Australia.

The number of residents accommodated on the first floor is to be reduced over time, and in the short term, non ambulant and residents who cannot obey basic instructions are to be relocated to the ground floor leaving ambulant and coherent residents residing on the first floor.

This is accepted on the understanding that Management have in place a Business Plan detailing the plans and time frames for the construction or purchase of a new facility within a two year period.

It should be noted that if all residents are removed from the first floor and access is restricted to staff only, the requirement for the smoke isolation of the stairway will be withdrawn.

It was agreed to arrange a further meeting between the Management of the home, the Department of Health and Family Services and the Tasmania Fire Service at a date to be fixed, allowing Management time to formulate a Business Plan for a new facility.

Management, should, within 14 days of receiving this letter, provide a progress report on the Business plan so the date of the meeting may be set.

128 The table in the letter was substantially reproduced, and the above text was reproduced, in a separate letter from Mr Knight that was addressed to Derwent Court and dated 3 June 1997. It is relevant to note that the business plan referred to in Mr Knight’s letter contemplated the construction or purchase of a new facility within a two year period.

129 On 30 May 1997, Mr Alexander received a quotation from Community and Health Services Tasmania for rental and other costs associated with occupancy of one floor of the Carruthers Building at New Town about which Mr Alexander had enquired for the purpose of relocating residents from the first floor of Derwent Court (see [111] above). The total cost was quoted at $4,100 per month. There is no evidence that Mr Alexander accepted this quotation, or pursued the proposal any further.

130 By letter dated 4 June 1997, Ms Julie Alexander wrote to Ms Paul of the Department with Jadwan’s response to the report of the second Standards Review Panel. The response extended over seven pages. The letter made some initial observations, including that –

 the second Standards Monitoring Team report had been made available to the Panel, when Ms Halton had said in her letter of 1 April 1997 that it would not be;

 two of the three members of the Panel had been members of the first Panel; and

 there had been a period of only three weeks between a visit by the members of the Standards Monitoring Team on 18 April 1997, and the inspection by the second Standards Review Panel, which was a relatively short time within which to be judged on Jadwan’s ability to demonstrate sustainable improvement.

131 The letter then addressed the issues raised by the report of the second Standards Review Panel, using headings that largely corresponded to those that the Panel had employed in its report.

132 On 10 June 1997, Mr Alexander met Mr Wicks and asked Mr Wicks to assist Jadwan with a proposed business plan. Mr Wicks’s note of the meeting stated (inter alia) –

Business Plan requested

don’t want to lock into building though

133 In evidence-in-chief, Mr Wicks stated that the reference to the building was to a new building, and that as far as he could recall, Mr Alexander was reluctant to commit to the cost of a new building. However, in cross-examination Mr Wicks thought it likely that this was a reference to not locking into the old building. Mr Wicks’s note also stated, “*Can declared home sell beds? (I yes)*”. In evidence-in-chief, Mr Wicks stated that he could not recall whether that was a question posed to him by Mr Alexander, or by him to Mr Alexander, but then stated that he thought it was a possibility that the question was by him to Mr Alexander, and that Mr Alexander gave the answer. The note also stated as follows –

2 residents have gone (deceased) – can only claim $26.50 per day resident contrib – have left bed vacant

you fear if you now say you want to sell

134 The note also suggested that Mr Wicks and Mr Alexander discussed the options available to Jadwan, such as the sale of its beds (“*Melb beds 18000 – 25000 in 6/12… here $12000?*”) and whether an approved business plan would result in a “*lift*” of the declaration. Mr Wicks accepted in cross-examination that the “*lift*” of the declaration was a reference to the financial sanctions, and accepted that he would have understood at the time that the lifting of the financial sanctions was a material concern for Jadwan, because as each patient died, Jadwan’s funding decreased, and that once the sanctions were lifted Jadwan could get funding for 51 beds. Additionally, there are references in the note to a conditional purchase contract, an option to purchase land, and to “*build*” subject to viability.

135 By letter dated 12 June 1997, Mr Wicks provided Mr Alexander with some suggested amendments and observations about Mr Alexander’s proposed business plan. The primary judge found at [301] that this advice did not require Mr Wicks to possess or apply any legal skills. The body of Mr Wicks’s letter of advice was as follows –

As discussed, I believe it important and in fact unavoidable for you to “show your hand” regarding the possibility of seeking another interested party to come into the picture [at] some point in the timetable. Your business plan could therefore contain a “rider” to the effect that would you wish to retain the right to seek expressions of interest from and contracting with any other interested operator who may wish to either complete the construction of the home or to ultimately operate it. However it is far too early to give any more detail in this regard at this point in time.

I believe an option to purchase is the best way to proceed although under the circumstances a fairly lengthy option period may be necessary to enable you to do all that you need to do up to the point where you decide whether or not you accept any particular tender and proceed with the construction. I think you can safely argue that it is a plan only at this stage and I fail to see how any degree of commitment can be inferred from it. *If the Plan has the effect of keeping both the Fire Service and the Department satisfied at least for the time being then it will allow you more time to plan your future courses of action*.

Of course, if you reach the stage where the building of a new home appears economically unviable for you and if there is no other interested operator in the wings who could take over the option and construct the home, then it would appear that you really would have little option other than to lose the beds allocated to the home unless, in the meantime, other homes in the area found themselves able to buy beds from you.

As mentioned, the Business Plan is necessarily tentative at this stage and you could perhaps stress in your covering letter that specified target dates are your best estimate only. Perhaps a shorter time frame may later emerge as achievable.

I trust this is of assistance. Clearly, there are a number of issues that need to be considered further namely the precise form of any option agreement and the agreement by which you would bring another operator into the picture at any particular point within the time frame. I would be happy to discuss these further with you.

[emphasis added in second paragraph]

#### Further correspondence

136 On 11 June 1997, the Commonwealth issued a certificate of approval of Derwent Court as an approved nursing home under s 40AA(2) of the *National Health Act* for the period 1 July 1997 to 30 June 1998. The certificate was indorsed with conditions, which included –

6.4 The proprietor of the nursing home will ensure that the nursing home satisfies the standards determined under section 45D.

137 On 13 June 1997, Jadwan wrote to Mr Knight of the Tasmania Fire Service and provided updates on the steps taken at Derwent Court to improve fire safety. Amongst other things, the letter stated that Jadwan had agreed to install an appropriate smoke door to isolate smoke between the ground and the first floor, and that Jadwan’s purpose was to accommodate 16 ambulant residents on the first floor. The letter also included the business plan for a new building at the new location, which had target dates that included the location of suitable land in December 1997, entry into an option to purchase land in February 1998, and an opening in October 2000, which was longer than the two year period to which Mr Knight had referred in his letters dated 30 May and 3 June 1997.

138 Also on 13 June 1997, Mr Wicks spoke by telephone to Mr Alexander. Mr Wicks’s note of that conversation included the following –

* hostile reception from Canberra
* spoke to Anne Thorpe – very cold
* spoke about whether you’re on the right track – she said she couldn’t comment on that – could only pass judgment on what has or hasn’t been done
* said some operators choose to sell in those circumstances
* C’w value for money is her concern

…

They’ll make decision within 10 days – 2 weeks

*I say get TFS approval of your Plan and of continuing status quo while you sort out your direction then we’ll write to [Canberra] a formal letter asking for assurances and stating your position in detail*.

(emphasis added)

139 At [549] the primary judge referred to the conversation recorded by the above note as having occurred on 13 July 1997, but we are satisfied that the note is dated 13 June 1997, which is also supported by the surrounding context, namely the reference in the note to the plan which Jadwan had submitted to the Tasmania Fire Service that day, and the later reference to Ms Thorpe in Mr Wicks’s file note of 2 July 1997 (see [144] below).

140 On 18 June 1997, Jadwan wrote to Ms Paul of the Department and referred to the discussions on 28 May 1997, to which we referred at [126] above. The letter addressed the installation of a smoke door to isolate the ground and the first floor, and identified a proposal to accommodate 16 ambulant residents on the first floor by transferring ambulant residents upstairs. The letter also included the business plan, substantially in the same terms as that conveyed to Mr Knight in Jadwan’s letter of 13 June 1997 referred to above.

141 On 23 June 1997, Rae & Partners issued an invoice to Jadwan in the sum of $1,400. The description of work in the body of the invoice was in the following terms –

To our professional fees in acting on the Company’s behalf in the above matter including numerous attendances on Directors to discuss Departmental requirements and to consider Company’s position and advise, attending to visit the Home on February 10th (1.5 hours – no charge), drafting on Company’s behalf submissions to the Department, attending with Directors on February 26th to meet with Mr Dellar of the Department including attendances before meeting to peruse file and meet with Directors in preparation, attendances on the Directors regarding submission on SRP Report, drafting covering letter to submission and SRP Report, subsequent perusal of further SMT Report, meeting with Mr Alexander on 8th April and attendances generally, exceeding but say

1,400.00

$1,400.00

#### Jadwan’s retainer of Wilson Dowd

142 Mr Wicks ceased his employment at Rae & Partners, and by 2 July 1997 he had commenced employment at Wilson Dowd, the second respondent. Jadwan re-engaged Mr Wicks as its solicitor after he moved firms.

143 A file note written by Mr Wicks dated 2 July 1997 recorded a telephone conversation between Mr Wicks and Mr Alexander and relevantly included the following statements –

(1) that Jadwan was “*still [awaiting] a response from [Canberra]*”;

(2) the Tasmania Fire Service had “*now gone sour*” on the downstairs fire door and that the verbal approval on this possibility given a year prior had “*been gone back on*”;

(3) the Tasmania Fire Service was “*unhappy with 3 year timetable*”;

(4) the Tasmania Fire Service wanted “*a package*” between the Commonwealth and it “*as to requirements*;” and

(5) “*Stephen Dellar can’t speak with you anymore*.”

144 Importantly, the file note also recorded that Jadwan was “*more inclined to sell now and get out*” and that “*you want to push Anne Thorpe* [an officer of the Department]”, which the primary judge inferred meant that Jadwan wanted to push Ms Thorpe to permit the sale of its bed licences. The note also recorded, “*you speaking [with] marketing firm today*”. It should be noted that, in her oral evidence before the primary judge, Ms Julie Alexander stated that she did not share the view that Jadwan should sell and “*get out*”, and said –

I remember Jeff having a discussion with me. It was, I don’t know, probably a month or two before we were closed... the notice of intention, asking what my thoughts were on it, whether we should sell. And my thoughts were that the reports were so grossly wrong that we should be challenging it and not allow these people to rob us of our nursing home.

145 Mrs Joan Alexander also made a note of the conversation between Mr Alexander and Mr Wicks on 2 July 1997, which included the following –

Heard nothing from Commonwealth.

Smoke door Jeff Knight doesn’t want it upstairs.

Unhappy with 2 yrs wants a package.

Unhappy about

Commonwealth what they want

What we want.

Sell out make it part of the deal.

Jeff Knight what he wants

Commonwealth what they want.

Lift declaration. Jeff Knight speaking to Commonwealth we don’t know what is going on. Local won’t give any advice. Anne Thorpe won’t give any advice. Jeff went to see Steve Dellar about beds been [sic] sold and he said he wasn’t able to speak to us.

Jeff ringing Anne Thorpe. We would rather get out of it. They shouldn’t lock us in on a commercial basis. To talk to James Lang Wotton [sic] tomorrow morning, selling beds. Get declaration lifted, sell beds. We want 16 ambulant people upstairs. Fire service have given us approval for what we have done. Next week for appointment the Commonwealth and Steve. John Calder got verbal approval from Jeff Knight for smoke doors. We have been to Glenorchy Sorel and Kingborough for land. That Steve thought it best we had a plan and know what we are doing when we see the Commonwealth.

146 Mr Alexander and Mr Wicks spoke by telephone on 7 July 1997. The file note prepared by Mr Wicks of that telephone conversation noted that Mr Alexander had arranged a meeting for 17 July 1997 with two representatives of the Department (Ms Hefford and Ms Thorpe) as well as Tasmania Fire Service representatives Jeff Knight and Leon Carr. The file note also recorded that “*staff morale very low*”, and that five residents had died.

147 That same day, 7 July 1997, the *Aged Care Act* and the *Consequential Provisions Act* received Royal Assent, though as we have mentioned at [28] above, this was not published in the Commonwealth Gazette until 16 July 1997.

#### 15 July 1997 meeting

148 On 15 July 1997, Mr Wicks met Mr Alexander and Ms Julie Alexander the purpose of which, the primary judge held at [330], was to prepare for the 17 July 1997 meeting with the Department and the Tasmania Fire Service referred to at [146] above. Mr Wicks prepared a file note summarising what was said at that meeting, which relevantly contained the following –

Jeff Knight still wants a package.

- 3 years too long for relocation

- purchaser.

- you have decided to get out.

- you to stress you’ll be relocating.

- advertise – tender

- u’taking 16 ambulant res on first floor

- 46 at the moment

 licenced to 51.

…

Smoke door – TFS meeting – Jeff Knight, Leon Carr.

- change of mind from bottom to top of stairs – major works

- package being put together – to disclose at meeting

- Canberra officials to meet

…

worst scenario – no residents top floor – 2/3 income drop.

(sprinklers & lift

- 35 residents – home not viable

149 The statement in the note, “*you have decided to get out*”, was significant to the findings of the primary judge. The parties disputed whether this note recorded Jadwan’s intention to close the nursing home. In evidence, Mr Wicks stated that he could not recall precisely who spoke the words, but expected that it was Mr Alexander. Mr Wicks was asked whether there was any broader discussion that day about the statement, and he said that he could not recall. As to his own understanding at around 15 July 1997 about Jadwan’s intentions, Mr Wicks stated in evidence-in-chief –

Up until the statement by Mr Alexander that he – or that the company decided to get out, it was my understanding that they were prepared to continue to attempt to satisfy Tas Fire Service and the department as necessary. But a point came where – my – my – my recollection was the point came where it was decided that it was going to be all too hard or – or economically not feasible and that the Derwent Court facility had to be either – I – I can’t recall with any certainty, but the – my general understanding is that Derwent Court could not continue and something would need to be done to either relocate it in the short-term or sell up the – the undertaking.

150 Mr Wicks was then asked in relation to the note “*you to stress you’ll be relocating*” whether he had any independent recollection of discussion about that, and why he wrote the note, and he said he did not. Similarly, in relation to the note “*advertise – tender*” Mr Wicks stated that he had no independent recollection of why he wrote the note, or what was told to him.

151 Mr Wicks agreed in cross-examination that in the period from July to September 1997, Jadwan had actively considered three options: (1) to try to satisfy the Department that it could continue to operate Derwent Court at its existing location; (2) if it was unable to that, to seek to relocate to a new purpose-built facility in Hobart; and (3) as a last resort, to try to sell the bed licences. Mr Wicks also agreed that there was never any talk or suggestion that Jadwan would simply give up or walk away without trying to secure something for the asset that it had.

152 Ms Julie Alexander gave evidence that she was present at the 15 July 1997 meeting with Mr Wicks and stated in cross-examination that the note “*you have decided to get out*” referred to getting out of the building and relocating to a greenfields site, and was not a reference to selling out of the nursing home business. Ms Alexander also denied that the suggestion that Jadwan was considering a new building on a new site was part of a “smokescreen” to make the Department think that Jadwan was really doing something to address its concerns. In cross-examination, Ms Alexander also denied that 35 places was the economic tipping point for the conduct of the nursing home.

153 At [336] and [339], the primary judge held that the inference to be drawn from the note was that Jadwan had decided to get out of operating Derwent Court, and that it intended, if possible, to sell its bed licences. The primary judge reached this conclusion relying also on Mr Wicks’s note of 2 July 1997, to which we have referred at [143]-[144] above, which recorded, “*more inclined to sell now and get out*”.

#### Program of works for a proposed new nursing home

154 On 16 July 1997, Mr Calder of Tasmanian Building Services Pty Ltd wrote to Mr Alexander in relation to a “*proposed new nursing home*”, stating “*[r]eference is made to your request for a program of work for the above”*. The letter thendetailed a “*reasonable minimum*” timeline of around 104 weeks for the project, that is, a two-year timeline.

#### Cancellation of the meeting of 17 July 1997

155 The meeting that had been scheduled for 17 July 1997 did not take place. In a later handwritten note by Mr Wicks of an attendance on Mrs Joan Alexander and Ms Julie Alexander on 4 August 1997, Mr Wicks recorded –

– 16/7 Anne Thorpe rang Jeff to say she couldn’t make the 17/7 meeting – fires not the issue – you have complex care needs – Fire hasn’t been a problem since February.

156 A note in an internal memorandum prepared by Mr Ken Hammond of Tasmania Fire Service addressed to Chief Officer John Gledhill dated 17 July 1997 set out a short chronology of events, commencing at 15 November 1997, and as part of that chronology explained the cancellation in the following terms –

* 23/06/97 Anne Thorpe, Assistant Director, Commonwealth Aged and Community Care Division organised a meeting for 17th July to discuss the revised schedule of works.
* 16/07/97 Anne Thorpe advised the TFS that due to the preparation of paperwork to formally withdraw the Homes [sic] licence, (the Home is unaware of this pending action) the Commonwealth Department saw little point in attending the meeting scheduled for 17th July.
* TFS notified the Home that meeting on 17/07/97 would need to be rescheduled to a later date.
* 51 Nursing beds will be required as soon as the licence is revoked (the Department advised the paperwork will be delivered to the Home on Friday 18th or by Monday 21st at the latest).

157 The memorandum also stated –

* TFS is concerned that media will attempt to highlight fire safety as a reason for the departments [sic] action.

158 The memorandum then set out a proposed press release in the following terms –

In January the Tasmania Fire Service was requested by the Commonwealth Department of Health and Family Services, to report on matters of fire safety within the Derwent Court Nursing Home.

The report outlined various requirements and recommendations in relation to fire safety issues.

The Tasmania Fire Service and Derwent Court Nursing home Management have worked closely to improve the levels of fire safety within the building.

All requirements have been addressed and many recommendations have been or are in the process of being adopted.

159 In addition, the memorandum attached a press release in the following terms –

The Tasmania Fire Service was commissioned by the Commonwealth Department of Health and Family Service, to report on matters of fire safety within the Derwent Court Nursing Home. The report contained various requirements and recommendations in relation to fire safety issues.

The Tasmania Fire Service and the Management of the Derwent Court Nursing Home have worked closely to improve the level of fire safety within the building. To date all the requirements have been addressed and in addition many of the recommendation have been adopted or are in the process of being adopted.

#### Monday 21 July 1997 - Notice of intention to revoke approval of Derwent Court

160 By letter dated 20 July 1997 (which we note was a Sunday), Ms Halton of the Department wrote to Jadwan and notified it of her intention, within 14 days, to revoke the approval of Derwent Court under s 44(2)(b) of the *National Health Act* on the ground that she considered that it had not complied with the condition of approval that the standards formulated under s 45D of the Act be satisfied. The letter attached a notice of intention under s 44(2A) of the Act signed by Ms Halton as a delegate of the Minister, together with a statement of reasons. The statement of reasons extended over 19 pages, and relied on acceptance of findings of the first Standards Review Panel, the second Standards Monitoring Team, and the second Standards Review Panel. The reasons stated that Ms Halton had found that –

 the Gazetted Standards had not been complied with by the nursing home;

 the non-compliance involved serious deficiencies in care, most of which required urgent action;

 the proprietor had not taken the appropriate substantial action which would overcome the deficiencies; and

 there was no reasonable prospect that the proprietor would do so on the substantial and urgent basis required.

161 The reasons had a number of attachments, including the report of the first Standards Review Panel dated 2 December 1996, the statement of the second Standards Monitoring Team following its visits on 12, 13 and 17 March 1997, the report of the second Standards Review Panel dated 26 May 1997, and the letter from TasFire Building Safety dated 3 June 1997 to which we referred at [128] above. In the covering letter, Ms Halton stated that if she made a decision to revoke the approval of Derwent Court, Jadwan was able within 28 days to request the Minister to reconsider the decision under s 105AAB(2) of the *National Health Act*, to which we referred at [21] above. A report of an internal review by the Department relating to the transfer of residents dated 29 April 1998 stated that the notice was sent to Jadwan’s registered office in Melbourne, and that a copy of the notice was hand-delivered to Derwent Court at 1.00pm on 21 July 1997.

162 By separate letter dated 20 July 1997, Ms Halton notified the residents of Derwent Court of her intention to revoke the approval of Derwent Court’s licence within 14 days. In that letter, Ms Halton referred to the report of the Second Standards Review Panel, and stated, inter alia –

The report from the Panel is quite clear - residents at Derwent Court Nursing Home have a quality of care and life far below that set by the approved standards.

The Panel’s report also says that the owner’s proposals to improve standards are not good enough.

I intend to revoke the approval of Derwent Court Nursing Home in fourteen days. In this time the Department will find you another nursing home to move to if you wish. If you choose to move the Government will keep funding your care.

This step has not been taken lightly. We will make every effort to reduce the stress of moving to another nursing home. You can expect that after moving you will receive better quality nursing home care. The Department is committed to ensuring that you get good quality care.

Departmental staff will continue to visit you to let you know about the move to the new nursing home.

The Department is also writing to all relatives giving them this information. A discussion for relatives will be held by Mr Dellar, the Department's State Manager at 2pm Wednesday 23 July 1997 at the Department’s offices, Level 3, 25 Kirksway Street, Hobart.

More help is available from the Department on 1800 005 119 and from the Advocacy Tasmania Inc. on (03) 6224 2240.

163 The Acting Director of Nursing at the time, Ms Callahan, gave evidence that the letter was put beside the bed of each resident, and that she recalled showing the letter to family members of the residents. The Department’s report following its internal review stated that a letter was also forwarded by the Department by Express Post to relatives on 21 July 1997, although some of those letters were returned unopened. The Department’s report also stated that the Department contacted the media in relation to the revocation of the approval of Derwent Court, and that the media were on site at Derwent Court as Department staff were arriving to notify Jadwan’s representatives of the intention to close the home. On the following day, a newspaper report of the proposed closure appeared in the Hobart Mercury under the heading, “*Nursing Home Loses Funding*”.

164 On 21 July 1997, Jadwan faxed to Mr Wicks a copy of Ms Halton’s letter to it of 20 July 1997. Mr Wicks also spoke by telephone with Mr Alexander, which he recorded in a file note. The file note stated –

- Nursing home to close in two weeks!

- staff have been told today (!!)

- 28 days to appeal

- 14 days to revocation of licence

- there’s so much against you - you believe any appeal may be not be worthwhile

- no mention of first SMT report!

- S.44 decision – “if made” my intention to revoke

Notice to the staff

165 A note that appeared to be that of Mrs Joan Alexander and dated 21 July 1997 was put to Ms Julie Alexander in cross-examination –

Julie is speaking with Anne Thorpe about staff pay and redundancies.

166 Ms Alexander stated that she did not recall any such conversation with Ms Thorpe, and denied that she would have raised the topic of redundancies herself.

167 Also on 21 July 1997, Mr Dellar of the Department wrote to Southern Cross Homes, and referred to its revised proposal of 14 March 1997 (see [101] above). Mr Dellar stated that the Commonwealth would like to proceed to reach agreement so that Southern Cross Homes would take responsibility for providing care for the people who were then resident at Derwent Court. The letter described the proposal of Southern Cross Homes as involving the permanent allocation to it of 51 nursing home beds, the provision of accommodation in the Carruthers Wing on the floor of a State government-owned building, and the balance to be accommodated within the Rosary Gardens Nursing Home by adding extra places to that facility. In relation to financing, Mr Dellar stated that the Commonwealth would be willing to fund costs for minor building alterations of the Curruthers Wing in a sum up to $90,000 to be made by a single advance at the time of the agreement, and for an interest free advance of recurrent benefits of $250,000 to be made by the Commonwealth, recoverable over three years.

#### Tuesday 22 July 1997

168 Section 42 of the *National Health Act* provided that a person authorized under the Act could enter upon the premises of a nursing home and inspect and make copies of records that related to the operation of the premises as a nursing home. The Department arranged for a leased photocopier to be delivered to Derwent Court on 22 July 1997 so that patient records could be copied, and copying commenced the following day, 23 July 1997. The report of the Department’s internal review dated 29 April 1998 stated that the proprietors of Derwent Court informed the Department in a meeting on 22 July 1997 that they would not be co-operating with the transfer of residents, but that at a second meeting on 25 July 1997, they agreed to co-operate fully in the transfer of information.

169 On 22 July 1997, Mr Wicks made a number of file notes. One file note records a telephone call from Mr Alexander, and states in part –

- meeting [with] Stephen Dellar this morning

\* - if you can sell the beds within next two weeks you can do so

– what’s the point – may just wait

– discussed at length.

170 Another file note was headed “Jadwan perusal“ in which Mr Wicks stated (inter alia) –

JADWAN – perusal

- Been operating since? Past records/compliance and standards

- as recently as SMT reports did not recommend closure/Dept did not require it.

- perceived deficiencies in the building have always existed – have not been of concern

before

- on what basis has our intention to rebuild been not accepted. !

- clearly a full reassessment of practice is needed



but give us time!



 (report suggests enough time has been given and proprietor hasn’t demonstrated ability to comply)

171 In the note, an arrow was drawn from the words, “*on what basis has our intention to rebuild been not accepted*” to the following, which was written –

– WE NEED TIME TO RELOCATE, RETRAIN ETC ..

CAN’T GET STAFF (eg, Director of Nursing!) within present climate

172 Mr Wicks was asked in cross-examination about the statement in the note, “*We need time to relocate, re*-*train*”, and he said that this statement would have been on instructions from his client.

173 Another file note made by Mr Wicks on 22 July 1997 is in the following terms –

Stephen Dellar – no joy

 \*foreshadowed starting to move residents out this Friday – funds go with the residents

½ to St Johns Park – Southern Cross Homes & Carruthers Wing

½ to Rosary Gardens

28 days run from date of revocation

redundancies will break the coy [company]

- sale of beds – 48 hrs.

…

payroll - $50,000 pw:

Redundancies - $400,000

174 The primary judge at [352] inferred that the above-mentioned file note recorded what Mr Wicks had been told by one of Jadwan’s directors about what Jadwan had discussed with Mr Dellar, and that Jadwan had not consulted Mr Wicks before speaking to Mr Dellar. The primary judge at [353] found, in that context, that the words “*redundancies will break the [company] – sale of beds – 48 hrs*” disclosed that Mr Wicks was told by Mr Alexander that he had expressed concern to Mr Dellar that the cost of redundancy payments for its staff could break the company. The primary judge inferred that Mr Alexander had asked Mr Dellar whether the Commonwealth would consider picking up those costs. The primary judge also found at [196] that Mr Dellar had offered Jadwan a two-day window within which to sell its bed licences. This inference arose from a later letter dated 31 July 1997 from Mr Alexander to Mr Wicks in which Mr Alexander stated, “*Last Tuesday week* [which was 22 July 1997] *he* [Mr Dellar] *advised that we had no more than 48 hours to find a buyer but he doubted our ability to do so*”.

175 Also on 22 July 1997, Mr Wicks undertook some further legal research. He prepared a handwritten note titled “*Perusing NHA*”. The primary judge summarised Mr Wicks’s evidence on this issue at [347]-[348] as follows –

On 22 July 1997 Mr Wicks refreshed his legal research. A three page file note records the research he then undertook. His note reveals he did not expand his research beyond the *National Health Act*. During the hearing Mr Wicks acknowledged that he had failed to identify that the *Aged Care Act* had received Royal Assent on 7 July 1997.

Mr Wicks gave evidence that he had remained entirely unaware of the existence of that Act and the *Consequential Provisions Act* throughout the entire period of his employment with the Second Respondent.

[References omitted]

176 It is not clear from Mr Wicks’s oral evidence whether he undertook the further examination of the *National Health Act* on 22 July 1997 at the Law Society library, as his research in February 1997 had been undertaken, or elsewhere. In evidence-in-chief, Mr Wicks was asked whether at Wilson Dowd he continued to use the Law Society library, to which he answered –

I expect I would have continued to use the Law Society library. I would imagine firms the size of Rae & Partners and Wilson Dowd were probably not sufficiently resourced to run to a – a comprehensive and up-to-date library, and the proximity to the Law Society liberty probably made it unnecessary for them to do so. That’s as much as I can offer in that regard.

177 In cross-examination, there was an exchange as follows –

MR PEARCE: Yes. Now, you gave some evidence this morning, Mr Wicks, and unfortunately we don’t have a transcript. I’m not sure I’ve got this entirely correct. But I think your evidence was to the effect that when you did this sort of research, you only researched current legislation; is that – am I fairly representing what you said this morning?---Yes. Yes.

Yes?---I researched what was available - - -

All right?--- - - - in the Law Society library at the time which - - -

Yes. And I take it on 22 July when you did this research you were not aware that the Aged Care Act of 1997 had received the royal assent on 7 July?---No. I wasn’t aware.

And your research didn’t pick that up?---No.

178 Later in the cross-examination, there was the following exchange –

HIS HONOUR: When you did the various pieces of research that have been referred to, Mr Wicks, I take it, given your evidence, that all of this research – I mean, you can please correct me – qualify anything that I am suggesting by way of a conclusion - but I take it from what you have said previously that this research was conducted in the then Law Society like an Inglis Clark Library?---Yes, your Honour, it would have been.

179 At that point, senior counsel for the first to third respondents intervened and stated that the library could not have been the Inglis Clark Library, because it had been established in the Supreme Court building after 1997.

180 As set out below, Mr Porter QC was initially retained on 23 July 1997. In a file note of Mr Wicks dated 28 July 1997 to which we refer at [210] below, which recorded matters about which he wished to speak to Mr Porter, Mr Wicks wrote, “send Act back to us”. And in a file note of a telephone conversation with Mr Porter on 29 July 1997 (see [211] below), Mr Wicks wrote “you’ll get Act back to me”. These notes support an inference that Mr Wicks had briefed Mr Porter with his copy of the *National Health Act*. At [500], the primary judge held that, on the evidence available to the Court, on 22 July 1997, Mr Wicks may well have simply perused his existing copy of the *National Health Act* without visiting the Law Society library to check whether, since its publication, there had been any amendments or repeals.

#### Wednesday 23 July 1997 - the retainer of Mr Porter QC

181 On Wednesday 23 July 1997, Mr Wicks sought instructions from Jadwan to brief counsel, and proceeded to engage Mr Porter. As the primary judge recorded at [356] of his reasons, Mr Wicks gave evidence explaining the decision to brief Mr Porter –

Once the notice of intention to revoke was issued by the Department, it became clear to – to me that the Department were inexorably heading down the path of closing down Derwent Court, and that the matter had, if you like, escalated to a – a degree of seriousness where I believed that external advice needed to be obtained as to Jadwan’s position and its options to protect its position generally.

182 The primary judge found at [358] that Mr Wicks had a short telephone conversation with Mr Porter on 23 July 1997 in which Mr Porter advised Mr Wicks to “*put them* [the Department] *on notice immediately against moving residents*”. In acting on this advice, on 23 July 1997, Mr Wicks wrote to the delegate, Ms Halton, copied to Mr Dellar, and stated –

You may be aware, we act for Jadwan Pty Ltd, the proprietor of the Derwent Court Nursing Home.

We have been handed a copy of your notification dated 20th July, 1997 of intention to revoke the approval of the Home under the provisions of the National Health Act.

We advise that we are urgently seeking senior counsel’s advice on options open to our client in this matter which may include a review of or appeal against the revocation of the Home’s approval.

In the meantime, and until senior counsel has had the opportunity to fully review the background to this matter and advise on options available to our client, we must warn the Department in the strongest possible terms against taking any action to remove any residents from the Home or to in any way pre-empt a revocation of approval.

183 Mr Peter Bowen of the Australian Government Solicitor responded later that day as follows –

I refer to your facsimile of 23 July 1997. I act for the Department of Health and Family Services in this matter. Please advise me of what action you propose to take on behalf of your client. The Department will not desist from taking appropriate action to protect the health and welfare of the patients.

I have advised the Department of the competing interests of your clients and the interests of the patients in the home. The Department is aware of the appropriate appeal rights available to your client and expects your client to take advantage of those rights.

184 In the afternoon of 23 July 1997, Mr Dellar convened a meeting of relatives of the residents at Derwent Court. The meeting was referred to in the report of the Department’s internal review –

Stephen Dellar facilitated a meeting in the afternoon of 23 July 1997 for relatives. The Department presented the reasons behind the decision, advising relatives of the availability of places in Rosary Gardens Nursing Home and that support would be provided by the Department in transportation costs such as ambulance fees.

Rosary Gardens Nursing Home staff provided relatives with an overview of their organisation and a detailed orientation package. The role of the Advocacy Service was explained and those present were invited to seek advice and support from this service. About 50 people attended this meeting.

#### Thursday 24 July 1997

185 The first resident was transferred from Derwent Court to Rosary Gardens on Thursday 24 July 1997. The Department’s report of its internal review stated –

The first resident was transferred from Derwent Court to Rosary Gardens. The decision to transfer a resident from one facility to another is not a matter which can be decided by the Department, but is a matter of agreement between the resident or his or her representative and the receiving facility. The move of this resident was initiated by a family member and was facilitated by both homes.

186 The report also stated that on 24 July 1997, interviews commenced for those Derwent Court staff who were interested in employment at Rosary Gardens.

187 Other events progressed quickly. At around 9.30am, Mr Wicks had a ten-minute conversation with Mr Alexander ahead of a conference with Mr Porter. In his note of that conversation, Mr Wicks recorded that Mr Alexander said that the Commonwealth “*will fund redundancies for nursing staff (80% of redundancy bill) but won’t fund notice that has to be given under the awards*”. Mr Wicks’s file note included a starred notation “[n]*otices hopefully today but if you give notice and get a ‘stay’ you’ll have patients to still care for with no staff*”. A few lines later were the words: “*how will you prove what you’ve done in period from last SRP ‘til now?*”. The primary judge at [361] inferred from this note that Mr Alexander told Mr Wicks that his earlier contact with Mr Dellar had led to the Commonwealth agreeing to meet 80% of the cost of Jadwan’s redundancy obligations for its staff at Derwent Court. The topic of redundancies was also addressed in a draft affidavit of Ms Julie Alexander that was prepared on about 6 August 1997. In cross-examination, Ms Alexander was taken to passages in the draft affidavit and accepted that: (1) the cost of redundancies was a considerable concern to Jadwan; (2) that it was probably correct that a liability in the order of $500,000 had arisen, but she just did not recall; and (3) that there was talk of the Department picking up the bill for redundancies, and that was subsequently what happened. Ms Alexander also stated that she did not recall any discussions with her father about the value of the licences, and did not recall discussing the value of the licences with Mr Wicks.

188 A conference between Mr Porter and Mr Wicks took place on the morning of 24 July 1997. Following the conference, Mr Wicks spoke to Mr Alexander by telephone. That conversation was noted by Mr Wicks in a typed file note –

After attending with David Porter in Chambers I telephoned Jeff Alexander and explained the options that appeared to be open to us.

Immediate concern of course is to prevent patients being moved from the home. Jeff pointed out that the first patient is apparently going to be moved at 1:00 p.m. today. I said that I intend writing to the Department via the Australian Government Solicitor and ask that they hold off the re-location of patients. This may or may not be effective. If it is not effective and they cannot advise immediately the next way of preventing the patients being moved would be to seek an injunction through the Federal Court. The bases on which the injunction would be sought are not yet clear and David Porter described it as being perhaps a high risk application and the costs of which could run into the order of $2-$3,000.00 with Affidavits etc and the actual hearing of the injunction. If the injunction did prove to be successful then we would at least have time to pursue first of all a review of the decision by the Minister and if that was not successful, an application to the AAT for review of the revocation decision.

It would appear to be fairly predictable what the Minister’s attitude would be to an application for review of the decision. We would then have to go to the AAT, costs of which could exceed $5,000.00+. A problem we could strike ultimately pursuing the matter through the AAT would be, at the best result, a decision by the AAT quashing the revocation decision. However, it would appear that from that point, the Department could simply turn round and “do it all again” and perhaps come up with the same decision properly arrived at. Of course, if the patients had been moved out then the home would be in a position of having no patients for the beds, no staff etc.

Jeff agreed that I should get a letter to the AGS immediately regarding removal of the residents at least as an attempted holding measure. He said he would discuss with the family the question of further courses of action and likely costs and let me have his thoughts on that later.

189 We observe that the advice recorded in the above file note contemplated an interlocutory injunction, following which Jadwan would seek review of the decision by the Administrative Appeals Tribunal. It is not apparent that Mr Wicks fully understood the issues, because the revocation decision had not been made, and a reviewable decision could not be the subject of review by the Tribunal unless it had been affirmed or varied upon an internal review by the Minister: *National Health Act*, s 105AAB(7).

190 Mr Wicks then wrote to the Australian Government Solicitor that day, stating –

I refer to my facsimile to your client yesterday and yours in reply. I understand the Department intends to start moving residents from the home at 1:00 p.m. today.

I repeat the warning to the Department in my facsimile yesterday and ask that the Department undertakes to hold off any relocation of residents pending the full consideration by senior counsel of the background to this matter and any review and appeal rights that may be open to our client and, if appropriate, the exercise of any of those rights.

I make the point that our client’s licence is still in force and the Department’s action in moving patients from the home may constitute an interference with the contractual relationship between my client and its residents with any consents to relocation, by either the residents or their representatives influenced by the Department’s reviewable and appealable decision that the home does not meet the prescribed standards.

Your reply as a matter of urgency would be appreciated.

191 Mr Bowen of the Australian Government Solicitor replied later that day –

I am instructed that the resident moving today is being moved by her daughter who is going to Queensland, travelling in part on the ferry this evening. The Department of Health and Family Services is not arranging this move and can take no action to prevent it.

I am also advised that there are a number of residents in a similar position where the family is arranging the move.

In relation to the consent to which you referred, this was a consent to release medical details and particulars held by the Department to the new home. It was not a consent to move the person.

192 A file note made by Mr Wicks records a further telephone conversation with Mr Porter on 24 July 1997 at 2.50pm in which Mr Wicks wrote, “*Still no joy on further consideration*”. The note then referred to the two possibilities of review by the “*AAT – act provides for stays – merit review*”, or under the *ADJR Act*, stating that it “*provides for stay but limits grounds of review – no reasonable tribunal etc.*” The note stated, “*can treat notice of intention as reviewable under ADJR but review grounds limited*.”

193 The same note also recorded a telephone conversation with Mr Alexander at 3.07pm in which reference was made to the Tasmanian Chamber of Commerce and Industry sorting out redundancies. The note also recorded that Mr Alexander would speak with his family that night, and that Mr Porter “*has not been able to proceed much further*”.

#### Termination of staff at Derwent Court

194 Meanwhile, Mr Alexander proceeded to give notice of termination of employment to the staff at Derwent Court by letters dated 24 July 1997, which relevantly stated –

It is with regret that we are now forced by the Commonwealth Department of Health and Family Services actions to give you notice of termination of employment effective from close of business today in accordance with the table below. If you are successful in gaining other employment before the notice period below expires and this requires you to leave prior to the expiration of the notice period below, you will be paid for the time worked up until the time of your leaving employment only.

195 It is relevant to note that the letters to the staff also stated -

Every effort is being made to reverse the situation and to keep Derwent Court open.

The Unions (HASCU and ANF) have been advised and talks will continue to take place, with the view to assisting you gaining other employment should the need arise.

At this time, the future of Derwent Court is uncertain. Should the worst occur, the Alexanders would like to take this opportunity of thanking you for your past support particularly over recent months and we wish you every success for the future.

#### Friday 25 July 1997

196 Mr Wicks made an undated note of a telephone conversation with Mr Alexander at “*9.12*” which commenced “*you terminated staff yesterday*”. The primary judge inferred at [373] that the call occurred on 25 July 1997. The note continued –

\* - you want to save the beds – sure can be done?

- 20 residents have agreed to go to St Johns

- 2 going home

- the rest? – you don’t know – where they’re going is no better a building

- Janet Cooper’s position

- you accept the patients have to be cared for so closure has to be accepted

- you bought the beds in ‘84 – 51

- bought as a package building & beds

\* Tony Holmes acted for you.

- 2 weeks to find a buyer! – unrealistic.

- statement of reasons being dissected now.

- payroll $70,000 pm f/n?

- St Johns will take on no new staff until yours have all been accommodated – union threatened industrial action.

197 The reference to “St Johns” appears to be a reference to St John’s Park, which the evidence suggests comprised the Carruthers Wing, and was to be managed by Southern Cross Homes.

198 The Department was also advancing matters at this time. An instrument dated 24 July 1997 recorded a decision by Mr Dellar, acting as delegate of the Minister, to grant approval in principle pursuant to s 39A(3) of the *National Health Act* for an additional 20 nursing home beds for the Rosary Gardens Nursing Home. On 25 July 1997, a similar instrument was made with respect to a further 31 nursing home beds for the Rosary Gardens Nursing Home, making a total of 51 additional beds for that home. These approvals appear to have been given after the expiry of the 48 hour window period that had been offered to Mr Alexander within which to sell Derwent Court’s bed licences, to which we referred at [174] above.

199 At about this time, Mr Wicks made an undated note to himself regarding the relevant legal considerations, which commenced –

Seek review/appeal with a view to the home regaining approval – absent residents (is this possible)

- doesn’t matter tho [sic] if no residents cos there’s no staff – both situations brought about directly or indirectly by Dept’s actions

- but if we get approval back – attached to the empty home, the beds could be sold

- demand here?

- demand interstate? (is this possible?).

- abandon trying to keep residents and keeping home open

– protect the goodwill.

200 The note also recorded qualifications for membership of panels that loosely corresponded to the language of regs 11 and 12 of the *National Health Regulations* for membership of a Standards Review Panel. The primary judge inferred at [376] that Mr Wicks had undertaken some research on 25 July 1997 in relation to the provisions of the regulations.

201 In cross-examination, when Mr Wicks was asked about this note, he stated that he could not recall reaching a conclusion that Jadwan’s legal position would not suffer any disadvantage if the residents moved out of the home. However, he accepted that he did not give Jadwan any advice in the period from 20 to 25 July 1997 that it should take action to prevent the residents from leaving.

202 The note went on to include the statement –

- glaring inconsistencies in reports of department’s SMT. Query qualification of SRP

203 We mentioned at [39] above that Mrs Joan Alexander maintained a work diary. In an entry dated 25 July 1997 at 9.45am, Mrs Alexander wrote –

JGA 9.45AM 25-7-97

JGA and Steve Wicks

We will go to AAT spend $5,000-

We will tell Commonwealth we want to sell the beds (51) today.

To go to Glenburn tell Pam we are selling today. If we put an injunction on we run the risk of Commonwealth funding running out.

204 Mrs Alexander gave evidence in examination-in-chief that the note recorded what Mr Alexander had told her on the telephone in relation to a conversation that he had with Mr Wicks. Mrs Alexander then gave evidence in cross-examination that there was a mistake in the note, that she was confused, and that they were not selling 51 beds, but were selling 30 beds at Glenburn Nursing Home, which was another nursing home associated with the Alexander family that was located at Geelong in Victoria. This evidence was confirmed in re‑examination. The primary judge at [145] accepted Mrs Alexander’s evidence on this point, and held it was consistent with a subsequent note in Mrs Alexander’s work diary also dated 25 July 1997 in which Mrs Alexander wrote, “*…we were told it could have an effect on Glenburn we need to get out quick before they do the same thing”*, and in which she referred to going to Geelong and telling “*them*” they were selling the business. In relation to the reference to risking Commonwealth funding, Mrs Alexander gave evidence in cross-examination that this was what Mr Alexander was telling her.

205 At around 11.35am on 25 July 1997, Mr Wicks had a telephone conversation with Ms Julie Alexander and Mr Alexander. Mr Wicks made both a handwritten and a typewritten file note of the conversation. The handwritten note relevantly stated that “*injunction out of the question*” and that they “*discussed damages*”. The typewritten file note set out the discussions in more detail, relevantly stating the following –

Julie Alexander rang and I spoke to her at length about this matter and she then handed me to Jeff and he discussed it further with me as well.

I confirmed with Julie all the matters that we had discussed with Jeff yesterday regarding injunction proceedings saying that David Porter said that injunction proceedings could not be guaranteed to be successful and that they would be “risky”. I said that what they needed to bear in mind is that in such proceedings the Commonwealth would, I expect, push the issue of fire safety and ultimately, Jeff Alexander may find himself in a position where the Judge said to him or asked him if he could guarantee that there would not be a fire in the home that particular night. Jeff’s answer to this would have to be no and the Judge would be likely to take the view that the only matters really to be balanced are the resident’s inconvenience and upset at being removed as opposed to their safety if they remain in the home for even one (1) night or one (1) night longer. It would be hardly relevant in the circumstances to argue that there has not been a fire to date and hence it’s not reasonable to expect that one would occur.

They confirmed that the staff had all now been given notice and that arrangements were presently under way for the Rosary Gardens Nursing Home to be upgraded in a rush job to take the 20 or so residents who have decided that they want to move to Rosary Gardens. Apparently, the Union has pressured Rosary Gardens to take any requirements of extra staff occasioned by the Derwent Court residents moving out there from amongst the Derwent Court staff.

Jeff then discussed the matter of pursuing Derwent Court retaining its beds to be able to sell them elsewhere on the market. I said I was still not totally familiar with how the beds were constituted and I was going to have to have a look at the regulations to “get a handle” on the nature of the asset that the beds represent. I said in any event, it’s perhaps academic to pursue that line of enquiry too far because if we can establish that the Minister’s revocation decision was improperly made then the question of damages flowing from that could be pursued and that this matter would most likely proceed on that basis.

…

206 The last paragraph set out above is significant: (1) it appears to record Mr Alexander’s desire to retain the benefit of the 51 “bed licences”; and (2) it suggests that Mr Wicks advised Jadwan that it could pursue an action in damages, which idea was also recorded in the handwritten note referred to above, and elsewhere in Mr Wicks’s file notes. Mr Wicks stated in cross-examination that he thought that a cause of action was available against the Department in consequence of the closure of Derwent Court as a result of improper procedures or steps.

207 Ms Julie Alexander gave evidence of a conversation with Mr Wicks about an injunction on about 25 July 1997, as follows –

Do you remember what Mr Wicks told you in that conversation?---Yes. He was saying that it was too risky to take out an injunction because we couldn’t guarantee a judge that there wouldn’t be a fire at Derwent Court that night. And he also said that if we take out an injunction, we – Jadwan wouldn’t receive Commonwealth funding. Funding would stop and we would have to fund the operation of the nursing home ourselves and it would take approximately a year to ..... for the proceedings to be heard. So we would have to fund Derwent Court for a whole year out of our own funds and the risk was that if we lost, we would have to bear those – bear the full cost of operating Derwent Court.

Was there any discussion in that conversation about letting the residents leave?---Yes. Mr Wicks told me there was no harm in letting the residents leave.

208 Mr Wicks denied in evidence-in-chief that he had ever advised Jadwan that if it took out an injunction, the Commonwealth funding would stop. Mr Wicks also denied that he ever told Mr Alexander or Ms Julie Alexander that there was no harm in letting the residents leave the home.

209 The primary judge found at [382]-[384] that Mr Wicks told Mr Alexander and Ms Julie Alexander in the telephone conversation that there was no harm in letting the residents go, finding that Ms Alexander’s account was unshaken in cross-examination. However, at [385], the primary judge rejected Ms Alexander’s evidence that Mr Wicks had told her that if Jadwan obtained an injunction then the Commonwealth funding would stop, holding that there was no corroboration, contextual or otherwise, to support that finding, and holding that he was satisfied that Ms Alexander’s recall of the context and detail was inaccurate.

#### Further consultations with Mr Porter QC

210 25 July 1997 fell on a Friday. On the following Monday, 28 July 1997, Mr Wicks sought to speak to Mr Porter by telephone. Mr Wicks made a file note of the call with the notation “*TT David Port – out – LMTCM*”, indicating that he had left a message for Mr Porter to call him. Mr Wicks’s note then stated –

We are accepting of closure – clients do/did not want to pursue injunction against the Dept

- Action for damages for loss of beds?

apply for review - why? - can’t feasibly hope to reopen.

- but – rebuild & still have beds.

how can we fund this if home not operating?

Or – sell beds

- Send Act back to us

211 Mr Wicks gave evidence that upon Mr Porter not being available, he made notes of the matters that he wanted to cover with Mr Porter when he called back, and that the above were those notes.

212 Mr Porter called back the following day, 29 July 1997, and Mr Wicks made a note of that conversation –

I explain how we won’t be pursuing an injunction – too fiddly – we have accepted closure and are working towards easing the transition – acceptance doesn’t mean we accept the decision.

- will seek review with a view to claim, damages for cost of beds

- you support FOI request. papers re residents relocation – internal memos – minutes of meetings, correspondence, phone call records

- also, all detail on Panel’s qualification/appointments, background etc – all instruments of appointment and delegation of delegates.

- you’ll get Act back to me.

213 Mr Wicks said in cross-examination that he did not recall that Mr Porter said anything about a damages claim.

214 The primary judge found at [387]-[390] that Mr Wicks spoke to Mr Porter on both 28 and 29 July 1997, but it is clear from the evidence that Mr Wicks spoke to Mr Porter only on 29 July 1997.

215 The primary judge found at [388] that Mr Wicks at this time conducted some further research, and in particular into the question whether the second Standards Review Panel was validly constituted. Mr Wicks gave some evidence of this in cross-examination. The finding is also supported by a note made by Mrs Joan Alexander and dated 29 July 1997 –

Steve Wicks 9-20AM

Panel wrongly appointed some doubt of validity of decisions. Getting information from freedom of information.

#### Jadwan’s retainer of Mr Hogan of Coltmans Price Brent

216 At this time, Jadwan sought a separate opinion from Mr John Hogan of Coltmans Price Brent in Melbourne. Mr Hogan made some answers to interrogatories sworn on 16 June 2011, which were tendered. In answer to Jadwan’s interrogatory 22, he stated that he had worked on transactions involving nursing homes from about the mid-1980s, and hence by 1997, he had worked on a considerable number of transactions relating to nursing homes. Mr Alexander wrote to Mr Hogan by letter dated 28 July 1997. The letter was four pages in length, and contained a number of attachments that comprised a further 236 pages, including the notice of intention to revoke the approval dated 20 July 1997. Mr Alexander’s letter of instructions to Mr Hogan relevantly included the following –

Dear John

I thought a brief overview of the background to the events of Derwent Court since August 1996 may be helpful.

…

COMMENTS

…

3. It has been our intention to rebuild and progress has been undertaken towards this end. We have heard that DH&FS seem to think we are not genuine about this.

…

6. There is concern amongst staff and relatives that an ulteria [sic] motive is behind all this eg. Southern Cross Homes have been given precisely 51 beds. Only 46 beds were needed to accommodate our residents. We are approved for 51 residents.

7. Residents have been progressively moved to Southern Cross Homes in Newtown since Thursday last week.

8. Unions have given us 100% support.

9. Our staff have been given notice and redundancy provisions are being negotiated. Southern Cross Homes are employing some of our staff.

10. The move of residents has been well orchestrated by DH&FS to the point where residents [and] relatives have no choice but to transfer to Southern Cross Homes; much to their displeasure and anger.

CONCLUSION

With our residents’ and staffs’ future now set we are looking to save the bed licenses. As stated previously our genuine intentions were two-fold:

1. Immediately update fire safety and care standards.

2. Rebuild an accredited first class aged care facility.

We believe we have completed 1. It seems we have been denied the chance to complete 2.

We now seek natural justice by being given the opportunity to sell the bed license [sic] without pressure and in an orderly manner.

217 Ms Julie Alexander stated in cross-examination that at the time the letter was written, Jadwan’s intentions were that it wanted to save and sell the bed licences.

218 Mrs Joan Alexander gave evidence that she had two meetings with Mr Hogan: one on each of 28 and 29 July 1997. Mrs Alexander made a note of the meeting on 29 July, which stated in part –

I went to see John Hogan. He didn’t seem to hold much hope under the act & the gazette 1987. That the best was to go to court. He mentioned an injunction …

219 For her part, Ms Julie Alexander gave evidence in cross-examination that she listened to a telephone conversation with Mr Hogan on 29 July 1997 in which Mr Hogan drew attention to the possibility of obtaining injunctive relief, but Ms Alexander stated that at that time, Jadwan had already decided not to seek injunctive relief. Ms Alexander gave evidence that Jadwan instructed Mr Wicks and Mr Hogan to liaise with each other in relation to the question of injunctive relief –

Mr Wicks was saying not to take out an injunction and Mr Hogan was saying to take out an injunction. And we told them to liaise with each other and sort it out, lawyer to lawyer.

220 There was an undated file note of Coltmans Price Brent in evidence which stated –

Jeff Alexander

- Injunction/ Fire mention too great a risk – Judge may not agree.

- Injunction/ if apply funding cut.

221 There was a also a file note dated 29 July 1997 in evidence in the same handwriting as the note above that referred to “*Alexander*” and stated, “*Injunction why not*”.

222 Relevant to the terms of Mr Hogan’s retainer were two further sworn answers of Mr Hogan to Jadwan’s interrogatories. First, Mr Hogan answered “yes” to interrogatory 12(h), which had asked him whether on or about 28 July 1997 he made an agreement with Jadwan to provide legal services to it –

in connection with the notification by letter dated 20 July 1997 by the Minister … of her intention to revoke the approval under s 40AA of the [*National Health Act*] to conduct the Derwent Court Nursing Home?

223 The second was Mr Hogan’s answer to Jadwan’s interrogatory 13(a), in which he stated –

The agreement was wholly oral. The substance of the relevant part of the conversation between Mr Jeff Alexander (on behalf of the plaintiff) and I was that I suggested that it may be possible to negotiate an agreement with the Commonwealth which enabled the plaintiff to sell for relocation its 51 bed licences, to which Jeff Alexander indicated that he wished me to attempt to do so. To the best of my belief the conversation was by way of telephone. I was in my Melbourne office, but I do not know where Jeff Alexander was.

224 In addition, a witness statement of one of Mr Hogan’s former partners, Mr Mark Dobbie, was admitted. In that witness statement, Mr Dobbie annexed his notes of instructions that Mr Hogan gave him on 15 July 2004 after the proceedings had been served, together with a memorandum from Mr Hogan dated 20 July 2004. That memorandum addressed Mr Hogan’s file notes, and included the following statement –

On 31 July Stephen Wicks advised that a barrister was drafting an Appeal with a view to being ready to move on the following Monday. He advised that the intention was to use the ADJR and a Stay Order. Clearly an injunction was being considered but, to the best of my memory, apart from 2 telephone conversations in which the prospect of an injunction was discussed I was asked for no formal advice and gave none. Rather I was asked to try to negotiate an arrangement with the Department which would have allowed Jadwan to realise a value for its places.

225 Amongst Mr Dobbie’s own notes are statements attributed to Mr Hogan that include the following –

We were instructed to keep the doors open for the sale of the asset.

226 The primary judge found at [398] that Mr Wicks first learned of Mr Hogan’s involvement on 30 July 1997. Mr Wicks prepared a typed file note dated 30 July 1997 that recorded a 15 minute telephone conversation with Mr Alexander during which Mr Alexander told him that in the course of speaking with an operator of an aged home in Melbourne about selling his beds, the operator gave him the name of his lawyer, Mr Hogan, who apparently had experience in the area. Mr Wicks’s note continued –

Jeff apparently spoke with John Hogan and sent him some background information to this matter and apparently Hogan’s advice to him was that we should be proceeding as a matter of urgency with an injunction application to prevent the revocation of approvals and the loss of beds.

I explained to Jeff that we had already been down the path of an injunction proceedings before and that I had sought David Porter’s advice and that advice was that injunction proceedings would be risky and no guarantee could be given of success. I pointed out to Jeff that he was going to consider with “the family” whether they wanted to pursue an injunction proceedings [sic] and his ultimate advice was to me that they did not and that they accepted that the residents were going to be relocated but nevertheless wanted me to pursue the matter of protecting “the beds”.

Some of the advice that John Hogan appeared to give him seemed to be very much off the cuff and I said I would telephone Hogan to see if there was anything further and relevant that he could add to my thoughts on this matter. However, I did make the point that Hogan was not obviously in possession of all the facts of the case and that both I and David Porter had better knowledge of what has transpired, what Jadwan wants and the risks involved with injunction proceedings. I pointed out to Jeff that it is quite possible for us to press ahead with injunction proceedings if he wishes, but he needs to take the risk of the proceedings not being successful and bearing the cost of the same. Again he made no comment to the effect that he is prepared to bear those costs.

I said I would speak with John Hogan and report back to him.

227 Mr Wicks then spoke to Mr Hogan on 30 July 1997. Mr Wicks’s file note of the conversation indicates that he spoke to Mr Hogan for 30 minutes. The file note stated –

- you spoke with Lisa Paul yesterday re not losing licences – good hearing

- staff entitlements?

Paul said Stephen Dellar already canvassed entitlements and wouldn’t be a difficulty

- wanted in-house advice re revocation and licences

- fax today.

- need to back Dept. against the wall

- review will be a likely outcome

- not much hope of dealing

Notwith[standing] concerns re injunction

- sufficiency of time to sell leaving revocation open.

bed licences are transferrable.

- apply for AIP of relocation – Dept. investigates – recipient to prove he can accommodate.

- Dept take no account of disputation –

- $28,000 –

- proceed with injunctive relief to retain licences.

- I’ll remain as solicitor on record

- you’ll be consultant.

- you’ll fax Lisa Paul –

- home to cease to operate but effectively licences will remain for us to deal with

- if threatened, they are likely to get backs up. See if we can do a deal

228 The material features of this file note include the reference to what we infer to be redundancy entitlements, the reference to “*need to back Dept against the wall*”, and the evident object of doing this, which was to achieve a sale of the bed licences before approval was revoked, which is indicated by the words, “*proceed with injunctive relief to retain licences*”. Also material is that the proposal to seek an injunction was on the premise that the home would cease to operate.

229 Mr Wicks then spoke to Mr Bowen of the Australian Government Solicitor. Mr Wicks’s note of that conversation stated –

Discussed our concerns or thoughts about loss of value of licence

- we are accepting of relocation but in no way concede it is justifiable – we don’t wish to use residents as pawns in a dispute with the Dept

- you’ll need to speak with Dellar

230 Mr Wicks then spoke to Mr Alexander on the afternoon of 30 July 1997. The file note of that conversation noted that the Public Health Complaints Commission was involved and that, “*You’re not welcome out there – nor are your staff*”. The file note also recorded that Mr Alexander had received some interest from two other homes in acquiring Derwent Court’s bed licences. The file note contained the following words –

you would be happy to [undertake] to take no more residents… - just so you can sell the beds!

231 The file note also stated –

8 left downstairs

35 allowed

232 Mr Wicks then recorded in the same file note that he had left a message at 3.20pm for Mr Dellar to call him. Mr Wicks also noted a telephone attendance on Mr Porter which referred to the *ADJR Act*, and an “*application for a stay*”.

233 Also on 30 July 1997, Mr Hogan sent to Mr Wicks a draft of a letter that he proposed to send to Ms Paul of the Department, requesting Mr Wicks to indicate that it was acceptable. Mr Hogan sent the letter to Ms Paul unaltered, stating –

We confirm that we have been consulted by Jadwan Pty Ltd the proprietor of Derwent Court Nursing Home relating to the notice of intent to revoke the approval of the nursing home under paragraph 44(2)(b) of the National Health Act 1953.

We note that pursuant to the notification dated the 20th July 1997 the Minister intends to revoke the nursing home’s approval under s.44(2) of the Act 14 days after the date of the notice.

Accordingly and with an emphasis on the short time frame within which we are working we ask that you advise as a matter of urgency whether the Department will contemplate the non-revocation of the approval of the nursing home so as to allow our client the ability to sell for relocation the 51 bed licences pertaining to the home.

We would anticipate that the home would not function pending the sale of the bed licences with all residents relocated and with the staff of the home having been given notice upon the basis that their entitlements inclusive of redundancy payments will be met by the Commonwealth.

We await your earliest advices.

234 There are three features to observe about Mr Hogan’s letter to Ms Paul. First, its focus is to facilitate the sale of the “bed licences”. Second, it proposes that Derwent Court would not function pending such sale, and that all residents would be relocated. Third, it refers to staff having been given notice and that the Commonwealth would meet their entitlement to redundancy payments.

235 Mr Wicks made a file note of his conversation with Mr Hogan on 30 July 1997 about the draft letter –

- discussing at length prepared fax to Lisa Paul and possible options – you accept Act doesn’t allow for […] transfers of licences – I say fax is OK although answer is perhaps predictable – Jane Halton is the sticking point – others are more sympathetic. I’ll speak with Dellar tonight to see if he will give me help/information.

#### Mr Wicks’s communications with the Department on Wednesday 30 July 1997

236 Mr Wicks then spoke on 30 July 1997 to Mr Dellar. Mr Wicks’s note of that conversation stated –

- never yet has anyone succeeded in an appeal.

Rating controls imposed some years ago – process of slowly eroding

- low growth in homes

- 8 extra beds last year

- 7 last year

- waiting for market to […]

40 beds per 1000 […]

1/10 – beds disappear – move into hostel, resi - 90/1000

Tas ration still over – say 93-94/1000

Outer limit for Tas c.2200

51 allocated to S.C. – ours disappear

If we weren’t revoked – 51 extra beds – of concern

Halton in Cairns

- Does C’w recognise value – in a practical sense yes but overall – prov of care is utmost

- Planning areas are important – planning considerations could allow a N. Tas reallocation \*!

237 Mr Wicks was cross-examined about this file note, and it was put to him that the reference to “*1/10 – beds disappear*” was a reference to beds disappearing on 1 October. Mr Wicks stated that he had no independent recollection of the conversation, nor did he understand what 1/10 meant. The primary judge found at [204] that the reference to “*51 allocated to S.C.*” was a reference to Southern Cross Homes. In relation to the reference to “*1/10 – beds disappear*”, the primary judge held at [211]-[218] that the note recorded what was going to happen to Derwent Court’s former allocation of beds, but declined to hold that Mr Dellar said anything in the conversation that alerted Mr Wicks to the new legislation governing nursing homes.

238 Mr Wicks’s file note indicates that he then spoke to Mr Alexander and raised the topic of relocation to northern Tasmania –

see what interest you can get from N/N.W. home operators as Dellar hinted he may look favourably on this.

239 Mr Alexander also wrote to Mr Dellar on 30 July 1997. In that letter, Mr Alexander referred to the question of redundancy entitlements and to relevant industrial instruments, and stated (inter alia) –

…

In view of the intended revocation of approval of Derwent Court Nursing Home from 4th August 1997, I would appreciate your prompt response to this letter as to whether or not your department will fund redundancy payments (including notice) in accordance with the Commission’s decision and for those staff covered by the Federal Award.

This letter serves as a submission by Derwent Court Nursing Home to the Secretary of Department of Health and Family Services for consideration of redundancy payments.

#### The events of Thursday 31 July 1997

240 Events continued to move quickly the next day, 31 July 1997. Mr Wicks made a file note that recorded that he spoke to Mr Porter which stated –

TT Porter

I’m currently drafting an FOI request & will deal [with] Dellar. I do not consider it possible for me to draft appeal & grounds or to efficient to get say A.B. up to speed so he could do it – will you? – yes – you’ll find form of appeal and draft grounds *in anticipation of revocation*.

[Emphasis added]

241 Mr Alexander sent Mr Wicks a letter dated 31 July 1997 in which he stated –

It is simply not possible to find a buyer NOW for the sale of such a complex business. We ask for a specified time to negotiate a sale in an orderly manner. We will immediate place the transaction in the hands of a business broker and ask him to act as expeditiously as possible. We would provide a time frame to support our actions.

Before any of this can happen, two assurances are required:

1. Ms Jane Halton removes or extends the Intention of Revocation.

Our good faith has been displayed over the last 10 days in that residents and staff have been relocated with the essential co-operation of Derwent Court management. This achievement resolves the Department’s immediate concerns for requiring revocation.

If the revocation is removed or extended we would undertake not to admit residents during this period.

2. Mr Steven Dellar permits a sale to occur.

The chance of selling the beds in the north of the state is a new twist from what we had been told by Mr Dellar previously. Last Tuesday week he advised we had no more than 48 hours to find a buyer, but he doubted our ability to do so. Since previous discussions have required building south of Oatlands, we assumed the sale of beds in the south would also be our only option.

Further we believe Jadwan Pty Ltd should be given an opportunity to sell their business of 13 years standing for these reasons:

Referring to Lisa Paul’s letter of 11th May 1997 (copy enclosed), we were encouraged by the content to continue working on improving care services. This has occurred. The second Standards Review Panel acknowledged improvement. Substantial improvements have continued over May, June and July, however a decision to revoke approval has been made on historical data.

Considering the encouragement in Lisa Paul’s letter of 11th May 1997, regarding care standards, it is unjust that we now receive a Notice of Intention indicating the Approval will be revoked in 2 weeks. This is hardly sufficient time to negotiate a complex business sale. If it had been indicated by the Department that they were not going to allow us more time to demonstrate substantial improvement, we would have put our bed licenses on the market.

Mr Dellar has stated previously, to put any proposition in writing for his consideration.

Also enclosed is a copy of our letter to John Hogan for your information.

242 Before the primary judge, Ms Julie Alexander gave evidence that her father had dictated the letter to her, that she had typed it, and that by this time she had accepted advice that an injunction application was too risky and had decided not to go down that path and to sell the business instead.

243 After Mr Wicks had spoken to Mr Porter, he spoke to Mr Alexander. Mr Wicks’s note of that conversation stated –

- got your letter

- haven’t spoken with northern ops. yet – I say to at least elicit expressions of interest in view of Dellars ‘hint’

- I explain David Porter is drafting appeal and grounds in anticipation of an appeal next week – I discuss your letter – raises nothing we haven’t already considered/dealt with. Hogan has asked for a ‘stay’ – we shall await a response

244 In the afternoon of 31 July 1997, Mr Wicks spoke to Mr Dellar. His note of that conversation stated –

Time frame?

\* Material – same locally – same in Canberra

- sent on to [Canberra]. Anne Thorpe – who will collect material – she’ll contact me – there’s some technical defect with our report which she’ll contact me about but won’t delay things.

245 Following on the same page is a note of a conversation with Mr Hogan, which stated –

- see put[ting] forward an expression of interest in moving from Hobart to elsewhere in state.

- expression of interest – you’ll send

I explain Porter’s tactic – drafting appeal and grounds – *awaiting decision to revoke*

[Emphasis added]

246 The primary judge at [410] inferred from the use of the word “tactic” that Mr Wicks had told Mr Porter about Mr Hogan’s rationale for seeking an injunction, being to put pressure on the Department to cause it to give Jadwan a further opportunity to sell its bed licences. Mr Hogan’s note of what we infer to be the same conversation on 31 July 1997 stated –

Maybe → North/North West.

Barrister is drafting Appeal + grounds

Ready to move on Monday

Using ADJR/ + Stay order

247 On the same page of Mr Wicks’s note of his conversation with Mr Hogan was a note that Ms Julie Alexander “*dropped by for developments*”. The note indicates that Ms Alexander provided Mr Wicks with a copy of a letter dated 31 July 1997 from Mary’s Grange Inc that expressed interest should Jadwan plan to sell its bed rights. Mr Wicks’s file note continued –

I explain ADJR procedure – I’ll write again to Dellar tomorrow to highlight interest, undertake to take no further residents and ask for revocation to be held off pending exploring expressions of interest.

#### The correspondence of Friday 1 August 1997

248 On Friday 1 August 1997, the Department wrote two letters of relevance. The first was from Mr Hargrave of the Department to Mr Alexander which related to redundancy funding. It relevantly stated –

I am writing in response to your letters of 30 and 31 July 1997, concerning payment of redundancies and the associated period of notice required to be served by affected staff.

As previously advised, provisions of the National Health Act allow for redundancy costs of nursing and personal care stuff to be funded if:

* a home closes
* a home subsequently reduces its number of beds or
* a home transfers to another site and where;
* as a result of the above, the home makes redundancy payments required by law or award.

The circumstances relating to your application obviously meet two of the requisite provisions of the Act and will be considered accordingly. The funding details cannot, of course, be finalised until actual costs are known and have been considered by the Delegate of the Secretary for the Department of Health and Family Services.

249 The second letter was from Ms Hefford of the Department in Canberra, and was addressed to Mr Hogan in response to his letter of 30 July 1997. The letter relevantly stated –

Under subsection 44(2) of the Act the Minister (or her delegate) is to take such action as is considered justified in the circumstances of the case. The period of 14 days from the service of the notice of intention is to permit the proprietor a further opportunity to submit relevant material to the delegate. Your letter appears to constitute the only additional material of any kind submitted by or on behalf of the proprietor.

You ask whether the intention to revoke might not be proceeded with so as to permit the proprietor “the ability to sell for relocation the 51 bed licences pertaining to the home”. There was in fact no “bed licences” under the Act. The approval of a nursing home under section 40AA of the Act is subject to a condition that the number of beds available in the nursing home for benefit purposes will not exceed the number determined by the Minister.

Under section 39B of the Act, the Minister may in her discretion grant a certificate of approval in principle for what is effectively the transfer of determined bed numbers between nursing homes. Your client should be aware, however, that the granting of such a certificate is subject to a specification that the nursing home from which beds are to be transferred continues to be conducted in accordance with the conditions to which it is subject under subsection 40AA(6). It is the failure to comply with such a condition that has precipitated the present action in respect of Derwent Court Nursing Home.

Whilst the matter is one for the delegate to consider at the relevant time, I have to say that it appears most unlikely that the desire of your client as indicated in your letter would have any material bearing on a decision to revoke the approval of the nursing home.

250 We observe that this letter appears to raise the prospect that the Minister would not issue a certificate enabling the transfer of bed approvals under s 39B of the *National Health Act*, to which we referred at [20] above, on the ground that Jadwan was in breach of the conditions to which it was subject under s 40AA(6) of the Act, to which we referred at [16] above.

251 Also on 1 August 1997, Mr Wicks sent a letter to Mr Dellar that referred to Mr Hogan’s letter of 30 July 1997 to Ms Paul of the Department. Mr Wicks’s letter continued –

I repeat the request in that letter that the Minister’s delegate gives urgent and close consideration to not revoking of the approval of the Derwent Court Nursing Home until such time as my client can negotiate the sale for relocation of the Home’s bed approvals.

I have already expressed my concerns at the way in which the Department had pre-empted any review of the revocation decision by putting in train the relocation of residents of the Home. My client’s ultimate decision to take no action to prevent the relocation was taken purely in the interests of the Home’s residents, many of whom were quite upset at the prospect of relocation. Its action in not challenging and in fact assisting the relocation can in no way be construed as an acceptance that there is a proper basis for the relocation of the residents or the revocation of the Home’s approval. The inconsistencies between the reports of both the Standards Monitoring Team and the Standards Review Panel, the glaring inconsistencies between the first and second Standards Monitoring Team reports, the questions surrounding the qualifications and experience of Standards Review Panel members, the apparent improper composition of the second Standards Review Panel and the open and public support given by a number of doctors familiar with the Home to the standard of care given there all raise serious doubts about the basis upon which the Minister’s delegate is proceeding in this matter.

It would appear that the Department is further attempting to pre-empt any appeal against or review of a revocation decision by allocating 51 ‘new’ beds to Southern Cross Homes and thereby creating a position where the total number of beds allocated at least in the south of the State, will exceed the allowable “ceiling” unless the 51 approved Derwent Court beds are withdrawn.

Up until receiving notice of the Minister’s delegate’s intention to revoke the Home’s approval, my client had been making every endeavour to comply with the Department’s required standards and given the obvious problems with the lay-out of the Home was in the meantime, genuinely pursuing the matter of relocation and rebuilding. My client’s intentions in this regard were quite incredibly rejected by the Standards Review Panel as not genuine.

You would be no doubt aware of the financial loss my client will suffer if the approvals are revoked. You would no doubt also be aware of the Department’s liability if, as we shall seek to prove, the revocation decision was improperly founded.

With the publicity surrounding the Home’s closure, my client has received a number of expressions of interest from home operators in the State for Derwent Court’s beds. I have copies of written expressions of interest from a number of operators and Mr Alexander is even today dealing with others.

It would greatly assist in the resolution of this matter without recourse to legal processes and perhaps with benefits to aged care nursing generally in the State if my client was allowed to negotiate the sale of its beds to other operators.

252 It is convenient to note that at about this time, Jadwan had received a number of expressions of interest for some or all of its 51 bed licences in addition to that from Mary’s Grange, to which we referred at [247] above. Other expressions of interest included –

(1) Queen Victoria Home on 30 July 1997 – 51 licences;

(2) Adaihi Nursing Home on 31 July 1997 – 2 licences;

(3) Norman & Houlihan on 31 July 1997 – 51 licences;

(4) Karingal Home for the Aged on 1 August 1997 – 51 licences;

(5) Masonic Peace Haven of Northern Tasmania on 1 August 1997 – between 5 and 10 licences; and

(6) St Luke’s (Anglican Church in Australia) Foundation on 4 August 1997; and

(7) Salvation Army on 27 August 1997 – 20 licences.

253 All of the above expressions of interest were made outside of the 48 hour period that Mr Dellar had allowed on 22 July 1997 (see [173]-[174] above).

254 Late on Friday 1 August 1997, Mr Porter sent Mr Wicks a fax containing draft grounds of review and relief to be inserted in an application to the Court under the *ADJR Act*. The orders sought included an order quashing the decision to revoke approval of the nursing home, and an order pursuant to s 15 of the *ADJR Act* suspending the operation of the decision. No order was sought in the draft application to set aside the February 1997 sanctions determination. It appears that Mr Wicks prepared a draft application based upon Mr Porter’s proposed grounds, which were the subject of some further refinement. In a draft of the application dated 6 August 1997, the grounds of review provided –

1. There was a breach of the rules of, natural justice in connection with the making of the decision in that a member of the Standards Review Panel which reported to the Minister on 2 December 1996 was biased in that he was, at the time, the Executive Director of an organisation the membership of which comprised nursing home operators which would be likely to benefit from a review decision adverse to the applicant.

2. The making of the decision was an improper exercise of the power in that:

(a) the Minister by her delegate failed to take a relevant consideration into account in the exercise of the power; namely that the applicant had taken remedial action in respect of matters of adverse comment in the report of the Standards Review Panel of 26 May 1997, between that date and the formation of the intention to revoke approval, notice of which was given to the applicant on 20th July, 1997;

(b) the Standards Review Panel which reported to the Minister on 2 December 1996 and upon which the decision was based included a member or members who did not have the qualifications prescribed by Reg. 11 of the National Health Regulations;

(c) the Standards Review Panel which reported to the Minister on 26 May 1997 and upon which report the decision was based, was not properly constituted, and included a member or members who did not have the qualifications, as prescribed by Reg 11 of the National Health Regulations.

3. There was no evidence or other material to justify the making of the decision.

#### Monday 4 August 1997 - the last resident leaves Derwent Court

255 The last resident left Derwent Court on Monday, 4 August 1997. On that day, Mr Wicks attended upon Ms Julie and Mrs Joan Alexander and prepared some 11 pages of notes of instructions, which included the entry to which we referred at [155] above, namely that when Ms Thorpe telephoned Mr Alexander on 16 July 1997 to cancel the meeting, she stated that fire was not the issue, and had not been a problem since February.

256 Mr Wicks also sent a fax to Mr Porter that attached a draft application and affidavit for Mr Porter’s comment. Mr Wicks wrote on the cover sheet –

I’m unsure whether and to what extent I should set out the deponent’s grievances as to the way in which they have been treated, the financial effects, the fact that they want to be able to sell the ‘beds’ and so on. Your advice would be appreciated as to how to finish it off.

#### Tuesday 5 August 1997

257 The following day, Tuesday 5 August 1997, Mr Wicks prepared a five-page note titled “*Research & Considering*”, in which he referred to s 39B of the *National Health Act*, and to the transfer of beds. In cross-examination, Mr Wicks stated that he conducted this research in the Law Society library and that he was unable to answer whether his research on 5 August 1997 extended to other legislation, or amending legislation.

258 Also on 5 August 1997, Mr Wicks attended a conference with Mr Porter. We infer from Mr Wicks’s note of the conference that it was largely preparatory to the drafting of an affidavit in support of the proposed application under the *ADJR Act*. Mr Wicks’s note included reference to the constitution of the first Standards Review Panel, and an allegation that Ms Parr and Ms Cooper did not have the experience or qualifications required by law.

259 Mr Wicks also made a file note of a telephone conversation with Mr Hogan on 5 August 1997, as follows –

\*TF Hogan – regarding fax from CBR [Canberra]

- I was aware – discussed

They respond to ACAT Team as to needs in a particular area.

- right of appeal for AAT?

going straight to AAT? - I discussed section 105AAB. Yes, you see.

- you’re out of it – good luck!

260 Mr Hogan had no further involvement in the matter, and sometime later on 3 March 1998, Mr Hogan provided to Jadwan an itemised list of his attendances, which included -

… Advising you generally with respect to Revocation of Licence. Examining notice under Section 44(2A) of the National Health Act, together with correspondence between the Commonwealth of Australia and Jadwan Pty Ltd.

Perusing and dealing with Jadwan Pty Ltd letter of 28 July 1997.

Receiving and dealing with facsimile from Jadwan Pty Ltd dated 28 July 1997 containing copy letter from Commonwealth Department.

Perusing correspondence to Standards Review Panel, together with supporting material.

#### Wednesday 6 August 1997 - revocation of approval

261 On Wednesday 6 August 1997, Ms Halton, as delegate of the Minister, revoked Derwent Court’s approval as an approved nursing home under s 44(2) of the *National Health Act*. As a consequence of that decision, Derwent Court was no longer entitled to receive any Commonwealth benefits for providing nursing home care to eligible nursing home residents. Jadwan was notified of the revocation by a letter from Ms Halton, which was accompanied by a copy of a signed instrument of revocation and a statement of reasons which referred to and attached –

(1) the first Standards Review Panel report, dated 2 December 1996;

(2) Jadwan’s submission dated 5 March 1997 in response to the first Standards Review Panel report;

(3) the second Standards Monitoring Team report which carried out an assessment on 12, 13, and 17 March 1997;

(4) Jadwan’s submission dated 22 April 1997 in response to the report of the second Standards Monitoring Team;

(5) the second Standards Review Panel report, dated 26 May 1997;

(6) Jadwan’s submission dated 4 June 1997 in response to the second Standards Review Panel report;

(7) the letter from Tasfire Building Safety to Jadwan dated 3 June 1997;

(8) the standards determined under s 45D of the National Health Act; and

(9) the letter from Mr Wicks to Mr Dellar of the Department, dated 1 August 1997.

262 The delegate’s decision to revoke the approval of Derwent Court was subsequently reviewed under s 105AAB of the *National Health Act,* and on 13 October 1998 was affirmed by Mr Griew, the State Manager of New South Wales of the Department.

263 At this time, Mr Wicks was preparing a draft affidavit for Ms Julie Alexander to swear in support of the proposed application under the *ADJR Act*. Mr Wicks prepared a note of a conversation with Ms Alexander dated 6 August 1997 that stated –

\*TT Julie Alexander for affidavit material

(concern re implications for Glenburn Home)

- problem with Dept. over redundancies – [Tasmanian Chamber of Commerce and Industry] are handling – Dept. are dragging their heels (TCCI – Mark Watson)

- Ind. Comm. have looked at it & confirmed employees are entitled to redundancies.

- Watson is unsure of Depts. tactics – they are saying they “may” meet the redundancies.

- redundancy bill will be over half a million dollars – which could be value of the bed licences – one will cancel out the other. (!)

- I say my thought is that if revocation can be shown to be improper damages can flow.

264 The note then recorded some other matters, before stating –

Dellar was adamant that Dept. had reached an [agreement] ~~to ‘give’ the beds to~~ Southern Cross. He [explained] that DC’s beds were going to go into the pool of State beds & S.C. would be given 51 from the pool. Discussed redundancies – he saved us. Next day he rang Jeff & said possibility Dept may pay the redundancies.

[Strike-through in original]

265 Ms Julie Alexander was cross-examined in relation to this note, and stated that she did not recall telling Mr Wicks that the redundancy bill would be over half a million dollars. Ms Alexander stated that she was not dealing with redundancies, but had a general awareness of what was going on in relation to redundancies. She accepted that a potential redundancy liability of almost half a million dollars would be almost crippling at that time. In response to a proposition that the cost of the redundancies could have been the value of the bed licences, Ms Alexander stated that she could not remember what her understanding at the time was, and stated that she could not recall being concerned that the liability to meet the redundancy payments would cancel out the value of the bed licences, and stated that it was more likely that Mr Alexander was handling that side of it.

266 As we have mentioned, Mr Wicks was working on drafts of an affidavit for Ms Julie Alexander to swear for the purposes of the proceedings under the *ADJR Act* that were then in contemplation. Paragraph 45 of one draft stated, in relation to a meeting between Mr Alexander, Ms Julie Alexander, and Mr Dellar of the Department on 22 July 1997 –

45 We discussed redundancies with Mr Dellar. This is a matter of considerable concern to the Company because, as a result of the Department’s Notice of Intention to revoke the Home’s approval, Notices of Termination had to be given to all staff on July 24th and a redundancy liability of something in the order of five hundred thousand dollars has arisen. ~~We asked if the Department would be prepared to meet redundancy payments due and Mr Dellar said no. I understand from my father however that the following day, Mr Dellar telephoned my father and said there may be a possibility of the Department paying out redundancies for the Company~~.

[Strike-through in original]

267 Adjacent to the above words that were struck out was written –

Department said the “Department” would meet the Company’s redundancy liability and it has invited a submission from the Company in this regard.

268 Paragraphs 55 and 56 of the same draft affidavit stated –

55 The loss of its bed approvals will have significant financial consequences for the Company which otherwise could transfer them either to another operator who wished to expand their nursing home or, if the Company was able to do so, it could build a new home and transfer the approvals to it. Since news of the Home’s closure became public, the Company has received a number of written expressions of interest from nursing home operators throughout Tasmania to take a transfer of some, and in a few cases all, of the Home’s fifty-one bed approvals.

56 It is most important to the Company that its fifty-one approvals remain in place while the Company pursues all avenues of appeal open to it against the Minister’s revocation decision and, in the event that its appeals result in a finding that is favourable to the Company, that it be allowed to negotiate as it sees fit for the transfer of the approvals to any interested buyer or buyers.

#### Thursday 7 August 1997

269 Mrs Joan Alexander recorded the following in a diary entry dated 7 August 1997 –

…now it must be costing us a lot of money it concerns us, $5,000 – AAT Good money after bad JAA.

…

David Porter’s costs $1,500 – a lot of work classified as AAT work

270 Mrs Alexander was cross-examined about this entry. She denied that the cost of getting an injunction was a concern. She stated that the reference to “JAA” was to Ms Julie Alexander, and that the note was of a conversation with her, but that she did not remember the conversation. Mrs Alexander accepted that the fact that she had made the notes of such conversations suggested that those matters were discussed. Ms Julie Alexander was not cross-examined about what was recorded in the diary entry.

#### Friday 8 August 1997 - further preparation of papers and attendances on Mr Porter QC

271 On Friday 8 August 1997, Mr Wicks met with Mrs Joan Alexander and Ms Julie Alexander, and telephoned Mr Porter to advise him of recent developments. Mr Wicks’s note of the conversation with Mr Porter records that Mr Porter stated that he was to be in court, and would look at the drafts of the application and the affidavit later in the day. The note states –

- move Monday

- me to check judge availability.

272 Later on 8 August 1997, Mr Wicks spoke to Mr Alan Parrott of the Hobart Registry of the Federal Court. Mr Wicks’s note records that Mr Parrott told him that no judge was available “*unless urgent – slim chance may be a judge down - o’wise 22/9*”. The note also makes reference to “*video link*”.

#### Monday 11 August 1997

273 On Monday 11 August 1997, Mr Wicks sent a fax to Mr Porter that attached a “*revised (final?) form*” of Ms Alexander’s affidavit to be sworn in the contemplated proceedings, and requested that Mr Porter call him. Mr Porter later telephoned Mr Wicks at 4.30pm, as recorded in Mr Wicks’s file note. The file note indicates that Mr Porter suggested some relatively small changes to the application and affidavit. The file note then recorded the following –

BUT – you see no need on the face of the affidavit for an interlocutory stay! – If AAT is successful, decision will be quashed ab initio & approvals will continue to exist. – [therefore] don’t proceed with appn – yes

\_\_\_\_\_\_\_\_\_

affidavit material will be used in AAT anyway so exercise not wasted.

– pursue review per Minister immediately then we go to AAT.

274 Mr Wicks did not elaborate on this conversation with Mr Porter in evidence-in-chief, and he was not cross-examined by counsel for the fifth respondent, Worsley Darcey, which faced exposure if any negligence of Mr Porter was found to have caused loss to Jadwan. In written reply submissions at trial, the fifth respondent accepted the note on its face, submitting at [2.6] –

On 11 August Porter QC gave oral advice to Mr Wicks as to the drafting of the application, and the affidavit in support. He also advised that he did not see a need on the face of the affidavit for an interlocutory application for a stay. He expressed the opinion that if the AAT application succeeded, then the revocation decision would be quashed ab initio and, in consequence, the approvals would continue to exist.

275 We note at this point that the primary judge found at [729] that there were significant reasons to doubt that Mr Porter had given the advice that Mr Wicks had recorded, and had understood him to give. At [730] the primary judge drew an inference that Mr Wicks had misconstrued Mr Porter’s advice when regard was had to a letter that Mr Porter wrote to Mr Wicks on 19 August 1997, in which Mr Porter stated –

I refer to our telephone conversation of 11 August 1997. I note that we discussed whether the need to maintain the approval status, pending any review of the determination, was sufficiently imperative to warrant proceeding with the ADJR application and associated stay.

As I advised you, it seems to me that the only way a stay can presently be obtained is by way of the ADJR proceedings. This is because until the Minister reviews the determination there is no decision reviewable by the AAT, and hence no stay could be obtained by that means. The scenario was to obtain the stay (hopefully), then to adjourn the ADJR proceedings sine die and to pursue the AAT remedy.

I note that you were in fact to proceed with the application for review by the Minister in any event. Not having heard further from you I assume that the ADJR proceedings are not to be pursued, at least for the time being, and that AAT proceedings will be instituted at the relevant time following the Ministerial review. My principal purpose in writing to you is to advise that I will be absent from Chambers from 25 August to 12 September 1997 and would of course be happy to speak to you further about this matter upon my return.

In the meantime I thank you for your instructions and enclose a memorandum of my fees to date.

276 After Mr Wicks spoke to Mr Porter on 11 August 1997, he spoke to Ms Julie Alexander on 12 August 1997. Mr Wicks’s file note of that conversation stated –

\*TT Julie to advise Porter’s position.

– patient records – going into envelopes for storage but I doubt whether they’d be needed or could be used

– I stress need to address reasons for decision on a point by point basis and get to me asap.

– Denise Callahan is reluctant to get involved – rather defeatist.

(2 have died since Rosary Gardens relocation)

- politically Minister may not be phased by any opposition

Dellar said after notice of [intention] you had 48 hours to sell – I say unrealistic in the circs & in any event, Dellar’s offer & Canberra’s position may differ significantly.

277 Later on 12 August 1997, Mr Wicks telephoned Mr Alexander. Mr Wicks’s note indicates that the time of the call was 20 minutes, and included the words –

\* Julie addressing reasons of decision on a point by point basis.

you surprised re not proceeding

#### Confirmation of allocation of beds to Rosary Gardens Nursing Home

278 On 20 August 1997, Ms Halton of the Department wrote to the Federal Member for Dennison, to respond to his questions in relation to the revocation of Derwent Court’s approval and the suitability of the proposed replacement home for Derwent Court’s residents. In the letter, Ms Halton confirmed that a new allocation of beds had been made to Rosary Gardens Nursing Home –

6. Twenty beds were granted to Rosary Gardens Nursing Home on 24 July 1997 and a further 31 beds were granted on 25 July 1997. These were a new allocation of bed approvals in light of the announced intention to withdraw funding from Derwent Court.

7. The decision to allocate 51 beds to Southern Cross Homes Incorporated was an outcome from the negotiations and formed part of the agreement reached between the Commonwealth and Southern Cross Homes Incorporated.

8. As mentioned above, the most recent Outcome Standards Monitoring visit to Rosary Gardens Nursing Home resulted in a positive report. In contrast, the findings of the standards Review Panel of Tasmania in relation to Derwent Court were that 25 of the 31 standards required urgent action. There were serious deficiencies between the level of care being provided and the requirements of the standards. The quality of care at Rosary Gardens Nursing Home is significantly better and is confirmed by the efforts being made at present.

#### Administrative review

279 On 26 August 1997, Mr Wicks recorded notes of a telephone conversation with Mr Alexander in the following terms –

Letter to Ombudsman O.K?

- I see no problem but you make no mention of our involvement.

you see our involvement as a sep. issue - don’t think so – can only await ombudsman’s advice now.

- you discuss reopening.

press for: restitution of bed approvals. Compensation for loss of income and damages.

- you stress it’s not only restitution of approvals – you want to get running again – I say do you not have problems with building etc.

- you say you believe can overcome these. Staff want to come back – you can get more residents.

280 On 28 August 1997, Mr Hargrave of the Department wrote to Mr Alexander in relation to the proposed payment by the Department of staff redundancies at Derwent Court. Mr Hargrave proposed to advance Derwent Court $250,000 to cover the redundancy payments, notwithstanding that there were outstanding validations to be completed by Derwent Court. Mr Hargrave noted that the estimated liability for the redundancies was $349,634.

281 On 28 August 1997, Derwent Court staff wrote to the Commonwealth Ombudsman, expressing concern about the “hasty closure” of the home.

282 On 1 September 1997, Mr Wicks wrote to Mr Alexander attaching a copy of a request to the Minister, also dated 1 September 1997, under s 105AAB(2) of the *National Health Act* for review of the revocation decision. The letter of request extended over four pages and set out a number of grounds on which the decision was challenged by Jadwan.

283 On 13 September 1997, Mr Wicks became an employee of the third respondent, Toomey Maning & Co, and took the Jadwan file with him.

284 As we stated at [262] above, the Department’s administrative review by Mr Griew pursuant to s 105AAB of the *National Health Act* affirmed the revocation decision. The notification of the outcome of the review dated 13 October 1997 was accompanied by a nine-page statement of reasons plus annexures. There are a number of relevant features of the statement of reasons, including findings that both the first and second Standards Review Panels were properly constituted under the requirements of the regulations. The reasons stated that in affirming the decision, Mr Griew relied on evidence that included the statement of reasons adopted by Ms Halton on 6 August 1997, and the reports of the first and second Standards Review Panels.

285 Also in October 1997, the Department commenced its internal review, which resulted in the report dated 29 April 1998, to which we have referred.

286 At some point later in 1997, Jadwan engaged another legal practitioner, Mr Sealy of Piggot Wood and Baker in Hobart, to act for it. On 12 November 1997, Jadwan wrote to Mr Sealy indicating that Jadwan’s real estate agent had been approached by Ms Parr, on behalf of St Ann’s nursing home, who was interested in leasing Derwent Court in order to relocate some residents from St Ann’s. Ms Parr had been the chairperson of the first Standards Review Panel that had described Derwent Court as being “*totally unsuitable for a nursing home*”. In its letter, Jadwan expressed concern about Ms Parr’s motives.

#### Nursing Board of Tasmania investigation

287 Following Derwent Court’s closure, the Nursing Board of Tasmania conducted an investigation and prepared a report about nursing standards at the home. This report was formally received by the Nursing Board on 5 February 1998, which resolved (*inter alia*) that the former Director of Nursing, Barbara Bensch, appear before the Board pursuant to s 61 of the *Nursing Act 1995* (Tas) (since repealed) to give an explanation of the findings of the investigation report. The executive summary of the report stated, in part –

The findings of the investigation revealed that there were some deficits in nursing standards, particularly related to the standard of documentation which was inconsistent with contemporary nursing care. Other deficits included the nursing assessment process, continence management, restraint, medication administration and pain management. The investigation, however, could not prove conclusively that the standard of nursing care did not meet the required standard.

Evidence was found that nurses were making the best of a difficult situation they found themselves in and provided the level of care that they could. Leadership was lacking from the Director of Nursing and as a result, a culture of “make the best of what we have” prevailed. Nurses felt unempowered by the lack of process in which change could be made.

There was also evidence that whilst nurses stated that they understood the nursing competencies and guidelines, the principles contained therein were not applied to individual’s nursing practice in a consistent manner. A number of recommendations have been suggested for consideration by the Nursing Board of Tasmania.

288 Also within the report was the following statement on which the primary judge relied at [183] in support of his Honour’s finding that Jadwan “scrimped” with staff training –

There were limited opportunities provided for inservice education due to lack of funds. Most staff funded the cost of continuing education themselves. If inservice education was held in the home, it had to be “in-house”, that is at no cost to the proprietor.

289 Nonetheless, the report concluded –

The investigation revealed that it is reasonable to assume from the facts that acceptable nursing care was provided to the residents. The investigators were limited because direct observation of nursing care and nursing practices did not occur.

### Judicial review proceedings

#### Jadwan No 1 – Heerey J – 19 June 1998

290 As we noted at [286] above, in late 1997, Jadwan engaged a new legal practitioner, Mr Sealy. On 21 January 1998, it commenced a proceeding in the Federal Court against the Minister for Health and Family Services seeking judicial review of the decision by the Minister’s delegate to revoke the approval of Derwent Court as a nursing home. Jadwan sought relief under the *ADJR Act* on two grounds. *First*, Jadwan claimed that the second Standards Review Panel had not been correctly constituted, and that the chairperson of the Panel had failed to give Jadwan notice that was required by the regulations. On these bases, Jadwan claimed that there had been a failure to observe procedures required by law, which engaged s 5(1)(b) of the *ADJR Act*. *Second*, Jadwan claimed that the Minister erred in law in relation to her interpretation and application of the applicable standards.

291 On 19 June 1998, Heerey J made an order declaring that the decision of the Minister on 6 August 1997 to revoke the approval of Derwent Court was void: *Jadwan Pty Ltd v Minister for Health and Family Services* [1998] FCA 715; 51 ALD 245. Heerey J held that the second Standards Review Panel was not correctly constituted in accordance with the *National Health* *Act*, to which we referred at [22] to [27] above, because, of the three members who were appointed, one member, Ms Cooper, was ineligible. Ms Cooper had been appointed to represent nursing home staff organisations, but was at the time the Tasmanian District Registrar of the Federal Court. Heerey J acted on a concession by the Minister that the Panel was not properly constituted if it consisted of only two validly appointed members. It was therefore unnecessary to consider other arguments that the Panel was invalidly constituted because it comprised only three members rather than five, and whether the absence of two members was cured by reg 12(11) of the *National Health Regulations* which provided that “*the exercise of a power or the performance of a function of a Panel is not affected by a vacancy in its membership*”. Heerey J also held that the chairperson of the second Panel had not given notice to Jadwan in accordance with reg 28 of the *National Health Regulations*. In relation to the consequences of the failure to follow procedures, Heerey J held that while the Minister seeking to exercise the power of revocation under s 44 of the *National Health Act* was not required to seek a panel report before doing so, in this case the Minister *did* seek a report and relied upon that report in making the decision. Therefore the procedures that were not complied with were procedures “*in connection with*” the Minister’s decision to revoke approval.

#### Jadwan No 2 – Full Court (Burchett, Drummond and Sackville JJ) – 4 December 1998

292 The Minister appealed the decision of Heerey J to the Full Court: *Minister for Health and Family Services v Jadwan Pty Ltd* [1998] FCA 1549; 89 FCR 478. The Full Court allowed the Minister’s appeal in part, and held that the Minister’s decision to revoke approval under s 44 of the *National Health Act* was not conditional upon the appointment of a Panel pursuant to the *National Health Regulations*, and further, that the appointment of panels was authorised for the purposes of financial sanctions in the exercise of powers under s 45E of the *National Health Act,* but not for the purpose of exercising the power of revocation of approval under s 44. Therefore, the failure to establish a Panel in accordance with the regulations was not a failure to observe procedures *required by law* such as to engage s 5(1)(b) of the *ADJR Act*.

293 However, Jadwan was given leave by the Full Court to amend its application to include an additional ground, which was that by having regard to the report of the second Standards Review Panel, the Minister had regard to an irrelevant consideration. The irrelevant consideration was that the Minister treated the Panel on whose report she had relied as having been validly constituted. For these reasons, the order of Heerey J declaring the decision void was set aside, and in substitution the Full Court ordered that the decision of the Minister revoking the approval of Derwent Court be set aside. This was a materially different order to that made by Heerey J.

#### Jadwan No 3 – North J - 23 August 2002

294 Following the decision of the Full Court, Jadwan took some preliminary steps towards the development of a new nursing home on a greenfields site. On 1 April 1999, a company named Aged Care Developments, which described itself as “designers and builders of quality aged care facilities”, sent a fax dated 31 March 1999 to Mr Alexander, stating –

Dear Jeff,

I’m pleased to present to you Aged Care Development’s fee structure and outlines for professional services and cost estimations for a proposed new 51 bed nursing home facility, to be constructed on your land in Tasmania.

This estimation is based on a brief given to Mark Selby-Hele by Mr. Jeff Alexander at the offices of Aged Care Developments at Seaford on 17/03/99.

295 The fax from Aged Care Developments referred to a new building with an area of 2250 square metres, with an estimated cost on a greenfields site of $2,445,000.

296 Ms Julie Alexander gave evidence that in July 1999, she bought approximately three hectares of land at Geilston Bay, Tasmania for the purpose of using it to build a new nursing home. She stated that after the decision of Heerey J, she believed that Jadwan could re-open Derwent Court. Ms Alexander gave evidence in cross-examination that she did not learn of the existence of the *Aged Care Act* until after the first Full Court decision in *Jadwan No 2*, and possibly as late as July 1999. Jadwan’s entitlement to approved places under the *Aged Care Act* became the subject of a dispute, and further litigation. In cross-examination, it was put to Ms Alexander that at the time of purchase, she knew that the relevant planning scheme did not permit use of the land as a nursing home, which she denied. However, there was no evidence that the planning scheme did not permit the construction of a nursing home on the land that Ms Alexander had purchased.

297 Jadwan alleged an entitlement to be an approved provider of aged care within the meaning of the *Aged Care Act*, and alleged that by operation of s 20(1) of the *Consequential Provisions Act*, to which we have referred at [35] above, the Minister was taken to have allocated to Jadwan 51 places for the provision of residential care under s 14-1 of the *Aged Care Act*. The Secretary of the Department contended that Jadwan did not engage the *Consequential Provisions Act* because it did not satisfy the conditions in s 7(1)(a) or (b), which we set out at [34] above. Relevantly, the issue was whether a Commonwealth benefit was payable to Jadwan in respect of an approved nursing home patient, within the meaning of s 4 of the *National Health Act*, for nursing home care received by a patient on 30 September 1997, being the day before the operative provisions of the *Aged Care Act* commenced. This issue directed attention to the effect of the order of the Full Court made on 4 December 1998, by which the decision to revoke approval was set aside.

298 In 2001, Jadwan commenced a second proceeding in the Court by which it sought declaratory relief. On 23 August 2002, North J held that the effect of the Full Court’s orders was that the revocation decision remained in effect until it was set aside by the Full Court: *Jadwan Pty Ltd v Secretary, Commonwealth Department of Health & Aged Care* [2002] FCA 1052. It followed that Derwent Court was not approved as a nursing home on 30 September 1997, and that consequently s 20(1) of the *Consequential Provisions Act* was not engaged so as to allocate to Jadwan approved places under the *Aged Care Act*. North J also held that s 7(1)(a) of the *Consequential Provisions Act* required that a Commonwealth benefit be payable in fact in respect of at least one nursing home patient on 30 September 1997, and that on that day, Jadwan had no patients receiving care at Derwent Court. Furthermore, and in the alternative, North J held that Jadwan had no entitlement in law to a Commonwealth benefit on 30 September 1997. And in the further alternative, North J held that even if Jadwan had qualified for the transfer of approved places, its provider status had lapsed under s 10-2 of the *Aged Care Act*,to which we have referred at [30] above, on the ground that Jadwan had not provided any aged care during a continuous period of six months, it had not applied for a waiver, and it was then out of time to apply for a waiver.

#### Jadwan No 4 – Full Court (Gray, Kenny and Downes JJ) - 12 December 2003

299 Jadwan appealed the decision of North J to the Full Court: *Jadwan Pty Ltd v Department of Health & Aged Care* [2003] FCAFC 288; 145 FCR 1. The Full Court affirmed that the order of the first Full Court was to be taken as an order setting aside the decision to revoke the approval of Derwent Court from the date of the Full Court’s order. Gray and Downes JJ held further that even if, as Jadwan had argued, the decision to revoke the approval of Derwent Court should be treated as a nullity, Jadwan had not satisfied the requirement in s 7(1)(a) of the *Consequential Provisions Act* that there was at least one nursing home patient on 30 September 1997 in respect of whom there was receipt of, or an entitlement to receive, Commonwealth benefit because it had no patients at Derwent Court on 30 September 1997 who were receiving nursing care. Section 20 of the *Consequential Provisions Act* therefore had nothing on which to operate. Further, Gray and Downes JJ held that even if Jadwan had engaged s 7(1)(a) of the *Consequential Provisions Act*, it still had to overcome s 10-2 of the *Aged Care Act* in circumstances where Jadwan had provided no aged care at Derwent Court for well over six months from 1 October 1997, with the consequence that its approval would have lapsed.

#### Settlement and consent orders – North J – 22 June 2005

300 Jadwan and the Minister for Health and Aged Care entered into undated terms of settlement of the second proceeding, which had been the subject of the orders of North J on 23 August 2002 and the subsequent appeal to the Full Court which was dismissed on 12 December 2003. The recitals to the terms of settlement recorded that Jadwan had, in that proceeding, sought orders that the decision of 3 February 1997 under s 45E of the *National Health Act*,and to which we referred at [61] above, to impose financial sanctions on Derwent Court be set aside. The terms provided that the parties would consent to an order that the decision be set aside, for a release and indemnity by Jadwan, and an agreement by the Minister, without admission of liability, to make a contribution towards Jadwan’s costs of the proceeding, but with a provision to set that sum off against the Minister’s costs of the appeal to the Full Court that Jadwan had been ordered to pay.

301 On 22 June 2005, North J made orders with effect from 3 February 1997 setting aside the financial sanctions that had been imposed on Jadwan –

1. Each of the decisions made by the Respondent on 3 February 1997:

(a) to declare under s.45B(l) of the National Health Act 1953 that Derwent Court Nursing Home did not satisfy the standards determined under s.45D of that Act; and

(b) to determine under s.45B(2) of the National Health Act 1953 that a Commonwealth benefit was not payable to the Applicant in respect of a patient who entered the Derwent Court Nursing Home from 4 February 1997;

be set aside with effect from 3 February 1997.

2. There be no order as to costs.

302 At [592], the primary judge accepted a submission that “*this order has no bearing on the resolution of the issues in these proceedings*.”

### Expert evidence of Ms Kay Horgan

303 As we have mentioned, Ms Kay Horgan, who was a registered nurse, gave evidence as an expert in aged care. She was asked to accept some assumptions, including that –

(1) the issues identified by the Department in relation to fire safety, and in relation to a lift between floors at Derwent Court, were being addressed by Jadwan to the satisfaction of the Tasmanian fire authorities before revocation; and

(2) the findings that were attached to the notice of revocation dated 20 July 1997 were correct.

304 Ms Horgan expressed the opinion that Derwent Court was unlikely by 1 October 1997 to have been able to meet the responsibilities of an approved provider under the *Aged Care Act*. In particular, when measured against the Residential Care Standards that Ms Horgan identified in her report dated 13 April 2016, there was a moderate or high risk of non-compliance. Ms Horgan identified steps that Jadwan would need to have taken to achieve compliance. One of the key points made by Ms Horgan and relied upon by Jadwan was that many nursing homes would have been non-compliant with the new Residential Care Standards that came into force on 1 October 1997, and would have needed to review their systems in order to become sustainable in the long term. Ms Horgan also expressed the opinion in her report that Jadwan was well positioned to comply with the new accreditation standards by 1 January 2000 and would most likely have gained accreditation had it applied. In giving this opinion, Ms Horgan assumed that Jadwan would have received accelerated attention in relation to its accreditation under the new legislation because it had been identified as a home of concern. Ms Horgan also made a number of comments in her report about the integrity of the assessments that had been made by the Standards Review Monitoring teams and the Standards Review Panels.

305 In relation to the building, Ms Horgan accepted that the building from which Derwent Court operated was unsuitable for a nursing home, and that the first floor was wholly unsuitable. In a joint report with Mr Davies, who was an expert architect, Ms Horgan and Mr Davies agreed that the first floor was a very poor environment for residents, and that the de-commissioning of the first floor would have mitigated many of the fire safety risks and freed up additional staff to concentrate on required improvements related to care. Both Ms Horgan and Mr Davies in their joint report agreed that the building, at the time Derwent Court closed, was not suitable for use.

### Evidence of reliance and causation

306 There was direct evidence of Mrs Joan Alexander and Ms Julie Alexander addressed to the issue of causation. In evidence-in-chief, Mrs Joan Alexander was asked what Jadwan would have done if its lawyers had advised that, if it did not apply to the Court urgently for an injunction or a stay, then it would lose its business. Mrs Alexander responded that Jadwan would have fought on, which she clarified to mean that Jadwan would have gone to court. Mrs Alexander was also asked what Jadwan would have done if its lawyers had also advised that in order to save the business, it needed to move a resident back into the nursing home before 30 September 1997. Mrs Alexander stated that Jadwan would have persuaded a resident to come back into the home, and she nominated a Mrs Jacobs as a person who wanted to come back to Derwent Court. Mrs Alexander also gave evidence that, had Jadwan retained its approval beyond 1 October 1997, and if in order to maintain its approval it had to move out of Derwent Court, then it would have done so.

307 Mrs Alexander was challenged in cross-examination by counsel for the fourth respondent in relation to this evidence. Mrs Alexander did not appear to dispute that the Commonwealth benefit together with a permissible private contribution for one resident would amount to about $30,000 per annum, and in order to keep the nursing home open, it would be necessary to have a minimum of two nursing staff on three shifts per day, 365 days per year, together with an extra two to four staff to cover weekend equivalent leave, annual leave, sick leave, and the like. Mrs Alexander accepted that somewhere between eight and ten staff would be required. Mrs Alexander also accepted that she had not calculated the cost of maintaining one resident at Derwent Court on an ongoing basis, and that she did not know that any other director of Jadwan had made such calculations. And Mrs Alexander accepted that when she gave her evidence that Jadwan would have sought the return of one resident, that she had not undertaken any sort of financial analysis, and said that she did not know whether any other director of Jadwan had done so. During the course of the cross-examination, senior counsel for Jadwan objected on the ground that the proposition that Jadwan advanced was that there needed to be one resident in a bed on 30 September 1997, and not for 12 months.

308 Ms Julie Alexander gave evidence-in-chief that if any of Jadwan’s lawyers had advised her that Jadwan needed urgently to apply for an injunction in the period July to August 1997, and that if it did not obtain an injunction to stop the revocation of approval it would lose the business forever, then Jadwan would have sought an injunction. Ms Alexander also stated that if she had been advised that Jadwan also needed to get a resident to move back into the nursing home and to have at least one resident in the nursing home on 30 September 1997, then she believed that Jadwan could get the residents back in, and stated that the staff wanted to come back as well. Ms Alexander stated that in those circumstances, Jadwan would have continued to operate the nursing home indefinitely, and if the old premises were unsuitable, it would have rebuilt on a greenfields site.

309 In cross-examination, Ms Alexander accepted that with only 15 or nine residents, under normal circumstances it was commercially unviable to operate the nursing home. And Ms Alexander accepted that unless the vast majority of residents had Commonwealth funding, Derwent Court was not an economic proposition. A number of assumptions were put to Ms Alexander in cross-examination from the standpoint of August 1997, including that from 1 October 1997 Derwent Court could not comply with the prescribed standards for a nursing home, that the existing premises could not be modified so as to achieve compliance, and that Jadwan faced making a decision to build a new nursing home. Ms Alexander accepted that, as at August 1997, Jadwan would not have committed the substantial funds required to build a new nursing home without knowing that it had its 51 bed licences, and that it would have to have had a guarantee from the Commonwealth that it would have its 51 bed licences before it made that decision.

## Summary of the primary judge’s findings

310 The primary judge’s findings may be summarised as follows –

(1) The directors of Jadwan had entrusted the responsibility for resident care at Derwent Court to an “old school” director of nursing, and there was considerable evidence that she was not in tune with, and was resistant to the need for change: [176]. Jadwan ran the nursing home in outdated facilities with its directors insufficiently aware of the pressure within the industry to improve care outcomes: [197].

(2) Until the director of nursing retired in May 1997, there had been no meaningful policy development in response to the first Standards Monitoring Team’s report dated 6 September 1996: [176].

(3) Jadwan made changes only when pressured to do so by the Commonwealth, and then only to the least degree required for compliance, and had been reluctant to spend money to upgrade Derwent Court: [177]. Examples of Jadwan’s reluctance to spend money included its failure to install a lift when offered Commonwealth funding in 1993 [178], its failure to install a sprinkler system, and its scrimping on staff training: [183]. As such, Derwent Court had taken few, if any, proactive steps to ensure that it would remain viable in circumstances where care standards would need to improve: [185].

(4) Jadwan had no knowledge of the proposed changes to the legislation, or of new demands for higher standards: [187].

(5) Prior to 1 October 1997, Mr Wicks did not become aware of the existence of either the *Aged Care Act* or the *Consequential Provisions Act*, and such legal research as he undertook did not lead him to discover their existence: [198], [200], [219], [347]-[348], [424], [457], [671].

(6) In relation to the liability of the first respondent, Rae & Partners, Jadwan did not initially retain Rae & Partners to provide Jadwan with general advice, but rather to provide a letterhead for Mr Alexander’s purposes to give the appearance to the Department that Jadwan had secured legal representation. Mr Wicks was asked to and agreed to be available and to undertake only such specific tasks as Jadwan might request of him: [256]-[258], [296]-[302]. Mr Wicks was not asked to give Jadwan legal advice about the prospects of it successfully challenging the sanctions determination: [272], [284], [289], [304]. As to Mr Wicks’s concession in cross-examination (see [95] above) that his note of 26 February 1997 appeared to record advice that he had given to Jadwan, the primary judge at [268]-[269] referred to that part of the note that recorded Mr Wicks as stating that it might be difficult to challenge any later decision to revoke the approval of Derwent Court unless Jadwan achieved compliance with fire safety standards as a statement of the obvious which, to the extent it was capable of being construed as legal advice, was self-evidently correct. The primary judge held at [270] that nothing in the note had anything to do with Mr Wicks giving advice about the sanctions determination.

(7) The primary judge held at [300] that –

The Court has been unable to identify any instance in which Mr Wicks added anything of legal consequence beyond his possession of the status of a legal practitioner. His editing of letters drafted by Mr Alexander and their prefacing with language such as “we act for Jadwan, which has sought our advice regarding its present dealings with the department” was pure illusion. He went to meetings as requested to foster that illusion. There is nothing in his notes to suggest he played any role of substance.

(8) By 15 July 1997, Jadwan had decided to cease operating Derwent Court, and intended, if possible, to sell its bed licences: [31], [330]-[343], [445]-[447]. This was a critical finding by the primary judge, and is the subject of challenge by Jadwan.

(9) On 20 July 1997, the Minister’s delegate gave notice of her intention to revoke the approval of Derwent Court as a nursing home: [345]. On 21 July 1997, Mr Alexander informed Mr Wicks of the notice: [346]. From the time Jadwan informed Mr Wicks that it had received the notice of intention to revoke Derwent Court’s approval as a nursing home, Mr Wicks’s instructions changed such that he was not merely to represent Jadwan in relation to specific tasks, but to represent Jadwan generally in relation to Derwent Court: [454]-[455].

(10) On 22 July 1997, the Department gave Jadwan 48 hours within which to sell its bed licences [354], but Jadwan did not succeed in selling them.

(11) Jadwan requested the Commonwealth to consider picking up the cost of redundancy payments to its staff: [353], and by 24 July 1997 the Commonwealth had agreed to meet 80% of the cost of redundancies: [361]. The Commonwealth’s agreement to meet the cost of redundancies came with an implicit price, namely that Jadwan would cooperate in the removal of patients to alternative accommodation, dismiss its staff, and cease its nursing home business: [557], [652]. The Commonwealth had offered Jadwan funds to meet the cost of redundancies in recognition that it had lost its chance to sell its bed licences: [664]. On 24 July 1997, Jadwan gave notice to all of Derwent Court’s staff: [372], [534]. Jadwan would not have acted in a way that required it to forego an offer by the Commonwealth to meet the cost of Derwent Court’s staff redundancies: [527], [571]. In particular, it would not have risked receipt of the funds by re-engaging staff before the funds had settled: [653]. It was implausible that Jadwan would have secured the agreement of the Commonwealth to meet the cost of redundancies except on the basis that Jadwan was not going to stand in the way of the transfer of residents: [537]. These findings were also critical, and are challenged by Jadwan.

(12) On 24 July 1997, Mr Wicks conferred with Mr Porter. After conferring with Mr Porter, Mr Wicks advised Mr Alexander that he should write to the Department asking that they hold off relocation of patients, and if that was not effective, the next way of preventing removal of the patients was to seek an injunction from the Federal Court, but that this was a high risk application: [368]-[370]. Mr Wicks’s advice to Jadwan on 24 July 1997 that an application for an injunction would be risky, or that it was a “high risk application” was not negligent: [645]-[649]. Similarly, Mr Porter’s advice on 24 July 1997 that seeking an injunction was a high risk application was not negligent: [714].

(13) On 25 July 1997, in a telephone call, Mr Alexander instructed Mr Wicks that an injunction was out of the question, and Mr Wicks advised Mr Alexander and Ms Julie Alexander that there was no harm in letting the residents go: [382], [384], [635]. The primary judge did not accept the evidence of Ms Alexander that Mr Wicks had advised Jadwan that it would lose Commonwealth funding if it sought an injunction, holding at [385] that there was no corroboration, contextual or otherwise, to support such a finding, and there was nothing to suggest that Mr Wicks ever held or expressed such a view.

(14) However, it was within the scope of a solicitor’s duty that he or she identify and advise having regard to enacted statute law of the Commonwealth: [465]. The primary judge found that the Acts of the Commonwealth Parliament would have been available for Mr Wicks at the Law Society library in Hobart [467], and that the library would have had a copy of the *Aged Care Act* and the *Consequential Provisions Act* available in its collection on or before 21 July 1997: [469].

(15) A reasonable solicitor would have checked whether the relevant statute law remained current or had been amended, and upon checking the *Consequential Provisions Act*, its potential relevance would have been identified: [501]-[503]. In consequence, a reasonable solicitor would have refrained from giving Jadwan unqualified advice that its interests would not be affected if it facilitated the relocation of its residents: [507].

(16) Yet, at this time, Jadwan had already decided to “get out” of the Derwent Court business, and its concern was to sell its bed licences: [636].

(17) With knowledge of the *Consequential Provisions Act*,competent advice would have alerted Jadwan to the fact that it not only needed to establish the invalidity of the decision to revoke approval, but also that Jadwan needed to retain at least one resident before the *Aged Care Act* came into force on 1 October 1997, and would have to do so at its own expense: [523].

(18) In relation to the proposed decision to revoke Jadwan’s approval, competent advice would have been that the delegate did not need to have reports of a validly constituted Standards Review Panel in order to make her decision to revoke approval and that therefore the grounds for challenging the proposed decision were doubtful: [520]. In relation to challenging the decision to revoke approval after that decision was made, competent advice would have been that any application challenging the decision would not be finally heard before 1 October 1997, that reliance on the reports of the Standards Review Panels on the premise that the panels were validly constituted would be an error of a non-jurisdictional nature, and that the judge hearing any application may not set aside the decision *ab initio*: [522].

(19) Competent advice would have been that because of the fire risk to Derwent Court’s aged and vulnerable residents, success in obtaining interlocutory injunctive relief could not be assured: [525].

(20) As to the prospect that an application might have been made in reliance on s 6 of the *ADJR Act* on the ground that the Minister’s delegate had engaged or proposed to engage in conduct for the purposes of making a decision, the primary judge was doubtful that Jadwan would have been entitled to relief under that provision: [478]. However, even if it could rely on the ground that the Minister’s delegate was proposing to rely upon the reports of the two Standards Review Panels, the Minister’s delegate was not required to have a report of a validly constituted Standards Review Panel as a condition of the exercise of the power to revoke, and it was open to the delegate to take account of the opinions of the members of the Standards Review Panels without giving them formal status, or the March report of the Standards Monitoring Team, and decide to revoke the approval on that basis: [487]-[488]. Commencing a proceeding would not have prevented the delegate from revoking Derwent Court’s approval: [479], [483]. Therefore, there was no breach of duty by Mr Wicks in failing to advise Jadwan that there were grounds to apply to the Court to restrain the delegate from making her decision: [491].

(21) However, even if Mr Wicks had, on 25 July 1997, given Jadwan the advice that a solicitor acting with requisite professional skill and care should have given, Jadwan would not have sought to prevent the transfer of residents from Derwent Court: [526], [559]. This was in a context whereby, at the time, Jadwan would have considered that the value of the 51 “bed licences” was $12,000 each, and under pressure of a “fire sale” may have been less: [567]. Further, Jadwan would not have pursued judicial review proceedings with the objective of continuing to operate Derwent Court and rebuilding on a greenfields site: [653].

(22) On both 28 and 29 July 1997, Mr Wicks telephoned Mr Porter and informed him that an application for an injunction would not be pursued: [387]-[389].

(23) On 29 July 1997, Mrs Joan Alexander met Mr Hogan. Mr Hogan’s retainer was confined to him doing what he could to help Jadwan obtain approval from the Minister to sell its bed licences at Derwent Court: [690]. Mr Hogan had been instructed on the basis that Derwent Court had to close and that all of its residents would be relocated: [692], [703]. When Mrs Alexander met Mr Hogan, he recommended that an injunction be sought: [395].

(24) On 30 July 1997, Mr Hogan also gave advice to Mr Wicks that Jadwan should seek an injunction to back the Department against the wall as a tactic for the purposes of securing Jadwan additional time to sell its bed licences: [693], [698]. As a result of this advice, on the afternoon of 30 July, Mr Wicks called Mr Porter and stated that Jadwan wished to make an application under the *ADJR Act*, and to seek a stay of the revocation decision: [407].

(25) The last resident left Derwent Court on 4 August 1997: [421]. Jadwan did not ever commit itself to relocating and rebuilding Derwent Court: [444]-[447], [551]. Jadwan had decided to “get out” of Derwent Court, and once notified of the delegate’s decision to revoke approval, its efforts were focussed on securing funding for redundancies, and persuading the Commonwealth to allow it to sell its bed licences: [539]. The Commonwealth, through Mr Dellar, had given Jadwan 48 hours to sell its bed licences, but Jadwan had failed to do so: [542]. By 1 August 1997, the Commonwealth had ruled out allowing Jadwan to sell its bed licences prior to revocation of the approval of Derwent Court: [543]. Jadwan would not have been willing to provide care to its residents beyond the date of revocation, 6 August 1997, without the availability to it of Commonwealth subsidies: [571].

(26) Until the Minister’s delegate made her decision on 6 August 1997 to revoke the approval for Derwent Court, it was not open to Jadwan to seek relief under the *ADJR Act* in respect of a “decision” within the meaning of s 5 of the *ADJR Act*, because until 6 August 1997, there was no reviewable decision, and therefore Mr Wicks had not been negligent in failing to advise Jadwan to pursue that course: [471]-[475].

(27) Jadwan had failed to prove its pleaded allegations that Mr Wicks had advised Jadwan to wait until it had been served with a notice of revocation of its approval before it commenced legal proceedings, and had advised Jadwan not to apply for an injunction to restrain the Minister from taking steps to remove residents from Derwent Court: [637]‑[640].

(28) As a result of a conversation with Mr Porter on 11 August 1997, Mr Wicks took no further steps to commence proceedings in the Federal Court under the *ADJR Act*: [438]. Mr Wicks had understood Mr Porter to advise that there was no need to seek an interlocutory stay of the revocation, and that if Jadwan was successful in the AAT, the decision would be quashed *ab initio*: [436]. However, the primary judge did not accept that Mr Porter had given this advice: [730]. Mr Wicks advised Jadwan of what he understood to be Mr Porter’s advice, and although both Ms Julie Alexander and Mr Alexander were surprised, Jadwan accepted the advice not to proceed with seeking an injunction: [441]. However, bringing judicial review proceedings as a “tactic” would not have caused the Commonwealth to extend its offer to permit Jadwan to sell its bed licences: [661]-[666].

(29) At [728], the primary judge accepted that there was no evidence to suggest that Mr Porter had identified the existence or consequences of the *Aged Care Act* or the *Consequential Provisions Act*, and accepted that if Mr Wicks’s file note expressed the true sense of what Mr Porter conveyed to him, that Mr Porter would have failed in his duty to exercise reasonable skill and care by not adverting to the potential consequences of those Acts.

(30) As to the prospect that Jadwan might have commenced proceedings after terminating the employment of its staff, and securing funding of redundancy payments from the Commonwealth, and after its residents had left, the consequence of the first sanctions determination in February 1997 under s 45E(2) of the *National Health Act* was that Jadwan would not have been entitled to any Commonwealth benefits in respect of a resident who returned to Derwent Court, because that person would be treated as a new resident for funding purposes: [574]-[583]. It was unrealistic that Jadwan could have secured an order before 1 October 1997 setting aside the February 1997 sanctions determination: [584]. Therefore, on this scenario, Jadwan would not have become an approved provider of nursing home services under the *Aged Care Act*:[583], [681].

(31) On the balance of probabilities, Jadwan would not have succeeded in obtaining an injunction and ultimately in setting aside the February 1997 sanctions determination: [590]. The reasons for this included: that the application for relief would have been out of time both under the *ADJR Act* and if Jadwan had applied for relief under s 75(v) of the *Constitution*[599]; that an extension of time would not have been granted [591]-[622]; that the balance of convenience did not favour the granting of interlocutory relief [626]-[627]; that an order that the sanctions determination was void *ab initio* would not have been made; and that any order setting it aside would not have been made before 1 October 1997: [628]-[630]. Unless Jadwan succeeded in obtaining an order setting aside the February 1997 sanctions determination with effect from a date prior to 1 October 1997, Jadwan would not have become an approved provider under the *Aged Care Act*: [648].

(32) The prospect that, after having obtained Commonwealth funding for redundancies, Jadwan would have recruited new staff and met the cost of operating Derwent Court for some time to secure the chance of operating at new premises that were to cost in the order of $3m was implausible: [588].

(33) As to the liability of the third respondent, Toomey Maning & Co, because Jadwan never committed to the course of relocating its business but had decided to “get out” of the business, no failure of Mr Wicks to advise Jadwan of the effect of the *Aged Care Act* and *Consequential Provisions Act* while employed after 12 September 1997 by Toomey Maning & Co was a cause of any loss to Jadwan: [673]-[677]. Further, to provide care for even a single resident required the recruitment of staff and attracted payroll costs for at least some period of time, and Jadwan would not have taken that course: [680].

(34) As to Mr Hogan’s advice, the primary judge held that before Jadwan consulted Mr Hogan, it had made the key decision to accept the Department’s offer to meet its liability for redundancy payments, and it had dismissed its staff: [699]. The primary judge held that Jadwan retained Mr Hogan to assist it, if possible, to sell the bed licences without pressure, and in an orderly manner: [692]. His Honour held that seeking an injunction would not have caused the Commonwealth to extend its original 48 hour window for Jadwan to sell its bed licences: [700]. Further, Mr Hogan was not responsible for Mr Wicks’s later decision to advise Jadwan not to proceed to seek an injunction: [701]. Therefore, the failure of Mr Hogan to give advice with respect to the existence and consequences of the enactment of the *Aged Care Act* and the *Consequential Provisions Act* did not cause Jadwan to suffer any loss of a chance to continue and ultimately to relocate its business: [704].

(35) As to the fifth respondent, and its liability for the loss of Jadwan’s chance to bring a proceeding against Mr Porter, even assuming that Mr Porter breached his duty as a barrister by failing to identify the existence and consequences of the *Aged Care Act* and the *Consequential Provisions Act,* such negligence did not cause Jadwan to lose a chance to continue to operate Derwent Court while it built a replacement facility on a greenfields site: [709]. Before Mr Porter was engaged, Jadwan had resolved to “get out”, and it had asked the Commonwealth to meet its redundancy obligations: [710]. Mr Porter’s advice on 24 July 1997 that seeking an injunction was a “high risk application” was not negligent: [714]. In relation to the application for an injunction that Mr Porter had been retained to prepare, Jadwan had not established that such an application would have resulted in the Minister giving Jadwan any further opportunity to sell its bed licences. As to the advice that Mr Wicks recorded Mr Porter giving to him on 11 August 1997, if Mr Porter gave advice that seeking an injunction was unnecessary, then that advice did not cause Jadwan to suffer any loss: [728]. However, in light of the contents of Mr Porter’s letter to Mr Wicks dated 19 August 1997 and referred to at [275] above, the primary judge was not prepared to find that Mr Porter gave the advice in the terms recorded in Mr Wicks’s note, and considered that it was an obvious inference from Mr Porter’s letter that Mr Wicks had misunderstood the advice: [730].

311 We shall return to some features of the primary judge’s reasons in greater detail when considering the grounds of appeal.

## The grounds of appeal

312 Jadwan, by its second further amended notice of appeal, raised 22 grounds which for the purpose of its submissions were grouped into challenges to the following nine findings of the primary judge –

(1) Jadwan had resolved to close the nursing home by 15 July 1997 and was concerned only to seek time from the Department to negotiate the sale of bed licences: *grounds 7 and 8*;

(2) having decided to close the nursing home, Jadwan’s intention from about 24 July 1997 was to seek agreement from the Department to pay for staff redundancies: *grounds 7, 8, 11 and 12*;

(3) Jadwan would not have succeeded in obtaining an injunction or other interlocutory relief to prevent the closure of the nursing home: *grounds 13 and 14*;

(4) Jadwan would not have applied for an injunction even if it had been advised of the impact of the new legislation: *grounds 15 and 16*;

(5) proceedings to seek to have lifted the financial sanctions imposed by a delegate of the Minister in February 1997 under s 45E(2) of the *National Health Act* would not have succeeded: *grounds 17, 18 and 19*;

(6) the retainer of Rae & Partners (as the first law firm engaged by Jadwan and as Mr Wicks’s employer) did not extend to giving legal advice on Jadwan’s rights under the *National Health Act* in respect of the financial sanctions: *grounds 1 and 2*;

(7) Mr Porter did not give advice not to seek an injunction: *grounds 3 and 4*;

(8) causation was not established, at least implicitly, by finding that Jadwan did not suffer any damage from the failure to give legal advice on the new legislation by reason of a finding that it did not have any intention to relocate the nursing home and had received value for the loss of its bed licences: *grounds 5, 6 and 20*;

(9) by way of summary, judgment should have been given arising out of negligence on the part of Messrs Wicks, Hogan and Porter in failing to advise of the consequences of allowing the nursing home to cease functioning prior to the commencement of the new legislation, and the antecedent failure of Rae & Partners (via Mr Wicks) in relation to the financial sanctions: *grounds 9, 10, 21 and 22*.

### Issue (1) – Jadwan’s decision to close the nursing home: grounds 7 and 8

#### Issue (1) - Jadwan’s submissions

313 Jadwan challenged the primary judge’s finding that by 15 July 1997, it had resolved to close Derwent Court and was concerned only to seek time from the Department to negotiate a sale of the bed licences. Jadwan also challenged the primary judge’s collateral finding at [341] that statements on behalf of Jadwan to the Department, and to the Tasmania Fire Service, that it was intending to relocate Derwent Court were a mere negotiating position that did not reflect Jadwan’s true intent. Jadwan submitted that the respondents had not at trial alleged that Jadwan had decided to get out of operating Derwent Court, and that the primary judge did not raise this case in the course of the trial. Jadwan accepted that the respondents had submitted that suggestions by Jadwan to the authorities that it intended to relocate were a “smokescreen” to make them think that it was addressing their concerns, but submitted this was a different point.

314 Jadwan submitted that the primary judge’s finding that it had decided to cease operating the nursing home underpinned the judge’s conclusion that the lawyers’ failure to advise Jadwan of the new legislation, namely the *Aged Care Act* and the *Consequential Provisions Act*, did not cause it to lose the nursing home business.

315 Jadwan challenged the primary judge’s findings on the ground that they were based largely upon an erroneous construction of Mr Wicks’s file note of 15 July 1997, to which we referred at [148] above. Jadwan relied on other evidence that it submitted should have led to a contrary finding, which included –

(1) the evidence of Ms Julie Alexander, who was present during the conversation with Mr Wicks on 15 July 1997, who said that the note, “*you have decided to get out*”, referred to getting out of the building and relocating to a greenfields site, and was not a reference to selling out of the nursing home;

(2) the evidence of Mr Wicks that in the period from July to September 1997, Jadwan had under active consideration three options, namely remaining in the old building, relocating and selling the licences, and that it never considered closing down and walking away (see [151] above);

(3) the absence of any reference in the contemporaneous notes of Mrs Joan Alexander in her work diary to any plan to bluff the Department in relation to Jadwan’s true intentions;

(4) the steps that Jadwan in fact took towards relocation of the nursing home, which included the investigation of alternative sites, obtaining costs estimates, making inquiries about the temporary relocation of upstairs residents during construction, and the fact that many of these steps were not disclosed to the Department as part of any “bluff”;

(5) the steps that Jadwan took in 1999 after succeeding initially in the Federal Court, namely obtaining another indication of scope of works, obtaining a quotation, and the purchase by Ms Julie Alexander of land for the purpose of building a new nursing home;

(6) the contents of a note that Mr Wicks made on 10 June 1997, to which we referred at [132] above, where Mr Alexander was noted as saying “*don’t want to lock in building though*”, which Mr Wicks said he understood was likely to be a reference to not wishing to lock into the existing old building, and which Jadwan submitted the primary judge had misinterpreted as being a reference to a new building;

(7) the contents of a file note made by Mr Wicks on 22 July 1997, to which we referred at [170] above, in which he wrote, “*On what basis has our intention to relocate not been accepted. !*”, and “*we need time to relocate – retrain etc*”, which Mr Wicks accepted in evidence reflected instructions from Jadwan; and

(8) the subsequent conduct of Jadwan in July and August 1997 in instructing its lawyers to make an application to set aside the revocation decision.

316 Jadwan also submitted that the primary judge did not consider the issue whether Jadwan had decided to “get out” of the nursing home on the correct premise, which was the likely impact of the new legislation at the time, including the transitional provisions in the *Consequential Provisions Act* to which we have referred, and to which attention should have been directed. Jadwan submitted that it would not have adopted the strategy attributed to it by the primary judge if it had been made aware of the likely effect of the new legislation on its approval and its bed licences for Derwent Court.

317 Moreover, Jadwan submitted that the idea that it had decided by 15 July 1997 to get out of the nursing home was not a case that was made at trial by the respondents. Jadwan pointed to paragraph 74(b) of the further amended defence of the first to third respondents, which alleged that between 24 and 25 July 1997, Jadwan had decided to cease operating the nursing home. A corresponding allegation was made by the fifth respondent in paragraph 80(b) of its defence. For her part, the fourth respondent alleged in paragraph 69A(a) of her defence that by the time Mr Hogan was engaged (which was on or about 28 July 1997), Jadwan had decided to cease operating Derwent Court as a nursing home. Jadwan submitted that a case that Jadwan had decided on 15 July 1997 to close the nursing home, and to negotiate for the sale of the licences, and to adopt a position with the Department about a proposed relocation that was not genuine, was not put to any witnesses, was not opened by any respondent, or closed, or raised by the primary judge during the course of the trial.

318 Jadwan relied on the oral evidence of Mr Wicks and Ms Julie Alexander, to which we referred at [144] and at [149] to [152], and submitted that the inference that the primary judge drew, that it had decided to get out of the nursing home by 15 July 1997, was in error. In summary, that was because –

(1) Mr Wicks had accepted in cross-examination that Jadwan had been considering all its options;

(2) Ms Alexander had stated in evidence that they had decided that they wanted to relocate;

(3) it was not put to Mrs Joan Alexander that Jadwan had decided by 15 July 1997 to sell; and

(4) the intention to rebuild and relocate was supported by other evidence, including –

(a) the inspection of potential greenfields sites, which was the subject of oral evidence from Mrs Joan Alexander, Ms Julie Alexander and Mr Wayne Alexander, and supported by contemporaneous notes of Mrs Alexander;

(b) the cost estimates that Mr Alexander obtained from Tasmanian Building Services, to which we referred at [102] above;

(c) the business plan for relocation dated 13 June 1997 submitted to Mr Jeff Knight of the Tasmania Fire Service, to which we referred at [137] above;

(d) the program of works which Jadwan obtained from Tasmanian Building Services dated 16 July 1997, to which we referred at [154] above;

(e) the letter dated 10 April 1997 from Mr Alexander to St John’s Park in New Town enquiring about the possible temporary relocation of 16 residents while a new home was built, to which we referred at [111] above;

(f) Mr Alexander’s visit to the Carruthers Wing at New Town on 21 April 1997, his subsequent letter on 5 May 1997, and the response of 30 May 1997, to which we referred at [111] above;

(g) Mr Wicks’s file note immediately following the notice of revocation, in which he wrote, “*on what basis has our intention to rebuild been not accepted. !*”, and “*We need time to relocate, retrain, etc*”, to which we referred to at [170]-[171] above;

(h) paragraph 45 of the draft affidavit of Ms Julie Alexander, to which we referred at [266] above; and

(i) the file note of Mr Wicks dated 26 August 1997, to which we referred at [279] above which recorded a conversation with Mr Alexander and which stated, “*You discuss reopening*”, and, “*…restitution of approvals – you want to get running again…*”.

(5) Jadwan submitted that most of the steps that it had undertaken towards relocation, such as the search for suitable land, the enquiries about suitable alternative accommodation for its residents, and the obtaining of cost estimates, were not matters that were conveyed by Jadwan to the Department, and that this did not sit with the theory that Jadwan was engaged in some negotiating ploy with the Department, or that the proposal to relocate was some sort of “smokescreen”. And when it was put to Ms Julie Alexander in cross-examination that Jadwan was engaged in creating a “smokescreen”, and that relocation never really had any serious prospect, she denied it.

(6) Jadwan acknowledged that no further steps were taken to arrange for the relocation of the residents, or the construction of a new home on a greenfields site before the revocation of the approval, but submitted that this feature of the evidence fell to be evaluated against the fact that Jadwan’s nursing home approval was in jeopardy, and under threat of being revoked.

(7) Jadwan also relied on the evidence that, following the determination of the Full Court appeal in December 1998, to which we referred at [292] above, in response to a request from Mr Alexander, on 1 April 1999, Aged Care Developments sent a fee structure and cost estimate to him for the construction of a new 51 bed nursing home (see [294] above), and on the evidence of Ms Julie Alexander, to which we referred at [296] above, that in July 1999, she purchased some land at Geilston Bay for the purpose of using it to build a new nursing home.

(8) Finally, Jadwan submitted that the finding that it had determined on 15 July 1997, before the notice of intention to revoke was given by the Department, to close Derwent Court was inconsistent with everything it subsequently did from that point onwards, including instructing lawyers to seek a stay of the revocation, and commencing two proceedings in the Court for the purpose of restoring its position as the holder of the approvals.

#### Issue (1) – respondents’ submissions

319 The respondents submitted that there was no error in the primary judge’s findings concerning Jadwan’s decision to “get out” of operating a nursing home at Derwent Court. The respondents relied on the primary judge’s finding at [673] that Jadwan had formed this intention before it received the notice of intention to revoke the approval dated 20 July 1997, and submitted that the finding was supported by a matrix of evidence, including –

(1) evidence in Mr Wicks’s file note of 7 February 1997 (see [72] above) that the possible sale of the bed licences was in contemplation at that time;

(2) Mr Wicks’s file note of 10 June 1997, which recorded discussion between him and Mr Alexander about the possible sale of beds (see [132]-[133] above);

(3) Mr Wicks’s file note of his conversation with Mr Alexander on 2 July 1997, to which we referred at [144] above, which recorded Mr Alexander as stating that he was “*more inclined to sell now and get out*”;

(4) Mrs Joan Alexander’s note of the same conversation that was recorded in her diary in which she wrote (inter alia), “*we would rather get out*” and “*selling beds”* (see [145] above); and

(5) Mr Wicks’s file note of 15 July 1997 in which he recorded, “*you have decided to get out*” (see [148] above).

320 The respondents submitted that this evidence fell to be evaluated against the broader context, including the reducing number of residents at Derwent Court, which was 46 at the time of Mr Wicks’s note of 15 July 1997. That note also recorded –

Worst scenario no residents top floor, two-thirds income drop, 35 residents home not viable.

321 The respondents submitted that, by this statement, Mr Alexander had represented that Derwent Court would not be viable with only 35 residents in the home. The broader context also included the difficulties that Jadwan was experiencing with the Department that are evident from the notes of the discussions with Mr Wicks on 2 and 15 July 1997. The respondents submitted that the idea that some residents might be relocated temporarily was never seriously considered as an option, and that it was not a commercial option for Jadwan.

322 As to Jadwan’s stated proposal to build a new nursing home on a greenfields site, the respondents submitted that the evidence about attempts to locate suitable land did not really amount to much. In the report of the second Standards Review Panel dated 26 May 1997, the following was recorded –

Mr Alexander tabled a vision statement and strategic plan, recently compiled by him, other Directors and Denise Callahan. He stated his intention to rebuild the nursing home in the next 2-3 years, but anticipated difficulty finding the two hectares of land he would need.

323 The respondents also submitted that there was no error in the primary judge’s understanding at [447] that the reference in Mr Wicks’s note of 10 June 1997 to “*don’t want to lock into building though*” was a reference to a new building, and not the existing building (see [132]-[134] above). The respondents submitted that this accorded with Mr Wicks’s evidence-in-chief, and his different answer in cross-examination was an example of Mr Wicks giving a spontaneous, unthinking response. The respondents also relied on the context of the reference, which was to the business plan that had been requested (see [132] above).

324 The respondents disputed that the Tasmania Fire Service was satisfied with the progress that Jadwan had made in addressing fire safety issues, and relied on Mr Wicks’s note of 2 July 1997, which recorded that the Fire Service had “*gone sour*” on a downstairs fire door, that it was “*unhappy with 3 year timetable*” (which was a reference to the timeline in the proposal to relocate in Jadwan’s business plan in its letter of 13 June 1997), and that it wanted a package between the Commonwealth and it as to requirements. The respondents submitted that there was no evidence that Mr Jeff Knight of the Tasmania Fire Service, with whom Mr Alexander had been dealing, had any involvement in the internal memorandum of 17 July 1997 on which Jadwan had relied.

325 The respondents submitted that by the time the notice of intention to revoke the approval was given, Jadwan was not going to commit to litigation in circumstances where it had decided to close the nursing home. This was consistent with Mr Wicks’s note of what Mr Alexander told him on 21 July 1997, “*There’s so much against you – you believe any appeal may not be worthwhile*” (see [164] above).

326 As to Mr Wicks’s acceptance in cross-examination (see [151] above) that in the period from July to September 1997, Jadwan had actively considered three options, the respondents emphasised that what Mr Wicks ultimately agreed to was a proposition that there was “*never talk or suggestion that Jadwan would simply give up and walk away without trying to secure something for the asset that it had*”.

327 In response to Jadwan’s submission that the case that Jadwan had decided to “get out” of Derwent Court by 15 July 1997 had not been run at trial, the respondents submitted that the real import of the primary judge’s findings was that Jadwan had formed that intention by the time it received the notice of intention to revoke the approval dated 20 July 1997, as indicated by [529], [538], and [673] of the primary judge’s reasons, where his Honour found –

529. That Jadwan had a settled resolve to “get out” is confirmed by Jadwan’s conduct in the immediate aftermath of it having been notified of Ms Halton’s notice of intention to revoke Derwent Court’s approval as a nursing home. Without waiting for any legal advice Jadwan had called on Mr Dellar to tell him that having to meet the cost of staff redundancies would break the company.

…

538. Notwithstanding Jadwan’s surviving directors’ contrary present recall, the evidence I have accepted establishes that before Jadwan had received Ms Halton’s notice of intention to revoke Derwent Court’s approval as a nursing home Jadwan had decided to “get out”.

…

673. The Court has given its reasons for concluding that Jadwan had never committed itself to that course. It has given reasons for concluding that even before Jadwan had received notice of Ms Halton’s intention to revoke Derwent Court’s approval as a nursing home, Jadwan had decided to “get out” of operating a nursing home at those premises.

328 The first to third respondents submitted that such a case was within the terms of paragraph 74 of their defence, albeit that they pleaded that the decision to cease operating the nursing home was made between 24 and 25 July 1997. The first to third respondents also relied upon the case which they opened at trial, which included reference to the file notes of Mr Wicks of 2 and 15 July 1997 and the reference in the latter file note to “*You have decided to get out*”, and to a submission that was made that the reference to “*You to stress you will be relocating*” referred to how the circumstances were to be explained to others. And they relied on paragraph 69A of the amended defence of the fourth respondent, which had alleged that by the time Mr Hogan had been engaged (which was on 28 July 1997), Jadwan had decided to cease operating Derwent Court as a nursing home.

329 In summary, the first to third respondents submitted that by 15 July 1997 at the latest, Jadwan had reached the position where it was going to get out of the business, and this involved selling the bed licences. This was brought about as a result of the difficulties that Jadwan was having with the Department, and the diminishing viability of the business as a result of the reduction in the number of residents, particularly if there were to be no residents on the first floor and therefore only 35 residents remaining. In addition, as to a proposed relocation, the evidence was that the Tasmania Fire Service was not satisfied with Jadwan’s three year timeline for relocation during which time it proposed the home would continue to operate at Derwent Court. And the respondents submitted that there was a real question as to whether Jadwan could find the land, which was reflected in Mr Alexander’s comment to the second Standards Review Panel, to which we referred at [322] above. Finally, and by way of summary, the respondents relied on Jadwan’s failure to commit to the significant items of expenditure involved in the installation of a lift and a fire sprinkler system.

330 The fourth respondent submitted by reference to the terms of Jadwan’s letter of instructions to Mr Hogan dated 28 July 1997 (see [216] above), and the surrounding circumstances, including that residents were being moved out of Derwent Court and that staff had been given notice, that by the time Mr Hogan had been retained, Jadwan had decided to sell its bed licences. The fourth respondent submitted that from these circumstances, it was to be inferred that Jadwan accepted that Derwent Court had to close, and submitted that Mr Hogan’s retainer was confined to negotiating with the Department to secure more time within which Jadwan could attempt to sell its bed licences, which was supported by the surrounding facts, including that Mr Wicks and Mr Porter were generally retained. In other words, Mr Hogan was only asked to facilitate the particular objectives set out in the letter of instructions. The fourth respondent emphasised that Mr Hogan was not instructed to give advice in relation to the sanctions determination, and was not instructed to give advice in relation to the potential ongoing operation of Derwent Court, because he was instructed on the premise that Jadwan had decided that Derwent Court had to close. The fourth respondent submitted that the penultimate paragraph of Mr Hogan’s letter to the Department, to which we referred at [233] above, confirmed that Mr Hogan’s instructions were that Derwent Court would cease to operate. The fourth respondent relied on the primary judge’s findings at [692] and [703] and submitted that they were not the subject of challenge by any ground of appeal –

692 I am satisfied that Mr Hogan’s instructions were that Jadwan did not dispute Derwent Court had to close and that all of its residents would be relocated. Jadwan was not seeking Mr Hogan’s advice as to how to prevent that occurring, or how Derwent Court might later relocate. Jadwan was retaining Mr Hogan to assist it, if possible, to sell Derwent Court’s bed licences without pressure and in an orderly manner.

…

703 I reject it was within Mr Hogan’s retainer or any perambulatory duty associated with his retainer to have provided advice as to how Derwent Court might continue to operate. Mr Hogan had been given express instructions that Jadwan accepted Derwent Court would have to close. He had been told that Jadwan had given notice to its staff at Derwent Court and the residents were leaving.

331 The fourth respondent also submitted that at the time Jadwan consulted Mr Hogan, it had already decided not to seek an injunction, and relied on the evidence of Ms Julie Alexander to this effect, to which we referred at [219] above. Relying on *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at [309] (Malcolm A‑JA), [364] (McPherson A‑JA), and [678] (Ormiston A‑JA), the fourth respondent submitted that there was no positive duty on Mr Hogan to give advice on matters that were not directly within the ambit of his retainer. Further, the fourth respondent submitted that the implications of the *Aged Care Act* and the *Consequential Provisions Act*, which were not proclaimed until 3 September 1997,were novel, complex, and would have been time consuming to work out, and work of that nature was not incidental to the limited scope of Mr Hogan’s retainer.

332 The fourth respondent submitted that Mr Hogan was instructed to liaise with Mr Wicks in relation to the question whether Jadwan should seek an injunction, which he did, and after that time, Jadwan had no further communications with, and did not give any further instructions to, Mr Hogan. The fourth respondent submitted that Mr Hogan’s involvement ceased on the basis that, through Mr Wicks, Jadwan was acting on his advice to seek an injunction.

333 The fourth respondent further submitted, more generally, that in evaluating the primary judge’s findings in relation to Jadwan’s intentions, and what it likely would have done, appropriate weight should be given to the advantages which the primary judge enjoyed, and the subtle influences of having seen two directors of Jadwan give evidence and the better understanding of the evidence that the primary judge enjoyed as a result of undertaking a view of the Derwent Court premises.

### Issue (2) – Jadwan’s intention to seek agreement from the Department to pay for staff redundancies: grounds 7, 8, 11 and 12

#### Issue (2) - Jadwan’s submissions

334 Jadwan submitted that the primary judge erred in finding that Jadwan’s decision to accept Commonwealth assistance in relation to redundancy payments supported the finding that Jadwan had decided that Derwent Court had to close, and that Jadwan must have indicated to the Commonwealth that it was not going to stand in the way of the transfer of its residents. These findings were the subject of paragraphs [35]-[37], [349]-[361], and [527]-[571] of the primary judge’s reasons.

335 The primary judge found at [539] that once Jadwan was notified of the delegate’s intention to revoke the approval, Jadwan’s objectives narrowed to doing what it could to avoid liability for staff redundancies, and to persuade the Commonwealth to allow it to sell the bed licences. Critically, the primary judge held at [568]-[569] that had Jadwan received the advice that it alleged that it should have, it would not have acted differently by forfeiting the certainty of the Commonwealth funding of redundancy payments in exchange for enhancing its chances of selling the bed licences.

336 Jadwan challenged the primary judge’s findings at [557] and [652]-[653] that the Commonwealth’s undertaking to meet the cost of redundancies came with an implicit price, namely that Jadwan would terminate the employment of the staff, and cease the nursing home business at Derwent Court. Jadwan also challenged the finding at [537] that it was implausible that Jadwan could have secured the Commonwealth’s agreement to fund the redundancies except on the basis that Jadwan would not stand in the way of the transfer of its residents. Jadwan relied on the following –

(1) The existence of more likely explanations for the Commonwealth’s agreement to fund the redundancy payments, namely political considerations and the desire to avoid opprobrium as a consequence of the decision to revoke approval for the nursing home.

(2) The absence of any testamentary evidence to support the findings, where there was a failure by the respondents at trial to call any witnesses who had knowledge of any of these matters, such as Mr Dellar, Mr Hargrave, Ms Thorpe, or other persons at the Department with whom Mr Alexander communicated in circumstances where Mr Alexander had passed away, and could not give evidence on the topic.

(3) The terms of the letter from Mr Hargrave of the Department dated 1 August 1997, to which we have referred at [248] above, which Jadwan submitted are inconsistent with the primary judge’s finding that there was any agreement in place under which the Department agreed to fund the redundancy payments to secure Jadwan’s agreement to close the nursing home.

(4) The terms of Mr Wicks’s file note of 6 August 1997, to which we referred at [263] above, which recorded, “*problem with Dept. over redundancies … Dept are dragging their heels*”, was inconsistent with the existence of the agreement that was found to have been made.

(5) The terms of the letter from Mr Hargrave of the Department dated 28 August 1997, to which we referred at [280] above, were also inconsistent with the existence of such an agreement.

(6) The unlikelihood that in circumstances where Jadwan was by letters from its solicitors dated 23 and 24 July 1997 threatening legal action (see [182]-[189] above), and where the Department was represented by the Australian Government Solicitor, that an undocumented agreement of the type found, involving waiver of rights by Jadwan, and an agreement of the Commonwealth to pay hundreds of thousands of dollars, would have been made.

(7) When it was put to Ms Julie Alexander in cross-examination that it was important to get redundancy funding from the Commonwealth locked in before Jadwan took the Commonwealth to Court because of the risk that the funding would not come, Ms Alexander responded, “*that sounds like rubbish to me*”.

(8) The fact that an advance payment of $250,000 was proposed in late August 1997, to which we referred at [280] above, well after the last resident had left, and while there was still time to challenge the revocation decision, was not consistent with the type of informal agreement found by the primary judge.

(9) Jadwan submitted that the primary judge was in error at [564] in equating the value of the assistance for the redundancy payments with the value of the bed licences, and relying upon that consideration to support the finding of the agreement with the Commonwealth.

(10) In referring to the equivalence of the value of the redundancy payments and the value of the bed licences, the primary judge at [564], referred to the file note of Mr Wicks of a conversation with Ms Julie Alexander on 6 August 1997, to which we referred at [263] above, which contained the words, “*redundancy bill will be over half a million dollars – which could be value of the bed licences – one will cancel out the other. (!)*”. Jadwan submitted that the note of Mr Wicks referred to above did not support the relevant finding because Mr Wicks gave no evidence about the note, and received no instructions from Jadwan about redundancies, and when Ms Julie Alexander was asked about the note, she gave evidence that she had little to do with redundancies, which were handled by Mr Alexander;

(11) Jadwan challenged the suggestion that there was in fact an equivalence between the value of the assistance for the redundancy payments and the value of the bed licences, and referred (*inter alia*) to –

(a) Mr Hargrave’s estimate in his letter of 28 August 1997 (see [280] above) that the cost of redundancies was estimated at $349,634;

(b) the evidence that Mr Alexander told Mr Wicks that Melbourne beds were $18,000 to $25,000, and were $12,000 in Hobart (see [134] above);

(c) the evidence of an expert valuer, Mr Brown, who was engaged by the fourth respondent, and who was of the opinion that *in situ* the licences were valued at $27,500 each, and perhaps $30,000 or more if they were separated; and

(d) the contemporaneous evidence of interest in purchasing the licences, and therefore the existence of demand in the market.

(12) Jadwan also relied on the evidence that the payment of redundancies would not in fact have broken Jadwan, and that it had over $600,000 in cash reserves at the relevant time.

(13) Jadwan further submitted that, had it been given advice to apply immediately to seek an injunction to prevent closure of the nursing home, then no question of redundancies would have arisen, and relied on the passage in the letters of termination dated 24 July 1997, to which we referred at [195] above, in which Jadwan stated, “*Every effort is being made to reverse the situation and to keep Derwent Court open*”.

(14) Finally, Jadwan relied on the absence of any evidence that the Commonwealth had relied upon any sort of implicit agreement in response to Jadwan’s claims under the *ADJR Act*.

337 Jadwan also submitted that no respondent made a case at trial that Jadwan had decided to accept the Commonwealth assistance for redundancy payments as a form of compensation for the closure of the nursing home. Jadwan pointed to paragraph 74(d) of the further amended defence of the first to third respondents which went no further than to allege that between 24 and 25 July 1997, Jadwan was negotiating redundancy payments for staff. There was a corresponding plea by the fourth respondent in paragraph 69A(c) of her amended defence, and by the fifth respondent at paragraph 80(d) of its defence. Jadwan submitted that none of the respondents pleaded the kind of tacit agreement with the Commonwealth that was the subject of the primary judge’s findings, that nothing was put to the relevant Jadwan witnesses, and that the respondents did not make that allegation during the course of their openings. Jadwan submitted that the only place in the trial where the issue was raised was in the course of exchanges between the primary judge and senior counsel for the fourth respondent, and even then only in a fleeting way during closing submissions in the context of a discussion about the market value of the bed licences. Jadwan submitted that the point was only floated by the primary judge, was not overwhelmingly received by senior counsel for the fourth respondent, was not put to senior counsel for Jadwan, and was not the subject of any amendment to the pleadings. Furthermore, Jadwan submitted that its principal case was that Jadwan should have been in the position where it sought interlocutory relief from the Court by 23, 24, or 25 July 1997, and if it had been successful, the question of redundancies would not have arisen.

#### Issue (2) – respondents’ submissions

338 The respondents submitted that the primary judge’s finding that the funding of redundancies by the Commonwealth came with an implicit price, namely the dismissal of the staff and the cessation of the nursing home business, was not a finding as to a legally enforceable agreement, but simply a finding as to what the facts were at the time. To put it another way, the occasion for the payment of redundancies was the closure of the business and the dismissal of all the staff. This was to be understood in the surrounding context of the determination of the Commonwealth to see Derwent Court closed, and its residents transferred to other homes. The respondents submitted that part of the context was that once Jadwan failed to sell its licences within the 48 hour window period which Mr Dellar had given to Mr Alexander, the Department would no longer approve a transfer of the licences. However, the funding of redundancies was not compensation for the bed licences. The respondents submitted that Mr Wicks’s file note of 24 July 1997 (see [188] above) supported an inference that Mr Alexander gave notice to the staff on 24 July 1997, only after obtaining the agreement of the Commonwealth to fund 80% of the cost of redundancy payments. The respondents submitted that the significance of these circumstances is that Jadwan was not in a strong negotiating position, and it could not risk the Commonwealth not assisting with the redundancy payments.

339 The respondents submitted that in evaluating the significance of the value of the bed licences, the correct inquiry was to be directed to what Jadwan perceived the value of the licences to be at the relevant time in 1997, and the evidence of that was in Mr Wicks’s notes of 7 February and 10 June 1997, which supported a finding that Mr Alexander thought that the value was $12,000 per bed, which accorded with the primary judge’s finding at [567]. The respondents relied on Mr Wicks’s note of 6 August 1997, when Mr Wicks took instructions from Ms Julie Alexander for the purposes of drafting an affidavit, where he wrote –

- redundancy bill will be over half a million dollars – which could be value of the bed licences – one will cancel out the other. (!)

340 The respondents submitted that Ms Alexander was operating on the basis that the bed licences had a value similar to Mr Alexander’s understanding. A figure of $500,000 for redundancies appeared in three versions of a draft affidavit of Ms Alexander prepared by Mr Wicks in contemplation of proceedings under the *ADJR Act*, and a figure of $400,000 was recorded in one of Mr Wicks’s notes of a conversation with Mr Alexander on 22 July 1997. The value of the bed licences was relevant to the primary judge’s findings at [562]-[564], which were –

562 Had the value of Derwent Court’s bed licences significantly exceeded the cost of Derwent Court’s staff redundancies it might be plausible to suggest that had Jadwan been competently advised it would have been prepared to take the risk of declining the Commonwealth’s offer in order to put pressure on the Department to reconsider its (passed) deadline of 48 hours to sell them.

563 But that was not the case.

564 The total Jadwan would have expected to get for the sale of Derwent Court’s bed licences if it had been permitted to sell them was no more than roughly equivalent to the over half a million dollars it was liable for with respect to redundancy payments.

341 As to various statements in the documentary evidence about the burden that redundancies would place upon Jadwan, the respondents relied on the balance sheet of the trust for the year ended 30 June 1997 which, while showing a substantial cash balance of $836,881, recorded substantial current liabilities in the sum of $1,095,495 in the beneficiary current account, and recorded the net asset position as $100, with no provision for liability for the redundancy payments.

### Issue (3) – Jadwan would not have succeeded in obtaining an injunction or other interlocutory relief to prevent the closure of the nursing home: grounds 13 and 14

#### Issue (3) - Jadwan’s submissions

342 Jadwan’s case at trial was that an application by it for injunctions to preclude the operation of the decision to revoke the approval of Derwent Court would have been successful. That case was pleaded in paragraph 68 of Jadwan’s second further amended statement of claim, and was rejected by the primary judge. The primary judge also held at [490] that, had they been commenced, proceedings seeking an injunction would not have prevented Ms Halton of the Department making an effective decision to revoke the approval of Derwent Court, because Ms Halton would have been advised before making her final decision that she did not need to rely on the report of a Standards Review Panel in order to revoke the approval of Derwent Court as a nursing home. Jadwan submitted that there were four elements to the primary judge’s reasoning. *First,* that Jadwan could not have applied for any interlocutory relief based upon s 5 of the *ADJR Act* prior to Ms Halton’s revocation decision on 6 August 1997: see [473] of the primary judge’s reasons. *Second*, it was doubtful that, prior to receipt of the decision and the reasons on 6 August 1997, Jadwan could have made a successful application on the ground that Ms Halton proposed to engage in conduct that would engage s 6 of the *ADJR Act* on the ground that she proposed impermissibly to give weight to the reports of the Standards Review Panels: see [478], [482] and [484] of the primary judge’s reasons. *Third*, if Jadwan had alleged that Ms Halton’s proposed conduct was unlawful because she proposed to take account of the reports of the Standards Review Panels in making her decision (as the Full Court ultimately held she need not have, but did), then this would only have alerted the Department to the error, which could then be avoided and a lawful decision made without reliance on the reports: see [479], [484]-[492], and [520] of the primary judge’s reasons. This finding reflected the reasoning of the Full Court in *Jadwan No 2*. *Fourth,* the primary judge relied upon the fire risk at Derwent Court as militating against interlocutory relief.

343 Jadwan submitted that the errors in the primary judge’s reasons were as follows –

(1) the primary judge’s reasons assumed incorrectly that the sole basis for seeking relief that was advanced on behalf of Jadwan at trial was under the *ADJR Act*, whereas Jadwan pleaded and ran its case on the basis that relief was also available under s 39B of the *Judiciary Act* and s 23 of the *Federal Court of Australia Act*, that had been pleaded, opened, and closed by Jadwan, which the primary judge did not consider;

(2) the primary judge erroneously assumed that Jadwan’s case required it to show that it would have been successful in setting aside the financial sanctions determination from a date prior to 1 October 1997 (see [648] of the primary judge’s reasons);

(3) the notice of intention to revoke the approval of Derwent Court dated 20 July 1997, to which we referred at [160] above, was accompanied by a statement of reasons which disclosed the erroneous intention to rely upon the reports of the Standards Review panels, and therefore the primary judge was in error at [482] in finding that until Jadwan received the revocation decision on 6 August 1997, it would have considerable difficulty in establishing that Ms Halton proposed to rely upon the Standards Review Panel reports;

(4) following service of the notice of intention to revoke the approval, the Department notified residents that Derwent Court would close, and arranged for the relocation of all the residents before 6 August 1997, which rendered it arguable that the Commonwealth proceeded on the basis that its decision was final, thereby arguably making that decision amenable to the Court’s powers under s 5 of the *ADJR Act*;

(5) the prospects of obtaining interlocutory relief were good, and the fact that the exercise of the power to revoke approval was ultimately held to be unlawful was a powerful indication that a triable issue would have been established;

(6) the assumption that the Department would have realised that it could make the decision lawfully without reference to the reports of the Standards Review Panels was ambitious, was not the subject of evidence from any witness, and would not have emerged in the rushed circumstances of an application for interlocutory relief in July or August 1997;

(7) even if an argument were made on an application for interlocutory relief in July or August 1997 that the delegate could revoke the approval without reference to the reports of the Standards Review Panels, there was enough material that pointed to various irregularities to establish a triable issue about the lawfulness of the proposed revocation;

(8) on the question of balance of convenience, the issues were overwhelmingly in Jadwan’s favour, and the most important factor was the impact of the new legislation on Jadwan’s position should it not have extant approval and a resident patient on the day before the commencement date of the *Aged Care Act*; and

(9) in relation to any concerns about care and fire risk, there was evidence available from medical practitioners and relatives about the quality of care, and the fire risk could have been addressed by temporarily relocating the upstairs residents.

344 Jadwan made a number of submissions by way of challenge to the primary judge’s finding at [487]-[490] that, if proceedings had been commenced by Jadwan, Ms Halton would have been advised that she could revoke approval without a report of a Standards Review Panel, thereby being able to “mend her hand”. Jadwan submitted that in the circumstances of an urgent application for interlocutory relief, it was not to be supposed that the point would become so apparent that it would defeat an application for an interlocutory injunction in July or August of 1997. Jadwan relied on the facts that the reasons of Heerey J in *Jadwan No 1* made no reference to the point, there was no evidence that the point was argued before Heerey J, and that the point arose only on the appeal to the Full Court, which was argued in November 1998. Indeed, the reasons of Heerey J proceeded on the premise that the delegate was entitled to take account of a Panel report, but that there was error because the Panel was invalidly constituted. Jadwan submitted that no witness from the Commonwealth had been called to support a finding that the point had been conceived and would have been deployed in 1997, in circumstances where the evidence suggested it was not argued before Heerey J in 1998. Jadwan submitted that a fresh revocation decision would amount to a *novus actus interveniens*, on which the respondents bore the onus of proof. Further, Jadwan relied on the reasons of Mr Griew dated 13 October 1997, who conducted the administrative review of the revocation decision under s 105AAB of the *National Health Act*, to which we referred at [284] above. The significance of those reasons, Jadwan submitted, was that the Commonwealth perpetuated its error by relying upon the reports of the invalidly constituted Standards Review Panels, and that this militated against the finding that at any point prior to 1 October 1997, the Commonwealth would have been alert to the idea that it could revoke the approval without reliance on those reports. Additionally, Jadwan submitted that in any event, it would have been difficult in the context of an application for interlocutory relief for the Commonwealth to “mend its hand” simply by omitting reference to the impugned reports, but at the same time acting upon, or adopting the conclusions of the Panels recorded in those reports.

345 Jadwan further submitted that the primary judge’s reasons proceeded on the premise that the only arguable ground on which Jadwan could have challenged the decision to revoke the approval was the invalidity of the report of the second Standards Review Panel, when this was not so. Jadwan relied on the draft grounds of review that had been prepared by Mr Porter and Mr Wicks, but not acted upon. Those grounds included an allegation that Jadwan had been denied natural justice, and Jadwan submitted that, competently represented, Jadwan would have been able to persuade a judge of the Court that there were triable issues.

346 As to the balance of convenience, Jadwan submitted that competently represented, Jadwan would have mounted a challenge to the reports of the Standards Review Panels by relying on the ostensible bias or conflict of interest of two members of the first Panel, the irregularities in the composition of the second Panel, and the fact that the second Panel was not truly independent as Ms Halton represented it would be (see [105] and [122] above). Jadwan submitted that, competently represented, it would also have challenged the accuracy and fairness of the Panels’ findings. Amongst other things, Jadwan submitted that it had available to it evidence from Dr Timmins, who visited Derwent Court regularly and who could have attested in a favourable way to the conditions at Derwent Court, and to the potential harm to dementia patients should unnecessary changes be made to their environment. Prior to the closure of Derwent Court, Dr Timmins had up to 20 patients who were resident there, and he visited the home weekly. Dr Timmins gave evidence that his impression was that the standard of nursing care at Derwent Court was excellent, and that he could not recall a single major problem that he had with any of the nurses not providing care. Dr Timmins stated that patients with dementia do not tolerate change, that many of his patients would not have understood the change, and that at the time he was upset that the closure of Derwent Court was going to affect them in some adverse way. Dr Timmins was taken to a letter to the editor of the Hobart Mercury which was published on 25 July 1997 which he wrote and to which 18 other medical practitioners put their names. The medical practitioners stated in the letter –

…

Collectively, we have had scores of years attending to the medical needs of residents at Derwent Court Nursing Home and consider ourselves well qualified to comment on the nursing attention given. It is not just formal care, it is overwhelmingly generous and indeed loving care. The nurses and aides work in the most difficult of circumstances, as those looking after the frail and severely demented would well know, and do so with humour, willingness and respectful professionalism. That 65 jobs are in jeopardy and the lives of 46 frail residents are to be disrupted should not in any way be seen to reflect the excellent standards of nursing care that have been maintained over many years.

The inference that nursing care has been inadequate or unprofessional should be refuted absolutely.

347 Jadwan submitted that opinions to this effect were available to Jadwan in July 1997 on the question of balance of convenience and to rebut the assessments in the two impugned reports of the Standards Review Panels.

348 Additionally, Jadwan submitted that evidence from relatives of residents of Derwent Court was available on the question of balance of convenience. At trial, evidence was given by Mr Weston, whose mother had been a resident at Derwent Court immediately before its closure. Mr Weston described the level of care that his mother had required, stated that his mother was happy at Derwent Court, that she did not complain about the care that she was given, that she did not want to leave Derwent Court, and that he was happy with the care that his mother was given. Evidence was also given by Mr Measham, who was a retired Baptist minister, who visited his mother at Derwent Court at least three times per week. Mr Measham described the environment in which his mother lived at Derwent Court, and stated that he had no reason to doubt her comfort, that there was a sense of care there, that his mother had not made any complaints to him while she was at Derwent Court, and that when the closure was announced, he did not want his mother moved.

349 At the trial, Jadwan also adduced evidence from a retired officer of the Tasmanian Department of Health and Community Services, Mr Manson. Mr Manson stated that he was directly involved in the regulation of Derwent Court, that he had visited the home approximately 25 times, that he was very familiar with the home, and that the care provided by Derwent Court matched other nursing homes generally quite well. Mr Manson had been the author of the report to which we referred at [49] to [51] above.

350 As to fire safety, Jadwan relied on the contents of the memorandum to the Chief Fire Officer of the Tasmania Fire Service dated 17 July 1997, to which we referred at [156]-[159] above, which proposed a press release that stated that the Fire Service and the management of Derwent Court had worked closely to improve the level of fire safety in the building, that all requirements had been addressed, and that many recommendations had been, or were in the process of being adopted. Jadwan submitted that the contents of the memorandum reflected the evidence that was available if evidence had been sought from the Fire Service, and in any event, components of the information in the memorandum concerning the steps taken to improve the level of fire safety were within the knowledge of Jadwan.

351 Finally, on the question of balance of convenience, Jadwan submitted that if it had not obtained interlocutory relief that enjoined the revocation of approval, then final relief would not have been available, because of the effect of s 7(1)(a) of the *Consequential Provisions Act*, to which we referred at [34] and [297]-[299] above.

#### Issue (3) – respondents’ submissions

352 The respondents accepted that the potential relief that was available to Jadwan on an interlocutory basis was not confined to the *ADJR Act*, and at least the fifth respondent accepted that Jadwan could have established a triable issue. The respondents also accepted that Jadwan did not need to demonstrate that it would succeed in having the sanctions determination set aside effective from a date prior to 1 October 1997. However, the respondents submitted that the balance of convenience weighed heavily against granting any relief in relation to the revocation decision. The respondents pointed to the evidence of the history of non-compliance that was to be found in the several reports that were available to the Commonwealth from December 1988. The respondents identified the fact that the Chair of the second Panel, Dr Flett, had specialist qualifications in geriatric medicine. The respondents emphasised that the reports that were available to the Commonwealth measured the performance of Derwent Court against required standards, whereas the evidence to which Jadwan had pointed, such as that of Dr Timmins, or of relatives of residents, did not.

353 The respondents submitted that on the question of the balance of convenience, the commercial interest of Jadwan in engaging the transitional provisions of the *Consequential Provisions Act* would not have carried much weight when balanced against the welfare, health, and safety of elderly dementia patients housed in what was, on the material available to the Commonwealth, a sub-standard nursing home with a continuing fire risk in respect of which Jadwan had been unwilling to expend money. The three main items on which the respondents relied were: (1) the failure of Jadwan to install a sprinkler system; (2) the failure to install a lift; and (3) the failure to install separation doors to compartmentalise smoke and fire.

354 The fourth respondent relied on other matters, including that the effect of granting an injunction would be to increase the number of Commonwealth funded places, with a consequential financial burden on the Commonwealth. Alternatively, the fourth respondent submitted that only a small number of places were capable of undertaking the transition to the *Aged Care Act* (see [389] below), and this favoured refusal of interlocutory relief. The fourth respondent also submitted that the prospect of the Commonwealth making an *ex gratia* payment to Jadwan under s 34 of the *Audit Act 1901*, as then in force, was a factor against granting interlocutory relief.

### Issue (4) – Jadwan would not have applied for an injunction even if it had been advised of the impact of the new legislation: grounds 15 and 16

#### Issue (4) - Jadwan’s submissions

355 Issue (4) is concerned with causation, and Jadwan challenged the primary judge’s findings at [510]-[526] that if it had been advised in late July 1997 of the new legislation, it would nonetheless not have instructed its lawyers to seek an interlocutory injunction. The primary judge’s findings included that competent advice would have alerted Jadwan to the fact that in order to transition to approval under the *Aged Care Act,* in addition to establishing the invalidity of the revocation decision, it was also necessary to retain at least one resident until the Act came into force on 1 October 1997, which the primary judge held appeared to be widely known. In addition, the primary judge held that competent advice would have alerted Jadwan to all the difficulties, the subject of the primary judge’s findings, and to which we have referred at [310 (18)-(20)] above. The primary judge held that competent advice would have been to the effect that, subject to interlocutory relief, Jadwan would have to retain any residents beyond 6 August 1997 at its own expense until the revocation decision was set aside. And the primary judge held that competent advice would have been that because of the apparent fire risk, success in obtaining injunctive relief could not be assured. The primary judge referred to Derwent Court’s payroll expenditure of $70,000 per fortnight, and held that upon receiving competent advice, Jadwan would have chosen to resume cooperating with the Department, and would not have sought to prevent the removal of Derwent Court’s residents.

356 Jadwan submitted that the findings were made despite the following –

(1) the evidence of Mrs Joan Alexander and Ms Julie Alexander that they would have given instructions to seek an injunction;

(2) the evidence that when Mr Hogan advised Jadwan that it should seek an injunction to protect its position, it instructed its lawyers to do so; and

(3) the evidence in the file note of Mr Wicks that Mr Alexander was surprised when told by Mr Wicks on 12 August 1997 that an application for an injunction would not be proceeding.

357 Jadwan also submitted that the findings were based upon other findings, namely that competent advice would have been that an application for an injunction would not have secured maintenance of Derwent Court’s approval status, which Jadwan also challenged as part of Issue (3). Jadwan submitted that the primary judge did not ever consider what Jadwan would have done had Jadwan been reasonably advised that an application for an injunction would probably have succeeded.

#### Issue (4) – respondents’ submissions

358 The respondents addressed the evidence of Mrs Joan Alexander and Ms Julie Alexander in relation to what Jadwan would have done had it been given advice that it would lose its business if it did not apply for an urgent injunction. The respondents submitted that the responses in evidence should be viewed cautiously because the questions to which the evidence responded did not take account of questions of risk, prospects of success, or the cost of litigation.

359 The fifth respondent submitted that the evidence of Mrs Joan Alexander and Ms Julie Alexander was unsatisfactory, and self-serving. It pointed to the evidence that on 29 July 1997, there were 15 residents left in the nursing home, and on 30 July 1997, there were nine. By reason of the sanctions determination, any new residents were not entitled to a Commonwealth benefit. It was submitted that Jadwan had not established that it could economically have continued to conduct the nursing home with the sanctions in force, and that Jadwan would not have committed the substantial funds necessary to continue its business. In this respect, reliance was placed on the evidence in cross-examination of Mrs Joan Alexander and Ms Julie Alexander, to which we have referred at [307] and [309] above. The fifth respondent also relied on what it submitted was the consistent reluctance of Jadwan to spend money on things such as a lift, a sprinkler system, or the relocation of first floor residents, or to take any steps beyond an aspirational business plan to move to a new site as undermining any inference that Jadwan would have devoted resources to seeking an injunction, and keeping Derwent Court operational.

### Issue (5) – proceedings to seek to have the financial sanctions lifted would not have succeeded: grounds 17, 18 and 19

#### Issue (5) - Jadwan’s submissions

360 Issue (5) relates to the financial sanctions determination dated 3 February 1997. The significance of this issue is that the respondents alleged that by reason of the financial sanctions determination, Derwent Court was bound to close in any event. The first challenge made by Jadwan is that it submitted that the primary judge’s consideration of the issue proceeded upon a misconception that the financial sanctions had to be lifted by 1 October 1997. Jadwan submitted that, contrary to the statement at [648] of the primary judge’s reasons, no concession to this effect was made by Jadwan at trial, and that no respondent made the case at trial that the financial sanctions had to be lifted by 1 October 1997. Jadwan submitted that its case was that the financial sanctions had to be lifted eventually in order for Derwent Court to be financially viable, but that did not have to happen by 1 October 1997. Jadwan submitted that it needed only one resident occupying a bed at Derwent Court on 30 September 1997 in order to become an approved provider under the *Aged Care Act*.

361 The second challenge made by Jadwan is to the primary judge’s assumption that Jadwan had only 28 days from the date of the determination on 3 February 1997 within which to apply to have it set aside. Jadwan submitted that the primary judge was in error in considering that an application could be made only under the *ADJR Act* or by a proceeding in the High Court under s 75(v) of the *Constitution*, and in respect of the latter, was in error at [599] in assuming that there was a 28 day time limit in respect of such a proceeding. Jadwan submitted that there was no time bar to a proceeding under s 75(v) of the *Constitution*, although delay might be relevant to the question of relief. Further, and as we have already mentioned, Jadwan submitted that the primary judge overlooked the jurisdiction of this Court under s 39B of the *Judiciary Act* for which there was also no time bar, although delay was also relevant to the question of relief. It followed, Jadwan submitted, that the primary judge’s analysis at [607]-[622] of the question whether an extension of time would have been given by the Court in relation to an application by Jadwan under the *ADJR Act* was unnecessary, because Jadwan did not need to make such an application. And if delay in bringing proceedings became relevant, Jadwan submitted that the relevant delay from February to July 1997 was not unreasonable, that there were explanations for the delay, namely that Jadwan had been endeavouring to satisfy the Department that sanctions should be lifted without the need to resort to legal proceedings, and that Mr Wicks had erroneously advised Jadwan on 26 February 1997 that there was nothing he could do in relation to the financial sanctions (see [94] above), and that there was in any event no prejudice to the Commonwealth as a result of the delay.

362 Jadwan submitted that the primary judge was in error in placing no weight on the consent orders of North J made 22 June 2005. While accepting that the orders of North J did not give rise to a *res judicata* or an issue estoppel, Jadwan submitted that the primary judge went too far in saying that no inference should be drawn about the Commonwealth’s reasons for consenting to the orders, and that it should not lightly be assumed that the Commonwealth would consent to an order for which there was no basis in fact or law, particularly when no witness from the Commonwealth was called to give evidence.

363 Jadwan also submitted that the primary judge too lightly brushed aside the conflicts of interest that Jadwan alleged affected two members of the first Standards Review panel, namely Mr Van der Schoor and Ms Parr. Jadwan submitted that Mr Van der Schoor’s conflict of interest was that he was employed by Aged Care Tasmania, which was an industry association of religious, charitable, and benevolent nursing homes that were competitors of Jadwan. Jadwan submitted that this apparent conflict manifested itself when, according to the evidence comprising Mr Wicks’s letter to Mr Dellar of the Department dated 12 February 1997 to which we referred at [77] above, Mr Alexander claimed that he had learned that Mr Van der Schoor had mentioned to one or more members of Aged Care Tasmania that Derwent Court was about to close and that the beds would be available for allocation.

364 In relation to the chairperson of the first Panel, Ms Parr, Jadwan submitted that her conflict was that she sat on the board of St Ann’s Nursing Home, which was a rival nursing home situated across the road from Derwent Court. Jadwan submitted that the conflict became apparent to Jadwan later when, after Derwent Court had closed, a real estate agent engaged by Jadwan reported that Ms Parr had made an approach with a view to leasing the premises for use as nursing home accommodation. Jadwan pointed to the report of the first Standards Review Panel chaired by Ms Parr which stated in the first line of its reasons for decision on p 14 of the report, “*The physical structure of Derwent Court is completely inappropriate for the purpose of a Nursing Home*”. Jadwan relied on the evidence of Mr Wicks at trial that he knew Ms Parr personally, and knew that she was on the board of St Ann’s Nursing Home, and that Mr Wicks did not raise this issue with Jadwan, including at the conference with Mr Porter on 5 August 1997, to which we referred at [258] above. Jadwan also sought to rely upon several entries in the first to third respondents’ itemised bill of costs for the proceeding below as evidence that the first to third respondents had obtained a proof of evidence from Ms Parr, but did not call her at the trial.

365 Jadwan also submitted that a third member of the first Standards Review Panel, Ms Cooper, was not qualified to be a member of the Panel for the reasons found by Heerey J in relation to the second Standards Review Panel, to which we referred at [291] above. Jadwan submitted that there were other irregularities relating to the report of the first Standards Review Panel, including a failure to give the correct notice as required by reg 28 of the *National Health Regulations*, which was one of the grounds on which Heerey J found that the report of the second Standards Review panel should be declared void.

366 In summary, Jadwan submitted that conflicts of interest affecting two members of the first Panel, the lack of qualifications of a third member, and irregularities affecting the notice that was given to Jadwan, were sufficient to invalidate the financial sanctions determination based upon the first Panel’s report, and that a Court would have so held if an appropriate application had been made in 1997 or 1998. Jadwan submitted that unlike the revocation decision, the financial sanctions determination was dependent upon a report of a validly constituted panel, and relied on s 45E(10) and (11) of the *National Health Act*, to which we referred at [17] above. Jadwan submitted that the Minister’s determination was therefore affected by jurisdictional error and was therefore amenable to relief in the exercise of the Court’s jurisdiction under s 39B of the *Judiciary Act*.

367 In addition, Jadwan submitted that one other way of overcoming the financial sanctions determination was to comply with the relevant standards to the Department’s satisfaction. Jadwan submitted that this was the subject of a pleading in its reply, its opening at trial, evidence at trial, and closing submissions. Jadwan relied on the evidence of an expert witness, Ms Horgan, to whom we referred at [303] to [305] above, that it was most likely that Derwent Court would have become compliant with standards applicable to an approved provider when accreditation standards under the *Aged Care Act* came into effect on 1 January 2000.

368 Jadwan submitted that the primary judge did not make any findings as to whether Mr Wicks or Mr Porter should have advised Jadwan to apply to have the financial sanctions determination set aside. Jadwan contended that Mr Wicks and Mr Porter, as part of their retainers, should have considered the financial sanctions determination, as it affected the viability of the nursing home business, which at least Mr Wicks understood. Jadwan submitted that Mr Wicks and Mr Porter breached their duties of care by failing to advise Jadwan to apply to the Court to have the determination set aside.

#### Issue (5) – respondents’ submissions

369 As to the financial sanctions determination, the respondents submitted that Jadwan’s pleadings alleged causation of damage only by reference to a lost opportunity and a failure to make an application for an injunction to prevent the operation of the revocation decision (see paragraphs 67-69A of Jadwan’s second further amended statement of claim).

370 The respondents further submitted that there was no triable issue that could have been demonstrated in order to support an application for any interlocutory relief, save for the supposed conflict of interest or apprehended bias of Ms Parr and Mr Van der Schoor. The respondents submitted that there was no evidence at trial that St Ann’s nursing home, on whose board Ms Parr sat, was a competitor of Derwent Court, which specialised in psychogeriatric care. Further, when regard was had to the requirements of the regulations (see [22]-[27] above), the participation and experience of Ms Parr and Mr Van der Schoor in the industry were qualifying rather than disqualifying factors. The respondents opposed Jadwan’s application to adduce as evidence on the appeal the bill of costs, referred to at [364] above. They submitted that no *Jones v Dunkel* inference could arise from their failure to call Ms Parr.

371 The respondents submitted that the order made by North J on 22 June 2005 on which Jadwan relied (see [362] above) was a consent order to bring to an end what was futile litigation. The respondents submitted that the sanctions determination was then no longer of any practical effect, because the nursing home was no longer operating.

372 The respondents also submitted that the Commonwealth was set upon a course to have the nursing home closed, and if there was any invalidity in the sanctions determination, it would have taken steps to achieve the same outcome on a valid basis. In this respect, the respondents pointed to the report of the second Standards Monitoring Team, in respect of which no vitiating error such as bias, or conflict of interest, was alleged to exist.

### Issue (6) – Rae & Partners retainer did not extend to giving legal advice on Jadwan’s rights under the National Health Act in respect of the financial sanctions: grounds 1 and 2

#### Issue (6) – Jadwan’s submissions

373 The only basis on which Jadwan maintained that Rae & Partners was liable to it was for a failure to give advice to challenge the financial sanctions determination. The primary judge found that Rae & Partners was not retained by Jadwan to give it advice in respect of the financial sanctions determination, and that its retainer was limited to providing a letterhead for Jadwan’s purposes, and to stand ready for such further specific tasks that it might be instructed to undertake: see [29] and [223]-[309] of the primary judge’s reasons. Jadwan challenged this finding, and relied on the following evidence –

(1) the terms of Jadwan’s letter of retainer to Rae & Partners dated 7 February 1997 (see [70] above), which enclosed a copy of the Department’s letter notifying the financial sanctions determination and stated it sought “*initial advice in the early stages, but it is our hope that by our genuine actions to satisfy the Department’s concerns, the matter will be resolved without legal involvement*”;

(2) immediately after receiving instructions, Mr Wicks went to the Law Society library and researched the relevant law (see [74] above);

(3) on 12 February 1997, Mr Wicks wrote to the Department stating that Jadwan had “*sought our advice about its present dealings with the Department*” and sought assistance “*with our consideration of this matter and the advising of our client*” (see [77] above);

(4) on 5 March 1997, Mr Wicks wrote again to the Department confirming the “*opinion of both ourselves and our client*” that the report on which the financial sanctions determination was based was unfair and inaccurate (see [97]-[98] above);

(5) Mr Wicks admitted that he was aware from early in the piece that the financial sanctions determination, if not lifted, would eventually result in the closure of the nursing home;

(6) at a meeting with the Alexanders on 26 February 1997, Mr Wicks advised them that if they could not comply with the standards “*the ultimate option may only be to sell the beds*” (see [93] above);

(7) Julie Alexander gave evidence that she asked Mr Wicks for advice about the financial sanctions determination at the meeting on 26 February 1997 (see [94] above);

(8) on 8 April 1997, Mr Wicks met with Mr Alexander and made a note that it was “*pointless challenging composition/bias of SRP anyway … so AAT review is less likely of their actions/decisions*” (see [108] above);

(9) on 10 June 1997, Mr Wicks had another meeting with Mr Alexander at which the lifting of the financial sanctions was discussed (see [134] above); and

(10) on 23 June 1997, Rae & Partners submitted an account to Jadwan, including for “*numerous attendances on Directors to discuss Departmental requirements and to consider the Company’s position and advise*” and for consideration of the report on which the financial sanctions determination was based (see [141] above).

374 Jadwan submitted that the primary judge’s conclusion that these matters did not justify a finding that Rae & Partners was retained to provide legal advice on the financial sanctions determination was based upon –

(1) an unwarranted discounting of concessions made by Mr Wicks ([252], [270] and [284] of the primary judge’s reasons);

(2) a misreading of Mr Wicks’s note of the 26 February meeting ([270]-[272] of the primary judge’s reasons);

(3) an implausible conclusion that Mr Alexander, not Mr Wicks, spoke the critical words at the meeting on 8 April recorded by Mr Wicks in his note ([284]–[289] of the primary judge’s reasons);

(4) a failure to take account of the meeting on 10 June 1997;

(5) a failure to take account of the terms of the invoice raised by Rae & Partners; and

(6) a general failure to consider the entirety of the evidence.

#### Issue (6) – respondents’ submissions

375 In relation to Mr Wicks’s initial retainer when he was employed by Rae & Partners, senior counsel for the first to third respondents accepted that Mr Wicks was retained to give legal advice, but only in the broadest possible terms. Until 10 June 1997, when Mr Wicks was asked to assist with a business plan, he was not asked to give advice on any particular point. Counsel submitted that Mr Wicks was not asked to give legal advice about the sanctions, but he was engaged to assist Jadwan in its dealings with the Department, when requested. Counsel relied on the terms of Mr Alexander’s letter of 7 February 1997, and Mr Wicks’s note of the initial meeting on 7 February 1997, to which we have referred at [70] and [72] above. Counsel submitted that Jadwan wanted to turn things around with the Department by their own dealings, which was supported by the reference in Mr Wicks’s note to an earlier bad report in 1991, where the report had been altered to Jadwan’s satisfaction. Counsel also relied on Mr Wicks’s file note of the meeting on 26 February 1997 with Mrs Joan Alexander and Ms Julie Alexander, to which we referred at [93] above, and submitted that it did not support Jadwan’s argument that Mr Wicks was instructed to do anything about the sanctions, or advised them that nothing could be done. Counsel submitted that the evidence in Mr Wicks’s note of the meeting was to be preferred to Ms Julie Alexander’s evidence in cross-examination (see [94] above).

376 Senior counsel for the first to third respondents submitted that Mr Wicks’s letter of 5 March 1997 to Mr Dellar of the Department (see [97] above) was significant to the question of the scope of the instructions which Jadwan gave to Rae & Partners. Mr Wicks gave evidence that Jadwan was responsible for drafting the submissions that were attached to the letter, and in relation to the letter itself. Although Mr Wicks did not recall obtaining approval from Mr Alexander, he said that it was his clear instructions not to have any communications with the Department without Jadwan’s approval. Counsel relied on the terms of the letter of 5 March 1997, and its focus on resistance to revocation of the approval of Derwent Court, and to the public dissemination of the report of the first Standards Review Panel, rather than the financial sanctions determination. Senior counsel for the first, second, and third respondents submitted that likewise, Mr Wicks’s note of his discussion with Mr Alexander on 8 April 1997 (see [108] above) did not evidence any concern by Jadwan about the financial sanctions determination, and the reason was that the decision was not affecting Jadwan in a significant way at that time. Counsel pointed to evidence that by the time of Mr Wicks’s attendance on Mr Alexander on 10 June 1997, the number of residents at Derwent Court had reduced by only two (see [133] above). Counsel relied on the fact that there was no contact between Jadwan and Mr Wicks between 8 April and 10 June 1997 as indicating the limited nature of the retainer of Mr Wicks during the period. And in relation to the letter from Mr Wicks to Mr Alexander dated 12 June 1997, counsel relied on the passage in the second paragraph that we have emphasised under [135] above as indicating a strategy to keep the Department and the Tasmania Fire Service satisfied for the time being, and to buy time. That strategy also informed the telephone advice that Mr Wicks gave to Mr Alexander on 13 June 1997, and which is recorded in the file note to which we have referred at [138] above. Counsel emphasised the proposal to seek assurances from the Department as supporting the respondents’ case that Jadwan was not prepared to commit to spending money unless it received assurances of longevity from the Department. That case was also supported by Mr Wicks’s file note of his attendance on Mr Alexander on 7 February 1997 (see [72] above), where in the context of the installation of a lift at Derwent Court, Mr Alexander was recorded as stating that he wanted a guarantee of funding from the Commonwealth if the lift was to be installed, and the guarantee was not forthcoming. For all these reasons, counsel submitted that it was not possible to infer that the scope of Mr Wicks’s retainer extended to giving any advice about the financial sanctions determination.

### Issue (7) – Mr Porter QC did not give advice not to seek an injunction: grounds 3 and 4

#### Issue (7) – Jadwan’s submissions

377 The primary judge found that, notwithstanding the terms of Mr Wicks’s note of 11 August 1997 to which we referred at [273] above, the evidence did not establish that Mr Porter gave advice not to pursue an application for an injunction. That was because the primary judge at [729]-[730] drew an inference that Mr Wicks had misconstrued Mr Porter’s advice.

378 Jadwan submitted that it was not open to the primary judge to draw an inference that Mr Wicks had misunderstood Mr Porter’s advice when it was not put to Mr Wicks, and Mr Porter was not called as a witness. As we noted at [274] above, Mr Wicks was not cross-examined at all by counsel for the fifth respondent, which faced exposure if any negligence of Mr Porter was found to have caused loss to Jadwan. Furthermore, Jadwan relied on a written submission in reply made on behalf of the fifth respondent at trial where it was affirmatively submitted that –

On 11 August Porter QC gave oral advice to Mr Wicks as to the drafting of the application, and the affidavit in support. He also advised he did not see a need, on the face of the affidavit, for an interlocutory application for a stay. He expressed the opinion if the AAT application succeeded, then the revocation decision would be quashed ab initioand, in consequence, the approvals would continue to exist.

379 Jadwan submitted further that, contrary to the primary judge’s finding, Mr Porter’s letter of 19 August 1997, to which we have referred at [275] above, was not inconsistent with advice not to proceed with an interlocutory stay or injunction. Further, there were other aspects of Mr Wicks’s note of 11 August 1997 that were consistent with the advice having been given, namely the reference to the affidavit material not being wasted, because it could be used in the AAT. Jadwan also submitted that there was no challenge to the primary judge’s findings at [728] that Mr Porter had not identified the existence or consequences of the *Aged Care Act* or the *Consequential Provisions Act*, and that if Mr Wicks’s note of 11 August 1997 expressed the true sense of what Mr Porter conveyed to him, then Mr Porter had failed in his duty to exercise reasonable skill and care by not adverting to the potential consequences of those Acts.

380 Jadwan accepted that perhaps not much turned on these findings, because by 11 August 1997 all the residents had left Derwent Court, and that the focus of the case against Mr Porter was the failure in July 1997, when he was first retained, to advise that an injunction should be immediately sought.

#### Issue (7) – respondents’ submissions

381 The fifth respondent submitted that Mr Porter was not retained to advise about the sanctions determination, and that this submission was supported by the fact that Jadwan had not sought advice from Mr Wicks about the sanctions determination.

382 In relation to the disputed question as to what advice Mr Porter gave on 11 August 1997, the fifth respondent submitted that its failure to call Mr Porter did not give rise to any inference, because Mr Porter was not a party, and was an adverse party vis-à-vis the fifth respondent, because it was engaged to serve a writ upon him. Primarily, however, the fifth respondent submitted that by 11 August 1997, the approval of Derwent Court had been revoked, and all the residents had left, and whatever advice Mr Porter gave on that day was of no practical significance and of no real consequence.

### Issue (8) – did Jadwan suffer any damage from the failure to give legal advice on the new legislation: grounds 5, 6 and 20?

#### Issue (8) – Jadwan’s submissions

383 Jadwan submitted that it was to be inferred that the primary judge did not consider that it had suffered any damage as a result of the failure of the lawyers to advise it of the new legislation. On this appeal, if successful, Jadwan does not seek damages, but an order that the proceeding be remitted for the assessment of damages. Jadwan sought a finding on appeal that it suffered some damage. It submitted that if it succeeded on other grounds of appeal, then it will succeed in showing that, but for the negligence of the lawyers, it would have retained its bed licences for Derwent Court as at 30 September 1997, and in consequence must have suffered some damage. Jadwan submitted that, contrary to the primary judge’s findings, there was a clear preponderance of view that Derwent Court was, in fact, a well-run nursing home with a high standard of care, and relied on the expert evidence of Ms Horgan, the evidence of Dr Timmins, and the evidence of relatives of former residents.

#### Issue (8) – respondents’ submissions

384 The respondents submitted that Jadwan had not shown that, as a result of the failure to give advice about the new legislation, Jadwan lost an opportunity of some value. The respondents submitted that Jadwan was required to demonstrate a substantial, and not merely speculative, prospect that a detriment would be avoided (see, *Badenach v Calvert* [2016] HCA 18; 257 CLR 440 at [39] (French CJ, Kiefel and Keane JJ)), and submitted that attention should be directed to the identification of what opportunity Jadwan had lost. The respondents relied upon *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; 247 CLR 613 at [24]-[25] in aid of a submission that it is necessary in an action in negligence alleging economic loss to identify, with some precision, the interest that is infringed by the negligent act, because the identification is necessary for a proper understanding of the damage that was suffered, and for the determination of what acts or omissions may be said to have caused the damage. The respondents submitted that Jadwan’s claim should be evaluated as being the lost opportunity of avoiding the detrimental consequences of Commonwealth decision-making, and not merely the lost opportunity to obtain some sort of injunctive relief from the Court. The significance of framing the issue in that way, it was submitted, is that it is necessary to focus on whether Jadwan would ultimately have been successful in avoiding revocation of the approval of Derwent Court. The respondents submitted that the evidence supported a conclusion that the Commonwealth would not have given up in its endeavours to revoke the approval of Derwent Court, and relied on evidence that included the letter from Mr Bowen of the Australian Government Solicitor referred to at [183] above, and the fact that the Commonwealth contested Jadwan’s *ADJR Act* applications, including on appeal. The respondents also submitted that Jadwan had to demonstrate that, contrary to the primary judge’s findings, the Commonwealth would not have made a new or substituted decision to the same effect. The respondents submitted that the legal burden of proving causation remained on Jadwan, and that this required Jadwan to show that the claimed loss would not have been suffered if the first to fourth respondents had given different advice. The respondents submitted that this required Jadwan to demonstrate a hypothesis in favour of causation of loss that was more probable than competing hypotheses denying causation, relying on *Sellars v Adelaide Petroleum NL* [1994] HCA 4; 179 CLR 332 at 367-368 (Brennan J). The respondents relied on the evidence of Ms Julie Alexander in cross-examination, to which we have referred at [309], [358] and [359] above, the substance of which was that, in August 1997, she believed that it would have been too risky to commit the development of a new nursing home unless she could be assured that Jadwan would have been entitled to 51 bed licences.

385 The respondents submitted that Jadwan did not establish that by 1 October 1997, Derwent Court would have retained at least one resident subject to a Commonwealth benefit. The respondents relied on the letter from Ms Halton of the Department to the residents at Derwent Court dated 20 July 1997, to which we referred at [162] above, and evidence of the departure of residents from 24 July 1997. The evidence in Mr Wicks’s file note of 10 June 1997, to which we referred at [133] above, was that two residents had died at that point, and the file note of 7 July 1997, to which we referred at [146] above, indicates that five residents had died by that time. The respondents relied on a note that was in evidence of the further reductions in the number of residents, to which we shall later refer.

386 The respondents also relied on evidence that on 24 and 25 July 1997, the Commonwealth had allocated an additional 51 bed licences to Rosary Gardens, and was facilitating the movement of residents to that home, as Ms Halton had foreshadowed in her letter of 20 July 1997. There was significance in the fact that this allocation occurred in circumstances where the maximum number of beds was regulated by s 39 and 39AA of the *National Health Act*.

387 The respondents also relied on the effect of the sanctions determination and submitted that once a resident had left, the resident could not return and be the subject of a Commonwealth benefit unless the sanctions determination was lifted. The respondents submitted that there was no allegation by Jadwan that an application for interlocutory relief would have succeeded in staying or otherwise ameliorating the effect of the sanctions determination (see also, [369] above). In broad terms, the respondents submitted that the operation of Derwent Court with a substantially reduced number of residents in respect of whom a Commonwealth benefit was payable was not sustainable.

388 Further, the fourth respondent submitted that by operation of s 39B(5)-(5B) of the *National Health Act,* Jadwan was unable to effect a transfer of the bed licences, because it was not compliant with the conditions imposed on its approval under s 40AA(6) of the Act, which included the condition under s 40AA(6)(ck) that it satisfy the standards determined under s 45D. This claimed impediment had been identified by Ms Hefford of the Department in her letter to Mr Hogan of 1 August 1997 (see [249] above). Jadwan replied that the Minister had power under s 40AD(1) of the Act to alter the conditions applicable to a nursing home, but we observe that s 40AD(1) appears to have been concerned only with an alteration of the number of beds.

389 In addition, the fourth respondent submitted that it was doubtful that all of Jadwan’s bed licences would transition to corresponding approvals under the *Aged Care Act* from 1 October 1997. The fourth respondent relied on the terms of s 14‑1(2) of the *Aged Care Act*, which constrained the Secretary’s power to allocate places to an approved provider, and which it submitted prevented the Secretary from allocating places in respect of which a Commonwealth subsidy was not payable. The fourth respondent relied on the effect of the sanctions, which had a corresponding operation under s 66‑1(c)(ii) of the *Aged Care Act* as a result of the operation of s 75(1)(c) of the *Consequential Provisions Act*. The fourth respondent submitted that in consequence, on 1 October 1997, Jadwan would have been taken to have been allocated only those places in respect of which a Commonwealth subsidy was then payable, and not all 51 places. For its part, Jadwan replied that the fourth respondent’s submission was made for the first time on appeal. In any event, Jadwan submitted that the sanction, transformed as one under s 68‑1 of the *Aged Care Act*, was capable of being lifted, and remained subject to review. In the alternative, Jadwan submitted that these matters highlighted the liability of Mr Wicks and Mr Porter for failing to advise Jadwan to have the financial sanctions lifted before 30 September 1997.

390 Counsel for the first to third respondents addressed the liability of the third respondent, Toomey Maning & Co, and submitted that the primary judge was correct in concluding that no failure by Mr Wicks after 12 September 1997 was a cause of any loss to Jadwan because, by that stage, all the residents had left, and Jadwan had terminated all its staff, and that Jadwan would not have committed to a course that required the recruitment of staff and payroll costs, in particular without the benefit of subsidies at that time because of the operation of the financial sanctions determination.

391 Further, the fourth respondent submitted that the contractual principles relating to remoteness of damage applied, and that the damage claimed by Jadwan did not arise naturally from the breach, and nor could it be reasonably supposed to have been within the contemplation of the parties. In this respect, counsel for the fourth respondent, who argued the point, relied on the decision of the England and Wales Court of Appeal in *Wellesley Partners LLP v Withers LLP* [2016] Ch 529 in support of a submission that the contractual principles of remoteness of damage, which direct attention to what was reasonably within the contemplation of the parties at the time they entered into the retainer, applied also in relation to a concurrent claim for negligence in tort. Jadwan submitted by way of reply that there was no privity of contract between Jadwan and Mr Porter, who had been retained by Mr Wicks, and that if Mr Porter had been liable to Jadwan, he was liable in tort.

392 Finally, the respondents submitted that if the appeal is allowed on liability issues, questions of causation, remoteness, and contributory negligence, and for what damage the respective respondents were liable remained live issues to be determined. The fourth and fifth respondents submitted that they were not concurrent wrongdoers with the first, second, and third respondents, and that any judgments against the respondents required separate consideration, as the respondents may be liable for different losses. The fourth respondent gave as an example that by the time Mr Hogan was retained, the value of the business was likely to be much lower than at earlier points in time during which Mr Wicks was retained, and submitted that the fourth respondent, if liable, should not be liable for the whole of the loss of the business as a going concern.

393 The fourth respondent also submitted that separate consideration had to be given to questions of remoteness of damage because the instructions upon which Mr Hogan acted were discrete, and what was within the reasonable contemplation of the parties to that retainer might well be different from the position of the other respondents and Mr Porter.

394 For the above reasons, it was submitted that if the appeal is allowed, the matter should be remitted to the primary judge for the determination of those issues, and not merely the assessment of damages.

### Issue (9) – summary issue: grounds 9, 10, 21 and 22

#### Issue (9) - Jadwan’s submissions

395 This issue was described by Jadwan as a summary of outcomes that flowed from success on the preceding issues. Jadwan prefaced its submissions on this issue by identifying four findings that it submitted were favourable to it, and which were not challenged on appeal by the relevant respondents –

(1) from 21 July 1997, when Mr Wicks was informed by Jadwan that it had received the notice of intention to revoke the approval of Derwent Court, the retainer of the second respondent, Wilson Dowd, was no longer limited, and it was retained to represent and advise Jadwan generally ([454] of the primary judge’s reasons);

(2) Mr Wicks should reasonably have been aware of the new legislation, and identified the potential relevance of the *Consequential Provisions Act* ([465] and [501]-[503] of the primary judge’s reasons);

(3) Mr Wicks breached his duty of care by advising Jadwan on 25 July 1997 (see [207] above) that there was no harm in letting the residents go ([507] of the primary judge’s reasons); and

(4) on the assumption (contrary to the primary judge’s principal finding) that Mr Wicks’s note of his conversation with Mr Porter on 11 August 1997 was accurate, then Mr Porter was in the same position as Mr Wicks, that is, that he should have identified the potential consequences of the new legislation ([507] of the primary judge’s reasons).

396 Having regard to those favourable findings, Jadwan challenged the following findings of the primary judge –

(1) that Jadwan had resolved by 15 July 1997 to close the nursing home, and to seek to sell the licences;

(2) that Jadwan had agreed with the Department on 24 July 1997 that it would not stand in the way of the removal of the residents, and the closure of the nursing home, and that the Department would pay the redundancies;

(3) because of its decision to close Derwent Court, Jadwan would not have acted on advice to apply for an injunction to keep the home open, and to prevent the removal of residents;

(4) that an application for an injunction, if made before 6 August 1997, would not have been successful in preventing the closure of Derwent Court either because there was no decision that could be the subject-matter of an application, or because the Commonwealth would “mend its hand” and make a lawful decision revoking the approval;

(5) that Jadwan needed to have the financial sanctions lifted before 1 October 1997, and that was unlikely to have occurred;

(6) that an injunction would not have been granted; and

(7) the first respondent, Rae & Partners, was not retained to give legal advice.

397 Jadwan submitted that the following consequences followed if its challenges were successful –

(1) Mr Wicks and Mr Porter breached their duties of care by not advising Jadwan to seek an injunction to prevent the closure of Derwent Court and the removal of residents;

(2) an injunction would have been granted, with the consequence that Jadwan would have made the transition to being an approved provider under the *Aged Care Act*;

(3) Jadwan would have succeeded in having the financial sanctions lifted;

(4) Jadwan would have continued to operate Derwent Court, eventually relocating, or alternatively, it would have sold its licences at a proper market value; and

(5) the first, second, third and fifth respondents were liable for Mr Wicks’s omission to advise, and Mr Porter was liable for not advising Jadwan to seek to have the financial sanctions determination set aside.

398 In relation to the fourth respondent, who is alleged to be liable for any negligence of Mr Hogan, Jadwan submitted that the key issue was the extent of Mr Hogan’s retainer. By paragraph 38 of the amended defence of the fourth respondent, it was admitted that Mr Hogan professed to have special expertise in the law relating to the conduct of nursing homes in Australia. Jadwan relied on the terms of the letter of instructions, referred to at [216] above, and a letter from Mr Hogan to Jadwan dated 3 March 1998 where Mr Hogan itemised his account, and stated, “*Advising you generally with respect to revocation of licence*…”. Jadwan submitted that in the context of Mr Hogan’s retainer to assist in the sale of the bed licences, Mr Hogan’s negligence lay in his failure to give Jadwan the critical advice about the impact of the new legislation, which jeopardised Jadwan’s ability to sell its licences. Although Mr Hogan had advised Jadwan to seek an injunction, he did so essentially for tactical reasons, and did not advise Jadwan of the effect of the new legislation.

#### Issue (9) – respondents’ submissions

399 In relation to the retainer of Mr Hogan, the fourth respondent submitted that advice about the new legislation was outside the scope of Mr Hogan’s retainer, which the fourth respondent submitted was limited to attempting to negotiate some way for Jadwan to sell its bed licences. The fourth respondent submitted that the work required to be undertaken to ascertain the implications of the new legislation was novel, complex, and would have been time consuming. The fourth respondent submitted that work of that nature was not incidental to the very limited scope of Mr Hogan’s retainer, nor was it something obvious that a solicitor in Mr Hogan’s position should have informed his client about. The fourth respondent referred to a number of authorities that have considered the solicitor’s “penumbral” duty, but submitted that it was unnecessary to consider them, because there were good reasons not to impose an obligation on Mr Hogan beyond the scope of his retainer.

400 The fifth respondent submitted that, in order to succeed, Jadwan had to establish the following, each of which was contested wholly or in part by the respondents –

(1) each of the respondents was subject to a duty of care which required the giving of the particular advice for which Jadwan contended;

(2) if such advice had been given, Jadwan would have given instructions to commence a proceeding for injunctive relief;

(3) a judge of this Court would have granted interlocutory relief;

(4) interlocutory relief would not have been granted on terms that Jadwan could not, or could not reasonably, comply with;

(5) Jadwan would have been able to retain at least one pre-February 1997 resident for such period of time as was necessary to enable it to construct and complete the development of a new facility elsewhere;

(6) it would ultimately have succeeded in its primary claim, and thereupon would have obtained permanent injunctive relief or a stay;

(7) at no point would the Commonwealth have made a new or substitute decision or decisions to the same effect, that would have been effective to revoke the licences; and

(8) in the interim, Jadwan would have been able to maintain the conduct of its business with one nursing home patient from 1 October 1997, and in a way that complied with the new care standards pursuant to the *Aged Care Act*.

401 By way of reply submissions, Jadwan accepted that it had to establish (1) to (4). As to (5) and (8), Jadwan accepted that it could not have continued to operate the nursing home with a small number of residents for very long, but submitted that this highlighted the urgency of an injunction, and the need to have the financial sanctions lifted. As to (6), Jadwan relied on its ultimate success in having the revocation decision set aside. And as to (7), Jadwan submitted that this was an issue on which the respondents bore the onus of proof.

## The nature of this appeal

402 There was a dispute between the parties concerning the principles applicable to the review on appeal of the findings of fact made by the primary judge that were challenged by Jadwan.

403 The appeal to this Court is brought under s 24(1)(a) of the *Federal Court of Australia Act 1976* (Cth)and is in the nature of an appeal by way of rehearing: *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 at [75] (Gleeson CJ and Gummow J); *Western Australia v Ward* [2002] HCA 28; 213 CLR 1 at [68]-[71] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). In an appeal by way of rehearing, the powers of the Court are exercisable where an appellant demonstrates some legal, factual, or discretionary error: *Allesch v Maunz* [2000] HCA 40; 203 CLR 172 at [23] (Gaudron, McHugh, Gummow and Hayne JJ). “The views and the conclusions of the trial judge ultimately have to be shown to be wrong. They should not be laid to one side and a simple re-argument of the case take place”: *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 (***Branir***) at [24], [28] and [29] (Allsop J, Drummond J and Mansfield J agreeing). What amounts to error will depend upon the issue in contention.

404 The principles that guide appellate review of findings of fact made by a trial judge have been discussed and applied in many High Court cases over the course of more than 100 years. Those cases include: *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)* [1904] HCA 51;1 CLR 243 at 277 (Griffith CJ); *Dearman v Dearman* [1908] HCA 84; 7 CLR 549 at 561 (Isaacs J); *Scott v Pauly* [1917] HCA 60; 24 CLR 274 at 278-281 (Isaacs J); *Paterson v Paterson* (1953) 89 CLR 212 at 218-225 (Dixon CJ and Kitto J); *Voulis v Kozary* (1975) 180 CLR 177 at 181-183 (McTiernan J); *Warren v Coombes* [1979] HCA 9; 142 CLR 531 at 537-553 (Gibbs ACJ, Jacobs and Murphy JJ); *Brunskill v Sovereign Marine & General Insurance Co Ltd* [1985] HCA 61 62 ALR 53 (***Brunskill***) at 56-57 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ); *Abalos v Australian Postal Commission* [1990] HCA 47; 171 CLR 167 at 178-9 (McHugh J); *Devries v Australian National Railways Commission* [1993] HCA 78; 177 CLR 472 (***Devries***) at 479-481 (Deane and Dawson JJ); *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* [1999] HCA 3; 160 ALR 588 (***Earthline Constructions***) at [73]-[93] (Kirby J); *Walsh v Law Society of New South Wales* [1999] HCA 33; 198 CLR 73 at [54] (McHugh, Kirby and Callinan JJ); *Rosenberg v Percival* [2001] HCA 18; 205 CLR 434 at [27], [37]-[41] at (McHugh J), [92] (Gummow J), [103], [163]-[164] (Kirby J); *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [22]-[31] (Gleeson CJ, Gummow and Kirby JJ); *CSR Ltd v Della Maddalena* [2006] HCA 1; 224 ALR 1 (***CSR***) at [17]-[24] (Gleeson CJ, Kirby J agreeing); *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; 241 CLR 357 (***Miller***) at [76] (Heydon, Crennan and Bell JJ); *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 (***SZVFW***) at [29]-[34] (Gageler J), [153] (Edelman J); and *Lee v Lee* [2019] HCA 28; 372 ALR 383 at [55] (Bell, Gageler, Nettle and Edelman JJ, Kiefel CJ at [1] agreeing).

405 In evaluating whether there is appealable error in relation to a finding of fact, the authorities distinguish between cases where findings depend upon some benefit enjoyed by the trial judge that is not available to an appellate court, and other cases, such as those where the impugned findings are inferences drawn from uncontroverted facts. Findings that are the product of some benefit enjoyed by a trial judge may include findings of secondary facts that are based on a combination of impressions and other inferences from primary facts: *Lee v Lee* at [55], citing *Kakavas v Crown Melbourne Ltd* [2013] HCA 25; 250 CLR 392 at [144], and *Thorne v Kennedy* [2017] HCA 49; 263 CLR 85 at [42], which in turn cited *Louth v Diprose* [1992] HCA 61; 175 CLR 621 at 639-641 (Dawson, Gaudron and McHugh JJ). The advantages that a trial judge may enjoy include those “that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole”: *Fox v Percy* at [23]. See also, *Branir* at [24], [28] and [29]. The advantages may include the opportunity to assess the testimony of witnesses. The value and importance of having seen and heard witnesses will vary according to the class of case, and the individual case in question: *Watt or Thomas v Thomas* [1947] AC 484 at 488, cited in *Paterson v Paterson* at 224, and *Devries* at 480. The disadvantages in which an appellate court is placed “may derive from considerations not adequately reflected in the recorded transcript of the trial; and matters arising from the advantages that a primary judge may enjoy in the opportunity to consider, and reflect upon, the entirety of the evidence as it is received at trial and to draw conclusions from that evidence, viewed as a whole”: *CSR* at [17] (Kirby J, Gleeson CJ agreeing). “The more prominently limitations of that nature feature in a particular appeal, the more difficult it will be for the appellate court to be satisfied that the primary judge was in error”: *SZVFW* at [33] (Gageler J). On the other hand, there may be circumstances where the capacity for appellate synthesis and perspective places the appellate court in an advantageous position over the trial judge: *Yarrabee Coal Co Pty Ltd v Lujans* [2009] NSWCA 85; 53 MVR 187 at [3] (Allsop P). In this case, which turns largely on the inferences that arise from the documentary evidence, we have had the benefit of careful consideration of that evidence: cf, *Earthline Constructions* at [90] (Kirby J).

406 In relation to an appeal from a decision that depends upon the acceptance of the evidence of a witness, the Court in *Brunskill* at 57 referred to whether the decision was “glaringly improbable”, likely picking up Lord Sumner’s reference to “glaring improbability” in *SS* *Hontestroom v SS Sagaporack* [1927] AC 37 at 50. *Brunskill* was cited by Kirby P in *Chambers v Jobling* (1986) 7 NSWLR 1 where, with reference to *Warren v Coombs*, his Honour stated at 10 –

[*Warren v Coombs*] re-established a slightly more robust and interventionist role for appeal courts in the review of decisions on the facts or decisions based on inferences from the facts. For all that, such review is always to be performed with proper regard to the advantages which the trial judge enjoyed. Especially is this necessary (as *Brunskill* lately reminds us) where issues of credibility are raised for decision, directly or indirectly. Particularly is it so where the credibility of a witness is determined by the trial judge, expressly or by inference, on the basis of his impressions of the witness whose credibility is under attack. In such cases, the appellate court is not released from its duty to review the trial judge’s conclusions. But the circumstances in which it may reverse those conclusions are very narrowly defined indeed. They are confined to those few cases where the trial judge’s decision is “*glaringly improbable*” or “*contrary to compelling inferences*”.

[Emphasis added]

407 Both *Brunskill* and *Chambers v Jobling* were then cited by Kirby J in *Earthline Constructions* where, at [93] points 2 and 7, his Honour stated –

2. It may be possible to show, by reference to *incontrovertible facts or uncontested testimony*, that although the trial judge reached conclusions which were adverse to the credibility of an important, even crucial, witness, such conclusions are plainly wrong. …

…

7. There is also the case, as was accepted in the early Privy Council decisions where, although a credibility finding has been made which represents an apparent obstacle to appellate review, it is so contrary to the “extreme and overwhelming pressure” resulting from the rest of the evidence, or is so **“***glaringly improbable”* or *“contrary to the compelling inferences of the case”*, that it justifies and authorises appellate interference in the conclusion reached by the trial judge. …

[Emphasis added, footnotes omitted]

408 *Brunskill,* *Chambers v Jobling*, and *Earthline Constructions* were cited by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* at [28]-[29] –

… the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases *incontrovertible facts or uncontested testimony* will demonstrate that the trial judge’s conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.

That this is so is demonstrated in several recent decisions of this Court. In some, quite rare, cases, although the facts fall short of being “*incontrovertible*”, an appellate conclusion may be reached that the decision at trial is “*glaringly improbable*” or “*contrary to compelling inferences*” in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must “not shrink from giving effect to” its own conclusion.

[Emphasis added, footnotes omitted]

409 *Brunskill*, *Chambers v Jobling*, and *Fox v Percy* were then cited by the Court in *Miller* at [76], in the same context.

410 The first, second, and third respondents, and separately the fourth respondent, submitted that the Court should not interfere with findings of fact made by the primary judge unless they were demonstrated to be wrong by “incontrovertible facts or uncontested testimony”, or they were “glaringly improbable” or “contrary to compelling inferences”. For this proposition they cited *Robinson Helicopter Company Incorporated v McDermott* [2016] HCA 22; 331 ALR 550 at [43], where French CJ, Bell, Keane, Nettle and Gordon JJ stated –

A court of appeal conducting an appeal by way of rehearing is bound to conduct a “real review” of the evidence given at first instance and of the judge’s reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge’s findings of fact unless they are demonstrated to be wrong by “incontrovertible facts or uncontested testimony”, or they are “glaringly improbable” or “contrary to compelling inferences”. In this case, they were not. The judge’s findings of fact accorded to the weight of lay and expert evidence and to the range of permissible inferences.

[Footnotes omitted]

411 In this passage, the Court cited *Devries* at 479-481, *Fox v Percy* at [28] - [29], and *Miller* at [76] which, as Allsop CJ explained in *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; 261 FCR 301 (***Aldi Foods***) at [3]-[10] is important. Statements of principle in a judgment of an appellate court such as those in [43] of *Robinson Helicopter* should not be treated as if they were provisions of a statute, defining a principle in precise and definite terms: *Mills v Mills* (1938) 60 CLR 150 at 169 (Rich J); *Benning v Wong* (1969) 122 CLR 249 at 299-300 (Windeyer J); *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1085 (Lord Reid); *Papaconstuntinos v Holmes à Court* [2012] HCA 53; 249 CLR 534 at [29] (French CJ, Crennan, Kiefel and Bell JJ). And brief allusions, or necessarily incomplete references to principles in appellate judgments should not ordinarily be understood as restating principles of long-standing that have been the subject of detailed and considered discussion in earlier cases. The statements of the Court in *Robinson Helicopter* at [43] that findings of fact made by a trial judge should not be interfered with unless they are demonstrated to be wrong by “incontrovertible facts or uncontested testimony”, or they are “glaringly improbable”, or “contrary to compelling inferences”, do not apply to all findings of fact. Those expressions have been used in the authorities in the context of findings that are the product of some advantage enjoyed by the trial judge, such as where there has been a credibility finding after assessing oral testimony. The advantages enjoyed by a trial judge may also be more subtle and imprecise, as Allsop J explained in *Branir* at [28]-[29], which has been cited and approved in many subsequent Full Court decisions (see *Aldi Foods* at [4]). The corresponding limitations on appellate review result from the “appellate court proceeding wholly or substantially on the record”: *Fox v Percy* at [23]. The limited application of the statements in *Robinson Helicopter* at [43] concerning appellate restraint was confirmed in *Lee v Lee,* where at [55], Bell, Gageler, Nettle and Edelman JJ stated*–*

Appellate restraint with respect to interference with a trial judge’s findings unless they are “glaringly improbable” or “contrary to compelling inferences” is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts.

412 The grounds of appeal in this case present for consideration the correctness of specific findings of fact made by the primary judge, the correctness of the legal foundation for the primary judge’s findings, and the correctness of the inferences that the primary judge drew. As we shall discuss, of particular importance to the outcome of the appeal is the primary judge’s findings on causation. It was necessary for Jadwan to prove on the balance of probabilities that it would have given instructions to its lawyers to pursue proceedings to seek the interlocutory relief that it alleged, and that it would have had at least one resident at Derwent Court on 30 September 1997 in respect of whom it was entitled to Commonwealth benefit. The inquiry as to what Jadwan would have done was necessarily hypothetical, and involved value judgments by the primary judge based upon the direct and circumstantial evidence. The particular issues that may arise in challenging such findings on appeal were referred to by McHugh J in *Rosenberg v Percival* at [27] and [37]-[41] in the context of a failure to warn a patient of risks attached to surgery. In that case, McHugh J was of the view that the Western Australian Court of Appeal was in error in reversing the trial judge’s finding as to causation, principally because the trial judge’s finding was based upon the credibility of the plaintiff. The causation question in this case is more complex, because it must be determined against resolution of the hypothetical issue of what advice a reasonable and prudent lawyer would have given Jadwan. And the issue was not what Mrs Joan Alexander or Ms Julie Alexander would have done had they received that advice, but what Jadwan would have done, which directs attention to what inferences arise in relation to what Mr Alexander would have done.

413 The fourth respondent also submitted that the possibility that one or more of the judges constituting this Court might, or might well have, formed a different view of the contested evidence or might, or might well have, reached different findings open on the evidence to those of the primary judge that were also open on the evidence, does not provide a principled basis for interfering with the findings of fact of the primary judge. This submission must be rejected. The fourth respondent’s submission is not supported by *Warren v Coombs*,or *Fox v Percy*,and isredolent of the views of Barwick CJ and Windeyer J in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506, *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 199 and 213-214, and *Edwards v Noble* (1971) 125 CLR 296 at 304-306 and 312-313, which were rejected by the majority in *Warren v Coombs* at 542-553. In *Fox v Percy* at [25], in a frequently cited passage, Gleeson CJ, Gummow and Kirby JJ said of an appellate court’s task –

Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge’s reasons. Appellate courts are not excused from the task of “weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect” [*Dearman v Dearman* (1908) 7 CLR 549 at 564, citing *The Glannibanta* (1876) 1 PD 283 at 287]. In *Warren v Coombes* [(1979) 142 CLR 531 at 551], the majority of this Court reiterated the rule that:

[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.

414 What is set out in the above passage is subject to other principles of appellate review to which we have referred, including the requirement that an appellant show error in the primary judge’s decision, and the acknowledgement in the authorities of the circumstances in which the appellate court will not be in as good a position as the trial judge to decide on the proper inferences to be drawn. The weight to be given to the findings of a trial judge will vary according to the type of issue in question, and the nature and the extent of the advantage enjoyed by the trial judge. But if error is shown, a court of appeal may then be required to make its own findings of fact and to formulate its own reasoning based upon those findings if it is in a position to do so: *Robinson Helicopter* at [43]; and see also, *Waterways Authority v Fitzgibbon* [2005] HCA 57; 221 ALR 402 at [134]-[135] (Hayne J).

415 The fifth respondent submitted that Jadwan must establish that each inference that it sought to impugn was not open on the evidence, citing *Ashby v Slipper* [2014] FCAFC 15; 219 FCR 322 at [62], [70]-[73] and [92]. The fifth respondent’s submission must also be rejected. It is not supported by *Ashby v Slipper*, which was an appeal from the summary dismissal of a proceeding where it was held that an inference drawn by the primary judge was not open to be drawn on the summary dismissal application, having regard to the onus that was imposed on the respondent on a summary dismissal application, and having regard to other evidence. The finding in *Ashby v Slipper* at [92] that the subject inference was not open must be understood as a finding that, on a summary dismissal application, the inference should not have been drawn. It is wrong to suggest that *Ashby v Slipper* is authority for any general proposition that an inference may be challenged on appeal from a decision at trial only if it was not open on the evidence. As we have indicated, a constraint of that type on appellate review was rejected in *Warren v Coombs*, and it is not consistent with the principles stated in *Fox v Percy* at [25], to which we have referred above*.*

## The nature of Jadwan’s claims

416 It is necessary to identify the nature of the claims advanced by Jadwan, the injury which Jadwan claimed to have suffered, and the relevant legal principles to the determination of those claims.

417 The identification of injury, or damage, is not to be equated with the assessment of damages: see the observations of Gummow A‑CJ in *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [23]. In *Hunt & Hunt v Mitchell Morgan Pty Ltd* [2013] HCA 10; 247 CLR 613, French CJ, Hayne and Kiefel JJ stated at [25]-[26] –

25 In *Hawkins v Clayton* [(1988) 164 CLR 539 at 601], Gaudron J pointed out that in an action for negligence causing economic loss it will almost always be necessary to identify, with some precision, the interest infringed by the negligent act [See also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527; *The Commonwealth v Cornwell* (2007) 229 CLR 519 at 525 [16]]. In [*Hawkins v Clayton*], it was necessary to identify the interest in order to answer the question as to when the cause of action accrued. Its identification is also necessary for a proper understanding of the harm suffered and for the determination of what acts or omissions may be said to have caused that damage. As her Honour observed [at 601], economic loss may take many forms. In *Wardley Australia Ltd v Western Australia* [at 527], it was said that the kind of economic loss which is sustained, as well as the time when it is sustained, depends upon the nature of the interest infringed and in some cases, perhaps, upon the nature of the interference to which it is subjected.

26. An interest which is the subject of economic loss need not be derived from proprietary rights or obligations governed by the general law. The interest infringed may be in the value of property or its physical condition. Thus in *The Commonwealth v Cornwell* [(2007) 229 CLR 519 at 526 [18]], the respondent’s interest was an entitlement conferred by federal statute to participate in a Commonwealth superannuation fund. An economic interest must be something the loss or invasion of which is compensable by a sum of money [*Cane, Tort Law and Economic Interests*, 2nd ed (1996), p 5]. One such interest identified in the cases is a lender’s interest in the recovery of moneys advanced [citation omitted].

418 Jadwan’s claim in negligence was for damage to its economic interests, namely its ability to generate income in the business of an accredited nursing home with approvals for 51 beds under Commonwealth legislation, or alternatively the capital value of those approvals on the assumption that they could be transferred for consideration. In the case of the first respondent, Rae & Partners, the injury was alleged to have been caused by the negligence of Mr Wicks in failing to advise Jadwan to take action to challenge the findings of the first Standards Review Panel, the financial sanctions determination, and the second Standards Review Panel, in circumstances where revocation of approval had been foreshadowed, and the Minister was likely to rely upon the findings in those reports. In the case of the second respondent, Wilson Dowd, and Mr Porter, the alleged negligence extended to failing to advise Jadwan of the enactment of the *Aged Care Act* and the *Consequential Provisions Act* and their relevance to the continuation of Jadwan’s approvals. No distinction was made in Jadwan’s pleadings between Wilson Dowd, and the third respondent, Toomey Maning. The main allegation made against the fourth respondent in respect of Mr Hogan’s advice was his failure to advise Jadwan of the new legislation, and its potential consequences for Jadwan’s approvals.

419 Jadwan characterised its claim as being one for a lost opportunity to continue to conduct its nursing home business at new premises, or alternatively, its lost opportunity to sell its approvals in the latter part of 1997. The claim rested on the following central premises –

(1) that reasonable advice to Jadwan required that its attention be directed to the new legislation, and to the effect of the transitional provisions in the *Consequential Provisions Act*;

(2) that if Jadwan had received reasonable advice about the operation of the new legislation, then it would have instructed its lawyers to seek interlocutory relief in the nature of injunctions;

(3) an application for such relief would have been successful;

(4) Jadwan would have organised its affairs so as to ensure that at least one resident with an entitlement to receive a Commonwealth benefit remained at Derwent Court on 30 September 1997; and

(5) consequently, on 1 October 1997, Jadwan would have become an approved provider under the new legislation.

420 In *Sellars v Adelaide Petroleum NL*, the Court held that the loss of a commercial or economic opportunity was compensable under s 82 of the *Trade Practices Act 1974* (Cth). At 352-353, Mason CJ, Dawson, Toohey and Gaudron JJ distinguished between causation of the damage which was to be proven on the balance of probabilities, and the assessment of loss which, in relation to hypothetical or future events, may be proven by reference to the principles essayed in *Malec v JC Hutton Pty Ltd* [1990] HCA 20; 169 CLR 638, under which damages may be assessed having regard to hypothetical or future possibilities. Their Honours thenstated at 355 –

Hence the applicant must prove on the balance of probabilities that he or she has sustained some loss or damage. However, in a case such as the present, the applicant shows some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant’s case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable.

421 Brennan J at 359 distinguished cases such as *Chaplin v Hicks* [1911] 2 KB 786, where the contractual promise was to afford the plaintiff an opportunity to acquire a benefit, or to avoid a detriment. In those cases, a breach of the promise resulted in loss. Brennan J stated at 359, in relation to cases where damage was the gist of the cause of action –

But in cases arising under s. 82(1) of the Act, as in cases of tort where damage is the gist of the action, a lost opportunity may or may not constitute compensable loss or damage. In such cases, the existence and causation of a compensable loss cannot be proved by reference to an antecedent promise to afford an opportunity. The plaintiff, who bears the onus of proving a loss suffered as the result of the defendant’s contravening or tortious conduct, must prove the existence and causation of the alleged loss in some other way. …

422 And at 364, Brennan J stated –

As a matter of common experience, opportunities to acquire commercial benefits are frequently valuable in themselves, not only when they will *probably* fructify in a financial return but also when they offer a *substantial prospect* of a financial return. The volatility of the market for speculative shares testifies to both the valuable character of commercial opportunities and the difficulty of assessing the value of opportunities which are subject to serious contingencies. Provided an opportunity offers a substantial, and not merely speculative, prospect of acquiring a benefit that the plaintiff sought to acquire or of avoiding a detriment that the plaintiff sought to avoid, the opportunity can be held to be valuable. And, if an opportunity is valuable, the loss of that opportunity is truly “loss” or “damage” for the purposes of s. 82(1) of the Act and for the purposes of the law of torts.

423 In *Tabet v Gett,* Gummow A‑CJ at [50] referred to Brennan J’s reasons for judgment in *Sellars* at 359, and stated –

As Brennan J indicated in *Sellars*, in an action in tort where damage is the gist of the action, the issue which precedes any assessment of damages recoverable is whether a lost opportunity, as a matter of law, answers the description of “loss or damage” which is then compensable.

424 In *Sellars* at 353-4, Mason CJ, Dawson, Toohey and Gaudron JJ referred to three cases involving the negligence of solicitors: *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113; the dissenting reasons of Brennan J in *Johnson v Perez* [1988] HCA 64; 166 CLR 351, and the decision of the Court of Appeal in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563. Their Honours noted that these cases concerned causes of action for breach of contract, however we note that in *Johnson v Perez*, a cause of action in negligence was also alleged, and at 363, Wilson, Toohey and Gaudron JJ stated that it was immaterial whether the problem that arose in that case, which concerned the time at which damages were assessed, was considered as one of contract or tort.

425 In *Sykes*, the solicitor’s negligence was his failure to draw the plaintiffs’ attention to an unusual term of an underlease, and the injury that was alleged was the loss of the opportunity not to enter into it, or to negotiate different terms. The plaintiffs failed to prove that, had they been given reasonable advice, they would have acted any differently, and were therefore entitled only to nominal damages for breach of contract. Salmon LJ at 129 rejected an argument that the plaintiffs were entitled to damages on account of the chance, however slim, that they might have acted differently.

426 In both *Kitchen* and *Johnson* *v Perez,* the plaintiff’s damage was the loss of a cause of action for damages for personal injuries. In *Kitchen*, the solicitors had negligently allowed the cause of action to become statute-barred, and in *Johnson* *v Perez*, the solicitors’ negligence in the conduct of the proceeding resulted in the proceeding being dismissed for want of prosecution.

427 In *Johnson v Perez,* it was not in issue on appeal that the plaintiff’s original claim for personal injuries would have succeeded, so consideration of the assessment of damages in the claim against the solicitors proceeded on that basis. Wilson, Toohey and Gaudron JJ at 363 approved the following statement of Lord Evershed in *Kitchen* at 575 –

In my judgment, what the court has to do (assuming that the plaintiff has established negligence) in such a case as the present, is to determine what the plaintiff has by that negligence lost. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can.

428 Their Honours in *Johnson v Perez* at 366 characterised the loss as follows –

When an action has been dismissed for want of prosecution due to the negligent conduct of a solicitor, the client has lost the opportunity to bring that claim to trial and recover damages in respect thereof. As already indicated, in some cases it may be appropriate to describe the loss as the loss of a chance for there may be various contingencies bearing on the likelihood that the plaintiff would have recovered judgment against the defendant and further that any such judgment would have been met.

429 In *Badenach v Calvert* [2016] HCA 18; 257 CLR 440, the beneficiary under a will alleged that the testator’s solicitor was negligent in failing to give advice about courses that might have been taken to avoid the risk of the testator’s daughter successfully bringing a testator’s family maintenance claim. On appeal to the High Court, the solicitor was successful in arguing that no duty of care was owed to the beneficiary. In addition, it was held that even if a duty was owed, the beneficiary had not demonstrated causation, in that the beneficiary had not proven on the balance of probabilities what course the testator would have taken had advice in the terms alleged by the beneficiary been given. In addressing the beneficiary’s claim that the loss was the loss of a chance that the testator would act on the advice, French CJ, Kiefel and Keane JJ stated at [39]-[41] –

39 The respondent’s case on causation is not improved by seeking to equate the chance spoken of with an opportunity lost. It may be accepted that an opportunity which is lost may be compensable in tort [*Sellars*]. But that is because the opportunity is itself of some value. An opportunity will be of value where there is a substantial, and not a merely speculative, prospect that a benefit will be acquired or a detriment avoided [*Sellars* at 364].

40 It remains necessary to prove, to the usual standard, that there was a substantial prospect of a beneficial outcome [*Sellars* at 355, 367-368]. This requires evidence of what would have been done if the opportunity had been afforded. The respondent has not established that there is a substantial prospect that the client would have chosen to undertake the inter vivos transactions. Therefore, the respondent has not proven that there was any loss of a valuable opportunity.

41 The onus of proving causation of loss is not discharged by a finding that there was more than a negligible chance that the outcome would be favourable, or even by a finding that there was a substantial chance of such an outcome. The onus is only discharged where a plaintiff can prove that it was more probable than not that they would have received a valuable opportunity. To the extent that the majority in *Allied Maples Group Ltd v Simmons & Simmons (a Firm)* [[1995] 1 WLR 1602] holds that proof of a substantial chance of a beneficial outcome is sufficient on the issue of causation of loss, as distinct from the assessment of damages, it is not consistent with authority in Australia and is contrary to the requirements of s 13(1)(a) of the *Civil Liability Act*.

430 The requirement to show that an opportunity lost was something of value was emphasised by Keane JA (McMurdo P and Wilson J agreeing) in *Lewis v Hillhouse* [2005] QCA 316. In that case, the appellant, who was the former Queensland Commissioner of Police, Terence Lewis, claimed that his lawyers had been negligent in the conduct of an appeal against his criminal convictions by failing to advance an argument that particular evidence had been wrongly admitted. The appellant characterised his damage as the lost chance of a successful appeal and new trial. Keane JA held that this claim amounted to a collateral attack on the conviction, and was precluded for that reason. In addition, Keane JA held that in order for the appellant to demonstrate that he had lost something of value, it was necessary to show on the balance of probabilities that if the point had been pursued, then the appellant’s convictions would have been quashed and verdicts of acquittal entered. At [24], Keane JA stated –

In the present case, unless the appellant is able to show that the evidence admission point was a good point, ie that it would have been accepted and acted upon by the Court, he will have failed to show that he has lost anything of value. An opportunity to litigate, considered in the abstract and without regard for the prospects of a favourable outcome, is not something of value. Rather, it is an occasion of confrontation, conflict and expense. No litigant suffers any real loss by losing the opportunity to run up dry gullies. It cannot sensibly be said that the loss of “a right to an appeal” or “a right to a trial”, without more, is a loss of something valuable. In the context of a claim for substantial damages, the loss of a right to an appeal or trial of criminal charges is, of itself, nothing more than the loss of the opportunity to be in peril of a conviction and to spend money to avoid that peril. It is only if the result of the appeal or trial was likely to be favourable in some sense that anything of value has been lost by the litigant. The client may suffer a loss in terms of wasted costs expended in the process of pursuing hopeless contentions, but such loss is plainly not what is claimed by the appellant in this case. It may indeed be the way in which the value of the appellant’s loss is quantified in his statement of claim, but this is merely to recognize an inconsistency in the appellant’s approach to the formulation of his claim, and hence another deficiency in the appellant’s pleaded case.

431 As we mentioned at [384] above, the respondents sought to characterise Jadwan’s lost opportunity as being the opportunity to avoid the detrimental consequences of Commonwealth decision-making. If Jadwan’s opportunity were to be characterised in that way, then Jadwan would be required to prove on the balance of probabilities that it would have avoided those detrimental consequences. However, Jadwan did not characterise its lost opportunity as an opportunity to obtain injunctive relief from the Court, or generally to avoid detrimental consequences of government regulatory action. Had it done that, then it would have had to confront the observations of Keane JA in *Lewis v Hillhouse*,referred to at [430] above. As we indicated at [419] above, by its claim, Jadwan undertook the burden of proving on the balance of probabilities that it would have sought interlocutory relief, that it would have succeeded in doing so, that it would have had one or more residents in respect of whom it would have been entitled to a Commonwealth benefit on 30 September 1997, and that its entitlements under the *National Health Act* would have transformed into corresponding entitlements under the *Aged Care Act*. Had that occurred, then Jadwan submitted that it would have held something of value as at 1 October 1997. On Jadwan’s case, questions concerning whether the Minister might thereafter have succeeded in revoking its approval, or whether for other reasons its value would have been impaired, went to the assessment of damages in accordance with the principles essayed in *Malec v JC Hutton Pty Ltd*.

432 In our view, the entitlement of Jadwan under Commonwealth legislation to operate a nursing home that attracted Commonwealth funding with approval for 51 beds was an economic interest, injury to which the laws of negligence are capable of compensating. The statutory mechanisms under the *National Health Act* and the *Aged Care Act* for the transfer of the approvals, and the evidence that the approvals had a market in which they were bought and sold, are a sufficient indication that the statutory entitlements had some value. The object of a judicial review proceeding that Jadwan had in contemplation from the time that Mr Porter was engaged on 23 July 1997, and which it later commenced in January 1998, was to have enjoined, or set aside the revocation decision, and to restore the approval of Derwent Court as a nursing home entitled to Commonwealth funding. That object was frustrated because Jadwan failed to secure its position as at 30 September 1997, so that its approvals under the *National Health Act* would engage the transitional provisions in the *Consequential Provisions Act*. Jadwan alleged that the frustration was caused by negligent advice given to it by the first to third respondents, Mr Hogan, and Mr Porter. On similar reasoning, Jadwan’s claim that the negligence of Mr Wicks, from 7 February to 1 July 1997 when employed by the first respondent, in failing to advise Jadwan to take action to challenge the findings of the first Standards Review Panel and the financial sanctions determination, resulted, on Jadwan’s claim, in the impairment of its economic interests as a result of its inability to admit new residents who were entitled to Commonwealth benefit, which in our view is also capable of being regarded as damage. No different analysis arises in relation to Jadwan’s claims against the first to fourth respondents in contract, which were concurrent with the claims in negligence, and which on the pleaded case required Jadwan to demonstrate the same loss of opportunity. The claim against the fifth respondent was in negligence alone, and the damage was alleged to be the lost opportunity to pursue the claim against Mr Porter. Subject to proving that the claim against Mr Porter had some value, the lost opportunity to pursue that claim was capable of being regarded as damage suffered by Jadwan.

## Some observations

433 Having identified the nature of the injury which Jadwan claimed to have suffered, we shall now identify the main issues that arise in the evaluation of the evidence before the primary judge, and the allegations of error by the primary judge that are raised by Jadwan’s grounds of appeal, as conveniently grouped by Jadwan into nine issues (see [312] above).

434 Jadwan bore the legal onus of proving damage caused by negligence of the respondents. The alleged causes of action in this proceeding against the first to fourth respondents, and any cause of action that existed against Mr Porter, accrued before 4 July 2003, and therefore the statutory provisions affecting questions of breach and causation in the laws of negligence do not apply: see, *Civil Liability Act 2002* (Tas), s 4(3). And the proceeding against Mr Hogan was brought before the commencement of the corresponding Victorian provisions with the consequence that they do not apply: see, *Wrongs Act 1958* (Vic), s 66. The factual questions of breach of duty and causation are therefore to be resolved by reference to common law principles, as picked up by the *Judiciary Act*, s 80.

435 It was not controversial that each of the relevant legal practitioners owed a duty to Jadwan to exercise reasonable care in the performance of their respective retainers. However, the scope of those duties was in issue. Rae & Partners maintained that the scope of its retainer did not require it to give advice about taking action to challenge the first Standards Review Panel report, or the financial sanctions determination, as Jadwan alleged. The fourth respondent claimed that Mr Hogan’s retainer was constrained by the terms of his instructions, which related to Jadwan’s short-term desire to sell its bed licences before the foreshadowed revocation of its approval, and which did not require Mr Hogan reasonably to direct attention to the new legislation. And the fifth respondent maintained that Mr Porter had not been requested to give advice about the new legislation.

436 The retainers of the first to third respondents, Mr Hogan, and Mr Porter are to be examined separately. Each may be liable to Jadwan independently in negligence, and in the case of the first to fourth respondents, also in respect of a corresponding breach of retainer. As McHugh J observed in *Bennett v Minister of Community Welfare* [1992] HCA 27; 176 CLR 408 at 429, citing the speech of Lord du Parcq in *Grant v Sun Shipping Co Ltd* [1948] AC 549 at 563 –

It is “a well settled principle that when separate and independent acts of negligence on the part of two or more persons have directly contributed to cause injury and damage to another, the person injured may recover damages from any one of the wrongdoers, or from all of them”.

437 While the existence of a duty to take reasonable care is a question of law, what reasonable care required to discharge such a duty depends upon all the factual circumstances. And whether reasonable care was exercised is a question of fact that is to be evaluated prospectively: *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [126] (Hayne J); *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330 at [18] (Gummow J). In relation to the duty of a solicitor, in *Badenach v Calvert*, French CJ, Kiefel and Keane JJ stated at [16] that –

There could be no doubt that a solicitor owes a duty to his or her client in both contract and tort. The scope of a solicitor’s duties with respect to the latter will usually be set by the terms of the retainer.

[Citation omitted]

438 Gageler J stated in the same case at [57] –

Subject to statutory or contractual exclusion, modification or expansion, the duty of care which a solicitor owes to a client is a comprehensive duty which arises in contract by force of the retainer and in tort by virtue of entering into the performance of the retainer. The duty is to exercise that degree of care and skill to be expected of a member of the profession having expertise appropriate to the undertaking of the function specified in the retainer. Performance of that duty might well require the solicitor not only to undertake the precise function specified in the retainer but to provide the client with advice on appurtenant legal risks. Whether or not performance of that duty might require the solicitor to take some further action for the protection of the client’s interests beyond the function specified in the retainer is a question on which differences of view have emerged. That question was not addressed in argument, and need not be determined in this appeal.

[Citations omitted]

439 Gageler J’s reference to taking action beyond the function specified in the retainer was accompanied by the citation of *Hawkins v Clayton* [1988] HCA 15; 164 CLR 539 at 544-545 (Mason CJ and Wilson J) and 579-580 (Deane J), and other cases where a solicitor’s “penumbral” duty has been considered. That has occurred often in the context where it has been alleged that a solicitor’s duty to take reasonable care required that advice be given as to the prudence of a proposed transaction: see for example, *Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343; 77 NSWLR 205 at 263-270. Whether such an obligation arises depends upon the circumstances, as the observations of Allsop P in *Provident Capital Ltd v Papa* [2013] NSWCA 36; 84 NSWLR 231 at [2]-[6] and of Nettle JA in *AJH Lawyers Pty Ltd v Hamo* [2010] VSCA 222; 29 VR 384 at [23] demonstrate. In the latter case, Nettle JA stated at [23] –

As Deane J said in *Hawkins v Clayton*, depending upon the circumstances, a solicitor may come under a duty to do more than simply perform the task defined by his instructions. A duty to warn may arise where circumstances give rise to a real and foreseeable risk of economic loss by the client or, in particular circumstances, even a person who was not a client but who may be adversely affected.

440 In *Dominic v Riz* [2009] NSWCA 216, Allsop P referred to other cases, namely *Heydon v NRMA Ltd* and the analysis by Campbell JA in *Kowalczuk v Accom Finance Pty Ltd*, and stated that the circumstances of the responsibility of a solicitor to act in respect of a matter falling outside his or her retainer were less than clear, and that, “[p]art of that lack of clarity is the impossibility and unwisdom of seeking to cover future factual circumstances of an infinite kind with a legal test.” And in *Provident Capital Ltd v Papa* at [5] Allsop P stated that “[t]he extent of proper fulfilment of the duty may be debateable in any given case”. We respectfully agree with these observations.

441 In *Cousins v Cousins* [1991] ANZ Conv R 245, Kirby P stated –

Lawyers are trained, and the law of their profession requires them to be vigilant for their client's interests. They must sometimes step in front of their client. They must provide advice to them against the follies of plans having a legal character, the full legal ramifications of which the client may not understand.

442 We do not treat this passage as laying down any general principle of law because, as we have said, what reasonable care requires in particular circumstances is fact-dependent. In *Provident Capital Ltd v Papa* at [6] Allsop P cited the above passage, and added –

I recognise the risk of simplistic encapsulation; but many clients look to and rely on an advising lawyer, not as the expounder of legal doctrine, but as the confidential adviser about the law and its practical intersection with life. That is why they seek advice.

443 For reasons that will become apparent, we do not think that any question of a penumbral duty arises in this appeal. But in relation to any such suggested duty, we express a preference for the statement of Kourakis CJ in *AS Bannister v Sirrom Enterprises Pty Ltd* [2016] SASCFC 153 at [92] that “what is sometimes described as a penumbral duty is no more than a particular aspect of a solicitor’s primary duty”.

444 Jadwan bore the onus of showing that it suffered damage that was caused by the negligence of its legal practitioners, which entailed proving on the balance of probabilities the matters identified at [419] above: *Evidence Act 1995* (Cth), s 140(1). In order for a fact to be proven on the balance of probabilities, the Court must have an actual persuasion of its existence. A mere mechanical comparison of probabilities independent of any belief in its reality, cannot justify a finding of a fact: *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 at 361 (Dixon J). See also, *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACCC* [2007] FCAFC 132; 162 FCR 466 at [31] (Weinberg, Bennett and Rares JJ). And the Court does not simply choose between alternatives on the ground that one is more likely. What must be demonstrated is a reasonable and definite inference: *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 (Dixon, Williams, Webb, Fullagar and Kitto JJ), cited in *Luxton v Vines* [1952] HCA 19; 85 CLR 352 at 358 (Dixon, Fullagar and Kitto JJ).

445 Although the component parts of Jadwan’s case require examination, on the question of causation upon the hypothesis that its legal practitioners were negligent, Jadwan had to satisfy the Court of the fifth proposition referred to at [419] above, namely that if reasonable care had been exercised, then on 1 October 1997, Jadwan would have become an approved provider under the *Aged Care Act*. To establish that fact required proof of a past hypothetical on the balance of probabilities, involving the evaluation – at a hypothetical level – of manifold and interdependent facts and circumstances. In evaluating those facts and circumstances it is necessary to stand back and consider whether the Court is satisfied of the ultimate proposition by looking at the overall effect of the evidence. The observations of Tadgell JA in *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 at 141 in relation to circumstantial evidence, and his Honour’s focus on what is ultimately sought to be proved, are equally applicable to the evaluation of complex past hypothetical circumstances –

… it should be said that, to assess the evidence in a case like this by reference to various individually-pleaded particulars, as though running through items on a check list, is apt to mislead. The evidence is to be evaluated as a whole in order fairly to consider whether the party bearing the onus of proof has established what is ultimately sought to be proved. The object of the exercise of evaluation is to discover whether the evidence paints a picture reflecting real life, rather than to place a tick or a cross against paragraph after paragraph of torpid pleading. A true picture is to be derived from an accumulation of detail. The overall effect of the detailed picture can sometimes be best appreciated by standing back and viewing it from a distance, making an informed, considered, qualitative appreciation of the whole. The overall effect of the detail is not necessarily the same as the sum total of the individual details: cf. *Hall (Inspector of Taxes) v. Lorrimer* [1992] I WLR. 939 at 944; *Shepherd v. R*. (1990) 170 C.L.R. 573 at 579-80.

In a civil case like this, where there is no direct evidence of a fact that a party bearing the onus of proof seeks to prove, “it is not possible to attain entire satisfaction as to the true state of affairs”: *Girlock (Sales) Pty. Ltd. v. Hurrell* (1982) 149 C.L.R. 155 at 169, per Mason J. In such a case, however, the law does not require proof to the “entire satisfaction” of the tribunal of fact.

446 To prove a past hypothetical on the balance of probabilities has its peculiar difficulties, as opposed to proof of historic facts: *Sellars v Adelaide Petroleum NL* at 355 (Mason CJ, Dawson, Toohey and Gaudron JJ). While there may be occasions where it is appropriate to assess damages on robust assumptions that are favourable to an applicant if the act of a wrongdoer has made proof of loss difficult (see, *Murphy v Overton Investments Pty Ltd* [2004] HCA 3; 216 CLR 388 at [74], citing *Armory v Delamirie* (1722) 1 Str 505; 93 ER 664), those principles do not apply so as to ameliorate the requirement to prove causation of the claimed injury or damage on the ordinary standard. Particular problems may arise in relation to testamentary evidence directed to a hypothetical. In relation to such evidence, “[t]he witness is giving evidence with the benefit of hindsight and knows where his or her interest lies at the time of giving evidence”: *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 5)* [1996] FCA 256; 64 FCR 73 at 77 (Lindgren J). See also the observations of Kirby J in *Chappel v Hart* [1998] HCA 55; 195 CLR 232 at 272-3. Testamentary evidence of what the directors of Jadwan would have done in a hypothetical situation is open to the criticism that it is self-serving, and may carry little weight: *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* [1992] FCA 550; 38 FCR 471 at 483 (Beaumont, Foster and Hill JJ). Senior counsel for Jadwan accepted in submissions on appeal that the evidence of Mrs Joan Alexander and Ms Julie Alexander as to what they would have done had they received competent advice was somewhat self-serving. On the other hand, as McHugh J demonstrated in *Rosenberg v Percival*, if a trial judge forms a favourable impression of the witness, direct evidence may have substantial weight. It is not apparent that the primary judge, who had the benefit of seeing Mrs Joan Alexander and Ms Julie Alexander give their evidence, gave any weight to their evidence on the topic of what Jadwan would have done had it received different advice. In the present case, the circumstantial evidence and the inferences arising therefrom were of significance, because the circumstantial evidence bore upon the probability of any hypothetical propositions asserted in the testamentary evidence. In discharging its legal onus, Jadwan had to show that it would have acted on advice to seek interlocutory relief from the Court, and that it would have continued to conduct its business so that at least one resident entitled to Commonwealth benefit remained at Derwent Court on 30 September 1997. That directs attention to what Jadwan itself would have done. The primary judge found at [149], [157], and [531] that Mr Alexander, who had passed away many years prior to the trial, was effectively the controlling mind of Jadwan. The hypothetical question of what course Jadwan would have taken if it had been given reasonable and prudent advice therefore depended on circumstantial evidence.

447 Part of the past hypothetical that Jadwan had to prove was what advice the exercise of reasonable care on the part of Mr Wicks, Mr Hogan, and Mr Porter required in the circumstances. That issue had to be evaluated prospectively, and directed attention to the individual circumstances of the retainer of the practitioner concerned, and to the standard of care.

## Consideration

448 We shall address the issues argued by Jadwan on appeal, but not in the same order in which they were presented in argument.

### 1. The retainer of Rae & Partners – Issue (6)

449 We respectfully do not agree with the primary judge’s findings that Rae & Partners had not been retained to give legal advice, or that the services that had been provided by Mr Wicks when employed by Rae & Partners did not add anything of legal consequence. The starting point is the letter of instructions that Mr Alexander sent to Mr Wicks on 7 February 1997, to which we referred at [70] above. That letter referred to Jadwan’s belief that it was “*prudent to seek initial advice in the early stages*”, and to a hope that the matter would be resolved without legal involvement. After receiving written and oral instructions from Mr Alexander, Mr Wicks undertook research at the Law Society library, which was evidenced by a five-page research note (see [74] above). That research note referred to a reprint of the *National Health Act* dated 20 September 1996. The note referred to provisions of the Act relating to declarations of non-compliance, revocation of approval, and administrative review by the Administrative Appeals Tribunal. There was no reference in the note to the *ADJR Act*, or any other form of judicial review. Later documents support an inference that Mr Wicks did not have a proper understanding of the applicable principles, because he referred in his notes as late as 31 July 1997 to the proposed *ADJR Act* proceeding as an “appeal”, and as we have mentioned, he was advising Jadwan in July and August 1997 that it could pursue a claim in damages if it were shown that the revocation decision was improperly made (see [205]-[206], [210], and [263] above). The evidence does not support an inference that Mr Wicks had any awareness of the principles concerning the tort of misfeasance in public office, and the elements that had to be established to show an entitlement to damages, as to which see *Northern Territory v Mengel* [1995] HCA 65; 185 CLR 307. Rather, it seems that Mr Wicks proceeded on the incorrect understanding that an action in damages lay if an administrative decision was set aside, without more.

450 Thereafter, Mr Wicks sent correspondence to the Department, including the letter of 12 February 1997 to Mr Dellar (see [77] above). The evidence of Mr Wicks was that the letter of 12 February 1997 was written based upon instructions given by Mr Alexander in the conference on 7 February 1997, during a telephone call on 12 February 1997, and from material that Mr Alexander provided to him. Mr Wicks did not say that Mr Alexander had drafted the letter of 12 February 1997, and the evidence does not support that inference. The letter of 12 February 1997 sought from Mr Dellar information about the process and instruments by which the first Standards Review Panel was appointed. This request directed attention to the legality of the Panel’s composition. We infer from the contents and form of the letter that its drafting involved the application of legal skill.

451 The letter dated 13 February 1997 that Mr Wicks sent to the Department was in a different category, because its contents were based upon a draft letter that Jadwan sent to Mr Wicks (see [80] above). However, it is material to observe that the contents of the 13 February 1997 letter were factual, and detailed, and necessarily required precise instructions from Jadwan. But even then, although Mr Wicks’s letter in its detail followed the text of the draft letter sent to him by Jadwan, it did not do so slavishly. The opening two paragraphs of the letter that Mr Wicks sent were different, and the closing paragraph was different. We infer from the contents of those paragraphs that the preparation of the letter was the product of the application of legal skill, which included the review and incorporation of the instructions that Mr Wicks had received from Jadwan in the form of the draft letter.

452 Nor do we consider that the work that Mr Wicks undertook in accompanying Mrs Joan Alexander and Ms Julie Alexander to the meeting with the Department on 26 February 1997 did not require legal skill. Mr Wicks met them before and after the meeting with the Department. Negotiation and advice on strategy in the context of a dispute with government are skills that are reasonably within a lawyer’s professional expertise. As Allsop P observed in *Provident Capital Ltd v Papa* (see [442] above), many clients look to and rely on an advising lawyer, not as the expounder of legal doctrine, but as the confidential adviser about the law and its practical intersection with life. It is tolerably clear from Mr Wicks’s file note of the meeting on 26 February 1997, to which we referred at [93] above, that he did proffer some opinions having a legal character, including on the prospects of challenging any decision to revoke Jadwan’s approval. We infer from that note, in combination with the product of Mr Wicks’s legal research, that the advice concerned administrative, merits-based review, rather than judicial review. In cross-examination, Mr Wicks accepted that his notes of the meeting of 26 February 1997 recorded advice that he had given to Mrs Joan Alexander and Ms Julie Alexander. For the reasons given by the primary judge at [124]-[128], Mr Wicks’s file notes are highly probative of what they recorded.

453 As to Ms Julie Alexander’s evidence that at the meeting on 26 February 1997 she conveyed a concern to Mr Wicks that Jadwan was not receiving any advice as to what they should be doing in relation to the financial sanctions determination, the primary judge held at [272] that Mr Wicks’s contemporaneous note was inconsistent with him being asked for advice about prospects of challenging the determination. The primary judge at [273] held that the evidence recorded in Mr Wicks’s contemporaneous note was to be preferred over Ms Alexander’s recall, and was not persuaded to accept her evidence on that issue. We see no appealable error in that approach, which involved a preference for the contents of a contemporaneous document. However, we differ from the primary judge because we infer from the file note that Mr Wicks gave advice to Jadwan by at least stating that he could not really assist in any way, that there was little further that he could do, and by stating that it may be difficult to challenge a decision to revoke the approval through an “appeal” process.

454 On 5 March 1997, Mr Wicks sent by fax to the Department some submissions prepared by Jadwan and its nursing staff under cover of a letter that challenged the merits of the first Standards Review Panel’s report, and pleaded that the approval should not be revoked, and that the report should not be made public. We regard that plea as involving legal work, namely an attempt to negotiate a favourable outcome with the Department.

455 Mr Wicks’s file note of the meeting with Mr Alexander on 8 April 1997, to which we referred at [108] above, recorded a statement that it was pointless challenging the composition of the first Standards Review Panel. The primary judge at [284] made no finding as to whether this statement was to be attributed to Mr Wicks, or to Mr Alexander. Mr Wicks had accepted in cross-examination that the note appeared to record a view that he conveyed to Mr Alexander, but the primary judge declined to act on that concession, finding that it was equally possible that the conclusion was expressed by Mr Alexander. We would not disturb that finding, because it was informed by the primary judge’s assessment of Mr Wicks as a witness (see [40] above), and no objective circumstantial evidence dictates a contrary finding. Further, on the assumption that Mr Wicks gave the advice recorded in the file note, we are not persuaded that the advice was unreasonable at the time that it was given, and we are not persuaded that there was any error in the primary judge’s finding to that effect at [287]. The context of the advice was that the first Standards Review Panel had recommended revocation of Jadwan’s approval, and the note recorded a reasonable view that by the appointment of the second Standards Monitoring Team, which had visited Derwent Court in March 1997, the Department was seeking to secure its position against the prospect of a review by the Administrative Appeals Tribunal. At the time, the principal threat was revocation of the approval, rather than the imposition of the financial sanctions, which was having only a marginal effect on resident numbers. As we noted at [133] above, by 10 June 1997, resident numbers had been reduced by only two. For the purpose of evaluating whether Mr Wicks’s advice was unreasonable at the time it was given, it is important not to view it in hindsight. The real significance of the financial sanctions determination to the revocation of approval would arise later in relation to the potential operation of the transitional provisions of the *Consequential Provisions Act*, which was not enacted until 7 July 1997. Moreover, the evidence does not support an inference that, if Jadwan had at any point prior to July 1997 been given advice about the prospect that it could seek judicial review of the financial sanctions determination, that it would have acted on such advice and commenced a proceeding. There was a shortage of evidence on the topic of causation in relation to these claims. The primary judge noted at [24] that as a distinct basis of liability, little attention was given to these claims at the trial. On the available evidence, the inference we draw is that Jadwan was seeking to assuage the Department, and the Tasmania Fire Service, without recourse to litigation, and was at least contemplating the sale of its bed licences.

456 On 10 June 1997, when Mr Alexander sought Mr Wicks’s assistance with the preparation of a business plan (see [132] above), they discussed whether an approved business plan would result in a lift of the financial sanctions determination. This discussion appears to have been incidental to Jadwan’s main concern, which was to satisfy the Tasmania Fire Service, and in turn the Department, of a proposal to relocate Derwent Court to a newly-constructed building. In relation to the draft business plan, by a letter dated 12 June 1997, Mr Wicks provided some considered comments to Mr Alexander, which are set out at [135] above. Those comments included giving advice that an option to purchase new land was the best way to proceed. We are of the view that the preparation of that letter from Mr Wicks involved the application of legal skills.

457 For the above reasons, the primary judge was in error at [256] in characterising the retainer of Rae & Partners as involving only the provision of a letterhead, and not requiring the application of legal skills. We consider that when Mr Wicks gave advice to Jadwan on 24 February 1997 about options that were open to it, reasonable care required that the possibility of judicial review of the financial sanctions determination and the proposed revocation be at least identified. We infer that Mr Wicks’s focus of attention had been confined to merits review. However, we are not persuaded that Jadwan established that it would have acted on any such advice and commenced proceedings at any point prior to service of the notice of intention to revoke the approval, which occurred on 20 July 1997. Whether Jadwan would have taken steps to seek judicial review of the financial sanctions determination, given its focus on dealing with the requirements of the Tasmania Fire Service, and the investigation of alternatives such as moving residents out of the first floor and developing new premises, is in the realm of true speculation. Relevant to this conclusion is the special significance of the new legislation, which the primary judge inferred at [469] was held in the Law Society library’s collection by 21 July 1997. The evidence does not support a finding that a solicitor exercising reasonable care should have become aware of the new legislation at any earlier point in time.

### 2. Had Jadwan decided by 15 July 1997 to “get out” – Issue (1)

458 The primary judge inferred from a file note prepared by Mr Wicks and dated 15 July 1997 that Jadwan had by that date decided to cease operating Derwent Court, and had decided to sell its bed licences. We have set out the file note at [148] above. Jadwan made two challenges to this finding. First, Jadwan submitted that the allegation that it had decided to get out had not been pleaded, or otherwise run at trial. And second, Jadwan submitted that the finding was in any event in error.

459 As to whether the respondents ran that case at trial, we accept Jadwan’s submission in part, to the extent that no respondent pleaded their case alleging in terms that Jadwan had decided irrevocably by 15 July 1997 to cease operating its business at Derwent Court and to sell its bed licences. The pleaded case of the first to third, and fifth respondents, to which we referred at [317] above, was that by 24 and 25 July 1997, Jadwan had decided to cease operating the nursing home. In our view, within that case was Jadwan’s circumstances in the weeks and days leading up to 24 and 25 July 1997, and it was permissible for the respondents to rely upon Mr Wicks’s file note of 15 July 1997 to support that case.

460 In opening Jadwan’s case at trial, senior counsel for Jadwan referred the primary judge to Mr Wicks’s file note of 15 July 1997, referred to the fact that the handwritten date was unclear, and submitted that it was dated 3 July 1997. As to the entry, “*you have decided to get out”*, senior counsel opened the case on the basis that while that may well have reflected the current thinking at the time, it did not remain the case. Later in his opening, senior counsel submitted that, in context, the words “*you to stress you will be relocating*”meant getting out of the old building, and relocating. When senior counsel for the first to third respondents opened their case, which occurred after Jadwan’s opening and before any evidence was called, he referred to Mr Wicks’s file note of 15 July 1997 and submitted that the decision to get out related to Derwent Court, which was a spent entity, and accepted a proposition put to him by the primary judge that “*you to stress you will be relocating*” was how the circumstances would be explained to others. In written closing submissions in reply at trial, the first to third respondents submitted that –

 the business plan that Jadwan submitted provided for a three-year timeframe, when the Tasmania Fire Service had requested a two-year timeframe;

 the business plan had been prepared only for the purpose of buying more time for the existing operation at Derwent Court;

 the evidence of Jadwan seeking a new site was of superficial efforts, and there was no evidence of any concrete proposal to relocate;

 despite enquiries about alternative accommodation for residents on the first floor, no arrangements were ever put in place; and

 these circumstances indicated that Jadwan had little interest in a future for Derwent Court as a going concern, as opposed to selling the bed licences.

461 Ms Julie Alexander was cross-examined about the meeting with Mr Wicks on 15 July 1997, and gave evidence that the reference in the note was to getting out of the building, and not the business. It was not put to her in clear terms that her evidence on that issue was incorrect, and no proposition to the effect that Jadwan had by 15 July 1997 made an irrevocable decision to cease its nursing home business and to sell the licences was put to her. However, earlier in the cross-examination, senior counsel for the first to third respondents put to Ms Alexander that obtaining quotations for works, and the making of suggestions that Jadwan was considering a new building, were part of a “smokescreen” to make the Department think that Jadwan was really doing something to address its concerns, when that was never a really serious prospect at all. This was an allied point, but it did not amount to putting a case that Jadwan had decided by 15 July 1997 to cease operating its business.

462 Senior counsel for the fourth respondent cross examined Ms Alexander on the premise that by 28 July 1997, being the date of the letter from Jadwan to Mr Hogan, there had been a change of intention from seeking to update the fire safety and care standards and building a new facility, to wanting to save and to sell the bed licences, to which Ms Alexander agreed.

463 As to Mrs Joan Alexander, it was put to her in cross-examination by senior counsel for the fourth respondent that Jadwan had decided by 2 July 1997 to get out of the nursing home business, which she denied.

464 When Mr Wicks gave evidence about the file note of 15 July 1997, his recollection was of a general understanding that Derwent Court could not continue, and that something would have to be done to relocate it in the short-term, or sell up the undertaking. In cross-examination by senior counsel for Jadwan, Mr Wicks accepted that during the period from July to September 1997, Jadwan had actively considered the three options referred to at [151] above, and stated that there was never any talk that Jadwan would just walk away.

465 The file note of 15 July 1997 was an important piece of evidence that was relied on by the respondents, and together with other circumstantial evidence there was a basis to find that Jadwan was in mid-July 1997 contemplating selling its bed licences. But we rather think that the case that the respondents ran was more closely aligned with their pleadings, which was that between 24 and 25 July 1997 Jadwan had decided to cease operating the nursing home, and in the case of the fourth respondent, that the decision had been made by the time Mr Hogan was engaged on 28 July 1997.

466 For two reasons, we consider that the primary judge was in error in finding that by 15 July 1997, Jadwan had decided to cease operating Derwent Court, but had decided falsely to represent to the Department that it would be relocating. The first reason is that in our view, the issue on which the parties joined was whether Jadwan would have acted on advice to seek interlocutory relief following its receipt on 21 July 1997 of the delegate’s notice of intention to revoke, and not whether it had decided by 15 July 1997 to get out of the nursing home business. The second reason is that in our view, the correct inference arising from the evidence is more nuanced, and it is that by 15 July 1997, Jadwan had been giving very serious consideration to getting out of Derwent Court and selling its bed licences, but not that it had made a firm or irrevocable decision to do so by that point, or on that day. That inference arises from the following circumstances –

(1) Mr Alexander’s initial mention to Mr Wicks on 7 February 1997 of the value of the bed licences at $12,000 each (see [72] above);

(2) Mr Wicks’s file note of 10 June 1997, where he recorded Mr Alexander asking whether a declared home could sell beds (see [133]-[134] above);

(3) Mr Wicks’s file note of 2 July 1997, in which Mr Wicks recorded Mr Alexander as saying, “*more inclined to sell now and get out”* and Mr Wicks’s note that Mr Alexander was going to speak to a marketing firm that day(see [144] above);

(4) Mrs Joan Alexander’s diary entry for 2 July 1997 (see [145] above), which included the statements –

* Jeff went to see Steve Dellar about beds been [sic] sold and he said he wasn’t able to speak to us;
* Jeff ringing Anne Thorpe. We would rather get out of it. They shouldn’t lock us in on a commercial basis. To talk to James Lang Wotton [sic] tomorrow morning, selling beds. Get declaration lifted, sell beds.

(5) although Mr Wicks’s file note of 2 July 1997 records Mr Alexander as stating that he was going to speak to a marketing firm, and Mrs Joan Alexander’s diary entry for 2 July 1997 refers to a proposal to speak to Jones Lang Wootton, there was no evidence that this occurred, and when Ms Julie Alexander was cross-examined about Mr Wicks’s note of 2 July 1997, she stated that the reference to “*more inclined to sell and get out*” represented Mr Alexander’s personal view, and that the directors of Jadwan had agreed to rebuild;

(6) the contents of Mr Wicks’s file note of 15 July 1997 relating to his attendance on Mr Alexander and Ms Julie Alexander (see [148] above); and

(7) the contents of Mr Wicks’s file notes of conversations with Mr Alexander on 22 July 1997 (see [169]-[171] above), which support an inference that at that time, Jadwan was still at least contemplating the possibility of continuing to operate Derwent Court.

467 In preparing its business plans, Jadwan was careful not to make any firm commitment to relocation, and it allowed itself ample time to consider its options. That can be seen in the business plan that was submitted on 13 June 1997, which allowed until December 1997 for the location of suitable land, and then for an option to purchase. We would not find that Jadwan was making false representations to the Fire Service or the Department at this time: the high-level, leisurely, and contingent nature of the business plan spoke for itself. The fact that by 15 July 1997, Jadwan was giving very serious consideration to getting out of Derwent Court and selling its licences, and that it had not made any firm commitment to relocate, informs what inferences are to be drawn in evaluating the hypothetical question as to what Jadwan would have done had it received advice on or shortly after 23 July 1997 about the effect of the new legislation, which is an issue to which will turn later in these reasons.

### 3. Was there an agreement with the Commonwealth in relation to payment of staff redundancies – Issue (2)

468 At [360]-[361], the primary judge held that by 24 July 1997, the Commonwealth had agreed to fund 80% of the cost of redundancy payments for nursing staff at Derwent Court. At [527], the primary judge held that Jadwan had a strong economic incentive not to stand in the way of the residents of Derwent Court leaving, because had it retained its residents, it would also have had to retain its nursing staff and forego the Commonwealth’s offer to meet the cost of redundancy payments. At [537], the primary judge held that it was implausible that Jadwan could have secured agreement from the Commonwealth to meet the cost of the redundancy payments except on the basis that Jadwan had indicated to the Commonwealth that it was not going to stand in the way of the transfer of residents. And at [557], the primary judge held that the Commonwealth’s undertaking came at an implicit price, namely that Jadwan would be expected to dismiss its staff, cooperate in the movement of residents to alternative accommodation, and to cease its nursing home business –

In the Court’s opinion it is open to infer that that undertaking came with an implicit price: Jadwan would be expected to dismiss its staff, cease its nursing home business and cooperate in the removal of Derwent Court’s residents to alternative accommodation. The Court finds that that premise informed Jadwan’s immediately subsequent conduct. Explaining Jadwan’s decision to give immediate notice to all of Derwent Court’s staff on 25 July 1997, Mr Alexander told Mr Wicks “that patients have to be cared for so closure has to be accepted”.

469 The primary judge then referred at [558] to the contents of Mr Hogan’s letter to Ms Paul of the Department dated 30 July 1997 (see [233] above) in which Mr Hogan stated, conformably with his instructions to Mr Alexander –

We would anticipate that the home would not function pending the sale of the bed licences with all residents relocated and with the staff of the home having been given notice upon the basis that their entitlements inclusive of redundancy payments will be met by the Commonwealth.

470 At [559]-[560], the primary judge inferred that even if Mr Wicks had given Jadwan the advice that a solicitor acting with the requisite degree of skill and care should have given, Jadwan would not have sought to stop the transfer of its nursing home residents, which was not a rational choice for it to make. The primary judge’s reasons included a comparison of the value of the bed licences and the extent of the liability for the redundancy payments. The primary judge at [565] rejected the evidence of the expert witnesses that the value of the bed licences at the time was as much as $30,000 each on an unimpaired basis, and referred to the evidence of Mr Alexander’s statements recorded in Mr Wicks’s file notes of 7 February 1997 and 10 June 1997 that the value of the licences was $12,000. The primary judge also took account of his finding that Jadwan had already decided to “get out” of its nursing home business.

#### The respondents’ cases at trial

471 We shall address first Jadwan’s submissions to which we referred at [326] that no respondent had made the case at trial that Jadwan had agreed to accept funding of redundancy payments from the Commonwealth as a form of compensation for the closure of Derwent Court, or that there had been a tacit agreement between Jadwan and the Commonwealth that the funding of redundancy payments was conditional on Jadwan’s agreement to terminate its staff, to cease its nursing home business, and to co-operate in the transfer of residents to the other accommodation.

472 In his opening address at trial, senior counsel for the first to third respondents referred to Mr Wicks’s file note of 22 July 1997 (see [173] above) and submitted that the question of redundancy payments was going to be a very important issue for Jadwan, and drew attention to the figures of $400,000 for redundancies, and $50,000 per week for the payroll. Counsel then referred to Mr Wicks’s file note of a conversation with Mr Alexander on 24 July 1997 (see [187] above) in which Mr Wicks wrote that the Commonwealth would fund 80% of redundancy payments for nursing staff, but not the notice that had to be given under the Awards. Counsel then submitted that there was an inescapable inference that as a result of the resolution of the redundancy issues, the staff were then given their notice. Counsel referred to an issue that appeared to arise later, on about 6 August 1997, when Mr Wicks wrote in a file note of a conversation with Ms Julie Alexander that in relation to redundancies there was a problem, and that the Department was “dragging its heels”, but submitted that any such issue was eventually resolved, and the government substantially funded the redundancies. The primary judge then drew attention to the following statement recorded in the file note of 6 August 1997 –

redundancy bill will be over half a million dollars – which could be value of the bed licences – one will cancel out the other (!)

473 Senior counsel for the first to third respondents then submitted –

Now, one can see how obtaining that funding for staff redundancies is an enormous incentive to Jadwan in the situation that it was already in, keeping in mind that it didn’t have to lose too many more bed licences before it would become unviable at 35. Now, with 51 bed licences, of course, it gets to 35 if it has no patients on the upper floor. But it was already down five in – sometime earlier. …

474 Senior counsel for the fourth respondent, in his opening address at trial, referred to the letter from Jadwan to Mr Hogan dated 28 July 1997 (see [216] above), and to the reference at point 9 of the letter –

9. Our staff have been given notice and redundancy provisions are being negotiated. Southern Cross Homes are employing some of our staff.

475 Senior counsel for the first to third respondents cross-examined Ms Julie Alexander about the topic of redundancies. Ms Alexander stated that she “*didn’t know anything about redundancies*”, and that “*Jeff was handling it all*”. Ms Alexander did not agree that on 21 July 1997, she had spoken to Ms Thorpe of the Department about staff pay and redundancies, when a note in Mrs Joan Alexander’s diary to that effect was put to her (see [165] above). Later, counsel put to Ms Alexander that having given notice to staff so quickly, she was keen to ensure that she obtained some funding from the Commonwealth. Ms Alexander was taken to Mr Wicks’s file note of 24 July 1997, to which we referred at [187] above, and the following exchange took place –

Now, clearly, that’s about the terms on which staff employment could be terminated, isn’t it?---Yes, obviously.

And about redundancies?---Yes.

And about notice provisions and requirements?---Yes.

And it would suggest, would it not, that Jeff knew all about this by 24 July?---Yes.

And is it something you had discussed with Jeff at all on or before 24 July?---I can’t – I’m not sure. I don’t know.

You can’t recall. Is that - - -?---Yes.

But you were, from that point on, very keen to make sure that you didn’t risk losing that redundancy funding, weren’t you?---I don’t know what you’re talking about.

Well, you did indeed seek some advice from Mr Wicks in connection with the redundancy funding, didn’t you?---Me personally? Are you asking me personally or are you asking whether Jeff did or anybody else from Jadwan?

I’m sorry, I didn’t hear that?---Did – are you asking whether Jadwan did or whether I personally sought advice from Stephen Wicks?

Well, I’m suggesting that you did?---No, I don’t recall.

476 Senior counsel for the first to third respondents subsequently put to Ms Alexander that it was important to get the redundancy funding from the Commonwealth locked in before Jadwan commenced court proceedings –

But what I’m putting to you is this: it was important – and you understood it to be important – to get the redundancy funding from the Commonwealth locked in before you took them to court against the risk that if you took them to court, that funding would not come. Do you want me to repeat that?---Sounds – yes. Yes.

The proposition I’m putting to you is that by 7 August it was important to get the redundancy funding from the Commonwealth locked in before you took them to court against the risk that if you took them to court the funding wouldn’t come?---That sounds like rubbish to me.

477 This was a distinctly different proposition than suggesting to Ms Alexander that there was an agreement that in exchange for the redundancy funding, Jadwan would close Derwent Court and not stand in the way of the transfer of residents.

478 Senior counsel for the first to third respondents then took Ms Alexander to Mr Wicks’s file note of his conversation with her dated 6 August 1997, to which we have referred at [263] and [472] above, and the following exchange took place –

Well, the potential redundancy liability for Jadwan of half a million dollars would be almost crippling, wouldn’t it, at that time?---Yes, it would be, yes.

Break the company. Would break the company?---I – Jeff was the one that handled all the financials. I can’t – I can’t comment on that.

Well, it could, in fact, have been the value of the bed licences. That was your understanding at the time, wasn’t it?---I can’t remember what my understanding at the time was.

And you were concerned, I suggest to you, that the liability to meet the redundancy bill would cancel out any value the bed licences had. Did you not have that - - -?---I don’t – I don’t recall - - -

- - - concern in your mind at the time?---I don’t recall. It was – more likely be Jeff handling that side of it than me.

More likely Jeff?---Jeff, yes.

The problem is this note has your name at the top of it. And, whichever way you look at it, it does tend to suggest this came from you, doesn’t it?---Well, yes, it does suggest that. Yes.

479 Senior counsel for the fifth respondent also cross-examined Ms Alexander about Mr Wicks’s file note of 6 August 1997 and its reference to the redundancy bill being over half a million dollars. Ms Alexander did not agree that this was information that she had given to Mr Wicks. Ms Alexander was then taken to one of the draft affidavits that Mr Wicks had prepared, to which we referred at [266] above, and its reference to discussing redundancies with Mr Dellar, which was “*a matter of considerable concern to the company*”. In relation to the words of the draft affidavit that were struck out, relating to the Department paying the redundancies, the following exchange occurred –

It was true that the department said that it would think about picking up the bill for the redundancies; that’s correct?---There was talk of it, yes.

And subsequently that’s what happened, isn’t it?---Yes.

480 Ms Alexander was then cross-examined by senior counsel for the fifth respondent about the value of the bed licences –

And you must have, I suggest to you, discussed at least with your father a price range or an indicative range that you were expecting to receive for the licences?---No, we didn’t

You knew, I suggest to you, that the licences, if sold with Commonwealth subsidies attached in Tasmania would probably bring about $500,000?---We didn’t have – I don’t recall a discussion.

I didn’t ask you about a discussion. You knew, I suggest to you, about August 1997, that the licences on the market in Tasmania would bring about $500,000 for the lot?---I – I don’t recall knowing that myself.

And I suggest to you that that is, in substance, what you told to Mr Wicks; that is, that the redundancy payments would cancel out the value of the licences?---I – I don’t recall saying that to him.

HIS HONOUR: You don’t dispute you did though?---No. But I do wonder whether some of this information has come from discussions Jeff might have had with Mr Wicks because I don’t remember having such a discussion.

MR McELWAINE: Well, we can’t ask him now. I’m trying to find out what you knew and I think your evidence is, “I don’t recall any knowledge about the value of the licences” - - -?---Yes - - -

- - - correct?--- - - - that’s right.

“I don’t recall any discussions with my father about the value of the licences”?---That’s correct.

And, “I don’t recall discussing the value of the licences with Mr Wicks”?---That’s correct.

But, on each – to each proposition, I think you would have to concede, you don’t dispute those things happened, do you?---No, I just can’t recall. Yes.

481 During closing submissions, the primary judge raised with senior counsel for the fifth respondent the value of the bed licences and the cost of redundancies –

HIS HONOUR: Can I also raise again – and this is a matter I will have to raise with Mr Pearce, but he will no doubt make the submission that, even at this late stage, the pleadings be permitted to be amended, and we will deal with that. But on the assumption that that were to be permitted, there is what appears to be relevant evidence about the licences contained in the evidence that is, to a substantial degree, more favourable to your client than that which is referred to in the submissions, and just mention that there’s a note where the prospect of sale of the bed licences is raised with the – with a note in Mr Wicks’ file saying:

*Melbourne beds selling 18 to 23,000, here 12,000.*

And then there is a further note where, after the – after the closure – well, the – the last patients left Derwent Court there was an issue about – about whether or not redundancies would be met by the Commonwealth.

MR McELWAINE: Yes.

HIS HONOUR: And there’s a file note to the effect that the amount of redundancies effectively are equivalent to the price that might have been obtained from the sale of the beds.

MR McELWAINE: That’s perfectly correct, your Honour, and I think that that was pursued with Julie Alexander and the answers were noncommittal, but the proposition which was sought to be established was about $500,000 equals about $500,000.

HIS HONOUR: Yes.

MR McELWAINE: But it would be wrong for me to say that she is assented to that proposition.

HIS HONOUR: But the two file notes together seem to suggest the contemporary evidence - - -

MR McELWAINE: Indeed.

HIS HONOUR: - - - being in the order of $12,000 a piece, which - - -

MR McELWAINE: Yes.

HIS HONOUR: - - - is about six hundred and some thousand, which - - -

MR McELWAINE: Yes. Indeed, your Honour.

HIS HONOUR: - - - is ball park half a million; not far different.

MR McELWAINE: Yes. But against me - - -

HIS HONOUR: Yes.

MR McELWAINE: - - - is the evidence of Mr Brown.

HIS HONOUR: Yes. Of course.

MR McELWAINE: But the evidence of Mr Brown has to be read very, very carefully because it’s the impaired bed licence value which is important, not the pre-economic sanctions decision bed.

482 In final written submissions at trial, counsel for the first to third respondents submitted –

Contrary to the impression that Julie and Joan Alexander sought to convey by their evidence, the contemporaneous evidence, especially from Jeff Alexander, leaves no doubt that the cost of redundancies and securing Commonwealth funding for that cost were serious issues for the applicant from immediately after it received notice of intention to terminate approval.

483 The written submissions then made a number of references to the evidence.

#### The primary judge’s reasons

484 We do not understand the primary judge’s reasons, to which we have referred at [468]-[470] above, as going so far as to find that some enforceable agreement had been made between Jadwan and the Commonwealth, or that funding of redundancies was compensation for Jadwan’s agreement to close Derwent Court. Rather, the primary judge referred to an undertaking to fund redundancies as coming with an “*implicit price*”. But even so, we respectfully consider that finding goes too far.

485 We would not infer that Mr Dellar represented to Mr Alexander between 22 to 24 July 1997 that the Commonwealth would agree to fund redundancy payments on the condition that Jadwan closed Derwent Court and did not stand in the way of the transfer of residents. That inference is not supported by the evidence, which included the letter that Mr Alexander wrote to Mr Dellar on 30 July 1997, to which we have referred at [239] above, by which he requested a response as to whether the Commonwealth would fund redundancy payments, including notice. The Department responded to that request by letter dated 1 August 1997, in the terms which we have set out at [248] above. The inference that we draw is that on about 22 July 1997, Mr Dellar made representations to Mr Alexander that were consistent with the terms of the letter from the Department dated 1 August 1997 (see [248] above), namely that funding of redundancy payments was available if, *inter alia*, Derwent Court closed. The information in the letter of 1 August 1997 is prefaced by the words, “*As previously advised*”. The assistance with redundancy costs was represented by the letter to be an entitlement under the *National Health Act* and the subject of government policy, rather than some sort of discretionary contribution that was conditional upon the co-operation of Jadwan in closing Derwent Court and assisting with the transfer of residents.We infer that Mr Dellar’s representations gave Mr Alexander some comfort in making his decision to give notice to the staff. However, Jadwan did not immediately co-operate with the Department in the closure of Derwent Court. Mr Wicks sent the letters of 23 and 24 July 1997 warning the Department against taking any action to remove residents from Derwent Court pending full consideration of the circumstances by senior counsel, and a review of “*appeal rights*”. This was not consistent with the acceptance of an offer not to stand in the way of closure in return for financial assistance with redundancy costs. Further, the report of the internal review by the Department dated 29 April 1998, to which we referred at [168] above, stated that the proprietors of Derwent Court had told the Department in a meeting on 22 July 1997 that they would not be cooperating with the transfer of residents, but that this changed at a meeting on 25 July 1997 when they agreed to co-operate. However, we infer that the meeting on 25 July 1997 occurred after Jadwan had received advice from Mr Wicks, and after Jadwan had decided not to proceed with an application for injunction.

486 The fact that Jadwan was concerned about its liability for redundancy payments was well-established by the evidence. It was also well-established that the Commonwealth had held out to Mr Alexander that assistance with funding redundancy payments was available upon the closure of Derwent Court. Senior counsel for the first to third respondents opened their case on the basis that the funding of redundancies was an enormous incentive for Jadwan. And that proposition was sufficiently put to Ms Julie Alexander in cross-examination to lay the foundation for a submission that Jadwan did not want to put at risk the funding of the redundancies. In a series of answers to questions directed to the topic of redundancy payments, Ms Alexander claimed that she could not recall, or that Mr Alexander had handled the matter. There were sufficient matters put to Ms Alexander in cross-examination to support a submission that there was a broad equivalence between the contemporary estimates of liability for the redundancy payments and the perceived value of the bed licences. Indeed, the suggestion of that broad equivalence arose from the file note of Mr Wicks of his instructions from Ms Alexander on 6 August 1997. We are of the view that the primary judge’s findings at [561]-[564] were within the boundaries of the case run by the respondents at trial –

561 Jadwan could not have taken advantage of the Commonwealth’s offer to meet the cost of staff redundancies if instead of giving its staff notice it would be keeping them on to provide ongoing care for Derwent Court’s remaining residents.

562 Had the value of Derwent Court’s bed licences significantly exceeded the cost of Derwent Court’s staff redundancies it might be plausible to suggest that had Jadwan been competently advised it would have been prepared to take the risk of declining the Commonwealth’s offer in order to put pressure on the Department to reconsider its (passed) deadline of 48 hours to sell them.

563 But that was not the case.

564 The total Jadwan would have expected to get for the sale of Derwent Court’s bed licences if it had been permitted to sell them was no more than roughly equivalent to the over half a million dollars it was liable for with respect to redundancy payments ….

### 4. Would Jadwan have applied for an injunction if it had been advised of the effect of the new legislation – Issue (4)

#### Reasonable and prudent advice from Mr Wicks

487 In order to evaluate Jadwan’s case, it is necessary to consider what advice reasonable care required Mr Wicks to give in the circumstances in the period following the service on Jadwan on 21 July 1997 of the notice of intention to revoke the approvals. This issue is relevant to the questions of breach of duty, and causation. In *Vairy v Wyong Shire Council* Gummow J at [61] and Hayne J at [124]-[129] emphasised, in the context of evaluating the question of breach of duty, that the enquiry is not directed to an assessment of what might reasonably have been done to avoid the damage that actually occurred, for that is a retrospective analysis. Rather, it is necessary to look forward and to ask what reasonable care was required to avoid a foreseeable risk of damage. As Megarry J explained in *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep 172 at 185 –

In this world there are few things that could not have been better done if done with hindsight. The advantages of hindsight include the benefit of having a sufficient indication of which of the many factors present are important and which are unimportant. But hindsight is no touchstone of negligence. The standard of care to be expected of a professional [person] must be based on events as they occur, in prospect, and not in retrospect.

488 Further, there might be a range of reasonable responses to a foreseeable risk of damage, and the selection of one reasonable response rather than another that would in retrospect have avoided the damage in question, does not amount to negligence. In the professional negligence context, one way in which that principle manifests itself is in statements in the authorities that the content of the duty to exercise reasonable care is to apply the relevant degree of skill and to exercise reasonable care in carrying out the professional task. “There is no implied undertaking that the advice is correct, but only that the requisite degree of professional skill and care has been exercised in giving the advice”: *Heydon v NRMA Ltd* at [147] (Malcolm A‑JA).

489 On the assumption that breach of duty is shown, questions of causation arise. On the issue of causation, the question of what advice would have been given if reasonable care had been exercised involves proof of a past hypothetical on the balance of probabilities. The issue is often framed by asking what advice a reasonably prudent solicitor would have given in the circumstances: see, for example, *Firth v Sutton* [2010] NSWCA 90 at [103] (Allsop P, Macfarlan JA and Young JA agreeing). This question also is to be examined prospectively, and not with the benefit of hindsight.

490 The primary judge held at [465] that it was unquestionably within the scope of a solicitor’s duty of skill and care that he or she identify, and advise, having regard to the significance of the relevant enacted statute law of the Commonwealth. Whether that is so in individual cases will be fact-dependent. No solicitor or barrister can reasonably be expected to know at the outset of a retainer all potentially applicable legislation of the Commonwealth. But generally speaking, the exercise of reasonable care in the discharge of a retainer may require a practitioner to identify applicable legislation for the purposes of giving advice. Subject to these observations, the primary judge’s conclusion is not controversial, and is supported by the reasons for judgment of Ormiston A‑JA in *Heydon v NRMA* who stated at [653] –

… the duty of the lawyer, whether Queen’s Counsel or senior firm of solicitors, is to advise their clients on the basis of principle, in which I would include for present purposes a proper understanding of statute law and its accepted interpretation.

491 There was no issue about whether Mr Wicks had a reasonable opportunity to identify the applicable legislation, because he was in the habit of using the Law Society library, and had done so in February 1997 when he conducted his research. The primary judge drew an inference at [467] that the Acts of the Commonwealth Parliament were available to Mr Wicks at the Law Society library, and drew a further inference at [469] that the Law Society library would have held copies of the *Aged Care Act* and the *Consequential Provisions Act* in its collection on or before 21 July 1997. The primary judge held at [501] that when Mr Wicks updated his research on 22 July 1997, a solicitor exercising the requisite degree of care and skill in advising his or her client would have checked whether the relevant statute law to which he or she had last given attention some months previously remained current or had been amended, and at [503] his Honour held that a reasonable solicitor would have identified the potential relevance of the *Consequential Provisions Act*. No notice of contention has been filed by any of the respondents on appeal, and no challenge was made by the respondents to these findings.

492 The primary judge stated at [504]-[507] that he did not intend to suggest that, upon discovering the new legislation, Mr Wicks was required to draw the conclusion that s 7(1)(a) of the *Consequential Provisions Act* would apply as the plurality in the Full Court reasoned it would in December 2003 in *Jadwan No 4*. His Honour held that it was only with hindsight that the reasoning of North J in *Jadwan No 3* and of the Full Court in *Jadwan No 4* might appear self-evident. There were three material elements to the decisions in *Jadwan No 3* and *Jadwan No 4*. *First*, it was held that the order made by the Full Court in *Jadwan No 2* that the revocation decision be set aside operated only prospectively, that is, from the date of the order that was made on 4 December 1998. *Second,* the fact that the Full Court’s order operated only prospectively meant that Jadwan had not been an approved operator or proprietor of an approved nursing home immediately before the commencement day of the new Act, because at that time its approval had been revoked. *Third,* the condition in s 7(1)(a) of the *Consequential Provisions Act* that a Commonwealth benefit is or was payable in respect of a nursing home patient was a requirement that had to be satisfied *in fact*, and Jadwan did not satisfy that requirement because there were no Commonwealth benefits payable to Jadwan in respect of an approved nursing home patient immediately before the commencement day.

493 However, the primary judge held that Mr Wicks was not in breach of his duty of care to Jadwan for the following reasons –

(1) at [473] his Honour held that until the delegate made her decision on 6 August 1997 to revoke approval, there was no operative decision, and that until then, an order of review under s 5 of the *ADJR Act* was not available;

(2) in relation to review under s 6 of the *ADJR Act*, at [478], the primary judge doubted whether Jadwan had a sound basis for relief, and at [482]-[483], referred to the difficulty in establishing that the delegate was proposing to rely on the reports of the first and second Standards Review Panels prior to receiving a copy of the delegate’s reasons;

(3) the primary judge held at [479] and [486]-[489] that, had Jadwan commenced a proceeding seeking relief pursuant to s 6 of the *ADJR Act*, then the delegate would have received advice before finalising her decision that she was entitled to make her decision based upon the findings of the Standards Review Panels as collective views, but without giving them the status of validly constituted panels, or she could have based her decision on the views of the second Standards Monitoring Team;

(4) for the above reasons, his Honour held that the commencement of proceedings would not have prevented the revocation decision, and the primary judge held at [491]-[492] that therefore Mr Wicks was not in breach of his duty; and

(5) further, on the question of causation, the primary judge held at [648] that success in setting aside the revocation decision was dependent upon Jadwan obtaining an order setting aside the financial sanctions decision with effect from a date prior to 1 October 1997.

494 We respectfully consider that the primary judge was in error in his Honour’s analysis for four reasons. *First,* his Honour confined his attention to relief under the *ADJR Act,* when Jadwan did not confine its case at trial to an hypothesis that it would have sought relief under the *ADJR Act*. In its pleadings, Jadwan had made express references to s 39B of the *Judiciary Act*, and s 23 of the *Federal Court of Australia Act.* The transcript of Jadwan’s opening at trial records that senior counsel for Jadwan referred to s 39B of the *Judiciary Act* and to the prospect of constitutional writs, and to the prospect of making an application to the Court for an interlocutory injunction in the exercise of powers under s 23 of the *Federal Court of Australia Act*. Given that no decision to revoke the approval was made until 6 August 1997, and that neither s 5 nor s 15 of the *ADJR Act* could until then have been engaged, any interlocutory relief before the revocation decision likely had to be granted in exercise of the Court’s power under s 23 of the *Federal Court of Australia Act*. By 1997, it had been established by Full Court authority that the Court’s power under s 23 of the *Federal Court of Australia Act* could be exercised in conjunction with the powers and jurisdiction under the *ADJR Act* and s 39B of the *Judiciary Act,* although an interlocutory order could not travel beyond the jurisdiction or powers to grant final relief: *Minister for Immigration, Local Government and Ethnic Affairs v Msilanga* (1992) 34 FCR 169 at 179 (Beaumont J, Black CJ agreeing) and at 185, 187 (Burchett J). Interlocutory relief might have been available to Jadwan in the exercise of power under s 23 of the *Federal Court of Australia Act* in order to preserve the subject-matter of an application for judicial review in aid of the Court’s power upon a final hearing to make an order authorised by s 16(2)(b) of the *ADJR Act* in relation to conduct engaged in for the purposes of making a decision, or a declaration in the exercise of powers under s 23 of the *Federal Court of Australia Act*, or an injunction under s 75(v) of the *Constitution* in the exercise of the jurisdiction conferred by s 39B(1) of the *Judiciary Act*.

495 *Second,* the primary judge’s reasons at [482] proceed on a premise that Jadwan would have experienced difficulties in proving the grounds on which the delegate proposed to revoke its approval. We do not accept that premise. The delegate’s notice of intention to revoke the approval dated 20 July 1997 attached a detailed statement of reasons which relied on findings of the Standards Review Panels and the second Standards Monitoring Team. There should have been little difficulty in proving, for the purposes of an interlocutory application, the basis on which the delegate proposed to revoke the approval.

496 *Third*, we respectfully consider that the primary judge was in error in making the affirmative findings at [486]-[490] that any proceeding commenced by Jadwan would have done no more than alert the delegate to the points in issue, and that the delegate would have received advice before finalising her decision that she was entitled to make her decision based upon the findings of the Standards Review Panels as the collective views of the members, but without attributing to them the status of validly constituted panels; or alternatively, that she could have based her decision on the views of the second Standards Monitoring Team. In our view, while that hypothesis is plausible, it is speculation. We agree that if Jadwan had succeeded in obtaining an interlocutory injunction from the Court, then the Department would likely have turned its mind to how it might lawfully revoke the approval of Derwent Court, and may have reviewed the question of the validity of the constitution of the Standards Review Panels. But we consider that it was in error for the primary judge to find that the delegate would have realised that she could make her decision without recourse to the reports of the Standards Review Panels having the status as validly constituted panels. We say this for the following reasons –

(1) We infer that the delegate was operating on the assumption that a report of a Standards Review Panel was a necessary precursor to the revocation of approval. That inference arises not only from the fact that the delegate relied on the reports, but from the fact that the report of the second Standards Review Panel was commissioned by the delegate on about 1 April 1997 at a time when Derwent Court was already the subject of a declaration of non-compliance with standards, and after the delegate had received the report of the second Standards Monitoring Team. In the covering letter of 28 May 1997 to Jadwan enclosing the report, Ms Paul of the Department stated that the delegate would consider the report, “*which could include consideration of whether approval should be revoked*”.

(2) The Department did not at any relevant time in 1997 concede that there was any irregularity in the composition of the Standards Review Panels. In his letter of 1 August 1997 to Mr Dellar of the Department, Mr Wicks had raised questions about the qualifications of the Panel members, and referred to the “*improper composition of the second Standards Review Panel*”. There is no evidence that the delegate then sought to reconsider the basis of her proposed decision. On the contrary, the statement of reasons that accompanied the revocation of approval on 6 August 1997 were substantially the same as those which accompanied the notice of intention to revoke the approval, and relied on the reports of the Standards Review Panels which Jadwan had sought to impugn.

(3) Similarly, when on 1 September 1997, pursuant to s 105AAB(2) of the *National Health Act*, Jadwan sought an internal review of the delegate’s decision to revoke the approval, it raised expressly the composition of the Panels, and claimed that the members of the Panels did not have the necessary qualifications or skills prescribed by the Regulations. The reviewer rejected those claims in his statement of reasons dated 13 October 1997.

(4) The reasons of Heerey J in *Jadwan No 1* at 51 ALD 245 at 249-250 disclose that although the Minister conceded that the composition of the second Standards Review Panel was irregular, the Minister continued to defend the legality of the revocation decision in June 1998, and filed affidavit material that suggested that the composition of the second Standards Review Panel was the product of a deliberate choice. The Minister continued to assert the legality of the decision by the appeal to the Full Court in *Jadwan No 2.*

(5) The idea that the delegate would have thought that she could rely on the reports of the Standards Review Panels as simply the opinions of the members of the Panels without attributing to them any statutory validity is the product of hindsight that arises from the decision of the Full Court of 4 December 1998 in *Jadwan No 2:* see (1998) 89 FCR 478 at 494*.* It proceeds on the premise that the delegate would have realised that a report of a Panel was not a necessary condition for the exercise of the statutory power to revoke approval. The circumstances do not support an inference that it would have occurred to the delegate or those advising her at any time before 1 October 1997 that the opinions of the Panel members could have been relied on, and that the question of the validity of their appointments could be quarantined.

497 None of the above is to suggest that there was not an appreciable risk that, if Jadwan sought interlocutory relief, the delegate would have sought to remedy the foundation for making the decision that she had foreshadowed. But the primary judge was in error in making an affirmative finding that she would have succeeded in doing so prior to 1 October 1997, with the consequence that any interlocutory relief that Jadwan obtained would have been inutile, and that Mr Wicks had therefore not breached his duty of care.

498 As we mentioned at [344] above, on appeal, Jadwan submitted that a fresh revocation decision would have amounted to a *novus actus interveniens*, on which the respondents bore an onus of proof. It is unnecessary for us to decide that question because, without reference to any question of onus, we would not infer from the circumstances that the delegate would have responded to an application for an interlocutory injunction in the way found by the primary judge. Having said that, we doubt that the principles relating to proof of a *novus actus interveniens* have any role to play. In our view, the correct analysis is that, at all times, Jadwan had a legal onus to prove the damage that it claimed, namely the lost opportunity to which we referred at [419] and [431] above. In evaluating the past hypothetical that it was necessary for Jadwan to prove, the respondents had an onus to introduce evidence or point to evidence that would counter any *prima facie* case that Jadwan established: see generally, *Purkess v Crittenden* (1965) 114 CLR 164 at 167-8 (Barwick CJ, Kitto and Taylor JJ). But the claimed lost opportunity was the fact in issue, and the onus to prove that fact remained stable.

499 The fourth reason for which we respectfully differ from the primary judge is that, contrary to the primary judge’s finding at [648], it was not necessary that Jadwan succeed in setting aside the financial sanctions decision from a date prior to 1 October 1997 in order to succeed in enjoining the proposed revocation decision, or in obtaining a final declaration or other final relief in the event that Jadwan persuaded the Court (as it did in *Jadwan No 1*) that the second Standards Review Panel was invalidly constituted. And it was not necessary that any relief in relation to the financial sanctions decision be obtained before 1 October 1997, although failure to do so resulted in Jadwan being unable to receive Commonwealth benefits for any new patients, and being reliant on existing patients remaining at Derwent Court in order to engage the transitional provisions in the *Consequential Provisions Act*.

500 The primary judge set out at [512]-[525] of his Honour’s reasons what competent advice from Mr Wicks to Jadwan should have been as the foundation for his Honour’s finding at [526] that, had Jadwan received such advice, Jadwan would have chosen to resume its co-operation with the Department, and would not have sought to prevent the removal of Derwent Court residents –

512. Had Mr Wicks exercised due care and skill, I am satisfied that he would have identified the existence of the [Aged Care Act](http://www.austlii.edu.au/au/legis/cth/consol_act/aca199757/) and the Consequential Provisions Act on 22 July 1997. He would have informed Jadwan of those Acts’ existence when he met with Mr Jeff Alexander and Ms Julie Alexander the following day.

513. Such advice would likely have led Jadwan briefly to delay facilitating the Department’s arrangements for the relocation to other nursing homes of those of Derwent Court’s residents. While it involves a degree of speculation I am prepared to accept that Jadwan’s directors would have done so.

514. Having become aware that new legislation would soon replace the [National Health Act](http://www.austlii.edu.au/au/legis/cth/consol_act/nha1953147/) I accept that it would have been logical for Mr Alexander and the other of Jadwan’s directors to have stalled the Department and sought urgent advice as to whether there might be something in the new legislation they could take advantage of.

515. But there was not.

516. Competent advice, had it been provided, would have been to the effect that the new legislation was the framework upon which new higher standards of nursing home regulation was to be erected.

517. Competent advice, given with requisite skill and care, had it been provided, would have alerted Jadwan to the fact that to transition as an approved provider in respect of Derwent Court it would need not only to establish the invalidity of Ms Halton’s revocation decision but also to retain at least one of Derwent Court’s existing residents until the [Aged Care Act](http://www.austlii.edu.au/au/legis/cth/consol_act/aca199757/) came into force on 1 October 1997. I am prepared to infer that competent advice would include that the [Aged Care Act](http://www.austlii.edu.au/au/legis/cth/consol_act/aca199757/) was to come into force on 1 October 1997 – that that would be the date appears to have been widely known: [his Honour referred to [209] of his reasons for judgment].

518. Jadwan would have been advised it faced an additional hurdle not an easier pathway.

519. Competent advice would have confirmed the difficulty of challenging Ms Halton’s intention to revoke Derwent Court’s approval prior to her making that decision.

520. Such advice would have identified that the only plausible basis for such a proceeding would be to assert that Ms Halton was impermissibly proposing to engage in conduct viz giving weight to the reports of SRP-1 and SRP-2 as the reports of validly constituted Standards Review Panels in the making of her decision, but that Ms Halton, properly advised, was likely to respond she had no need to do so and would not. Jadwan’s legal grounds were doubtful.

521. Competent advice would have informed Jadwan that any (improbable) victory on that basis would likely to be pyrrhic – the point being conceded and the decision made nonetheless.

522. Competent advice would have made Jadwan aware that any proceeding brought after Derwent Court’s approval had been revoked would be unlikely to obtain a final hearing before the new legislation came into force on 1 October 1997. Competent advice would have included that while Jadwan would have good prospects of success if Ms Halton did rely on the reports of SRP-1 and SRP-2 as being those of validly constituted Standards Review Panels, such an error would be a non-jurisdictional error (see Jadwan No 4) and that the judge hearing their review, in his or her discretion, might exercise one of the other options available under s 16(1) of the ADJR Act rather than quashing or setting aside Ms Halton’s decision from the date of its making.

523. Competent advice would have confirmed that if Jadwan were to retain any residents at Derwent Court beyond 6 August 1997, subject to interlocutory relief, it would have to do so at its own expense until the decision was set aside. It was not part of Jadwan’s case that Derwent Court’s residents could have met the unsubsidised cost of their care.

524. Derwent Court’s average payroll expenditure was $70,000 per fortnight (Ex A1 p 4146). Even with a decreased number of residents (those wanting to stay) the cost of staff required for their care would have been substantial. Only if wholly successful would Jadwan have recovered those costs.

525. Competent advice would have been that because of the fire risk to Derwent Court’s aged and vulnerable residents, success in obtaining injunctive relief by way of an interlocutory proceeding could not be assured.

526. Having regard to the above, on the assumption that Jadwan would have obtained competent legal advice as a matter of urgency, the Court is satisfied that upon receiving that advice Jadwan would have chosen in any event to resume cooperating with the Department at some point before 6 August 1997 when Ms Halton’s revocation decision was to come into effect. It would not have sought to prevent the removal of Derwent Court’s residents.

501 Largely for the reasons we have given at [494]-[496] above, the hypothetical advice formulated by the primary judge at [519], [520], [521], [522], [523], and [524] of his Honour’s reasons was in error. In addition to what we have said at [494]-[496] above –

(1) The primary judge’s reasons at [522] proceed upon an incorrect hypothesis that proceedings would have been brought by Jadwan after the approval of Derwent Court had been revoked, when Jadwan’s case extended to alleging that a proceeding seeking an interlocutory injunction should have been recommended, and would have been commenced, before the approval was revoked.

(2) In relation to the finding at [523] that if Jadwan were to retain any residents at Derwent Court beyond 6 August 1997, and that subject to interlocutory relief it would have to do so at its own expense until the decision was set aside, this finding does not address the case that Jadwan had advanced, which was that it would have sought and obtained interlocutory relief. On the hypothesis that the Minister was enjoined from revoking the approval of Derwent Court, we consider that reasonable advice would have been that any residents who remained at Derwent Court during the period an interlocutory injunction remained in force would continue to be subject to an entitlement that Commonwealth benefits on their account were payable to Jadwan.

(3) We do not understand the primary judge’s finding at [524] that Jadwan would recover staffing costs if wholly successful. Staffing costs were outgoings for which Jadwan was liable so long as it continued to operate Derwent Court. We do not consider that there was any prospect that Jadwan could recover staffing costs from the Commonwealth.

502 As we mentioned at [209] above, the primary judge accepted the evidence of Ms Julie Alexander that during a telephone conversation on 25 July 1997, Mr Wicks had advised her and Mr Alexander that there was no harm in letting the residents go. The primary judge held at [507] that a solicitor exercising reasonable care, having become aware of the new legislation, would not have given Jadwan such unqualified advice. There is no notice of contention by which the second respondent challenges this finding. However, as noted above, the primary judge held at [526] that for a range of reasons, upon receiving competent advice, Jadwan would have chosen to resume its co-operation with the Department, and would not have sought to prevent the removal of Derwent Court residents.

503 Having concluded that the primary judge erred in formulating the advice that a solicitor exercising reasonable care would have given to Jadwan, this Court should make its own findings: *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; 331 ALR 550 at [43]. We accept, on the unchallenged findings of the primary judge at [512], that the exercise of reasonable care by a solicitor in the position of Mr Wicks would have resulted in the existence of the new legislation and its transitional provisions being disclosed to Jadwan on 23 July 1997. In relation to the advice that a reasonable and prudent solicitor would have given to Jadwan on that day, and in the days thereafter, our findings are as follows –

(1) A reasonable solicitor would have advised Jadwan of the enactment of the *Aged Care Act* and the *Consequential Provisions Act*, and that the operative provisions were due to commence on a day to be proclaimed.

(2) The primary judge held at [517] that the proposed commencement date of 1 October 1997 would appear to have been widely known. That finding was based upon Mr Wicks’s conversation with Mr Dellar on 30 July 1997, in respect of which Mr Wicks recorded Mr Dellar’s reference to “*1/10 beds gone*”. His Honour may also have been influenced by his finding at [209] that a workbook for a seminar that Mr Alexander attended in August 1997 referred to 1 October 1997 as the date on which the “*Aged Care Structural Reform Strategy*” would come into effect. The primary judge stated that it was not at all improbable that, as at 30 July 1997, and notwithstanding that the commencement date had yet to be formally gazetted, that internal planning within the Department was proceeding on the basis that the *Aged Care Act* was to come into effect on 1 October 1997. The primary judge held that competent advice would have included that the *Aged Care Act* was due to come into force on 1 October 1997. For our part, we would not impute that knowledge to a reasonable solicitor or barrister except on the basis that after ascertaining the existence of the new legislation, a reasonable solicitor would make enquiries of the Department or the Australian Government Solicitor to ascertain whether it knew of the proposed commencement date. We infer that the commencement date was ascertainable by these means by no later than 30 July 1997, and if Jadwan had commenced proceedings prior to that time, the expected commencement date would likely have been exposed at or before the hearing of an application for an interlocutory injunction.

(3) A reasonable and prudent solicitor would have studied the material features of the new legislation in the same way that Mr Wicks had studied the features of the *National Health Act* when he undertook his research in February 1997 and again in July 1997. A reasonable study of the features of the new legislation would have disclosed the following –

(a) section 10-2(1) of the *Aged Care Act*, which provided that the approval of an aged care provider lapsed if it did not provide any aged care during a continuous period of 6 months;

(b) sections 16-1 to 16-11 of the *Aged Care Act*, which made provision for the transfer of places with the approval of the Secretary, and did not contain provisions that corresponded to s 39B(5A) and (5B) of the *National Health Act*;

(c) sections 54-1 and 54-2 of the *Aged Care Act*,which required that there be compliance with standards, including new standards that were to take effect on the “*accreditation day*”;

(d) section 66-1 of the *Aged Care Act*,which provided for the imposition of sanctions for non-compliance with responsibilities, including revocation of approval;

(e) sections 67‑1 to 67-5 of the *Aged Care Act,* which provided for the procedures for the imposition of sanctions;

(f) the transitional provisions in s 7(1) of the *Consequential Provisions Act,* to which we have already referred,which required that immediately before the commencement day of the *Aged Care Act* –

(i) Jadwan be an approved operator or proprietor of an approved nursing home; and

(ii) Commonwealth benefits be payable to Jadwan in respect of an approved nursing home patient;

(g) section 74 of the *Consequential Provisions Act*,which provided that a determination in force under s 45E(2) of the *National Health Act* was taken to be a sanction imposed under s 66‑1(c)(ii) of the *Aged Care Act* on the commencement day, and ending when the Secretary lifted the sanction under s 68‑3.

(4) A reasonable and prudent solicitor would have advised Jadwan that there was a real risk that, unless Jadwan sought an urgent injunction to prevent the delegate from acting in the way foreshadowed in the notice of intention to revoke the approval, then upon revocation of its approval, Jadwan would not have the opportunity to become an approved provider under the new legislation.

(5) On 3 February 1997, the delegate of the Minister determined that no Commonwealth financial support was payable in respect of any patient who entered Derwent Court from 4 February 1997. The text of s 45E(2) of the *National Health Act* was that “*Commonwealth benefit [was] not payable to the proprietor of the nursing home in respect of a patient admitted to the nursing home after the making of the determination*”. Reasonable and prudent advice to Jadwan would have been that there was a reasonable prospect that the effect of the financial sanctions determination was that the return of a resident who had left Derwent Court would be a fresh admission of a patient for the purposes of s 45E(2) of the *National Health Act*.

(6) Reasonable and prudent advice would have directed Jadwan’s attention to the practical necessity, if it commenced proceedings, of also challenging the financial sanctions determination which, unless set aside by a Court, or by the Administrative Appeals Tribunal*,* or lifted by the Department, had the consequence that as residents left Derwent Court, the number of residents entitled to Commonwealth benefit diminished, thereby putting at risk Jadwan’s ability to have at least one such resident in place at Derwent Court immediately before the commencement day and to continue operating the home thereafter. The 28-day time period for making an application under s 11(1)(c) and (3)(a) of the *ADJR Act* in relation to the financial sanctions determinationhad expired, but could be enlarged by the Court. There was no time limit applicable to judicial review in the exercise of the Court’s powers under s 39B(1) of the *Judiciary Act*, but delay might have been relevant to the discretion whether to give a remedy. The 28-day time limit under s 105AAB(2) of the *National Health Act* for seeking administrative merits-based review had expired, but could be enlarged by the Minister.

(7) Reasonable and prudent advice would have identified that there was a real question whether Jadwan could effect a transfer of its licences under the *National Health Act* in circumstances where the Department considered that Derwent Court did not comply with its conditions of approval (see s 39B(5A) and (5B) of the Act referred to at [20] above). More considered advice would have pointed to the prospect that the Minister might not issue a certificate approving the transfer of licences in circumstances where the Department regarded Jadwan as being in breach of the statutory conditions. The potential that s 39B(5A) and (5B) might preclude a transfer of licences, when the Department took the view that Derwent Court did not comply with its conditions of approval, was adverted to in the letter from Ms Hefford of the Department to Mr Hogan of 1 August 1997 (see [249]-[250] above). Mr Wicks had previously addressed this issue in a meeting with Mr Alexander on 10 June 1997 (see [133] above), but his note of his research in February 1997 did not record any reference to s 39B. In Mr Wicks’s later note of his research dated 5 August 1997, there is reference to s 39B, but there is no express reference to s 39B(5A) and (5B).

(8) Reasonable and prudent advice to Jadwan would have been that there were properly arguable grounds on which an injunction might be sought relating to the composition of both Standards Review Panels, and the qualifications of their members. As to whether there was a serious question to be tried, Mr Wicks was alerted to the question of Ms Cooper’s eligibility on 25 July 1997 (see [196] above), and conducted research on that day into the requirements of the *National Health Regulations* in relation to the composition of Standards Review Panels. Mr Porter had identified by no later than 1 August 1997 that the constitution of the second Standards Review Panel was an available ground of review, because he included it in the grounds that he prepared and faxed to Mr Wicks (see [254] above). The presence of Ms Cooper as a member of both the first and second Standards Review Panels was an arguable ground on which the reports of both could be the subject of at least a declaration as to invalidity, and an interlocutory injunction in support of that final relief was an available avenue to preserve Jadwan’s interest in its bed licences. The exercise of reasonable care would have resulted in advice that there were proper grounds to argue that there was a serious question to be tried.

(9) Reasonable and prudent advice to Jadwan would have directed its attention to the usual requirement that an applicant for an interlocutory injunction give an undertaking as to damages, and to the possibility that the directors of Jadwan or the beneficiaries of the Trust might have to give security. However, reasonable advice would not have over‑stated this consideration, and would have been to the effect that it was difficult to say that the Commonwealth would likely suffer any substantial damage if an interlocutory injunction were granted, and subsequently set aside.

(10) Reasonable and prudent advice would also have alerted Jadwan to potential difficulties that it faced, including –

(a) the Department had demonstrated a firm resolve to revoke Derwent Court’s approval, and the Minister was likely to contest any proceeding;

(b) the bringing of a proceeding seeking an injunction would likely focus the Department’s attention on any defects in its proposed decision-making process, and would direct the Department’s attention to remedying any such defects;

(c) most importantly, in the medium to long term, an interlocutory injunction would not prevent the Minister from seeking to revoke the approval of Derwent Court on some available basis, whether under the *National Health Act*, or under the corresponding provisions of the *Aged Care Act* when it came into force, and Mr Wicks in fact gave advice to this effect on 24 July 1997, saying that the Department could simply turn around and “*do it all again*” (see [188] above);

(d) on the assumption that Jadwan obtained an interlocutory injunction, reasonable and prudent advice would have alerted Jadwan to the necessity of keeping Derwent Court operating until at least the commencement day of the new legislation in order to preserve its capacity at that time to become an approved provider under the *Aged Care Act*;

(e) initially, the commencement date of the operating provisions would have been unknown, as they had not been proclaimed, but the proposed commencement date of 1 October 1997 would upon enquiry of the Department or the Australian Government Solicitor likely have been ascertained;

(f) upon the commencement of the new legislation, Derwent Court would still be subject to the financial sanctions determination, unless it was set aside by the Court, or lifted by the Secretary;

(g) because Jadwan would have to keep Derwent Court operating, there were balance of convenience issues in play relating to patient care and fire safety that Jadwan would have to address by affidavit evidence;

(h) if Jadwan sought an injunction, then given that the subject-matter of the adverse reports related to the quality of care, Jadwan would have to secure its professional staffing arrangements at Derwent Court, and address that topic in evidence;

(i) if the advice was given on 23 or 24 July 1997, Jadwan would have to take account of whether it proposed to seek an interlocutory injunction in determining whether or not to give notice to its staff, in circumstances where Mr Alexander had identified the issue of notice to Jadwan’s staff in his conversations with Mr Wicks on 21, 22, and 24 July 1997;

(j) if the advice was given after 24 July 1997, and Jadwan had given notice to its staff terminating their employment, thereby triggering entitlements to severance and redundancy payments, then the notices of termination could not be withdrawn unilaterally – see, *Birrell v Australian National Airlines Commission* [1984] FCA 419; 5 FCR 447 at 457-8 (Gray J); and

(k) obtaining an interlocutory injunction would not prevent residents leaving voluntarily having regard to the uncertain circumstances, and the Department’s offer to relocate them in accommodation that the Department had identified as suitable, and the fact that the residents and their families had a choice in that regard.

504 The prospect that, if Jadwan obtained a “stay”, it would not have any staff, had been adverted to by Mr Wicks on 24 July 1997 in his file note of his telephone conversation with Mr Alexander (see [187] above). However, in evidence Mr Wicks denied that he had ever been asked to give any advice to Jadwan about the termination of its staff.

505 Senior counsel for Jadwan emphasised in submissions that the grounds of judicial review available to Jadwan were not limited to those relating to the composition of the panels (including apprehended bias), but included a ground relating to denial of natural justice. Putting aside the alleged apprehension of bias, there were two ways in which this ground arose in the evidence. First, in a file note taken by Mr Wicks on 8 April 1997 of an attendance on Mr Alexander following the presentation of the report of the second Standards Monitoring Team, Mr Wicks wrote, “*They are concentrating on policies, procedures & practices under the new (draft) standards*” (see [108] above). We do not consider that there is objective support for the statement in the file note, as a comparison between the reports of the first Standards Monitoring Team, the first Standards Review Panel and the second Standards Monitoring Team shows that the reports appear to identify the same standards, being the gazetted standards set out in Commonwealth Special Gazette S303 dated 11 November 1987. Senior counsel for Jadwan submitted that, on review, Mr Griew explained the disparity between the reports on the basis that the second team was applying new draft standards, but we can find no support for that submission in Mr Griew’s statement of reasons. Even if this suggestion appeared in Mr Griew’s reasons of 13 October 1997, it does not support a finding that this would have been apparent to a reasonable and prudent legal adviser to Jadwan in July or early August 1997.

506 The second ground on which a denial of natural justice appears in the evidence is in the draft grounds of review that Mr Porter prepared on 1 August 1997 (see [254] above), which included a ground that claimed that Jadwan had not been afforded an opportunity to be heard in relation to the adverse material contained in the report of the second Standards Review Panel. This ground was removed from a later draft of the application, and having regard to the fact that by letter dated 4 June 1997 Jadwan responded to the report of the second Standards Review Panel (see [130] above), we are not persuaded that a reasonable and prudent legal adviser would regard those allegations as having merit.

507 In our view, a claim that the Panels were not constituted in accordance with the regulations was a sufficiently reasonable basis on which to allege the invalidity of the Standards Review Panel reports on which the delegate proposed to rely in revoking approval, thereby giving rise to a serious question to be tried.

#### The effect of the financial sanctions determination

508 As we have stated at [503(5)] above, reasonable and prudent advice to Jadwan would have included that there was a reasonable prospect that the effect of the financial sanctions determination was that the return of a resident who had left Derwent Court would be a fresh admission of a patient for the purposes of s 45E(2) of the *National Health Act*. Further, we consider that construction to be correct, with the consequence that Jadwan was reliant on the retention of existing patients at Derwent Court until 30 September 1997 in order to engage the transitional provisions in the *Consequential Provisions Act*. In this respect, the primary judge stated at [577]-[584] –

577. Jadwan’s underlying proposition necessarily includes that a returning resident, assuming the sanctions decision was ultimately to be set aside, would fall within the description of a person in respect of whom “a Commonwealth benefit…is or was payable…for nursing home care received by the patient on the day before [1 October 1997]” for the purposes of s 7(1)(a) of the Consequential Provisions Act.

578. That proposed need only be stated to be doubted.

579. Jadwan had discharged all its former residents. Because Derwent Court was subject to financial sanctions it was not eligible to receive a subsidy for a new resident.

580. A resident returning to Derwent Court from another nursing home where he or she had been receiving care after leaving Derwent Court would have been a new admission for the purposes of the sanctions decision.

581. The reasoning of the plurality in Jadwan No 4 required there to be a resident in respect of whom Commonwealth subsidies were payable at Derwent Court on 30 September 1997 to enable Jadwan to transition as an approved provider under the Aged Care Act.

582. Because of the operation of the sanctions decision a subsidy would not have been payable to Derwent Court in respect of any re-admitted resident on 30 September 1997.

509 We agree with the primary judge’s conclusions, set out above, for the following reasons.

510 Section 7(1)(a) of the *Consequential Provisions Act* required that on the day before the commencement of the *Aged Care Act*, which was 30 September 1997, a Commonwealth benefit be payable to Jadwan “*in respect of an approved nursing home patient…for nursing home care received by the patient*”. The financial sanctions determination was the subject of the letter from Mr Dellar to Jadwan dated 3 February 1997 to which we referred at [61] above, which stated (*inter alia*) –

**2. Determination under section 45E(2) National Health Act 1953**

The standards Review Panel specifically recommended that financial sanctions not be imposed as, in the Panel’s view, it would unnecessarily prolong the operation of an inadequate nursing home. Nevertheless, to ensure that there is no Commonwealth financial support for you if new residents continue to enter the facility, I determine that while this declaration remains in force **Commonwealth benefit is not payable to you in respect of any patient who enters the nursing home from 4 February 1997**.

(emphasis added)

511 The determination was made pursuant to s 45E(2) of the *National Health Act*, to which we referred at [17] above, and which provided –

(2) Where a declaration is in force under subsection (1), the Minister may, by written notice served on the proprietor of the nursing home, determine that, while the declaration remains in force, **Commonwealth benefit is not payable to the proprietor of the nursing home in respect of a patient admitted to the nursing home after the making of the determination**.

(emphasis added)

512 The determination as expressed in the letter referred to Commonwealth benefit not being payable in respect of any patient who “*enters*” the nursing home after 4 February 1997. That engaged the statutory power in s 45E(2) of the Act, being that Commonwealth benefit was not payable in respect of a patient “*admitted*” to the nursing home after 4 February 1997. The determination as expressed in the letter gave effect to what was permitted under the statutory power.

513 The question then arises whether a person who was a resident at Derwent Court, who then left and became a resident of another nursing home, and who then returned to be a resident at Derwent Court again, would have been “*admitted*” upon his or her return to Derwent Court, such that Commonwealth benefit would not have been payable to Jadwan in respect of that person.

514 The *National Health Act* did not include a definition of “*admitted*” or “*admission*”. The construction of s 45E(2) of the Act and in particular the word “*admitted*” in that provision must be assessed in its context, in a manner that is consistent with the language and purpose of all of the provisions in the Act, viewed as a whole: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69]-[71] (McHugh, Gummow, Kirby and Hayne JJ). The construction of s 45E(2) of the Act is informed by some related definitions in s 4 of the Act. The definition of “*nursing home*” includes (*inter alia*) premises in which patients are “*received and lodged exclusively for the purpose of providing them with accommodation and nursing care*” and specifically excludes hospitals and institutions for the treatment of the mentally ill. The definition of “*qualified nursing home patient”* is a “*person who occupies a bed in an approved nursing home for the purpose of nursing home care*”, with some limited exceptions. These definitions suggest that a person who is “*admitted*” to a nursing home is a person who is received and lodged, and who occupies a bed, at that nursing home. Further, those definitions suggest that a person cannot be “*admitted*” at more than one nursing home, and that they can only lodge and occupy a bed at any one nursing home at any one time.

515 We agree with the primary judge’s finding at [580] that “*a resident returning to Derwent Court from another nursing home where he or she had been receiving care after leaving Derwent Court would have been a new admission for the purposes of the sanctions decision*”, and the primary judge’s characterisation at [582] that such a person would be “*re-admitted*” to Derwent Court. Accordingly, we consider that if, for example, one of the patients who left Derwent Court in late July to early August 1997 and took up lodgement at Rosary Gardens was later persuaded to return to Derwent Court, that patient would for the purposes of s 45E(2) of the *National Health Act* be “*admitted*” to Derwent Court upon her return, such that Commonwealth benefit would not have been payable to Jadwan in respect of that person. Therefore, we reject the proposition that if Jadwan could have persuaded a patient to return so that she was a resident at Derwent Court on 30 September 1997, that Jadwan would thereby have satisfied the requirement in s 7(1)(a) of the *Consequential Amendments Act* that a Commonwealth benefit be payable to Jadwan in respect of that person on that date.

#### Reasonable and prudent advice from Mr Porter QC

516 Mr Porter was consulted on the following occasions –

(1) on Wednesday 23 July 1997, Mr Wicks had a short telephone conversation with Mr Porter, in which Mr Porter advised him to put the Department on notice immediately against moving residents, and which resulted in Mr Wicks’s letter to the Department of that day (see [182] above);

(2) on Thursday 24 July 1997, Mr Wicks attended a conference with Mr Porter at 10.00am (see [188] above);

(3) during the afternoon of Thursday 24 July 1997, Mr Wicks consulted Mr Porter by telephone (see [192] above);

(4) on Tuesday 29 July 1997, Mr Wicks telephoned Mr Porter and told him that Jadwan was accepting of the closure, and did not wish to pursue an application for an injunction, and requested that the Act be returned to him (see [212] above);

(5) on Wednesday 30 July 1997, Mr Wicks telephoned Mr Porter following his discussions with Mr Hogan and Mr Alexander (see [232] above);

(6) on Thursday 31 July 1997, Mr Wicks called Mr Porter, and requested that Mr Porter draft grounds of review “*in anticipation of revocation*” (see [240] above);

(7) on Friday 1 August 1997, Mr Porter sent Mr Wicks a first draft of the grounds of review (see [254] above);

(8) on Monday 4 August 1997, Mr Wicks sent a fax to Mr Porter attaching a draft application and affidavit for Mr Porter’s comment (see [256] above);

(9) on Tuesday 5 August 1997, Mr Wicks attended a conference with Mr Porter (see [258] above);

(10) on Friday 8 August 1997, Mr Wicks telephoned Mr Porter and informed him of developments, which by then would have included service of the notice of revocation (see [271] above);

(11) on Monday 11 August 1997, Mr Wicks sent a fax to Mr Porter attaching a draft affidavit of Ms Julie Alexander (see [273] above);

(12) later on Monday 11 August 1997, at about 4.30pm, Mr Wicks spoke to Mr Porter by telephone (see [273] above); and

(13) on Tuesday 19 August 1997, Mr Porter wrote to Mr Wicks, not having heard from him since 11 August 1997 (see [275] above).

517 It is a minor point, but as we identified at [214] above, we consider that the primary judge was in error at [387]-[390] in finding that Mr Wicks spoke to Mr Porter on both 28 and 29 July. The preferable inference from the evidence, to which we have referred at [210]-[212], is that Mr Wicks left a message for Mr Porter on 28 July 1997, and that Mr Porter called him back and that they spoke on 29 July 1997.

518 The primary judge found that Mr Porter was not negligent in the advice that he gave in the initial stages. In relation to Mr Porter’s initial advice, at [712]-[719] his Honour found –

712 I have concluded Mr Porter’s advice when initially consulted by Mr Wicks, despite that advice not having then been informed by an awareness of the existence of the Aged Care Act and the Consequential Provisions Act, was not negligent.

713 It will be recalled that Ms Halton gave Jadwan notice of her intention to revoke Derwent Court’s approval as a nursing home on 20 July 1997.

714 I am satisfied that Mr Porter’s preliminary advice provided on 24 July 1997 that then seeking an injunction would be “a high risk application” was not negligent. His opinion, expressed as his preliminary view, was entirely justifiable given what had been identified by at least three inspection reports as fire safety issues relevant to the care of the non-ambulant residents of Derwent Court located on the second floor.

715 What had then been in issue was the possibility of Jadwan applying for an injunction prior to Ms Halton making her final and operative decision.

716 The Court has given reasons at [476] to [492] above for having concluded that Jadwan fails to establish on the balance of probabilities that applying for an order pursuant to s 6 of the ADJR Act could have prevented Ms Halton making a final and operative decision to revoke Derwent Court’s approval.

717 I further note that Mr Porter was not then purporting to express his concluded opinion. Rather, he had told Mr Wicks that he would continue to research and consider the position.

718 It had been Mr Wicks who had called Mr Porter on 28 July 1997 to inform him that Jadwan had accepted Derwent Court’s closure and had decided not to seek an injunction.

719 I have noted at [387] that Mr Porter, correctly in my view, expressed some scepticism regarding the reasoning Mr Wicks advanced to explain Jadwan’s decision. However Mr Wicks had reconfirmed the next day that Jadwan was not seeking an injunction. As an indicator of the finality of that position, Mr Wicks had asked Mr Porter to return his copy of the National Health Act.

519 As to [714] and [717] of the primary judge’s reasons, Mr Porter spoke to Mr Wicks twice on 24 July 1997. On the first occasion, he spoke to him in the conference at about 10.00am (see [188] above). On the second occasion, Mr Wicks spoke to Mr Porter by telephone in the afternoon after Mr Porter had given the matter further consideration (see [192] above). On neither occasion did Mr Porter identify the significance of the new legislation. Mr Porter’s advice that seeking an injunction was “*perhaps a high risk application*” (see [188] above) did not take account of the risks for Jadwan if it did not seek an injunction. If Mr Porter had identified the existence of the new legislation, then Jadwan would have had the benefit of Mr Porter’s advice about its significance, and Jadwan could then have considered what course it proposed to take based upon reasonable and competent advice. For the reasons that follow, we respectfully do not agree with the primary judge that Mr Porter’s advice was not negligent.

520 In our view, reasonable care required that senior counsel in the position of Mr Porter should have taken steps to acquaint himself with, and advise Jadwan having regard to current Commonwealth legislation. Reasonable care did not require that he know of the legislation when initially retained. But reasonable care required that he search for the current legislation shortly after he was retained, and before he gave advice to Mr Wicks, which occurred on 24 July 1997, or that he qualify such advice if he had not had the opportunity to search for the current legislation. It was not reasonable for Mr Porter to rely on the reprint of the *National Health Act* that had been given to him by Mr Wicks as comprising the current legislation without conducting further searches to ascertain whether there had been any amendments since the reprint. This is a basic legal task. We infer that if Mr Porter had undertaken reasonable searches of Commonwealth legislation, then he would have identified the *Aged Care Act* and the *Consequential Provisions Act*. It is unnecessary for us to go further and make findings as to how Mr Porter would have gone about those searches. Reasonable care required that senior counsel practising in 1997 should have had the means of being able to check current Commonwealth legislation, whether from his or her own resources, or from access to a library. Upon identifying the new legislation, reasonable care required that Mr Porter give consideration to its effect on Jadwan’s circumstances, and to give advice substantially to the same effect as we have identified at [503] above in respect of Mr Wicks.

521 Other findings made by the primary judge about Mr Porter concerned the preparation of the papers in support of the application under the *ADJR Act* following the advice given by Mr Hogan on 30 July 1997. At [720]-[724], the primary judge found –

720 It was only after Mr Wicks had been persuaded by Mr Hogan that to convince the Department to permit Jadwan to sell its bed licences Jadwan should seek an injunction to “back the [Department] against the wall” that Mr Wicks reverted to Mr Porter. He had done so late on the afternoon of 30 July 1997. He had asked Mr Porter if he would assist in preparing the necessary application.

721 However it is important to emphasise that the application Mr Wicks was asking Mr Porter’s assistance to prepare was to be deployed merely as a stratagem to put pressure on the Department. No one, least of all Jadwan (which by then had dismissed all of its nursing staff), then had any illusions that such an application was to be brought with the purpose of allowing Jadwan to continue to operate Derwent Court while it proceeded to build a new facility on a greenfield site.

722 That Mr Porter was so instructed is confirmed by Mr Wicks’ note of his penultimate conversation with Mr Hogan in which he refers to Mr Porter’s “tactic” of preparing an application with the intention of it being filed after Ms Halton had made a final and operative decision.

723 That the true aim of that application was to put pressure on the Department to sell Derwent Court’s beds is also confirmed by the cover sheet of Mr Wicks’ facsimile of 4 August 1997 (Ex R1-3 X6 marked 4607) in which, in relation to Ms Julie Alexander’s draft affidavit, Mr Wicks seeks Mr Porter’s advice as to the extent that affidavit should set out “the deponents [sic] grievances as to the way in which they have been treated, the financial effects, the fact that they want to sell the ‘beds’ and so on”.

724 Mr Porter continued with those preparations, including asking Mr Wicks to check the availability of a judge to hear an application. I accept that those preparations were not complete by the time Ms Halton’s revocation decision of 6 August 1997 was notified to Jadwan.

522 The primary judge held that any delay in preparing the papers was inconsequential, based upon his Honour’s findings at [599] to [627] that Jadwan had not established on the balance of probabilities that an injunction would have resulted in the Department granting Jadwan any further opportunity to sell its licences.

523 We agree with the primary judge’s findings at [721]-[722] that Mr Porter was consulted on 31 July 1997 only for the purpose of preparing papers to be filed as a tactic to put pressure on the Department to permit Jadwan to sell its licences. It is not to be inferred from Mr Wicks’s file note of 31 July 1997 (see [240] above), or the surrounding circumstances, that when Mr Wicks and Mr Porter spoke that they had in contemplation seeking an injunction to enjoin the delegate from revoking Derwent Court’s approval. The file note does not support that inference, because it refers to an “*appeal*”, and states that Mr Porter would draft some grounds “*in anticipation of revocation*”. There was then no relative urgency in the way Mr Wicks went about the preparation of the papers. The other circumstantial evidence includes –

(1) Mr Wicks’s file note of his conversation with Mr Alexander on 31 July 1997 (see [243] above) in which he recorded telling Mr Alexander that Mr Porter was drafting grounds “*in anticipation of an appeal next week*”;

(2) Mr Wicks’s file note of his conversation with Mr Hogan on 31 July 1997 (see [245] above), and to which the primary judge referred, in which Mr Wicks recorded that they were “*awaiting decision to revoke*”;

(3) Mr Porter’s draft application that he sent to Mr Wicks by fax late in the afternoon of Friday 1 August 1997 (see [254]), which contained no claim for any injunctive relief, but sought a stay of the revocation decision under s 15 of the *ADJR Act*, and an order that the decision be quashed; and

(4) Mr Wicks’s fax to Mr Porter on Monday 4 August 1997 (see [256] above), which was also consistent with the preparation of papers in anticipation of the revocation decision.

524 In relation to Mr Wicks’s file note dated 11 August 1997 which records that Mr Porter told him that he saw no need for an interlocutory stay (see [273] above), the primary judge held at [729] that there were significant reasons to doubt that Mr Porter gave the advice that Mr Wicks had understood him to give. The primary judge referred to Mr Porter’s letter to Mr Wicks dated 19 August 1997 to which we have referred at [275] above as the source of that doubt. We share those doubts to an extent. Mr Porter may have been addressing the question of a stay under s 41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth), and advising that it was not available because the reviewable decision would not have been amenable to review by the Tribunal until after the internal review under s 105AAB(2) of the *National Health Act.* However, having regard to the absence of cross-examination on the topic, and the content of the written reply submission of the fifth respondent which we have set out at [378] above, whether Mr Wicks’s note represented a misunderstanding of Mr Porter’s advice was not in issue at trial, and we respectfully consider that the primary judge was in error in finding that Mr Wicks had misunderstood Mr Porter’s advice. Mr Porter’s letter supports an inference that he discussed with Mr Wicks the utility of seeking a stay of the revocation of Derwent Court’s approval in the circumstances that existed by that time. We infer that Mr Porter had reservations about the utility of seeking a stay pending administrative review by the Minister and then the AAT, and those reservations are reflected in Mr Wicks’s file note of the conversation.

525 We have mentioned that no party called Mr Porter. We do not draw any inference from this failure against any party in evaluating the evidence. Jadwan could hardly be expected to have called Mr Porter. And given that the fifth respondent was engaged by Jadwan’s former solicitors to serve a writ on Mr Porter, we do not think that any inference should be drawn from the fifth respondent’s failure to call him. Further, although this was not raised in argument, we expect that Mr Porter would likely have been subject to professional obligations that would have prevented him from discussing his retainer by Jadwan with the legal representatives of the fifth respondent.

#### Reasonable and prudent advice from Mr Hogan

526 Mr Hogan was an experienced Melbourne solicitor whose practice had included working on a considerable number of transactions relating to nursing homes. His professed expertise in the law relating to the conduct of nursing homes in Australia was the subject of an admission in paragraph 38 of the amended defence of the fourth respondent. Reasonable care required that, before giving advice to Jadwan, Mr Hogan acquaint himself with the relevant Commonwealth legislation. As the primary judge remarked at [502], the existence of the *Aged Care Act*, being an Act of the Commonwealth Parliament, was not some hidden trap. We are satisfied that the exercise of reasonable care by Mr Hogan in giving advice to Jadwan required that he draw attention to the new legislation, and in particular the transitional provisions in the *Consequential Provisions Act,* and give Jadwan advice about the significance of that legislation to its objective of selling its bed licences. The fact that the commencement date for the operative provisions of the legislation had not been proclaimed at the time Mr Hogan gave advice on 28 to 30 July 1997 reinforced, rather than detracted from, the requirement that, in the exercise of reasonable care, he draw the legislation to Jadwan’s attention. We reject the submissions advanced by the fourth respondent that advice about the existence and general effect of the new legislation was outside the scope of Mr Hogan’s retainer. On the contrary, we would regard such advice as being well within the scope of the retainer, and no question of any “penumbral” duty arises. That is because the enactment of the new legislation and in particular the transitional provisions in the *Consequential Provisions Act* were directly relevant to the subject-matter on which Jadwan sought advice from Mr Hogan, namely its desire to “*save the bed licences*” (see the letter from Jadwan to Mr Hogan dated 28 July 1997, set out at [216] above). Jadwan’s objective to preserve its bed licences reasonably required that Mr Hogan direct attention to the effect of the new legislation in order that Jadwan could consider what course it should follow.

527 At [698]-[704], the primary judge found that Mr Hogan was not liable to Jadwan for the following reasons –

698 … I am satisfied that the advice Mr Hogan provided to Jadwan and Mr Wicks was confined to seeking an injunction as a tactic to put additional pressure on the Department to secure a quite different objective: consent to Jadwan being granted additional time to sell its bed licences.

699 I have earlier set out my reasons for coming to the conclusion that before Jadwan had consulted Mr Hogan, its directors had made the key decision to accept the Department’s offer to meet Derwent Court’s liability for redundancy payments. Jadwan had dismissed all of Derwent Court’s staff. Mr Alexander’s letter of instruction had referred to those events as settled (see [394] and [689] above).

700 The Department was also aware of those circumstances. Mr Hogan’s reasoning and advice was not implausible but I have rejected finding on the balance of probabilities that seeking an injunction in that context would have led to the Department extending its 48 hour window for Jadwan to transfer its bed licences.

701 But in any event, Mr Hogan was not responsible for Mr Wicks’ later decision (based on his understanding of Mr Porter’s advice) not to proceed in that regard. On 31 July 1997 Mr Wicks had informed Mr Hogan of Mr Porter’s “tactic” to seek an injunction. Mr Hogan’s retainer was terminated on 5 August 1997. As at that point in time it had been his understanding, as conveyed by Mr Wicks, that Jadwan’s lawyers in Hobart had agreed to file an application for an injunction immediately upon confirmation of Ms Halton’s revocation decision. That they did not do so was not his responsibility. He was never advised of any change of plans.

702 I am therefore not satisfied, even had such a course been likely to have achieved its objective of persuading the Department to allow Jadwan a further opportunity to sell its bed licences (which I have rejected as an available finding) that there is any basis for holding Mr Hogan liable for failing to provide advice to Jadwan to seek such an injunction for that purpose. I reject that Mr Hogan caused Jadwan the loss of the chance it pleads on that basis.

703 I reject it was within Mr Hogan’s retainer or any perambulatory duty associated with his retainer to have provided advice as to how Derwent Court might continue to operate. Mr Hogan had been given express instructions that Jadwan accepted Derwent Court would have to close. He had been told that Jadwan had given notice to its staff at Derwent Court and the residents were leaving.

704 Accordingly I reject Jadwan’s case that the failure of Mr Hogan to give advice with respect to the existence and consequences of the Aged Care Act and the Consequential Provisions Act caused Jadwan to suffer the loss of its chance to continue and ultimately to relocate its business.

528 The primary judge’s findings at [698] are concerned with identifying the advice that Mr Hogan gave, rather than the advice that reasonable care required him to give, and which he omitted to give, which we have addressed at [526] above. The findings at [699]-[704] are otherwise concerned with causation, which issue we shall consider for ourselves on the premise that reasonable care required that Mr Hogan draw attention to the new legislation, and its significance to Jadwan’s objective of saving its bed licences.

#### Toomey Maning & Co

529 We are not satisfied that any act or omission of Mr Wicks when employed by Toomey Maning & Co was capable of being a cause of the damage alleged by Jadwan, being the loss of opportunity to which we have referred at [419] and [431] above, and we shall not give any further consideration to its liability.

#### What course would Jadwan have taken had it received reasonable, prudent advice?

530 Because this Court has concluded that the primary judge erred in making findings concerning the advice that reasonable care required Mr Wicks, Mr Porter, and Mr Hogan to give Jadwan, this Court should now make its own findings concerning causation, weighing conflicting evidence, and drawing its own inferences and conclusions: *Devries v Australian National Railways Commission* at 479-481 (Deane and Dawson JJ), cited in *Robinson Helicopter Company Inc v McDermott* at [43]. As we have discussed, the question of causation involves the evaluation of a past hypothetical in which the circumstantial evidence is the dominant consideration. In this case, causation does not turn on any relevant advantage that the primary judge enjoyed by observing witnesses. As we noted at [446] above, senior counsel for Jadwan accepted that the evidence of Mrs Joan Alexander and Ms Julie Alexander concerning what they would have done had they received competent advice was somewhat self-serving. And as we have already noted, causation invites attention to what Jadwan would have done in circumstances where Mr Alexander, who was its controlling mind, had passed away some years before the trial.

531 We infer that at the time Jadwan received the delegate’s notice of intention to revoke the approval of Derwent Court on 21 July 1997, Jadwan was aware of a likelihood that it could not continue in the long term to operate Derwent Court from its existing premises. This inference is supported by Jadwan’s acknowledgment that it had to relocate its premises, which had been conveyed to Mr Dellar at a meeting on 4 March 1997 (see [100] above), by the letter from Jadwan to the Department dated 22 April 1997 (see [113] above), by the correspondence passing between Jadwan and the Tasmania Fire Service in late May and early June 1997, by Mr Wicks’s file notes of 10 June 1997, 2 July 1997, and 15 July 1997, by Mr Wicks’s letter of advice of 12 June 1997, and by the statements that Mr Alexander made to the second Standards Review Panel that were recorded in its report (see [124] above).

532 The letter from the Tasmania Fire Service to Jadwan dated 30 May 1997, to which we referred at [127] above, made explicit that the approval of the various fire safety measures set out in the letter, including the reduction in the number of residents on the first floor, was subject to a business plan detailing the plans and time frames for the construction or purchase of a new facility within a two year period. The letter also foreshadowed a meeting between Jadwan, the Fire Service, and the Department, after Jadwan had formulated its business plan.

533 Jadwan did not submit a business plan that conformed to the request that it span a two year period. Instead, by its letter dated 13 June 1997, to which we referred at [137] above, Jadwan proposed a plan that extended from December 1997 to October 2000. Mr Alexander submitted the plan after consulting Mr Wicks on 10 June 1997, and after receiving Mr Wicks’s letter of advice dated 12 June 1997. Mr Wicks’s file note of his meeting with Mr Alexander on 10 June 1997 gives rise to an inference that Mr Alexander did not want to lock into a new construction, and was considering the alternative of selling the bed licences, which accounted for his question to Mr Wicks as to whether a declared home could sell beds. Mr Wicks’s letter of advice of 12 June 1997 gives further support for the inference that the realistic options available to Jadwan at that time were limited to constructing a new home, or to losing the beds if a buyer for the licences could not be found.

534 The fact that Mr Alexander submitted to the Tasmania Fire Service a plan that extended over more than three years, rather than two years as requested, did not go unnoticed. Mr Wicks’s file notes of his conversations with Mr Alexander on 2 July 1997, and 15 July 1997, referred to the Fire Service having gone sour on the proposal for a downstairs fire door, and referred to the Fire Service being unhappy with the three year timetable, because it was too long. Further, Mr Wicks’s file note of 15 July 1997 referred to the prospect of the smoke door being required at the top of the stairs, and to major works. It was in those contexts that on 2 July 1997 Mr Wicks recorded Mr Alexander as saying that he was more inclined now to sell and get out, and that he was speaking to a marketing firm that day, and that on 15 July 1997 he recorded Mr Alexander as saying that he had decided to “*get out*”.

535 At about this time, Jadwan was expecting to meet representatives of the Fire Service, and the Department, as Mr Knight had suggested in his letter of 30 May 1997. On 7 July 1997, Mr Alexander advised Mr Wicks of a proposed meeting on 17 July 1997 at 2.00pm. That meeting did not occur, because it was cancelled by the Department upon the delegate deciding to take steps to revoke Derwent Court’s approval. However, Mr Alexander had obtained the letter from Mr Calder of Tasmanian Building Services dated 16 July 1997, to which we referred at [154] above, which proposed a timetable extending over 104 weeks. We infer that Mr Alexander had requested this timetable to have available to present to the meeting that had been planned for 17 July 1997, but which did not take place. In the meantime, Mr Wicks met Mr Alexander and Ms Julie Alexander on 15 July 1997, to which we have referred at [458] to [467] above, and we infer that they discussed getting out of Derwent Court, and that Jadwan was giving serious consideration to selling its licences and was thinking of advertising them for sale, or putting them out to tender.

536 We are not persuaded that at the time Jadwan received the delegate’s notice of intention to revoke the approval of Derwent Court dated 20 July 1997, that Jadwan had taken any steps to further any proposal to relocate Derwent Court to a greenfields site. While it may have contemplated purchasing land for that purpose in late 1996 and early 1997, and some of its directors at earlier times had inspected some sites, the evidence does not disclose any concerted efforts to proceed with any purchase. The report of the second Standards Review Panel recorded that Mr Alexander tabled a “*vision statement and strategic plan*”, and that he stated his intention to rebuild over two to three years, but noted that he anticipated difficulty in finding the two hectares of land that he needed. Mr Alexander’s business plan that he submitted to the Tasmania Fire Service did not propose the location of land until December 1997, and did not propose an option to purchase land until February 1998. The proposed dates were qualified as being best estimates only. The proposal by Tasmanian Building Services dated 16 July 1997 was nothing more than an indicative timetable, and did not amount to any affirmative step by Jadwan to relocate Derwent Court. This situation might be well understandable, given that Jadwan’s approval for Derwent Court was known by it to be in jeopardy, and acting rationally, Jadwan would not wish to devote substantial funds to a venture that might turn out to be futile. We regard Ms Julie Alexander as having accepted in cross-examination that Jadwan would have to have received a guarantee from the Commonwealth that if it built a new home, it would get 51 bed licences, before it made the decision to do so. That is an unsurprising position for Jadwan to have taken, and was a theme in its decision-making relating to financial expenditure.

537 All this tends to reinforce a conclusion that as at 21 July 1997, there was no real advance on any proposal to relocate Derwent Court, and Jadwan had no developed plans to do so. Nor had Jadwan taken any positive steps to reduce the number of residents located on the first floor of Derwent Court, to which Mr Knight had referred in his letter to Jadwan of 30 May 1997. Mr Alexander had enquired on 10 April 1997 about the possibility of relocating residents to the Carruthers Wing at St John’s Park, and had subsequently visited that site on 21 April 1997. There were further communications in May 1997 that terminated with a fax to Mr Alexander dated 30 May 1997 setting out the quoted costs (see [129] above). Notwithstanding Mr Knight’s letter of 30 May 1997, and its reference to the reduction of the number of residents on the first floor, Mr Alexander took no actual steps to facilitate this occurring. This points to Jadwan’s practical options narrowing to the sale of the bed licences.

538 In relation to the sale of the bed licences, we infer from Mr Wicks’s file note and Mrs Joan Alexander’s diary entry of 2 July 1997 that the directors of Jadwan spoke to Mr Wicks about engaging selling agents to market the licences. We also infer that on 15 July 1997, Mr Alexander spoke to Mr Wicks about the possibility of advertising the licences for sale, or putting them out to tender, but it appears that prior to the service of the notice of intention to revoke the approval, nothing was done. That inference is reinforced by the evidence of the extensive interest shown in purchasing the licences that arose after the notice was served, to which we referred at [252] above.

539 Upon Jadwan being served on 21 July 1997 with the notice of intention to revoke the approval for Derwent Court, one of the first things to which it gave attention was the termination of its staff. Ms Julie Alexander spoke to Ms Thorpe of the Department that very day about staff pay and redundancies, as reflected in the primary judge’s findings at [532]-[533]. Jadwan’s concern over its liability for redundancy payments is also recorded in Mr Wicks’s file note of 22 July 1997 (see [173]-[174] above), from which it is to be inferred that Mr Alexander had spoken to Mr Dellar that day. And by 24 July 1997, Mr Alexander had spoken to Mr Dellar about Commonwealth funding of redundancies, and received information that the Commonwealth would fund 80% of redundancy payments, but not payment in lieu of notice. Jadwan then prepared letters to its staff terminating their employment. On the hypothesis that Mr Wicks should have advised Jadwan of the new legislation by 23 July 1997, the first issue confronting Jadwan would have been whether to proceed to terminate the employment of its staff.

540 The issue of timing, and the influence of other events that were occurring after Jadwan received the notice of intention to revoke its approval, must be considered in forming a view of the overall picture. We set out in a table below the number of residents that remained on relevant dates. The information in the table has been derived from the contents of the note that was in evidence, to which we referred at [385] above, Mr Wicks’s file notes of 10 June 1997 and 7 July 1997, and the report of the internal review by the Department dated 29 April 1998, to which we referred at [161] above. The information in those documents largely corresponds, save that the report of the Department’s internal review states that seven residents were transferred on 26 July 1997, and that four were transferred on 28 July 1997. We have calculated the column “Residents remaining” based on the figures in the note that was in evidence, and the information in Mr Wicks’s file notes of 10 June and 7 July 1997 –

|  |  |  |
| --- | --- | --- |
| **Date** | **Departures** | **Residents remaining** |
| Tuesday, 10 June 1997 | 2 | 49 |
| Monday, 7 July 1997 | 3 | 46 |
| Thursday, 24 July 1997 | 1 | 45 |
| Friday, 25 July 1997 | 3 | 42 |
| Saturday, 26 July 1997 | 6 | 36 |
| Sunday, 27 July 1997 | 8 | 28 |
| Monday, 28 July 1997 | 5 | 23 |
| Tuesday, 29 July 1997 | 8 | 15 |
| Wednesday, 30 July 1997 | 6 | 9 |
| Thursday, 31 July 1997 | 4 | 5 |
| Friday, 1 August 1997 | 2 | 3 |
| Saturday, 2 August 1997 | 2 | 1 |
| Sunday, 3 August 1997 | 0 | 1 |
| Monday, 4 August 1997 | 1 | 0 |

541 If Mr Wicks had located and advised Jadwan of the new legislation by 23 July 1997, then reasonable care would not result in all of the issues to which the new legislation gave rise becoming immediately apparent. The complexity of the issues would likely cause a reasonable solicitor, as Mr Wicks did, to seek instructions to retain counsel. A reasonable solicitor, and counsel, would take time to consider carefully the facts, the legislation, and to formulate advice to Jadwan of the type to which we have referred at [503] above. In this case, Mr Porter took time to consider the issues, because after Mr Wicks consulted him on the morning of 24 July 1997, Mr Porter continued to give consideration to the issues, as evidenced by Mr Wicks’s file note of his telephone conversation with him on the afternoon of 24 July 1997.

542 Reasonable and prudent solicitors and counsel would require time to formulate any available grounds on which to seek an interlocutory injunction. We consider that the ineligibility of Ms Cooper for membership of the Standards Review Panels would have been identified on 24 or 25 July 1997 as giving rise to a reasonable argument that there was a serious question to be tried. Mr Wicks made a note on 25 July 1997 referring to Ms Cooper’s position, and at about that time prepared an undated file note recording his consideration of the relevant regulations (see [199] above). Further time would have been required to marshal evidence addressing such issues as the balance of convenience, which would have to be addressed on the assumption that Jadwan proposed to continue operating Derwent Court until the trial of the proceeding. After a reasonable solicitor had identified the new legislation on Wednesday 23 July 1997, Jadwan would have received preliminary advice about the prospects of obtaining an interlocutory injunction on Thursday 24 July 1997. Jadwan would then, as it did, have to consider that advice and evaluate its options. On the assumption that Jadwan expressed interest in seeking an injunction to enjoin the delegate from making the revocation decision, on balance, we consider that Jadwan was likely to have been in a position to move on an application on Monday 28 July 1997.

543 The choice confronting Jadwan from 23 July 1997 and in the days following was not simply whether to commence and maintain a proceeding seeking an interlocutory injunction. The choice was whether to continue to operate Derwent Court at the existing premises in the following circumstances –

(1) Derwent Court remained subject to financial sanctions;

(2) Mr Alexander understood that the consequence of the financial sanctions was that as residents left, Jadwan would not be entitled to a Commonwealth benefit for any new resident (this inference arises from Mr Wicks’s note of 10 June 1997);

(3) Jadwan had not taken steps towards relocating to new premises, notwithstanding its statements to the Department and to the Tasmania Fire Service that it would do so;

(4) Jadwan had taken no taken steps to secure alternative accommodation for the first floor residents, notwithstanding that many weeks earlier, in April and May 1997, it had made enquiries to locate alternative accommodation and in relation to the cost thereof;

(5) if residents remained on the first floor, there was the prospect that Jadwan would have to effect major works to install a smoke door at the top of the stairs on the first floor of the Home;

(6) the Department had arranged alternative accommodation for Derwent Court’s residents at homes operated by Southern Cross Homes, namely Rosary Gardens and the Carruthers Wing;

(7) the Department had on 21 and 22 July 1997 communicated with the residents and their relatives about its intention to close Derwent Court, the reasons for doing so, and of the fact that the Department would find alternative accommodation for the residents;

(8) the letter to the residents dated 20 July 1997 contained a statement that implied that moving to new accommodation would be necessary in order that the residents retain their entitlement to Commonwealth funding –

I intend to revoke the approval of Derwent Court Nursing Home in fourteen day[s]. In this time the Department will find you another nursing home to move to if you wish*.* **If you choose to move the Government will keep funding your care.**

[Emphasis added]

(9) the Department had convened the meeting on Wednesday 23 July 1997 at its offices in Hobart with relatives of the residents and representatives from Rosary Gardens who provided relatives with an overview of their organisation and a detailed orientation package, and which was attended by about 50 people;

(10) in her draft affidavit that was sent to Mr Porter on 11 August 1997, Ms Julie Alexander stated that she had been told by some of the relatives that as a result of the meeting, they were convinced that the Department was adamant that the closure would go ahead, and that a number of relatives had told her father that they were upset and angry about the relocation;

(11) we infer that, in consequence of these communications, a number of residents, in consultation with their relatives, chose to leave Derwent Court, so that –

(a) one resident left on Thursday, 24 July 1997;

(b) three residents left on Friday, 25 July 1997;

(c) by the end of Monday, 28 July 1997, a further 19 residents had left; and

(d) by the end of Tuesday, 29 July 1997, a further 8 residents had left, and only 15 then remained (see the table at [540] above);

(12) it would have been apparent to Jadwan that residents were likely to continue to leave Derwent Court, even if Jadwan obtained an interlocutory injunction, and in this regard, Mr Alexander told Mr Wicks on 25 July 1997 that 20 residents had agreed to go to St John’s (see [196] above);

(13) Mr Alexander appreciated the pressure on residents to leave Derwent Court, because in his letter to Mr Hogan dated 28 July 1997, he stated –

The move of residents has been well orchestrated by DH&FS to the point where residents [and] relatives have no choice but to transfer to Southern Cross Homes; much to their displeasure and anger.

(14) as we have mentioned, reasonable advice to Jadwan would have been that the effect of the financial sanctions determination was that there was a reasonable prospect that Jadwan would not be entitled to Commonwealth funding in respect of any resident who left Derwent Court and sought to return while the sanctions determination remained in force; and

(15) at the same time, Jadwan was dealing with the redundancy issue, and the Department was facilitating interviews for those staff at Derwent Court who wished to take up employment at Rosary Gardens.

544 We infer from Mr Wicks’s file note of 24 July 1997 that when Mr Porter gave advice to Mr Wicks on 24 July 1997 about the prospects of obtaining an injunction, he did so on the premise that if an injunction was obtained, Jadwan would seek administrative review of the revocation decision which, at best, would lead to the Administrative Appeals Tribunal quashing the decision. Mr Wicks conveyed to Jadwan Mr Porter’s opinion that the Department could then simply turn around and “*do it all again*”. Whether Jadwan succeeded on judicial review, or administrative review, this was reasonable and sound advice. As we have held at [503(10)(c)], upon the hypothesis that reasonable advice included identification of the new legislation, reasonable care still required that Jadwan be advised that an interlocutory injunction would not prevent the Department from making another decision. Reasonable care required that Jadwan be advised that if an interlocutory injunction was obtained in support of final relief, then following the hearing and determination of the proceeding, there was a real prospect that the Department would seek to “*do it all again*”, whether under the *National Health Act*, or under the corresponding provisions in s 16-1 of the *Aged Care Act* that authorised revocation of approval as a sanction. For these reasons, it would have been reasonable to advise Jadwan that, overall, there was an appreciable risk that any success would be pyrrhic.

545 The draft application under the *ADJR Act* that Mr Wicks and Mr Porter were working on in early August 1997 was consistent with Mr Hogan’s letter to the Department of 30 July 1997 that requested time to sell the bed licences on the basis that Derwent Court would not function pending a sale. There was no material in the draft affidavit of Ms Julie Alexander that addressed what Jadwan proposed to do to maintain patient care, or which addressed fire safety. While the draft affidavit that Mr Wicks sent to Mr Porter on 11 August 1997 referred in passing to the possibility of building a new home if Jadwan was able to do so, it concluded with the following which was confined to an intention to sell the bed licences –

It is most important to the Company that its fifty-one approvals remain in place while the Company pursues all avenues of appeal open to it against the Minister’s revocation decision and, in the event that its appeals result in a finding that is favourable to the Company, that it be allowed to negotiate as it sees fit for the transfer of the approvals to any interested buyer or buyers.

546 The application that Mr Wicks and Mr Porter prepared was no more than an application under s 15 of the *ADJR Act* to suspend the operation of the revocation decision. An application of that nature, if successful, would not have enabled Jadwan to engage the conditions in s 7(1)(a) of the *Consequential Provisions Act*. But importantly, Jadwan would likely have perceived that the proposed application would have involved little financial risk to it other than modest legal costs. Mr Porter had given very modest estimates (see [188] above) that the costs of an application to the Court could run to $2,000 to $3,000, and that the costs of a review by the Administrative Appeals Tribunal could exceed $5,000. Even in relation to those costs, Mrs Joan Alexander had recorded a concern in a diary entry dated 7 August 1997 that it was costing a lot of money, referring to the sum of $5,000 for the AAT, and writing that it was “*good money after bad*” (see [269] above).

547 On the other hand, any application for an injunction on the basis that Jadwan would continue to operate Derwent Court was a very different proposition. In order to meet its objective, Jadwan would have to refrain from terminating the employment of all its staff, or alternatively, if it had already given notice, then negotiate the withdrawal of the notices of termination with individual staff members. Jadwan would have to retain sufficient nursing staff for three shifts per day, seven days per week, with a significantly reduced number of residents, and with the risk, which we find that Jadwan appreciated, that residents would continue voluntarily to leave. In this regard, it is not to be supposed that the residents whom the Department was assisting to relocate to alternative accommodation, or their relatives, had any insight into the merits of any claim that Jadwan had, or in relation to the prospects that Jadwan might succeed in continuing to operate Derwent Court notwithstanding the strongly-worded letters to residents from the Department.

548 Ms Julie Alexander accepted in cross examination that Derwent Court was unviable with only 15 residents. The commencement and maintenance of an application for an interlocutory injunction would likely have involved Jadwan electing to continue to operate Derwent Court at a loss for at least two months, and probably longer.

549 Relevant to any decision to continue operating Derwent Court would have been Jadwan’s perception in July 1997 of the value of its bed licences. In his file note of a conversation with Mr Alexander on 7 February 1997, Mr Wicks recorded that the bed licences were “*worth about $12,000 each in Tas in current climate*”. In his file note of 10 June 1997, Mr Wicks recorded Mr Alexander as suggesting that while licences in Melbourne were worth $18,000 to $25,000, the licences in Hobart were worth $12,000. And in Mr Wicks’s file note of his conversation with Ms Julie Alexander on 6 August 1997, to which we have already referred, he recorded –

- redundancy bill will be over half a million dollars – which could be value of the bed licences – one will cancel out the other. (!)

550 While there was no exact equivalence between the expected Commonwealth assistance for redundancy payments and the perceived value of the bed licences, the contemporaneous evidence is that Ms Julie Alexander made the comparison, and we infer that the comparison would not have escaped Mr Alexander. While we have found that there was no agreement with the Department in relation to the funding of redundancy payments, the fact that the Department represented that Commonwealth assistance was available provided a cushion to the costs that Jadwan would incur, and we infer that it was a consideration of which Mr Alexander took account in deciding to terminate the employment of all Jadwan’s staff on 24 July 1997.

551 By at least the end of Friday 25 July 1997, the situation at Derwent Court was one of great uncertainty and upheaval. Residents had started leaving. Staff from the Department had commenced copying patient records. On that day, Mr Alexander advised Mr Wicks that he accepted that the patients had to be cared for, and that closure had to be accepted (see [196] above). However, that decision was made after receiving the advice of Mr Wicks and Mr Porter who had failed to identify the new legislation.

552 At [207] above, we referred to the evidence of Ms Julie Alexander, which the primary judge did not accept, that Mr Wicks had advised her in a conversation on about 25 July 1997, that if Jadwan obtained an injunction, it would not receive Commonwealth funding and would have to fund the nursing home itself. That evidence was given by Ms Alexander in evidence-in-chief. But her evidence was not consistent. In cross-examination, Ms Alexander placed that advice in a different context, namely Jadwan’s decision to give notice to its staff on 24 July 1997 –

Well, that leads to the question: why was the decision taken to give notice on 24 July rather than wait?---There was a couple of reasons. One – the point that was foremost in my mind was that we had received advice that we couldn’t – that we – if we took an injunction to stop the residents from leaving, we would have to fund the nursing home for about a year out of our own funds and, if we lose, then we will bear those costs ourselves. …

553 That context was confirmed by Ms Alexander when it was put to her by senior counsel for the first to third respondents that Mr Wicks had at no time told Jadwan that it risked losing Commonwealth funding if it obtained an injunction, which Mrs Joan Alexander denied, stating –

I recall having that in my mind at the time that I was typing the redundancy letters.

554 The primary judge held at [385] that that there was no corroboration, contextual or otherwise, to support a finding that Mr Wicks told Ms Alexander that if Jadwan obtained an injunction, that Commonwealth funding would cease. However, we can identify two items of evidence that are arguably corroborative. *First*, in Mrs Joan Alexander’s diary entry for 25 July 1997 Mrs Alexander wrote, “*If we put an injunction on we run the risk of Commonwealth funding running out*” (see [203] above). *Second*, there is an undated file note of Coltmans Price Brent referring to Mr Alexander which stated, “*Injunction/ if apply funding cut*” (see [220] above). We infer that this file note is a record of what Mr Alexander told Mr Hogan of the advice that he had received from Mr Wicks. We would not disturb the primary judge’s finding that Mr Wicks did not give the advice, which was made after seeing both Mr Wicks and Ms Alexander give evidence, where Ms Alexander gave inconsistent accounts. Further, the primary judge at [385] suggested a more plausible account of the advice that was given, which was that it related to the effect of the financial sanctions decision. There is support for this alternative account in Mrs Joan Alexander’s diary entry, which is equally consistent with the formulation of the advice suggested by the primary judge.

555 On either version of the advice, Jadwan’s response would indicate that it was sensitive to the cost of operating Derwent Court at a loss. The prospect of deciding on 25 July 1997 to keep Derwent Court operating for some months with a reduced number of residents, and at a loss, was not on the same scale as operating without any Commonwealth funding. But having regard to Jadwan’s general sensitivity about expending money and minimising its losses, we find that the prospect of operating Derwent Court at a loss would have been a material consideration for Mr Alexander in deciding whether to seek an injunction, had Jadwan received the prudent and reasonable advice that we have identified.

556 Ultimately, Jadwan would have to decide whether it should keep Derwent Court operating at a loss for some months. We are not persuaded that, in late July and early August 1997, Jadwan would have conceived the idea that it only needed to have one or more residents remain at Derwent Court until 1 October 1997, and that it would keep the home running on that basis. As we stated at [296] above, Ms Julie Alexander did not learn of the existence of the *Aged Care Act* until after the first Full Court decision in *Jadwan No 2*, and possibly as late as July 1999.

557 We referred at [306] above to Mrs Joan Alexander’s evidence that she was confident that Jadwan would have persuaded a resident to return to Derwent Court, and she nominated a Mrs Jacobs. A staff member at Southern Cross Homes had reported to Mrs Alexander that Mrs Jacobs was screaming, and wanted to come back. We note that the report of the internal review by the Department dated 29 April 1998 recorded concerns about the fact that the last resident to leave Derwent Court had spent the last night with only staff for company. Beyond the hearsay evidence about Mrs Jacobs, the circumstances of any particular resident were not explored by the evidence. In the state of upheaval and turmoil that existed, there must be considerable doubt that relatives, and those responsible for the care of the dementia patients, would have permitted one or more patients to remain at, or to return to Derwent Court. And there are indications in the evidence that Jadwan was also concerned about the interests of its residents, because in his letter to the Department dated 1 August 1997 Mr Wicks stated that –

My client’s ultimate decision to take no action to prevent the relocation was taken purely in the interests of the Home’s residents, many of whom were quite upset at the prospect of relocation.

558 We are not satisfied on the evidence that Jadwan would have persuaded any resident to remain at, or return to, Derwent Court: whether any resident would have done so is true speculation. Further, as we have held at [508] to [515] above, if a resident had left Derwent Court, and had been admitted to another nursing home, a return to Derwent Court would involve a fresh admission, and would not attract Commonwealth funding.

559 The operation of Derwent Court for some months with only one or more residents would not have been an attractive basis on which to present an application for an interlocutory injunction to the Court. And it would not have been attractive to residents, their relatives, or the Court, for Jadwan to propose that Derwent Court would remain open only until 1 October 1997, with no longer term plans in place.

560 In our view, one of the most substantial considerations for Jadwan would have been reasonable advice that, even if Jadwan obtained an injunction, and even if it was successful at trial, there was a real risk that the delegate would be able to “*do it all again*”, including under the new legislation. All the circumstances of the case show that without some reassurance by the Department that its approval was secure, Jadwan was not prepared to commit any substantial resources to any long-term plans.

561 Given all these considerations, and looking at the accumulation of detail, we are not persuaded that, had Jadwan been given reasonable advice to the effect that we have identified at [503] above, that it would have commenced and maintained an application for an interlocutory injunction to enjoin the Minister from revoking its approval.

#### Causation arising from Mr Hogan’s negligence

562 It follows that we are not persuaded that Jadwan would have acted on advice from Mr Hogan about the effect of the new legislation and commenced a proceeding seeking an injunction to enjoin the revocation of the approval of Derwent Court, so as to enable Jadwan to continue its operations in the interim. Any application for an injunction of that type upon receiving advice from Mr Hogan was not likely to have been made before 1 August 1997. By the time Jadwan wrote to Mr Hogan on Monday 28 July 1997, it had given notice to all its staff, and it was co-operating with the transfer of residents. As the table we have set out at [540] above shows, by Wednesday 30 July 1997, there were only nine residents left, by Thursday 31 July 1997, there were five, and by Friday 1 August 1997, there were three. There is an insufficient evidentiary foundation to find that those remaining residents were likely to stay, or that Jadwan had reasonable grounds at the time to think that they would stay.

### 5. Did Mr Porter QC give advice not to seek an injunction – Issue (7)

563 We have addressed this question at [524] above. We do not find that Mr Wicks misunderstood Mr Porter’s advice. The advice that Mr Porter gave concerned a proposed application under the *ADJR Act* to suspend the operation of the revocation decision after the revocation had effect: see, *Riverside Nursing Care Pty Ltd v Bishop* [2000] FCA 434; 60 ALD 704 at [27]-[28] (Sundberg J). But by 11 August 1997, the utility of any such order was doubtful, as Mr Porter may have realised. Mr Porter’s advice was given well after the staff had been given notices of termination, and one week after the last resident had left. We are not persuaded that Mr Porter’s advice on 11 August 1997 was a cause of the lost opportunity that was the subject of Jadwan’s claim.

### 6. Would an application for interlocutory relief have been successful – Issue (3)

564 Jadwan has not persuaded us that, on the assumption it received reasonable and prudent advice from its legal advisers, it would have decided to continue to operate Derwent Court and to seek an injunction to enjoin the Minister from revoking its approval. It is therefore unnecessary for the Court to make any further findings. In *Boensch v Pascoe* [2019] HCA 49 at [7], Kiefel CJ, Gageler and Keane JJ stated –

Though it would have been preferable for the primary judge to have made findings on all of the facts that were in contest before him, we would not criticise the Full Court for not addressing an issue raised before it which it did not consider to be dispositive. The principle that an appellate court should confine itself to determining only those issues which it considers to be dispositive of the justiciable controversy raised by the appeal before it is so much embedded in a common law system of adjudication that we have no name for it. In some other systems, it is known as “judicial economy”. Judicial economy promotes judicial efficiency in a common law system not only by narrowing the scope of the issues that need to be determined in the individual case but also by ensuring that such pronouncements as are made by appellate courts on contested issues of law are limited to those that have the status of precedent.

565 In this case, one of the difficulties about making findings as to whether Jadwan would have succeeded in obtaining an interlocutory injunction is that the Court would be required to make assumptions about a number of factual hypotheses that we have rejected. Any further findings would therefore be truly hypothetical in nature, and they could have no bearing on the disposition of this appeal. We do not think the Court should embark on such a course.

### 7. Would proceedings to have the financial sanctions lifted have succeeded – Issue (5)

566 We do not infer that an application filed by Jadwan in or after July 1997 to quash or set aside the financial sanctions determination could have been heard and determined before 1 October 1997. If Jadwan had persuaded the Court that it would have succeeded in becoming an approved provider under the *Aged Care Act* on 1 October 1997, then the chance that it would have succeeded in having the financial sanctions lifted, and that it would have avoided a further decision revoking the approval of Derwent Court, would have been relevant to the assessment of damages. But as that question does not arise, it is also unnecessary for us to address this issue.

### 8. Did Jadwan suffer any damage from the failure to give advice about the new legislation – Issue (8)

567 For the reasons set out at [530] to [546] above, we are not persuaded that Jadwan would have continued to operate Derwent Court so as to engage the transitional provisions of s 7(1)(a) of the *Consequential Provisions Act*. Accordingly, no act or omission of Mr Wicks, Mr Hogan, or Mr Porter was a cause of the damage that Jadwan alleged in this proceeding.

568 It follows that the opportunity for Jadwan to pursue proceedings against Mr Porter was not one that had any value, and that the fifth respondent had no liability to Jadwan for the damage claimed against it.

### 9. Summary of outcomes – Issue (9)

569 The appeal must be dismissed.

570 We will hear the parties on costs and any consequential orders by inviting written submissions, and we shall consider any questions that arise on the papers.

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| I certify that the preceding five hundred and seventy (570) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Bromwich, O'Callaghan and Wheelahan. |

Associate:

Dated: 9 April 2020

**SCHEDULE OF PARTIES**

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| Respondents |  |
| Fourth Respondent: | JANET KAY HOGAN AS THE EXECUTRIX OF THE ESTATE OF THE LATE JOHN MICHAEL HOGAN |
| Fifth Respondent: | WORSLEY DARCEY & ASSOCIATES (A FIRM) |