FEDERAL COURT OF AUSTRALIA

Stirling v Minister for Finance [2017] FCA 874

|  |  |
| --- | --- |
| File number: | TAD 42 of 2016 |
|  |  |
| Judge: | **TRACEY J** |
|  |  |
| Date of judgment: | 4 August 2017 |
|  |  |
| Catchwords: | **ADMINISTRATIVE LAW** – application for judicial review of a decision of a delegate of the Minister for Finance to refuse to waive a debt owed to the Commonwealth – whether failure to take into account relevant considerations – whether irrelevant considerations taken into account – whether the decision was legally unreasonable |
|  |  |
| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(e), 5(2)(a), 5(2)(b), 5(2)(g), 13, 13(1)  *Migration Act 1958* (Cth) s 430  *Public Governance, Performance and Accountability Act 2013* (Cth) ss 5(c)(iii), 6, 63(1), 63(1)(a) |
|  |  |
| Cases cited: | *Alexander v Australian Community Pharmacy Authority* (2010) 265 ALR 424; [2010] FCA 189  *Anderson v Director-General, Department of Environmental and Climate Change* (2008) 251 ALR 633; [2008] NSWCA 337  *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174  *ARM Constructions v Commissioner of Taxation* (1986) 10 FCR 197; [1986] FCA 108  *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560; [2014] HCA 14  *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513; [2015] FCAFC 83  *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* (2011) 180 LGERA 99; [2011] FCAFC 59  *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107  *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280; [1993] FCA 456  *Comcare v Broadhurst* (2011) 192 FCR 497; [2011] FCAFC 39  *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353  *Dranichnikov v Centrelink* (2003) 75 ALD 134; [2003] FCAFC 133  *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498; [2012] HCA 7  *Faulkner v Conwell (1989)* 21 FCR 41; [1989] FCA 134  *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203  *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1; [1988] FCA 549  *Islam v Cash (Assistant Minister for Immigration and Border Protection)* (2015) 148 ALD 132; [2015] FCA 815  *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291; [1987] FCA 713  *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2009) 165 LGERA 203; [2009] FCA 330  *Lek v Minister for Immigration, Local Government and Ethnic Affairs (No 2)* (1993) 45 FCR 418; [1993] FCA 730  *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166; [2012] FCAFC 90  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67; [2014] FCAFC 16  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18  *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1  *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164; [2010] HCA 48  *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162; [1990] FCA 229  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259  *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426; [2001] FCA 274  *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30  *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212; [2003] HCA 56  *Reece v Webber* (2011) 192 FCR 254; [2011] FCAFC 33  *Soliman v University of Technology, Sydney* (2012) 207 FCR 277; [2012] FCAFC 146  *Turner v Minister for Immigration* (1981) 35 ALR 388; [1981] FCA 61  *Williams v Minister for Environment and Heritage* (2003) 74 ALD 124; [2003] FCA 535  *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 |
|  |  |
| Date of hearing: | 18 May 2017 |
|  |  |
| Registry: | Tasmania |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 51 |
|  |  |
| Counsel for the Applicant: | Dr TJF McEvoy QC with Mr B Mason |
|  |  |
| Solicitor for the Applicant: | HWL Ebsworth Lawyers |
|  |  |
| Counsel for the Respondent: | Mr C Gunson SC |
|  |  |
| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | TAD 42 of 2016 |
|  | | |
| BETWEEN: | RUPERT ANDREW STIRLING  Applicant | |
| AND: | MINISTER FOR FINANCE  Respondent | |

|  |  |
| --- | --- |
| JUDGE: | TRACEY J |
| DATE OF ORDER: | 4 AUGUST 2017 |

THE COURT ORDERS THAT:

1. The application be granted.
2. The decision of the delegate of the respondent, made on 7 July 2016, be set aside.
3. The matter be remitted to the respondent to be further heard and determined according to law.
4. The respondent pay the applicant’s costs of the proceeding.

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

REASONS FOR JUDGMENT

TRACEY J:

1. This is an application for judicial review of a decision of a delegate of the respondent Minister to decline an application, made by Dr Stirling, for a waiver of debt.
2. The application for waiver was made pursuant to s 63(1)(a) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (“the PGPA Act”). This provision empowers the Finance Minister, on behalf of the Commonwealth, to authorise the waiver of an amount owing to the Commonwealth. The amount involved was $332,541.30.
3. The circumstances in which the debt arose are, for the most part, uncontroversial. Dr Stirling is a general practitioner. He is a fellow of the Royal Australian College of General Practitioners and a member of the Australasian College of Phlebology. Phlebology is the study of diseases of the veins and lymphatics. Dr Stirling is the only phlebologist who practises in northern Tasmania. In order to provide treatment to his patients, Dr Stirling, in 2003, purchased an ultrasound machine. At the time he did so, he contacted Medicare Australia to determine whether he could claim under two items numbers on the Medicare Benefits Schedule (“the MBS”) which related to the use of the ultrasound machine. He was advised that he could not do so because he was not regarded as a specialist or a consultant physician. As a result, he did not make claims at that time.
4. In December 2005, Dr Stirling was told by a colleague that he may hold a specialist qualification which would enable him to claim the benefits.
5. Following his discussion with his colleague, Dr Stirling telephoned Medicare to enquire about his entitlement to make claims under the two item numbers. A recording of the discussion was made by Dr Stirling and a transcript was prepared. Dr Stirling understood that he had been advised that he was eligible to make the claims.
6. By letter dated 14 December 2005, addressed to Medicare, Dr Stirling wrote:

After communication with Medicare technical staff in Canberra I have had my eligibility confirmed, and therefore would just like to give notification of billing to item numbers 55246 and 55054 in the future.

This will be associated with my current LSPN registration … [number] for those patients who have been referred to me for consultation about, or management of, their venous disease.

Dr Stirling received no response to this letter.

1. He commenced to make claims under the items and continued to do so for the next five years.
2. Late in 2010, Dr Stirling was advised by Medicare that it intended to conduct an audit of services for which he had made claims. In December 2010, Medicare told him that it intended to recover all of the amounts paid to him in respect of the claims which he had made under the two item numbers. The debt, which is the subject of the present proceeding, was then raised.
3. Dr Stirling sought review of Medicare’s decisions but was unsuccessful. Having exhausted his review rights, he then made an application to the Scheme for Compensation for Detriment caused by Defective Administration. Again, he was unsuccessful. In October 2014, Dr Stirling made the application to the Minister to waive the debt.
4. The application was supported by written submissions. Those submissions covered a wide range of matters. They included:

* Dr Stirling said that, as a result of his 2005 telephone conversation with a Medicare advisor, he held a genuine belief that he was entitled to claim under the two MBS item numbers.
* Whether or not Medicare gave technically correct information in answer to his enquiries was irrelevant. This was because what was said was, at best, equivocal and Medicare did not disclose that scope to charge under the two items existed but was extremely restricted.
* Medicare had failed to examine the entirety of the conversation which included Dr Stirling advising that he held a location specific provider number (“LSPN”) and an ultrasound machine on site and he wished to charge for MBS items 55248 and 55054. Dr Stirling had applied for and obtained an LSPN for ultrasound imaging, provided by Medicare and renewable each year over the entire period of the claims.
* It could be inferred from the fact that Dr Stirling had told the Medicare advisor that he was performing venous work almost exclusively that he was not intending only to charge for these items in emergency circumstances.
* He had advised Medicare in writing immediately after the telephone conversation that he held the view, as a consequence of the conversation, that he was eligible routinely to claim under the two MBS item numbers. He had advised that he would be utilising those numbers from then on.
* Medicare had ostensibly ratified Dr Stirling’s understanding by continuing to pay, for in excess of 5 years, on his claims for the MBS item numbers.
* Repayment of the debt would constitute a significant financial impost in circumstances where his gross income was approximately $140,000 per annum, and much of the total practice income was spent on equipment and upgrades of the facility, with the community and Medicare benefiting from relatively modest charges.
* In order to continue providing his services Dr Stirling wished to purchase a new ultrasound machine at a cost of some $160,000, and that such a purchase would be out of the question were he required to pay the debt.
* He would have to borrow the full sum of the debt. The repayment of capital and interest on the loan would take a long time.
* Dr Stirling said that he provides a unique and valuable service to the community of northern Tasmania and still undertakes ultrasounds for his patients, absorbing the difference between the commercial value of the service and the charge.
* Because of his inability to claim a rebate from Medicare, Dr Stirling will often not raise a charge to the patient and, if a full scan is required, he will charge the patient $180, irrespective of the complexity of the procedure, and then provide a report to the referring doctor.
* Dr Stirling’s referrer feedback was that reports of the kind he prepared are generally more informative than those from other ultrasound services whose charges to the patient are up to $400 with a Medicare rebate of $140. As a result, the out-of-pocket expenses incurred by the patient were still greater than that those borne by his patients.
* Dr Stirling’s rooms are situated in a privately owned obstetric hospital in Launceston. They are refurbished to a standard that complies with most criteria for a theatre within a day surgery unit.
* Because Medicare paid on the claims, Dr Stirling could not now charge patients for the services without the Medicare subsidy.
* If he were another 20 kilometres away from the population centre of Launceston, the criteria contained in the MBS would allow him to charge for the items with no other change in his circumstances.
* Tasmania’s population, geography or socio-economic profile was materially different from mainland Australia. It was inherently unfair for the criteria to be enforced in Tasmania.

1. In July 2016, the Department of Finance advised Dr Stirling that his application for the waiver had been unsuccessful.
2. The application to review the delegate’s decision was made pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (“the ADJR Act”).
3. Dr Stirling sought reasons for the decision pursuant to s 13 of the ADJR Act. In response, he received a document which purported to set out the delegate’s reasons. Senior counsel for the Minister properly conceded that, on no view, could these purported reasons satisfy the requirements of s 13 of the ADJR Act. Having set out certain definitions and identified the legislative provisions which she said she considered were relevant, she recorded what she said were a series of findings of fact. They were:

3. …

(i) On 3 October 2014, Finance received a waiver of debt request from Ms Alexandra Davey, on behalf of Dr Andrew Stirling. The request was equivalent to MBS item numbers that Dr Stirling was not entitled to claim, for services he provided to patients from 8 December 2005 to 7 December 2010 inclusive.

(ii) On 28 February 2011, Dr Stirling incurred a debt to Medicare in the amount of $332,541.30 for incorrect billing of MBS item numbers 55054 and 55246 between December 2005 and December 2010. Dr Stirling did not hold the relevant recognised qualifications to bill for these services under the Medicare Billing Schedule.

(iii) Dr Stirling stated he was provided with incorrect verbal advice by Medicare staff, through its specialised hotline for medical professions on or around 14 December 2005, which he recorded. Dr Stirling requested a copy of Medicare’s recording of the conversation which could not be provided, as Medicare advised that not all calls are recorded.

(iv) DHS did not support a waiver of debt to Dr Stirling. DHS stated that Dr Stirling’s contention [that] he was given incorrect advice in 2013, was after the period of December 2005 to December 2010 and had no bearing on Dr Stirling’s waiver of debt request.

(v) DHS did not consider that Dr Stirling met the eligibility criteria under relevant legislation to bill Medicare for item numbers 55054 and 55246. DHS did not accept Dr Stirling’s claim that he had been given incorrect advice regarding the billing of these services in 2005, and did not consider Dr Stirling’s recording of the alleged conversation was viable evidence, due to low quality and lack of identifying information to confirm authenticity.

(vi) DHS stated that Dr Stirling’s qualifications were not considered as specialist qualifications for Medicare purposes, and Dr Stirling was not located in a remote area which would allow him to bill for the item numbers 55054 and 55246 under relevant legislation.

In doing so she did not state that she had considered and applied any of the definitions or statutory provisions which she had earlier identified as being relevant.

1. In the following paragraph she listed all of the documentary evidence to which she had regard and then turned to her reasons for decision. They were five in number:

5. I considered that Dr Stirling did not receive written approval from DHS to bill for MBS item numbers prior to billing Medicare for these item numbers, which Dr Stirling is not legally entitled to claim under relevant legislation.

6. I considered that although Dr Stirling stated that he wrote to Medicare to inform it of his intention to claim the MBS item numbers 55054 and 55246 in December 2005, he did not make any further enquiries to ascertain in writing that he was eligible when he did not receive any response from Medicare.

7. I considered that the legislation was applied as intended and that it would be inequitable to other medical practitioners to waive the debt that has been incurred by Dr Stirling, as it would give rise to unjust enrichment.

8. I considered advice from DHS that although Dr Stirling contended that he was given incorrect advice in 2013, it was after the period of his current debt that is recoverable. Therefore, I considered that this contention had no bearing on Dr Stirling’s waiver of debt request.

9. I considered DHS advice that Dr Stirling’s qualifications are not considered as “specialist qualifications” for Medicare purposes. I also considered that Dr Stirling was not located in a remote area which would have allowed him to bill Medicare for item numbers 55054 and 55246 under relevant legislation.

1. Section 13(1) of the ADJR Act requires that the written statement of reasons set out “the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision”. The decision-maker must explain the “actual path of reasoning” by which he or she arrived at a conclusion. The decision-maker must do so in sufficient detail to enable a reviewing court to see whether the conclusion is or is not affected by any error of law: cf *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 501; [2013] HCA 43 at [55] (French CJ, Crennan, Bell, Gageler and Keane JJ).
2. The provision of reasons for administrative decisions serves multiple purposes. In addition to allowing the reader to follow the path of the decision-maker’s reasoning and enabling a reviewing Court to determine whether or not the reasons disclose any reviewable error of law, other useful social purposes are also served. Some of these were identified by Kirby J in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 242; [2003] HCA 56 at [105]:

The rationale of the obligation to provide reasons for administrative decisions is that they amount to a “salutary discipline for those who have to decide anything that adversely affects others”. They encourage “a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making”. They provide guidance for future like decisions. In many cases they promote the acceptance of decisions once made. They facilitate the work of the courts in performing their supervisory functions where they have jurisdiction to do so. They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions. … By giving reasons, the repository of the public power increases “public confidence in, and the legitimacy of, the administrative process”.

(Citations omitted.)

None of these purposes has been served by the statement of reasons presently under consideration.

1. One of the consequences of a failure, by a decision-maker, to deal with particular matters when providing reasons for a decision under s 13 of the ADJR Act may be that a reviewing court might infer that the particular matters were not considered or were not considered to be material: see *Turner v Minister for Immigration* (1981) 35 ALR 388 at 392; [1981] FCA 61 at pp 7–8 (Toohey J); *ARM Constructions v Commissioner of Taxation* (1986) 10 FCR 197 at 205; [1986] FCA 108 at p 16 (Burchett J), approved in *Faulkner v Conwell* (1989) 21 FCR 41 at 47; [1989] FCA 134 at p 8 (Jenkinson J, Woodward and Ryan JJ agreeing); *Alexander v Australian Community Pharmacy Authority* (2010) 265 ALR 424 at 435; [2010] FCA 189 at [56] (Bromberg J); *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* (2011) 180 LGERA 99 at 113; [2011] FCAFC 59 at [46]–[47] (Emmett, McKerracher and Foster JJ); *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at 295; [2012] FCAFC 146 at [54] (Marshall, North and Flick JJ).
2. In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346; [2001] HCA 30 at [69], McHugh, Gummow and Hayne JJ dealt with s 430 of the *Migration Act 1958* (Cth), which is in substantially the same terms as s 13 of the ADJR Act. Their Honours said that:

It is not necessary to read s 430 as implying an obligation to *make* findings in order for it to have sensible work to do. Understanding s 430 as obliging the Tribunal to set out what were its findings on the questions of fact it considered material gives the section important work to do in connection with judicial review of decisions of the Tribunal. It ensures that a person who is dissatisfied with the result at which the Tribunal has arrived can identify with certainty what reasons the Tribunal had for reaching its conclusion and what facts it considered material to that conclusion. Similarly, a court which is asked to review the decision is able to identify the Tribunal’s reasons and the findings it made in reaching that conclusion. The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material. This may reveal some basis for judicial review by the Federal Court under Pt 8 of the Act, or by this Court in proceedings brought under s 75(v) of the Constitution. For example, it may reveal that the Tribunal made some error of law … such as incorrectly applying the law to the facts found by the Tribunal. It may reveal jurisdictional error. The tribunal’s identification of what *it* considered to be the material questions of fact may demonstrate that it took into account some irrelevant consideration or did not take into account some relevant consideration.

(Original emphasis. Citations omitted.)

1. The failure to refer to a relevant matter does not necessarily lead to a finding that it was not considered: see, in the context of s 13 of the ADJR Act, *Turner* at 392; *Alexander* at 440 [84]; *Bat Advocacy* at 113 [44], [47]. See also, in the analogous context of reasons provided under s 430 of the *Migration Act 1958* (Cth): *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 605–606; [2011] HCA 1 at [31] (French CJ and Kiefel J, Heydon and Crennan JJ agreeing). A determination of whether or not a negative inference should be drawn will depend upon a fair reading of the whole of the decision-maker’s reasons: see *Alexander* at 440 [87]; *Bat Advocacy* at 113 [47]; cf *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 at 75; [2014] FCAFC 16 at [34] (Katzmann, Griffiths and Wigney JJ); *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174 at [64]–[66] (Griffiths, Perry and Bromwich JJ). However, absent any contra-indications, a statement of reasons made under s 13 of the ADJR Act may “sustain the inference that it is an accurate account of the findings and reasons actually relied upon by the decision-maker”: *Alexander* at 434 [55] and 441 [89], citing *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 179; [1990] FCA 229 at p 23 (French J); see also *Bat Advocacy* at [46].
2. The delegate’s so-called reasons are manifestly inadequate. Before dealing with the many particular deficiencies, some general observations may be made. The first is that no attempt at all appears to have been made to deal with the case made by Dr Stirling. A few material facts were found but, for the most part, the findings went no further than to record that someone, other than the delegate, had formed certain opinions about Dr Stirling’s eligibility to make claims under the items or that Dr Stirling had made certain statements. Such “findings” did not inform the reader whether or not the delegate had accepted the statements or opinions and a number of the reasons were unsupported by any of the found facts. Paragraph 3(vi) provides an illustration of this feature of the reasons. It records that the Department of Human Services (Medicare) had stated that Dr Stirling’s qualifications and geographic location were not such as to allow him to claim under the two item numbers. The delegate made no finding herself as to Dr Stirling’s eligibility. In paragraph 9, she recorded that she had “considered” Medicare’s advice relating to Dr Stirling’s qualifications, and listed this as a reason for rejecting his waiver claim, despite having made no relevant finding.
3. Parts of the reasons are unintelligible. Paragraphs 3(iv) and 8, for example, refer to a contention, attributed to Dr Stirling, that he was “given incorrect advice” in 2013. Senior counsel for the Minister said that, among the material before the decision-maker, was a claim by Dr Stirling that, in 2013, he telephoned Medicare and was advised again that he was eligible to make claims on the relevant item numbers. However, when asked about where and when and to whom Dr Stirling had advanced the specific contention that such advice was incorrect and the whereabouts of any record of him having done so in any of the material which was before the delegate, counsel were unable to assist. In this context I note that Dr Stirling made some written statements that, in 2013, he had received the same advice which he had been given in 2005 in relation to his entitlement to make claims under the two item numbers. He did not, of course, allege that this advice was “incorrect”. Plainly, as senior counsel for the Minister submitted, it is unlikely that any advice given in 2013, well after the debt had been raised, would have any bearing on the exercise of the Minister’s discretion to waive. It is not, however, impossible that the 2013 advice (if it was provided) might have included a reaffirmation of earlier statements with which Dr Stirling had taken issue. The delegate’s reasons do not record any finding on the question. The need to engage in such speculation only serves to highlight the inadequacy of the reasons.
4. I have included a lengthy summary of the submissions made in support of Dr Stirling’s waiver application earlier in these reasons. I did so because they can be seen to be carefully reasoned and deal with a range of considerations which were relevant to the exercise of the Minister’s discretion. The delegate’s reasons, however, failed to engage with the case being put. Central to that case was the oral advice which Dr Stirling said that he had obtained, in 2005, from a Medicare advisor. The advice, as he understood it, was that he was entitled to make claims under the two items in the MBS. He had acted on that advice. The transcript of the 2005 conversation was before the delegate. The delegate recorded, as a fact, that Dr Stirling had stated that he was provided with incorrect advice during the conversation, that the Department of Human Services (Medicare) did not accept that Dr Stirling had been given incorrect advice, and that the Department had not treated the recording as providing any “viable evidence” of errant advice being given. The delegate made no findings of her own as to the authenticity of the taped conversation and whether or not any advice had been given to Dr Stirling which could reasonably be understood by him as an acceptance of his entitlement to make claims under the two items. None of the reasons set out at paragraphs 5 to 9 makes any reference to the central claim. The reader is left to wonder how it could be rejected when the delegate has made no relevant factual findings about it.
5. In addition to the central claim, Dr Stirling’s submissions raised a range of relevant matters that were simply ignored by the delegate. She said nothing about the failure by Medicare, over a period of five years, to raise any query about the efficacy of the claims made by Dr Stirling despite Medicare being aware of his professional circumstances. She said nothing about Dr Stirling’s submissions about the importance of his professional work as the only phlebotomist in the north of Tasmania and the implications for his patients if he were precluded from making claims under the two items. No mention was made in the reasons of the financial impact on Dr Stirling personally and on his practice were he to be required to repay the debt.
6. The reasons, given by the delegate for rejecting Dr Stirling’s waiver claim, which appear in paragraph 7 of the reasons, are particularly problematic. The delegate there says that she “considered that it would be inequitable to other medical practitioners to waive the debt that has been incurred by Dr Stirling, as it would give rise to unjust enrichment”. The delegate does not explain how any relevant inequity would arise in the event that the claims were granted. The evidence, such as it was, suggested that there were no other phlebotomists in northern Tasmania who had and used an ultrasound machine of the kind to which the disputed claims related. No comparator medical practitioners were identified. Moreover, the delegate had made no findings upon which any assertion of inequity could be founded.
7. The reference to “unjust enrichment” is puzzling in this context. It is a well-known (but, perhaps, not well understood) legal term. It has been described by the High Court as “a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another”: see *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516; [2012] HCA 7 at [30] (French CJ, Crennan and Kiefel JJ). One of those categories of case is that in which money has been paid mistakenly by one person to another.
8. In *Equuscorp*, French CJ, Crennan and Kiefel JJ (at 516 [30]) referred to and summarised the principles earlier expounded by the Court in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, as follows:

In *David Securities Pty Ltd v Commonwealth Bank of Australia*, this Court explained the part played by unjust enrichment in a claim for money had and received (in that case for recovery of a payment made under mistake of law). That explanation may be expressed, at a fairly high level of abstraction, as an approach to determining such claims. In summary:

* recovery depends upon enrichment of the defendant by reason of one or more recognised classes of “qualifying or vitiating” factors;
* the category of case must involve a qualifying or vitiating factor such as mistake, duress, illegality or failure of consideration, by reason of which the enrichment of the defendant is treated by the law as unjust;
* unjust enrichment so identified gives rise to a prima facie obligation to make restitution;
* the prima facie liability can be displaced by circumstances which the law recognises would make an order for restitution unjust.

(Citations omitted.)

1. Claims for recovery upon the principle of unjust enrichment may be resisted on the ground that it would not be unconscionable for the recipient of money to retain it. It may, for example, be found to be inequitable to require the payment in circumstances where the recipient has changed its position in relation to the receipt such “that it would be a detriment to it if it were now required to repay”: see *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560 at 592–603 and especially at 596; [2014] HCA 14 at [65]–[98], and especially at [77] (Hayne, Crennan, Kiefel, Bell and Keane JJ).
2. This is no occasion to delve in to the intricacies of doctrine: cf Elise Bant, “Change of Position: Outstanding Issues” in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016) at p 134. It may be that the delegate was not intending to refer to the legal doctrine of unjust enrichment. If, however, she was seeking to equate the principles which underpin the doctrine with those which inform the exercise of the statutory discretion under s 63 of the PGPA Act, sufficient has been said to make it clear that any such equation would be unsustainable on the flimsy factual findings made by her. Had the Commonwealth sought to recover the payments which it had made to Dr Stirling, relying on an unjust enrichment claim, he would have had a potentially good “change of position” defence based upon many of the considerations raised by him in support of his application for waiver (such as the use of the funds to operate the ultrasound machine and the facilities in which it was housed), in respect of which the delegate made no findings.
3. Some additional matters also bear mention. It is true, as the delegate said in paragraph 5, that Dr Stirling did not receive written approval to make claims under the two item numbers. The delegate did not, however, explain how the absence of written approval is of any relevance to her decision given that none was required as a precondition for making such claims.
4. In paragraph 6 of her reasons, the delegate said that Dr Stirling had not, subsequent to sending his unanswered letter of December 2005, made any further enquiries to ascertain “in writing” that he was eligible to make the claims, but does not explain why his failure to do so tended against a favourable decision.
5. When analysing the delegate’s reasons for decision I have been conscious of the injunction that her reasons are “not to be construed minutely and finely with an eye keenly attuned to the perception of error”: see *Collector of Customs v Pozzolanic* *Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; [1993] FCA 456 at p 13 (Neaves, French and Cooper JJ), a principle which was subsequently endorsed by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271–272 (Brennan CJ, Toohey, McHugh and Gummow JJ).
6. The Minister emphasised the breadth of the discretion conferred on him by s 63(1) of the PGPA Act. He referred to the well-known dictum of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 that:

where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors in which the decision-maker may legitimately have regard.

The Minister submitted that there was nothing to be found in the subject-matter, scope and purpose of the PGPA Act which impliedly limited the range of considerations which the delegate could take into account. Conversely there were no considerations which, on an analysis of the legislation, the delegate was impliedly bound to take into account: *Peko-Wallsend* at 40.

1. Dr Stirling pointed to a number of passages in the delegate’s reasons which, he submitted, demonstrated that the delegate had had regard to irrelevant considerations and had failed to have regard to some relevant ones, thereby attracting the grounds provided for in s 5(1)(e) when read with subsections 5(2)(a) and (b) of the ADJR Act. Some aspects of the delegate’s decision were attacked on the additional ground that the decision was so unreasonable that no reasonable person could have so exercised the power: see s 5(1)(e), read with s 5(2)(g) of the ADJR Act.
2. In order to make good his submissions relating to relevant and irrelevant considerations, Dr Stirling sought to establish that the broad discretion, provided for in s 63(1) of the PGPA Act, was constrained by various other provisions of that Act and, in particular, the objects set out in s 5, including that the Commonwealth and Commonwealth entities use and manage public resources properly: s 5(c)(iii). He claimed that the matters dealt with in paragraphs 5 and 7 of the decision-maker’s reasons were irrelevant considerations which should not have been brought to account in exercising the power conferred by s 63(1). He further complained that the decision-maker had failed to take into account certain relevant considerations, including the importance of Commonwealth agencies acting consistently with the objects of the PGPA Act, the factors specified in the *Resource Management Guide No. 401: Requests for Discretionary Financial Assistance under the Public Governance, Performance and Accountability Act* (July 2014) (“the Resource Management Guide”), and the advice said to have been provided by Medicare to Dr Stirling during the telephone conversation in December 2005.
3. Central to Dr Stirling’s case is the complaint that the delegate failed to deal with significant elements of the argument which the advanced in support of his application. Such a complaint was dealt with in *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1 at 12–13; [1988] FCA 549 at pp 24–26, by Sheppard J when considering an application made under the ADJR Act on the grounds that the decision-makers had left relevant considerations out of account (s 5(2)(b)) and also exercised their discretion in accordance with a rule or policy without regard to the merits of the particular case (s 5(2)(f)):

In support of his submissions counsel relied upon two unreported decisions of single judges of this Court and on authorities referred to in those judgments. The two decisions are *Brelin v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, Wilcox J, 14 May 1987) and *Khan v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, Gummow J, 11 December 1987). Both cases involved situations in which it was submitted that inadequate consideration had been given to applications. In the *Brelin* case Wilcox J said of the criticisms made of the Panel’s consideration of the matter (at 9-10):

“These criticisms do not go to the weight of the various factors to be taken into account. Weight was for the Panel and, ultimately, for the Minister to determine. Rather they concern the question whether the Panel gave to the application proper and adequate consideration: see *Padfield v Minister of Agriculture, Fisheries and Food*[1968] AC 997 at 1053; or, expressing the question another way, whether there was ‘a real exercise of discretion’: see *Associated Picture Houses Ltd v Wednesbury Provincial Corporation*[1948] 1 KB 223 at 228.”

Earlier his Honour indicated that the provision of the Administrative Decisions (Judicial Review) Act upon which reliance had been placed was s 5(2)(b), namely, that the Minister’s delegate failed to take into account a relevant consideration (at 8‑9).

In *Kahn’s* case, Gummow J reached the conclusion (at 12) that on the whole of the evidence in that case, the applications in question had not each been given “proper, genuine and realistic consideration upon the merits”. He relied on s 5(2)(f) of the Administrative Decisions (Judicial Review) Act which provides a ground for judicial review where there has been an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case. Gummow J said (at 11-12):

“[W]hat was required of the decision maker, in respect of each of the applications, was that in considering all relevant material placed before him, he give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy: *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169 at 195; *Kioa v West* (1985) 159 CLR 550 at 604; *Chumbairux v Minister for Immigration and Ethnic Affairs* (1986) 74 ALR 480 at [492]-494. … The assertion by a decision maker that he has acted in this fashion will not necessarily conclude the matter; the question will remain whether the merits have been given consideration in any real sense: *Turner v Minister for Immigration and Ethnic Affairs* (1981) 55 FLR 180 at 184; *Chumbairux v Minister for Immigration and Ethnic Affairs* (1986) 74 ALR 480 at 495-496.”

I would, with respect, adopt what both Wilcox and Gummow JJ have said in these two cases. It matters not that one judge approached the matter by treating it as a case where a relevant consideration had been omitted from [ac]count and the other by treating the case as one where a policy had been applied without regard to the merits of the case. *The essential principle upon which counsel for Mr Hindi relied was that the Minister, the Panel and the delegates were required to give proper consideration to the merits of the cases before them. So the question for decision is whether that consideration has been given to the applicant’s case here*.

(Emphasis added).

See also *Lek v Minister for Immigration, Local Government and Ethnic Affairs (No 2)* (1993) 45 FCR 418 at 435; [1993] FCA 730 at p 36, where Wilcox J followed *Hindi* when considering an application under s 5(2)(b) the ADJR Act which claimed that relevant considerations were not adequately addressed by a decision-maker. And see *Williams v Minister for Environment and Heritage* (2003) 74 ALD 124 at 130; [2003] FCA 535 [29]–[30], where Wilcox J again considered these principles in the context of the same ground in the ADJR Act.

1. In a number of subsequent cases the Court has been invited to adopt the “proper, genuine and realistic consideration upon the merits” mantra as a free standing ground of judicial review of administrative decisions. These invitations have not, for the most part, been accepted, although the phrase has been utilised by courts in relation to a range of different statutory and common law grounds.
2. The Full Court has accepted, as a general proposition, that a decision-maker must give “proper, genuine and realistic consideration” to “matters that must be taken into account for an exercise of statutory power to be lawful”: *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513 at 520; [2015] FCAFC 83 at [23] (Flick, Griffiths and Perry JJ), citing Gummow J in *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292; [1987] FCA 713 at pp 11 and 12. It has also accepted that adopting the formula promulgated by Gummow J may, if taken out of context, lead to a risk that a Court will impermissibly scrutinise the merits of an administrative decision: see *Ayoub* at 520 [24], citing *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426; [2001] FCA 274 at [78] (Heerey, Goldberg and Weinberg JJ) (see also at 442 [65]); *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 at [31]–[34] (Griffiths, White and Bromwich JJ); see also *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 175–176; [2010] HCA 48 at [30] and [34] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). I had also identified some of these concerns in *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2009) 165 LGERA 203 at 219–220; [2009] FCA 330 at [37].
3. These riskswere also noted by the Full Court in *Reece v Webber* (2011) 192 FCR 254 at 277–278; [2011] FCAFC 33 at [68]–[69] (Jacobson, Flick and Reeves JJ) in an appeal concerning the question whether a decision-maker had failed to take into relevant material, where the original review application had been made under, inter alia, ss 5 and 6 of the ADJR Act. However, their Honours continued at 278 [70]:

Whatever reservation must be exercised when considering whether “proper, genuine and realistic” consideration has been given to particular material, the importance of ensuring that proper consideration has been given to particular material is only heightened when it goes to a matter of central relevance and importance to the ultimate conclusions to be reached.

1. Similarly, in the context of judicial review of a decision made under the *Migration Act 1958*(Cth), Flick J noted in *Islam v Cash (Assistant Minister for Immigration and Border Protection)* (2015) 148 ALD 132 at 135; [2015] FCA 815 at [14] that, despite the reservations that exist, the phrase “nevertheless remains a useful touchstone to ensure that consideration given to a particular matter is such consideration as is required by law”, where such a matter is one that is required to be taken into account by a decision-maker. See also *Khan v Minister for Immigration and Citizenship* (2011) 192 FCR 173 at 192–193; [2011] FCAFC 21 at [74]–[76] (Flick J), which also concerned an alleged failure to give proper consideration to a matter that the decision-maker was bound to take into account.
2. The cases set out above indicate that the phrase “proper, genuine and realistic” may be used, with appropriate caution, to describe the quality of the attention required to be given, by a decision-maker, to mandatory considerations. In other cases concerned with the same ground of review, it has also been held that a decision-maker is required to “engage in an active intellectual process, in which each relevant matter receive[s] his or her genuine consideration”: see, eg, *Bat Advocacy* at [44]; *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166 at 198; [2012] FCAFC 90 at [145] (North, Logan and Robertson JJ). See also the various formulations summarised by Tobias JA in *Anderson v Director-General, Department of Environmental and Climate Change* (2008) 251 ALR 633 at 651; [2008] NSWCA 337 at [57]. Ultimately, such formulations should not deflect the Court from its responsibility to determine whether consideration has been given to matters to which the decision-maker was required, in the particular statutory context, to have regard.
3. As already noted, the origin of the phrase “proper, genuine and realistic consideration” can be traced to the judgment of Gummow J in *Khan.* This was a case argued under, inter alia, s 5(2)(f) of the ADJR Act. His Honour was able to infer, from the surrounding circumstances, that the decision-maker had merely applied a rule of policy without proper regard to the merits of the applications for permanent residence status. In the present proceeding, there was some evidence of a policy under which applications under s 63(1)(a) of the PGPA Act are likely to be refused. The Resource Management Guidestates at [36] that there are some circumstances in which “the debt would be unlikely to be waived”, including:

* debts that have been established by a judicial decision of a court, which are separate from the decisions of the executive arm of the Australian Government
* debts owed to the Commonwealth that will be paid on to third parties
* debts that have arisen through deliberate fraudulent or other illegal actions
* requests submitted by companies on the grounds of financial hardship
* where an amount owing to the Commonwealth is not certain or ascertainable.

(Formatting in original. Footnotes omitted.)

1. While the delegate stated, at [2(ix)] of her reasons, that this paragraph of the policy “outlines circumstances where a debt is unlikely to be waived”, there is no indication that she considered that any of the listed circumstances applied to Dr Stirling or that this aspect of the policy influenced her decision. I am not, therefore, able to draw an inference similar to that in *Khan* on the material before me. In any event, the ground in s 5(2)(f) of the ADJR Act was not relied upon by Dr Stirling in his application.
2. The stronger ground is that in s 5(2)(b) of the ADJR Act, namely that the delegate failed to have regard to relevant considerations. Consistently with the High Court’s decisions in this area, jurisdictional error will only have occurred if the decision-maker has failed to have regard to a consideration which he or she was bound to take into account: see, eg, *Peko-Wallsend* at 39 (Mason J). The identification of such considerations requires resort to the scope and purpose of the relevant legislation: *Peko-Wallsend* at 40.
3. As the overview of the PGPA Act, in s 6, records, the “Act is mainly about the governance, performance and accountability of Commonwealth entities”. Chapter 2 of the PGPA Act, in which s 63 appears, is concerned to identify the accountable authorities and officials of Commonwealth entities and deals with matters such as the general duties of those authorities and officials, the preparation of corporate plans and budget estimates and the measurements of performance by such entities against established targets, as well as the use of public resources, appropriations, cooperating with other jurisdictions and companies, subsidiaries and new corporate entities. Part 2-4, which appears in Chapter 2, is concerned, generally, with the use and management of public resources by Commonwealth entities and deals with matters such as funding and expenditure, banking, borrowing, investments, indemnities, guarantees, warranties and insurance, as well as special provisions applying to Ministers and certain officials. The granting of waivers of amounts owing to the Commonwealth in Division 7 of that Part is but a peripheral aspect of this broad coverage of financial management. In this sense s 63 is a stand-alone provision rather than an integral part of a broader statutory scheme.
4. Section 63(1)(a) stands apart from other provisions in the Act. Its evident purpose is to allow the Minister to waive a debt owed to the Commonwealth if, in his or her discretion, it is adjudged appropriate to do. Although the discretion is broadly conferred its exercise is not free of constraint. It cannot be exercised arbitrarily. A waiver could not, for example, be refused because of some animosity between the Minister and the applicant. In the normal case a person who wishes to obtain a favourable exercise of the power will make an application to the Minister. Since public money is involved the applicant will need to do more than just request the waiver: he or she will have to persuade the Minister that a proper basis exists for the waiver to be granted. This will involve the presentation of evidence and reasons supporting the waiver to the Minister or the delegate for consideration. The various items of evidence and the individual submissions do not each become mandatory relevant considerations. In the context of s 63(1) of the PGPA Act, however, the representations as a whole do take on such a characterisation given that they are a necessary precursor to any exercise of the statutory power other than, perhaps, in exceptional cases in which the Minister chooses to act on his or her own initiative: cf *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 at [56] (Robertson J). The delegate was bound to take account of Dr Stirling’s detailed submissions. Consideration of at least two broad aspects of those submissions was required.
5. In exercising the discretion the delegate was, in my view, bound to have regard, at the very least, to the circumstances in which the debt arose. Unless this is done, it is difficult to comprehend how a rational decision could be made: cf *Dranichnikov v Centrelink* (2003) 75 ALD 134 at 148 and 150; [2003] FCAFC 133 at [67] (Hill J) and [79] (Hely J). Similarly the delegate was bound to have regard to any of the adverse consequences which the applicant alleges will arise from enforcement of the repayment obligation. Again, such matters are of central relevance to the exercise of the discretion and cannot be ignored. So much is implicitly recognised in the Resource Management Guideat [34] where it said that:

[t]he current and possible future circumstances of the person or organisation, including the financial situation, may be taken into account. Why the debt arose and what role the Commonwealth had in the debt arising may also be considered.

There may well be other relevant considerations to which the Minister is bound to have regard in exercising the discretion but it is not necessary, for present purposes, to identify them.

1. The delegate, in the present case, has failed to make any findings about whether the debt arose because of wrong or misleading advice being given to Dr Stirling and whether the failure by Medicare, for over five years, to query the efficacy of the payments led him to incur the debt. The delegate also failed to deal with the impact on Dr Stirling of the requirement to repay and his capacity to service his patients in Northern Tasmania. These failures strongly support the inference that the delegate did not take these matters into account in reaching her decision. There are no contra-indications that would displace the inference. The failures gave rise, in my opinion, to error of the kind recognised by s 5(2)(b) of the ADJR Act.
2. Having made this finding, it is unnecessary for me to determine whether the delegate also erred in taking into account any irrelevant considerations as provided for in s 5(2)(a) of the ADJR Act.
3. Dr Stirling also sought to rely on s 5(2)(g) of the ADJR Act, complaining that aspects of the decision were unreasonable. He contended, for example, that it was unreasonable for the decision-maker to exercise her discretion having regard to the alleged inequity of a decision, favourable to Dr Stirling, to other medical practitioners. He also alleged that it was unreasonable for the decision-maker to have relied on his failure to make further enquiries of Medicare to ascertain in writing that he was eligible to receive the payments, in circumstances where his unanswered letter of December 2005 did not request that Medicare provide such confirmation. It was further alleged that it was unreasonable for her to have reached a decision without making any findings about what advice had been given to Dr Stirling in December 2005. Because of my earlier findings, it is not necessary that I come to a concluded view as to the additional question of whether the decision was unreasonable in the *Wednesbury* sense or the broader concept articulated in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18.

# DISPOSITION

1. The application should be granted and the delegate’s decision set aside. Dr Stirling’s application for waiver of the debt should be remitted to the Minister for further consideration and determination in accordance with law. It will be a matter for the Minister to determine whether the same or another delegate makes the decision or whether he does so personally: cf *Comcare v Broadhurst* (2011) 192 FCR 497 at 515–517; [2011] FCAFC 39 at [88]–[95] (Tracey and Flick JJ).
2. The Minister should pay Dr Stirling’s costs of his application.

|  |
| --- |
| I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey. |

Associate:

Dated: 4 August 2017