SUPREME COURT OF QUEENSLAND

CITATION:	*Thomas v Attorney-General and Minister for Justice and Minister for Training and Skills* [2017] QSC 308
PARTIES:	**BARRY JOSEPH THOMAS** (Applicant) **v** **ATTORNEY-GENERAL AND MINISTER FOR JUSTICE AND MINISTER FOR TRAINING AND SKILLS** (Respondent)
FILE NO/S:	BS No 5580 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	15 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2017
JUDGE:	Bowskill J
ORDER:	**1. The application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR RELATING TO FACTS – where the applicant was the president of the Mental Health Review Tribunal – where the applicant discovered one of the persons purporting to be a legal member of the tribunal was not qualified as she had never been admitted to practice as a lawyer – where the applicant did not notify the Minister of the person's ineligibility for over three months, but took other steps – where the applicant's appointment was terminated in the exercise of a discretionary power conferred on the Governor in Council by s 444(1)(b) of the *Mental Health Act* 2000 where he is satisfied a member of the tribunal has performed their duties carelessly, incompetently or inefficiently – whether the decision-maker erred in law in making findings of fact which were perverse, illogical or irrational ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – whether the decision-maker erred in law by acting on a wrong principle, as to the interpretation of "member's duties" in s 444(1)(b) of the *Mental Health Act* 2000 – whether the "member's duties" are limited to the express legal obligations imposed by the Act, or refer to the functions of the office of a member,

relevantly the president

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – whether the decision-maker acted in excess of the jurisdiction conferred by s 444(1)(b), in circumstances where the necessary jurisdictional fact, the formation of the opinion of the decision-maker that the applicant performed his duties carelessly, incompetently or inefficiently, was illogical or irrational – whether the decision was affected by legal unreasonableness

Judicial Review Act 1991
Mental Health Act 2000, ss 440, 444, 446, 484
Public Service Act 2008, s 98

Attorney-General (NSW) v Quin (1990) 170 CLR 1
Buck v Bavone (1976) 135 CLR 110
Canadian Pacific Tobacco Co Ltd v Stapleton (1952) 86 CLR 1
Crime and Misconduct Commission v Swindells [2009] QSC 409
Director of Public Prosecutions v Zierk (2008) 184 A Crim R 582
GJ Coles & Co Ltd v Retail Trade Industrial Tribunal (1986) 7 NSWLR 503
Herscu v The Queen (1991) 173 CLR 276
Minister for Immigration and Border Protection v Singh (2014) 231 FCR 437
Minister for Immigration and Border Protection v Stretton (2016) 237 FCR 1
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
Plaintiff M64/2015 v Minister for Immigration and Border Protection (2015) 258 CLR 173
Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144
Puhlhofer v Hillingdon London Borough Council [1986] AC 484
Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 73 ALD 1

COUNSEL: K Mellifont QC with C Massy for the applicant
G Gibson QC with S McLeod for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant
Crown Law for the respondent

[1] The applicant was, until April 2017, the president of the Mental Health Review Tribunal. On 6 April 2017 the Governor in Council, upon the advice of the respondent,[1] terminated the applicant's appointment under s 444(1)(b) of the *Mental Health Act* 2000 (Qld), which confers a discretion on the Governor in Council to do so if he is satisfied a member of the tribunal has "performed the member's duties carelessly, incompetently or inefficiently".

[2] The applicant applies for a statutory order of review in relation to that decision under the *Judicial Review Act* 1991 (Qld), and seeks an order quashing or setting aside the decision, with effect from the date of the decision.

Factual and legal context

[3] The applicant was first appointed as president of the tribunal in January 2005 for a five year term. He was successively reappointed in 2010 for five years, then 2015 for one year and, most recently, on 15 January 2016 for two years.[2]

[4] It is helpful to begin by referring to the relevant provisions of the *Mental Health Act*.

Mental Health Act

[5] The tribunal was established under s 436(1) of the *Mental Health Act* 2000.[3] The tribunal consists of the president and other members (s 436(2)). The appointment of the president and members is dealt with in s 440, which provides:

> "(1) The president of the tribunal is to be appointed by the Governor in Council on a full-time basis.
>
> (2) The other members are to be appointed by the Governor in Council on a full-time or part-time basis.
>
> (3) A person is eligible for appointment as the president of the tribunal only if the person is a lawyer[4] of at least 7 years standing.
>
> (4) A person is eligible for appointment as another member only if the person –

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1 The Attorney-General is the appropriate respondent to this application, having regard to s 53(b) of the *Judicial Review Act* 1991.

2 Affidavit of Thomas (filed 7 August 2017) at [1]-[4].

3 Now repealed, and replaced by the *Mental Health Act* 2016 (which commenced on 5 March 2017), under which the Tribunal is continued (s 704). It is the 2000 Act which is relevant on this application.

4 "Lawyer" is defined in schedule 1 to the *Acts Interpretation Act* 1954 to mean an Australian lawyer within the meaning of the *Legal Profession Act* 2007. Under s 5 of the *Legal Profession Act* 2007 an "Australian lawyer" is a person who is admitted to the legal profession under that Act or a corresponding law.

(a) is a lawyer of at least 5 years standing [*referred to as a legal member*]; or
(b) is a psychiatrist [*referred to as a psychiatrist member*]; or
(c) has other qualifications and experience the Minister considers relevant to exercising the tribunal's jurisdiction [*referred to as a community member*].

…

(7) Members are to be appointed under this Act, and not under the *Public Service Act 2008*."

[6] The jurisdiction of the tribunal is as set out in s 437 and includes reviewing the application of treatment criteria for patients, the detention of young patients in high security units, the mental condition of forensic patients and forensic disability patients, and the fitness for trial of certain persons; deciding applications for forensic information orders and treatment applications, as well as other applications and appeals relating to the movement of and visits to certain patients; and deciding appeals from certain decisions of the Director of Mental Health. Under s 439 the tribunal may do all things necessary or convenient to be done for, or in relation to, exercising its jurisdiction.

[7] By s 442(1) members are entitled to be paid the remuneration and allowances decided by the Governor in Council. Section 442(2) provides that members hold office "on the terms not provided for in this Act as are decided by the Governor in Council".[5]

[8] Section 444 provides that:

"(1) The Governor in Council **may** terminate the appointment of a member if the Governor in Council is satisfied the member –

(a) is mentally or physically incapable of satisfactorily performing the member's duties; or

(b) **performed the member's duties carelessly, incompetently or inefficiently**; or

(c) is guilty of misconduct that could warrant dismissal from the public service if the member were an officer of the public service.

(2) The Governor in Council **must** terminate the appointment of a member if the member –

(a) ceases to be eligible for appointment as a member; or

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[5] See exhibit MT5 to the affidavit of Tuohy (memorandum confirming the appointment of the applicant to the position of president of the tribunal for five years commencing on 15 January 2010, and attaching a schedule setting out the relevant conditions as to "remuneration, allowances and terms").

(b) is convicted of an indictable offence."[6]

[9] Section 446(1) and (2) provide that there are to be appointed an executive officer of the tribunal and other staff necessary for it to exercise its jurisdiction, who are to be employed under the *Public Service Act* 2008. Section 446(3) provides that the president of the tribunal has all the functions and powers of the chief executive of a department, so far as the functions and powers relate to the organisational unit made up of the tribunal's staff, as if the unit were a department, and the president were the chief executive of the department. The functions (responsibilities) of a chief executive are set out in s 98(1) of the *Public Service Act* 2008. Each of them can be seen to "relate to the organisational unit made up of the tribunal's staff", namely:

> "(a) establishing and implementing goals and objectives in accordance with Government policies and priorities;
>
> (b) managing the department in a way that promotes the effective, efficient and appropriate management of public resources;
>
> (c) the following for departmental employees –
>
> (i) their numbers;
>
> (ii) classification levels;
>
> (iii) designation of roles;
>
> (d) adopting management practices that are responsive to Government policies and priorities;
>
> (e) promoting continual evaluation and improvement of the appropriateness, effectiveness and efficiency of departmental management;
>
> (f) implementing policies and practices about access and equity to ensure maximum access by members of the community to Government programs and to appropriate avenues for review;
>
> (g) ensuring compliance with the equality of employment opportunity obligations under chapter 2;
>
> (h) ensuring maintenance of proper standards in the creation, keeping and management of public records."

[10] It may be accepted that where this provision refers to "employees" that would not include other members of the tribunal.

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[6] Emphasis added.

[11] The president is responsible for deciding the tribunal's constitution for a particular hearing (ss 447(3) and 448). The president also has responsibility for directing the tribunal rules, and the practice and procedure of the tribunal (s 480(1)) and approving forms (s 481).

[12] Section 484 (arrangement of business) provides, relevantly:

> "(1) The president of the tribunal is responsible for ensuring the quick and efficient discharge of the tribunal's business.
>
> (2) Without limiting subsection (1), the president must give directions about –
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> (a) the arrangement of the tribunal's business; and
>
> (b) the number of members to constitute the tribunal for a particular hearing; and
>
> (c) the members who are to constitute the tribunal for a particular hearing; and
>
> (d) the places and times the tribunal is to sit."

[13] Section 486 obliges the president to keep a register of various things (applications made, reviews heard, decisions and reasons). Under s 487 the president is required to prepare and give the Minister an annual report on the tribunal's operations.

[14] There are no other provisions of the Act expressly outlining the duties of the members of the tribunal, including the president.

Position description

[15] A position description has been prepared for the position of the president of the tribunal. There were included in the evidence before the court two versions of the position description, one which is stated to have been authorised by the former present (Mr Clair) on 9 September 2004 and reviewed on 9 September 2007; and another which is stated to have been authorised by the applicant on 2 March 2007, and reviewed in March 2009.[7]

[16] Relevantly, the position description authorised by the applicant included the following:

> "**Purpose of the Position**
>
> To ensure that the Mental Health Review Tribunal fulfils its statutory responsibility to provide effective independent review of the involuntary

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[7] Exhibit MT4 to Tuohy.

status of individuals receiving involuntary treatment under the *Mental Health Act 2000*, the key areas of jurisdiction being involuntary treatment order and forensic order reviews, and applications to perform ECT (electroconvulsive therapy); and

To fulfil the responsibilities of the Chief Executive Officer of the department to direct and provide overall management of the state wide membership and the Tribunal office for the purpose of ensuring that the Tribunal's business is conducted in an efficient and effective manner and in accordance with the requirements and spirit of the *Mental Health Act 2000*.

…

Role of the Organisational Unit

… This unit [the tribunal] operates as a department within the meaning of the *Public Service Act 1996* with the President as the chief executive of the department.

…

Supervises

The position directly supervises the Executive Officer and indirectly, through the Executive Officer, all officers in the Tribunal Office.

The position is also responsible for advising, directing and overseeing members in the practices and procedures of the Tribunal. This includes responsibility for appropriate performance review.

…

Primary Duties

1. Chair hearings of the MHRT (in a panel of 3-5 members), constitute single member panels, and make determinations in the absence of a panel as provided under the *Mental Health Act 2000*.

2. Take responsibility for monitoring the arrangements for forensic order reviews throughout Queensland and regularly preside at hearings of forensic orders in high secure settings.

3. Exercise statutory powers and functions of the President including, for example, approving the sitting arrangements, maintaining the register, and approving Tribunal forms.

4. Delegate powers of the President to appropriately qualified members (as is necessary for the Tribunal's effective operation) and oversee the ongoing exercise of those powers.

5. Actively promote and advise on the review of legislation relating to the *Mental Health Act 2000* and the functions of the Mental Health Review Tribunal.

6. Provide leadership and direction to MHRT members including maintaining the overall responsibility for directing procedures and arranging business of the MHRT.

7. Provide authoritative advice to legal members and other applicants (as provided by the Act) on matters of interpretation and legal issues that relate to the business of the MHRT.

8. Maintain overall management responsibility for the MHRT's human and financial resources, and oversee the operation of policies, procedures, and protocols required for the effective functioning of the Tribunal Office.

9. Direct and oversee the operation of quality management activities to maintain high standards in decision making and client services.

10. Provide authoritative advice to the Minister for Health on the MHRT and related *Mental Health Act* issues.

11. Develop strategic partnerships with senior officers in the health service delivery system, Corporate Office of Queensland Health and other government departments to ensure the effective operation of MHRT.

12. Promote awareness of the role of the MHRT in health service personnel, mental health service consumers and the general public.

13. Oversee the preparation of the Annual Report for Minister to table in Parliament.

    Contribute to the enhancement of the body of knowledge concerning Tribunals, including mental health review tribunals.

Primary Delegations and Accountability

The President will be accountable for:

The effective operation of the Mental Health Review Tribunal and performance of statutory responsibilities of President under the *Mental Health Act 2000*.

The quality, accuracy and timeliness of advice to the Minister for Health, other Ministers of the Crown, senior Government officials, professional organisations and community groups, and members of the general public in relation to the statutory functions of the Mental Health Review Tribunal.

The effective management of the financial and human resources and general operation of the Tribunal.

The performance of the statutory responsibilities of chief executive under the *Public Service Act 1996*.

This position is responsible for:

- the monitoring and reviewing of work practices and making recommendations leading to continuous improvements.
- identifying, reporting and recording non-compliances to established policies and procedures and recognising opportunities for improvement, as outlined in the documented quality management system.
- for contributing to consistency and best practice within the organisation."

Process of appointment of members

[17] The tribunal is a busy one. The applicant says that in the 2016-2017 period 12,948 hearings were conducted in over 70 venues across the State. There were 92 part-time members as at February 2017 and 22 staff.[8]

[18] Central to the decision to terminate the applicant's appointment was a controversy concerning Ms Anne-Maree Roche, who purported to act as a legal member of the tribunal from 2002, when she was first appointed, until August 2016 when the applicant discovered that she was not eligible for the role, as she had never been admitted to practice as a lawyer.

[19] The evidence about the appointment process is relevant to the matters to be determined on this application. The applicant explained the appointment process which was in place during his tenure as president, as follows:[9]

> "16. During my tenure as President the appointment process was that:
>
> a. The MHRT [tribunal] **fielded all applications**;

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[8] Thomas (7 August 2017) at [10].

[9] Thomas (7 August 2017) at [16]-[21].

b. A selection panel of three or four, being the President, the Executive Officer and other members, either a retiring MHRT member or a person with outside expertise then interviewed the candidates. The interviews were usually conducted by two out of the panel members. The panel members rotated through the interviews to ensure that a consistent approach was adopted. At the interview the applicant was provided with a case study and 20 minutes to prepare a response to that case study. Then the applicant addresses the panel for 40 minutes about how they would approach the case study. The interview is concerned with ascertaining whether applicants are capable of approaching the types of matters dealt with by the Tribunal in a suitable way.

c. The selection panel discussed and then **the President nominated a cohort of suitable applicants to the Minister for Health**. The nomination occurred by way of **a brief from the President**. This brief initially attached all the applications of every applicant which included a signed consent to criminal history checks, and a signed Personal Particulars Declaration that the information was correct and the applicant was not aware of anything that would not entitle them to their appointment, and they would advise the Minister if that changed. In 2013, the applications were submitted online through the Government's online portal 'Smartjob' which was available to all authorised persons. The MHRT was instructed to request an additional two-page Curriculum Vitae be included with this application and that only a copy of this CV accompany the brief rather than the full online application. The full application was available online to any authorised person within the relevant Government department. The brief, and attachments, were physically compiled by administrative staff within the MHRT.

d. Over time, the names of various Health bodies involved changed, but the brief was first submitted to the Minister and sent to Statutory Authorities, or later the Office of Statutory Health Authorities (the OSHA).[10] The Statutory Authorities then OSHA were responsible for reviewing the applicants and determining their suitability to be considered by the Minister. I am not familiar with all the subsequent steps in the process as the MHRT was never responsible for them from the first appointments in 2001. The brief was then forwarded on to the Minister and Queensland Health whereby it was reviewed and a

[10] According to Mr Tuohy, who is the director of it, this body is called the Office of Health Statutory Agencies (abbreviated in these reasons as OHSA, other than where it appears in a quoted passage).

> list of recommendations prepared and provided to the Minister. As part of that review process the nominations were then provided to the Department of Premier and Cabinet for review and approval and also the Department of Communities. The Minister for Health then recommended the successful applicants to the Governor in Council for appointment as members. After the creation of OSHA in 2012, the brief was issued simultaneously to OSHA and to the office of the Minister for Health.

17. **I would review the brief**. This ensured that no one was included who had not successfully completed an interview process at some time to assess their skills. However, I did not compile and review the documents attached to the brief.

18. The MHRT process described above was not prescribed by the Act, direction, instruction or policy.

19. The 2008 round of appointments was the first round that I oversaw as President. Prior to that round commencing, **I gave an instruction to the administrative staff at the MHRT that all applicants were to provide copies of their relevant qualification documents**. These qualification documents were then to be kept with the application and **submitted with the brief**. The purpose of this instruction was to streamline and improve the efficiency of the subsequent assessments conducted by the Department of Premier and Cabinet, and Queensland Health.

20. At no time during my tenure did administrative staff from the MHRT check to ascertain whether the applicants met the statutory criteria for appointment. For example, the MHRT did not check to see whether the applicants were undischarged bankrupts or whether the medical degrees were in the relevant fields. This work was undertaken by the Department of Health, OSHA or the Department of Premier and Cabinet.

21. For example, in 2016 after the brief had been submitted, the OSHA contacted the MHRT to advise that a person with the same name as one of the applicants had recently been declared bankrupt in New South Wales. The MHRT then undertook to speak with the applicant to ascertain whether they were the same person."[11]

[20] Mr Tuohy, the Director of the Office of Health Statutory Agencies (OHSA) says in his affidavit that one of the roles performed by OHSA is to assist health agencies with a

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[11] Emphasis added.

range of processes and functions, including inquiries arising from the recruitment of members of various health portfolio boards and tribunals. He says it is not and has never been the role of OHSA to undertake the initial process of seeking out, vetting and selecting nominees to be put to the Minister for consideration of appointment to the tribunal. That role has always been one performed by the tribunal itself (at [14]). Mr Tuohy disputes, as incorrect, the applicant's statement, at paragraph 16d (set out above) that OHSA were responsible for reviewing the applicants and determining their suitability to be considered by the Minister. What OHSA does is conduct "probity checks" in relation to nominees for appointment (including criminal history, bankruptcy and ASIC checks, as well as general internet checks). Mr Tuohy says these checks do not address any threshold issues regarding a candidate's qualifications or expertise, but address other matters of their general conduct or character that the Minister may care to consider when considering making recommendations for appointment (at [17(a)]).

Discovering Ms Roche's ineligibility

[21] On 3 August 2016 the applicant was part of a two person interview panel, conducting interviews for member appointments for the next term of the tribunal, commencing in February 2017. He interviewed Ms Roche, an existing legal member. The applicant says he "noticed that Ms Roche's application for re-appointment did not state that she was admitted, or include her certificate of Admission as a barrister or solicitor". He asked Ms Roche to supply that document. She said she had never been admitted. The applicant was "surprised by this admission".[12]

[22] The following day, 4 August 2016, the applicant "stood Ms Roche down" from the tribunal. He asked her for an explanation as to how it was she said she was eligible to sit as a member of the tribunal. She apparently referred to conversations with the former executive officer, in 2007 and 2010, who had requested a copy of her admission certificate, and when Ms Roche advised she did not have one, said it did not matter.[13] The applicant was not aware of those conversations, and says he did not know, prior to August 2016, that Ms Roche was not a "lawyer" (I infer he means admitted as such).[14]

[23] The applicant explains that, by standing Ms Roche down he "stopped any immediate risk". He formed the view that decisions of the tribunal of which she was a member were valid until a challenge may be made to them. He further formed the opinion that, since each decision of the tribunal was required to be reviewed within six months, every decision that Ms Roche had been involved in would, in due course, have been "remade on up to date information by a properly constituted panel", which reduced the scope for adverse effects from Ms Roche's invalid appointment.[15]

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[12] Thomas (7 August 2017) at [22]-[25].

[13] There was no evidence otherwise before the court about this conversation, and I am not asked to make any findings or draw any conclusions about it.

[14] Thomas (7 August 2017) at [26]-[28].

[15] Thomas (7 August 2017) at [41]-[43].

[24] Ms Roche withdrew her application for reappointment on 8 August 2016. On that day the applicant directed that she "would not be permitted to participate in any further MHRT hearings".[16]

[25] Having formed the view that Ms Roche "must have known that she was required to be admitted as a lawyer and that she had held herself out as being so admitted, and subsequently received remuneration for over 14 years without being qualified", the applicant says he further formed the view her conduct may amount to corruption within the meaning of the *Crime and Corruption Act* 2001, and so referred the matter to the Crime and Corruption Commission on 8 August 2016.[17]

[26] The applicant was on leave from 23 August to 14 September 2016.

[27] He was advised by letter dated 20 September 2016 that the CCC "intended to close the matter as it did not disclose corrupt conduct".[18]

[28] The applicant says he "conducted an internal assessment to ascertain how Ms Roche had been appointed without being qualified" and that he "also conducted an internal assessment to ensure that every other member of the Tribunal had the relevant qualifications".[19] I infer this commenced after he returned from leave (given what he says in [45] of his first affidavit, referred to below).

[29] The applicant had a meeting with the Minister on or about 29 September 2017. He describes it as a "longstanding appointment", to discuss particular things, scheduled to last 20 minutes. He did not mention the issue of Ms Roche's ineligibility with the Minister. The applicant says that:

> "Given the matters to be discussed, the fact that I had only recently become aware that the CCC were not investigating the matter involving Ms Roche and that the internal inquiries had only just commenced, I did not raise the issue of Ms Roche's appointment. I thought that it was best to raise that issue only after I was aware of what had transpired and was in a position to properly address any enquiries about the issue."[20]

[30] On 24 November 2016 the applicant received notification from the CCC about complaints that had been made about the appointment of Ms Roche, as well as unrelated allegations about the appointment of his wife as a part-time community member. The applicant says that "[a]s the allegations related to my conduct, I immediately informed the Ethical Standards Unit of Queensland Health on 24 November 2016 of the

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16 Thomas (7 August 2017) at [29]-[30].

17 Thomas (7 August 2017) at [31]-[36].

18 Thomas (7 August 2017) at [37] and [40].

19 Thomas (7 August 2017) at [44].

20 Thomas (7 August 2017) at [45].

allegations with a view to organising the appropriate protocol to delegate any investigation to the Director-General of the Health Department".[21]

[31] On 15 December 2016 the applicant and Mr Troy (the executive officer of the tribunal) had a meeting with Mr Tuohy (of the OHSA) to discuss the issue of Ms Roche's appointment.

[32] Mr Tuohy says, by reference to a file note he made the next day, that at this meeting:

> "I was informed by Mr Thomas and Mr Troy of the possible invalidity of the appointment of Ms Roche as a member of the Tribunal. This was the first occasion that any issue about potential invalidity of Ms Roche's appointment to the Tribunal had been brought to my attention."

[33] On the evidence before the court there is a slight difference of view about what happened at this meeting, and the next day. The applicant says that during the meeting Mr Tuohy said the OHSA would take responsibility for obtaining legal advice about the issue, but that the next day Mr Tuohy contacted Mr Troy and said that the OHSA would not be taking any steps in that regard, and that it would be a matter for the tribunal to obtain independent advice.[22] Mr Tuohy says he did not say during the meeting that OHSA would take responsibility for obtaining legal advice about the matter; the applicant disputes that. Mr Tuohy acknowledges that the following day, in the context of receiving some further information from Mr Troy, he did indicate that he was "happy for OSHA to request the legal advice", but that later that day, having spoken with his Acting Senior Director, Ms Heywood, and Corporate Counsel from Queensland Health, he informed Mr Troy that a different approach needed to be taken, and that the tribunal, as a statutory authority in its own right, should obtain its own legal advice. The parties were in agreement that this difference was not of any particular significance for the purposes of the present application.

[34] In any event, the applicant says he then arranged for the tribunal to obtain legal advice from a barrister about "possible mechanisms to resolve any difficulties associated with Ms Roche's appointment". That advice was obtained by the applicant on 9 January 2017 and provided to Mr Tuohy the following day.[23]

[35] The applicant says he had proposed sending a brief to the responsible Minister, including the legal advice. However, on 17 January 2017 he had a conversation with a policy adviser from the Minister's office, Mr Kerdel, who "informed me that the Minister's office did not wish to receive a brief in respect of this matter at that time".[24]

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[21] Thomas (7 August 2017) at [50]-[51]; Thomas (filed 6 November 2017) at [2].

[22] Thomas (7 August 2017) at [52]-[53].

[23] Thomas (7 August 2017) at [54]-[56].

[24] Thomas (7 August 2017) at [61].

[36] There is again a slight difference, on the evidence before the court, as to what was said in this conversation. Mr Kerdel says that what he told the applicant was that the Minister's office did not wish to receive a brief *directly from Mr Thomas or the Tribunal* in respect of the matter at that time, and that the context in which he said that was that the Minister had already been briefed through the Office of the Director General, and legal advice was being sought by that office about the matter, so he formed the view that all information relating to the matter should be received and coordinated through the Office of the Director General before being provided to the Minister's office.

[37] Again, the parties agreed that nothing particularly turned on this difference.

[38] The applicant had requested further advice, from a different barrister, and that was provided on 6 February 2017.

[39] The applicant says that in early February 2017 he became concerned that neither the Department, OHSA, nor the Minister were willing to take responsibility for addressing the issues, and that if the issues were made public in an uncoordinated or sensationalised way there could be "serious effects upon patients and their carers, and victims of forensic patients and confidence in the mental health system would be undermined", so he retained EMC Group to prepare a co-ordinated communications plan.[25]

[40] The applicant says that on 8 February 2017 he was informed by Ms Heywood that "she did not wish to receive a copy of [the second barrister's] advice or the communication plan".[26]

[41] Ms Heywood says she does not recall speaking to the applicant on 7 or 8 February, but does recall a telephone conversation on 17 February, during which he offered to provide her with a copy of the further legal advice he had received, and his media communication plan. Ms Heywood agrees she told him it was not necessary to do so. Although she did not inform the applicant of this, she says the reason for this was because she was aware the department had already sought and obtained advice from the Solicitor General about the matter and, having no reason to doubt that advice, did not consider it necessary to see the advice obtained by the applicant. Nor did she consider it necessary to see the applicant's media communication plan, as she considered that an internal matter for him to manage.

[42] On 24 February 2017 the applicant attended a meeting with the Minister for Health and the Director General of Health. The applicant says the Minister advised the applicant that he did not have faith in him as president of the tribunal, and that there were two courses available, effectively for the applicant to voluntarily resign, or he would

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[25] Thomas (7 August 2017) at [64].

[26] Thomas (7 August 2017) at [65].

formally be required to show cause why he should not be dismissed.[27] He declined to resign and left the meeting with a show cause letter.[28] In the show cause letter dated 24 February 2017 the Minister refers to the tribunal becoming aware of Ms Roche's lack of eligibility in 2007 (based on Ms Roche's assertion of a conversation at that time about the fact that she did not have a certificate of admission), and her subsequently being reappointed as a lawyer member, and says "[y]ou took no action to prevent this". The letter also refers to the delay in notifying the Minister about the issue in 2016, and states:

> "… I am concerned about your ability to continue in the role as president of the Tribunal. The continuing purported reappointments of Ms Roche as a lawyer member of the Tribunal is suggestive of long standing and poor administrative practices with regard to the appointment of Tribunal members."

[43] The applicant, by his solicitors, responded to the show cause letter on 2 March 2017.[29] Amongst other things, in this detailed response, the applicant refutes the allegation that he was aware, prior to August 2016, of Ms Roche's ineligibility, and says:

> "59. It appears that the Show Cause Notice proceeds on a misapprehension. In the Show Cause Notice you assert that either Mr Thomas took no action to prevent Ms Roche's appointment as a legal member, or that her continued appointment was suggestive of some shortcoming in the administrative practices within the Tribunal. However, this misunderstands the appointment process. Firstly, the Tribunal was not responsible for **assessing** the applicant's qualifications. That assessment is undertaken by officials within the OSHA and Queensland Health. Each of those officials is **given the candidate's requisite qualification material**. The fact that Ms Roche was appointed on a number of occasions, despite not being a legal practitioner, indicates a systemic failure across multiple Departments and agencies. However, this was not a matter that Mr Thomas was responsible for.
>
> 60. Further, after commencing as President of the Tribunal, Mr Thomas **instituted a practice whereby proof of a person's qualification had to be provided**. On Ms Roche's account, that requirement was circumvented in this case by Ms Roche misleading a non-legally qualified administrative officer. However, Mr Thomas was not informed of this answer, nor was he informed at any time that there

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[27] Thomas (7 August 2017) at [74]-[83].

[28] See exhibit ND-1 to the affidavit of Dore.

[29] Exhibit "ND-2" to Dore.

was not a Certificate of Admission for Ms Roche. It is difficult to see any shortcomings in Mr Thomas' conduct in this regard.

61. The first time that Mr Thomas became aware of the fact that Ms Roche was not admitted as legal practitioner, Mr Thomas took immediate action …

…

63. It is true that these circumstances are unusual. There has been a systemic administrative failure across multiple government departments and agencies for multiple years. However, Mr Thomas is not responsible for those systemic failures. Upon becoming aware of those failures, Mr Thomas took immediate action to address the issue. He also undertook the appropriate internal investigations, developed a solution and sought to report the issue to the relevant administrative agencies. At no time did Mr Thomas seek to conceal the matter or ignore its importance."[30]

[44] The response also invited the Minister for Health to have no further role in this matter, and requested that a new decision-maker be appointed, on the basis that the Minister had failed to afford the applicant procedural fairness before forming a view which he expressed at the meeting of 24 February 2017, and that an ordinary reasonable observer may consider the Minister might not bring an impartial mind to the decision.

The decision to terminate the applicant's appointment

[45] On 6 April 2017, the respondent, as acting Health Minister (the Minister having recused himself from the decision-making process[31]) advised the applicant that his appointment had been terminated.[32]

[46] A statement of reasons was provided on 8 May 2017.[33] After setting out relevant statutory provisions, the statement of reasons includes the following:

"**Factual background**

10. Anne-Maree Roche was first purportedly appointed as a lawyer member of the MHRT in February 2002.

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[30] Emphasis added.

[31] Exhibit ND-4 to Dore.

[32] Thomas (7 August 2017) at [85]-[86]; exhibit ND-5 to Dore.

[33] Exhibit ND-6 to Dore.

11. Ms Roche was reappointed as a lawyer member of the MHRT in 2005, 2008, 2011 and 2014. She applied for reappointment again in 2016.

12. Ms Roche's CV discloses that she has a Bachelor of Laws from the Queensland University of Technology from 1995.

13. Ms Roche has not ever been admitted to the legal profession.

Evidence or other material on which findings of fact were based

14. In arriving at its decision, the Governor in Council had before it for consideration a bundle of documents comprised of the following material:

> … [the material listed includes the Executive Council Minute regarding the proposed termination of the applicant, comprising an explanatory memorandum signed by the Attorney-General and schedule; as well as the applicant's response to the show cause letter]

Findings on material questions of fact

15. The following findings of fact were made.

16. At the time of her first appointment to the MHRT and at each subsequent reappointment Ms Roche did not hold the required qualification for appointment as a lawyer member of the MHRT.

17. In the CVs submitted by Ms Roche in her applications from time to time to be a member of the MHRT she disclosed that she held a Bachelor of Laws but there is no evidence that Ms Roche claimed to have been admitted to legal practice.

18. At all material times, the primary process of finding and assessing people with suitable qualifications for appointment to the MHRT was a function performed initially by the MHRT. Recommendations were then made, with assistance from various departmental officers, to the relevant Minister to take, as a member of the Executive Council, to the Governor in Council for a final decision.

19. It was part of Mr Thomas' responsibilities, as President of the Tribunal, to ensure that recommendations made to the Minister for appointment to the MHRT were of people who held the requisite qualifications.

20. Mr Thomas was admitted to legal practice in 1976 and has around 40 years' post-admission experience.

21. Mr Thomas asserts that he only became aware of the fact that Ms Roche had never been admitted to legal practice on 4 August 2016 (document 3: response to show-cause letter, para 16).

22. Mr Thomas, upon becoming aware of Ms Roche's ineligibility, did not immediately inform the Minister for Health and Minister for Ambulance Services, despite a clear understanding of the implications of Ms Roche's ineligibility.

23. According to Mr Thomas, upon being informed that Ms Roche was not eligible to be appointed as a lawyer member, he immediately directed that she not participate in any further Tribunal hearings (document 3, paras 17 and 24). He says that 'the prospect that news of potential invalidities with Tribunal Orders could adversely affect patients was real' (document 3, para 31).

24. Mr Thomas informed the CCC on 8 August 2016 of the circumstances after forming a view that Ms Roche's conduct was potentially corrupt (document 3, para 25).

25. Mr Thomas formed his own view on the consequences of Ms Roche's ineligibility (document 3, paras 26-27). He made no attempt at this stage to bring the problem to the attention of the Minister. He says that he 'investigated and considered potential solutions to the possible invalidities caused by Ms Roche's appointment' (document 3, para 35).

26. After 20 September 2016 Mr Thomas put in place internal investigations of the circumstances of Ms Roche's appointment (document 3, paras 31-35).

27. In late November 2016 Mr Thomas contacted Queensland Health's Ethical Standards Unit in regard to allegations made against him in a complaint to the CCC (document 3, para 37).

28. On 15 December 2016, more than three months from the time he asserted he first became aware of the problem of Ms Roche's ineligibility, Mr Thomas contacted Mark Tuohy, a departmental officer from the Office of Statutory Health Agencies (***OSHA***), an administrative unit of the Department of Health, to discuss issues surrounding Mr (sic) Roche's appointment (document 3, para 38).

29. Mr Thomas obtained legal advice from Mr Hickey of counsel on 9 January 2017 (document 3, para 40).

Reasons for the decision

30. The decision to terminate the appointment of Mr Thomas was made for the following reasons.

31. Appointments of the president and members of the MHRT are made by the Governor in Council on advice of the responsible Minister. Having regard to the nature of the MHRT's jurisdiction and the effects of its decisions, the implications of an invalid appointment are serious. That is more so when the invalidity extends over such a long period of time.

32. The appointment of Ms Roche as a legal member of the MHRT was made by the Governor in Council on the advice of the Minister from time to time. It was the Minister's responsibility to take appropriate action to remedy the defective appointment. The president's responsibility was to inform the Minister of a serious problem with a member's appointment immediately it became known, not several months later. It was not Mr Thomas's responsibility to embark on developing a policy response of his own (document 3, paras 26, 38, 40 and 46).

33. One of the functions of the president is to take responsibility for the efficient discharge of the MHRT's business. In practice, this has included taking responsibility for the recruitment of members to the MHRT, at least in the initial stages of the process. It is not satisfactory to assert that the responsibility for defects in the process lies with others (document 3, paras 59 and 65).

34. In any event, whatever view is taken of responsibility for recruitment and appointment of members, the main issue here was about Mr Thomas's failure to notify the Minister immediately once Ms Roche's non-qualification became apparent.

35. Mr Thomas's conduct in regard to the issues arising from Ms Roche's appointment, particularly once her non-qualification became apparent, was incompetent, inefficient and careless. That was grounds for the recommendation to the Governor in Council that Mr Thomas's appointment as President and member of the MHRT be terminated.

36. The complaints to the CCC in relation to Mr Thomas and the appointment of his wife as a member of the MHRT and in relation to Mr Troy and the appointment of his wife as a member of the MHRT

> were not taken into consideration by the Governor in Council in determining to terminate Mr Thomas as a member and President of the MHRT (document 1, schedule p 7)."

Relevant principles

[47] It is important to emphasise at the outset the constraints of an application for judicial review such as this. Judicial review is confined to the legality of the decision in question. It is concerned with whether the decision was one which the decision-maker was authorised to make. It is not an appellate procedure enabling either a general review of the decision or a substitution of the decision which the court thinks should have been made.[34]

[48] In this regard, in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 Brennan J (as his Honour then was) said:

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

[49] The power to terminate the applicant's appointment under s 444(1)(b) is discretionary. The exercise of the discretion was conditional upon the Governor in Council being satisfied that the applicant had performed his duties carelessly, incompetently or inefficiently. The necessary factual criterion, satisfaction of which is necessary to enliven the power of the decision-maker to exercise the discretion (the requisite jurisdictional fact) is the formation of the opinion by the Governor in Council that he is so satisfied, involving as that does assessment and value judgments on the part of the decision-maker.[35] Having formed that opinion, there is then a discretion whether or not to decide to terminate the appointment. The grounds of review challenge both the formation of the opinion (the state of satisfaction) on various bases (grounds 1 to 5) and the exercise of the discretion (ground 6).

[50] In a case such as this, where the "jurisdictional fact" is the opinion or belief held by the decision maker about a particular matter, as opposed to the existence of the particular matter itself, the basis on which such a decision may be judicially reviewed was explained by Gibbs J in *Buck v Bavone* (1976) 135 CLR 110 at 118-119:

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[34] See *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [23] per French CJ, Bell, Keane and Gordon JJ.

[35] See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [57] per French CJ.

> "In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached."[36]

Limited scope for review of factual findings

[51] The scope for judicial review of a finding of fact in a proceeding such as this is very narrow. In the oft-quoted words of Brennan J (as his Honour then was) in *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77, "[t]here is no error of law simply in making a wrong finding of fact". But a finding or inference of fact will be reviewable on the ground that there is no evidence to support it, or that it is perverse, in the sense that there is no probative evidence to support it.[37]

[52] Both parties referred me to a useful summary of the relevant principles in the reasons of Applegarth J in *Crime and Misconduct Commission v Swindells* [2009] QSC 409 at [9]-[14], including the following:

> "[11] … Whether treated as an application of the *Wednesbury* principle to what is alleged to be a perverse factual conclusion, or as a separate but similar principle that permits judicial review of findings of fact for extreme irrationality or illogicality, perverse factual conclusions are open to judicial review. However, the scope to challenge irrational or illogical fact-finding is limited. As Gleeson CJ and McHugh J said in *Eshetu*:
>
> > 'Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as 'illogical' or 'unreasonable', or even 'so unreasonable that no reasonable person could adopt it'. If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.'

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[36] See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130]-[137] per Gummow J.

[37] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 359-360 per Mason CJ.

> [12] There are strong grounds to conclude that '*Wednesbury* unreasonableness' relates to the exercise of discretionary power and is not available to challenge unreasonable findings of fact. Another view is that *Wednesbury* unreasonableness remains available to challenge findings of fact but that, in practical terms, it 'will be largely confined to review of discretionary decisions.' Whether described as *Wednesbury* unreasonableness, or review on the grounds of illogicality or irrationality, **judicial review of findings of fact is subject to demanding requirements if a challenge is to succeed. It is not sufficient that the decision is unreasonable in the sense of being against the overwhelming weight of the evidence. It must be perverse or capricious, for instance, because there was no probative evidence to support it**.
>
> [13] Whether such a finding of fact constitutes an 'error of law' falls to be determined in the context of statutory judicial review rather than in a constitutional setting or in the context of an appeal in which rights of appeal only arise in respect of 'errors of law'. In the context of judicial review under the *JRA* it is possible to characterise a finding of fact that is perverse as involving an improper exercise of power. It is also possible to characterise such a perverse finding of fact as involving 'an error of law' within the meaning of s 20(2)(f) of the *JRA*. This is because where reasons for decision demonstrate manifest error or indicate 'such an unexplained perversity as to suggest that an error has taken place' in the process of decision-making, an error of law may be established.
>
> [14] The important distinction between errors of fact and law does not preclude judicial review of findings of fact. Findings of fact are not open to review on the grounds of irrationality or illogicality simply because the process of reasoning is open to compelling criticism or the conclusion reached is one which most reasonable decision-makers would not reach. A factual conclusion, however, will be invalid in circumstances in which it is not reasonably open to the decision-maker acting according to law on the basis of probative evidence…"[38]

[53] To refer to a factual conclusion as not reasonably open does not invite review on the basis that the finding was one on which reasonable minds may differ, but denotes an illogical, irrational or perverse process of reasoning.[39] In this regard, in *Eshetu* at [41], after the passage quoted in Applegarth J's decision above, Gleeson CJ and McHugh J referred to the following statement of Lord Brightman in *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518:

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[38] References omitted; emphasis added.

[39] *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 73 ALD 1 at [81] and [128] per Kirby J; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [78] per Heydon J and at [131] per Crennan and Bell JJ.

> "Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

[54] In *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [40], in the context of considering whether a jurisdictional fact conditioned upon the satisfaction of the decision-maker had been met, Gummow A-CJ and Kiefel J (as her Honour then was) applied the characterisation of the "critical question" as "whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds"; remarking also that this "critical question" should not receive an affirmative answer that is lightly given.[40]

[55] In the same case Crennan and Bell JJ emphasised that an allegation of "illogicality" or "irrationality" must mean something other than emphatic disagreement (at [129]),[41] and said:

> "[130] … 'illogicality' or 'irrationality' sufficient to give rise to jurisdictional error must mean the decision … is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is 'clearly unjust' or 'arbitrary' or 'capricious' or 'unreasonable' in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person …
>
> [131] What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence

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[40] Endorsing in this regard the reasons of Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at [37]-[38].

[41] See also at [124], referring to *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [5] per Gleeson CJ and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626 per Gleeson CJ and McHugh J.

> upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion."

Unreasonableness

[56] The ambit of unreasonableness as a ground of review was revisited by the High Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

[57] What is apparent, from *Li* and subsequent analysis of that decision, particularly by the Full Court of the Federal Court,[42] is that legal unreasonableness, as a ground of review, is not limited to the familiar formulation of *Wednesbury* unreasonableness; but nor is the language used by the plurality in *Li*, for example at [76] (referring to a result, on the facts, which "is unreasonable or plainly unjust", or a "decision which lacks an evident and intelligible justification") to be adopted as some kind of rigid or precise formulation of the boundaries of legal unreasonableness. The analysis is more subtle.[43]

[58] As explained by Allsop CJ in *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [4]-[6]:

> "4 In *Minister for Immigration and Citizenship v Li* … the High Court made clear that legal reasonableness or an absence of legal unreasonableness was an essential element in the lawfulness of decision-making; Parliament is taken to intend that statutory power will be exercised reasonably: see *Li* at [26] and [29] (French CJ), [63] (Hayne, Kiefel and Bell JJ) and [88] (Gageler J).
>
> 5 These statements of general principle in the three judgments… variously drew upon and drew together a number of well-known expressions and bodies of principle including… [his Honour here set out a lengthy list of such expressions and principles, included among which is "the illegitimacy of the exercise of a discretion in reaching a conclusion that no reasonable person could ever come to: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229, or where no sensible decision-maker acting with due appreciation of his or her responsibilities

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[42] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [43]-[50] per Allsop CJ, Robertson and Mortimer JJ; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [2]-[13] per Allsop CJ, at [52]-[62] per Griffiths J and at [91]-[92] per Wigney J.

[43] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [62] per Griffiths J.

would so decide: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064"].

6 Each of the judgments in *Li* sought to give *explanatory* content to the concept of legal unreasonableness. As was discussed in *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, the judgments in *Li* identified two different contexts in which the concept of legal unreasonableness was employed: a conclusion after the identification of jurisdictional error for a recognised species of error, and an 'outcome focused' conclusion without any specific jurisdictional error being identified: *Singh* at [44]."

[59] In relation to the "outcome-focused" application of the concept, Allsop CJ went on to say:

"7 … There is 'an area of decisional freedom' of the decision-maker, within which minds might differ. The width and boundaries of that freedom are framed by the nature and character of the decision, the terms of the relevant statute operating in the factual and legal context of the decision, and the attendant principles and values of the common law, in particular, of reasonableness. The boundaries can be expressed by the descriptions and explanatory phrases of the kind set out in [5] above.

8 The content of the concept of legal unreasonableness is derived in significant part from the necessarily limited task of judicial review. The concept does not provide a vehicle for the Court to remake the decision according to its view as to reasonableness (by implication thereby finding a contrary view unreasonable). Parliament has conferred the power on the decision-maker. The Court's function is a supervisory one as to legality: see *Li* at [30], [66] and [105]."

[60] After noting that the "concept of legal unreasonableness is not amenable to minute and rigidly-defined categorisation or a precise textual formulary" (at [10]), Allsop CJ said:

"11 … The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to **whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power**. The descriptions of the lack of quality used above are

not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.

12 Crucial to remember, however, is that the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error; rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful. The undertaking of that task may see the decision characterised as legally unreasonable whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised."[44]

[61] That last point was also emphasised by Wigney J at [92]:

> "The critical point is that, in reviewing a decision on the ground of legal unreasonableness, the Court's role is strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power**. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification**. If there is **an evident, transparent and intelligible justification for the decision** (*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76], [105]; *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [44]-[45]), or if the decision is **within the 'area of decisional freedom' of the decision-maker** (*Li* at [28], [66], [105]; *Singh* at [44]), it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently."[45]

[62] I turn now to address the grounds of review.

Ground 1

[63] Ground 1 contends that the decision-maker "erred as a matter of law by mistaking the facts" in holding at [17] of the decision that Ms Roche had not claimed to have been admitted to legal practice in circumstances where Ms Roche had submitted an

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[44] Emphasis added. See also at [52]-[57] per Griffiths J and at [91]-[92] per Wigney J.

[45] Emphasis added. See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [137] per Gummow J.

application for appointment as a legal member of the tribunal on five separate occasions.

[64] The finding at [17] of the statement of reasons is as follows:

> "In the CVs submitted by Ms Roche in her applications from time to time to be a member of the MHRT she disclosed that she held a Bachelor of Laws but **there is no evidence that Ms Roche claimed to have been admitted to legal practice**."

[65] That ought to be read with paragraphs [12] and [13] under the heading "factual background", which state that "Ms Roche's CV discloses that she has a Bachelor of Laws from the Queensland University of Technology from 1995" and "Ms Roche has not ever been admitted to the legal profession", respectively.

[66] The applicant contends that the emphasised part of [17] is a perverse finding because:

(a) The application form submitted by Ms Roche on each occasion she sought to be (re)appointed included the following words (on page 13 of 16):[46]

> "Additional Requirements – Legal Category
>
> 1. Mandatory Requirement: Lawyer of at least five years standing
>
> ***Please supply a certified copy of Certificate of Admission***."

(b) In addition, Ms Roche was required to sign a "personal particulars form" (exhibit 1) as a candidate for appointment to a government body, which required answers to a number of questions (such as, would you have any conflict of interests, are you affected by bankruptcy action, do you have any disclosable criminal convictions, are you aware of any charges pending against you, have you been subject of a complaint to a professional body), including "Do you know of any reason why you should not be appointed?"; to which she answered "No".

(c) Both of these documents "involve an implicit representation" by Ms Roche that she was admitted to legal practice.

(d) Consequently, the finding that there is no evidence that Ms Roche claimed to have been admitted to legal practice is perverse and amounts to an error of law on the part of the decision-maker.

[67] The applicant further submits that this finding was "one of the fundamental building blocks relied upon" in reaching the satisfaction required under s 444. Since the finding

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[46] See the first annexure to the response to the show cause letter, which is exhibit ND-2 to Dore (and referred to in paragraphs 21 and 22 of that response).

was wrong, the resultant opinion cannot stand. The applicant does not contend there was no evidence for the finding; but rather contends that it is perverse, within the meaning of the authorities discussed above, because there is evidence of a claim by Ms Roche.

[68] I do not accept the applicant's submissions in this regard.

[69] Read in the context of the statement of reason, including the references in [12] and [17] to Ms Roche's CV, the finding at [17] ought in my view to be construed as a finding that there was no evidence of a claim, in the sense of a positive assertion, by Ms Roche that she was admitted to legal practice. This is consistent with the ordinary meaning of the word "claim", informed by the Oxford English Dictionary as, relevantly, "an assertion of a right to something".

[70] In so far as the application form is concerned, it is common ground that Ms Roche did not submit a certificate of admission on any of the occasions she applied for appointment as a member of the tribunal. Plainly there was a substantial error made, by Ms Roche herself, and also others who failed to notice, as to her eligibility to be a legal member of the tribunal. But the fact that there is a statement of that "mandatory requirement", and a request to supply a certificate of admission on the application form, does not mean one can conclude from Ms Roche's completion of that form that she made a claim to be admitted to legal practice, expressly or implicitly.

[71] Similarly, the declaration (exhibit 1) that she does not know of any reason why she should not be appointed, does not amount to a claim by her that she was admitted as a legal practitioner. There is no basis in the material before this court to conclude that Ms Roche acted deliberately, in the sense of fraudulently; as opposed to mistakenly, not knowing or understanding or appreciating that she had to be admitted as a legal practitioner in order to be eligible under the terms of the *Mental Health Act* 2000. It is also appropriate, as the respondent submits, to view the declaration (exhibit 1) in the context of the preceding questions (about conflicts of interest, bankruptcy, criminal convictions, charges pending, complaints to a professional body). In that context, the last "catch all" question ("do you know of any reason why you should not be appointed") appears to be directed to broader matters, not the eligibility requirements. It is a long bow to interpret the negative response given to that question by Ms Roche as a claim by her that she is (was) admitted to legal practice.

[72] Accepting that Ms Roche was not at any time admitted to practice as a lawyer; had never provided a certificate of admission with any of her applications for (re)appointment as a lawyer member of the tribunal; and did not positively assert that she was so admitted (in her CV, or otherwise), the finding made at [17] of the statement of reasons was plainly open to the decision-maker and involved no error of law.

Ground 2

[73] Ground 2 contends that the decision-maker "erred as a matter of law by mistaking the facts" in holding at [19] of the decision that it was part of the applicant's responsibilities as president of the tribunal to ensure that recommendations made to the Minister for appointment to the tribunal, in accordance with s 440 of the Act, were of people who held the requisite qualifications, in circumstances where there was no basis in fact for that finding.

[74] At paragraph [19] of the statement of reasons the decision-maker found that:

> "It was part of Mr Thomas' responsibilities, as President of the Tribunal, to ensure that recommendations made to the Minister for appointment to the MHRT were of people who held the requisite qualifications."

[75] The applicant submits, firstly, that the extent of his responsibilities were a matter to be determined by reference to the statutory terms of his appointment; not a matter of a factual finding. The applicant submits the *Mental Health Act* did not impose any such obligation as is referred to in [19] on the applicant. Secondly, the applicant submits that even if the applicant's responsibilities were to be the subject of factual finding, the evidence does not support the finding at [19] of the statement of reasons.

[76] As to the first point (which is linked with the contention underpinning grounds 3 and 4), for the reasons given at paragraphs [90]-[99] below, I do not accept that the extent of the applicant's responsibilities were to be determined only by reference to the express provisions of the *Mental Health Act*.

[77] As to the second point, in my view the relevant provisions of the *Mental Health Act,* together with the evidence of the applicant himself and the position description, plainly support the finding at [19]. I can see no basis to conclude that the finding was perverse, as that concept is explained in the authorities discussed above.

[78] Relevantly, under s 446(3) of the Act, the applicant had all the functions and powers of the chief executive of a department, so far as those functions and powers relate to the organisational unit made up of the tribunal's staff, which included among other things "managing the department in a way that promotes the effective, efficient and appropriate management of public resources" and "promoting continual evaluation and improvement of the appropriateness, effectiveness and efficiency of departmental management".[47]

[79] Under s 484(1), the applicant, as president of the tribunal, was responsible for ensuring the quick and efficient discharge of the tribunal's business.

[80] Bringing these two functions together, and as articulated in the position description, the purpose of the applicant's position as president was "to fulfil the responsibilities of the Chief Executive Officer of the department to direct and provide overall management of

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[47] See paragraph [9] above.

the state wide membership and the tribunal office for the purpose of ensuring that the Tribunal's business is conducted in an efficient and effective manner and in accordance with the requirements and spirit of" the *Mental Health Act*. Amongst the applicant's duties he was required to "maintain overall management responsibility for the MHRT's human and financial resources, and oversee the operation of policies, procedures, and protocols required for the effective functioning of the Tribunal office" and "provide authoritative advice to the Minister for Health on the MHRT and related *Mental Health Act* issues". Further, the applicant, as president, was accountable for the "effective operation" of the tribunal; the "quality, accuracy and timeliness of advice to the Minister" and others in relation to the statutory functions of the tribunal; and, again, the "effective management of the financial and human resources and general operation of the Tribunal".[48]

[81] On the applicant's evidence, in relation to the process of appointment of members:

(a) the tribunal fielded all applications (para 16a);

(b) interviews were conducted by a panel of three or four including the president, executive officer and other members, a retired member or "person with outside expertise" – with each interview usually being conducted by two of the panel (para 16b);

(c) following a discussion with the selection panel, in the applicant's words "the President nominated a cohort of suitable applicants to the Minister for Health", by way of a brief, reviewed by the applicant, which initially attached the full applications, but later included only a two page CV (para 16c and 17);

(d) having been sent to the Minister, the brief was sent to the OHSA (para 16d) which, according to Mr Tuohy's evidence, carried out "probity" checks in relation to nominees for appointment;

(e) prior to the 2008 round of appointments, which was the first round the applicant "oversaw as President", he gave an instruction to the administrative staff at the tribunal that "all applicants were to provide copies of their relevant qualification documents", which were to be kept with the application, and submitted with the brief (para 19).

[82] The role of the president of the tribunal as the chief executive, with overall management responsibility of the tribunal, its membership and the office; his express statutory responsibility regarding the quick and efficient discharge of the tribunal's business; the duties and responsibilities articulated in the position description; and the factual circumstance that applications for appointment of members were initially dealt with by the tribunal itself, in terms of fielding the applications, conducting interviews, obtaining

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[48] See paragraph [16] above.

and collating copies of the relevant qualification documents, and then the president providing a brief to the Minister "nominating a cohort of suitable applicants" – all supports the finding that it was *part* of the president's *responsibilities* to ensure that recommendations made to the Minister for appointment to the tribunal were of people who held the requisite qualifications.

[83] Given the substantive role, from the very beginning, played by the tribunal, the "chief executive" of which is the president, in recruitment of members, the submission that it was perverse to find that it was part of the president's responsibilities to ensure that people being recommended to the Minister for appointment held the requisite qualifications, is not accepted. It is reasonable to expect that would be the first thing that was checked, even before spending time interviewing an applicant. The fact that the applicant introduced a procedure, by giving a direction in 2008 to the administrative staff, that all applicants were to provide copies of their relevant qualification documents, supports that. The failure of that procedure, for whatever reason, to pick up the fact that Ms Roche was not appropriately qualified, is a matter for which, in part, the president is responsible, given his role, duties and responsibilities in respect of the overall management of the tribunal.

[84] The applicant says OHSA were responsible for reviewing applicants and "determining their suitability to be considered by the Minister" (para 16d). Plainly the OHSA does have a substantial role in vetting nominees for appointment. But its role only comes into play once the president has "nominated a cohort of suitable applicants to the Minister". Further, as set out in the response to the show cause notice, officials within the OHSA and Queensland Health were (supposed to be) given the candidate's requisite qualification material. The applicant contends that the tribunal was not responsible for *assessing* an applicant's qualifications. That may be right, in the sense that it would not be for the tribunal to look behind an assertion of qualification by an applicant (just as it was not the tribunal's role to carry out other probity checks). But that is a separate matter from ensuring that a person being nominated to the Minister for appointment has, on the face of the material before the tribunal, the necessary qualifications. It may also be fair to say that OHSA ought also to have picked up the absence of evidence of Ms Roche's admission to practice, after the brief was sent to that body. But that does not detract from the reason, logic or rationality of the finding in [19] of the statement of reasons, in so far as the applicant is concerned.

[85] No reviewable error in the making of that finding has been established.

Grounds 3 and 4

[86] Grounds 3 and 4 contend that the decision maker:

(a) "erred as a matter of law by acting on a wrong principle" by holding at [32] and [35] of the decision that the failure to notify the Minister of Ms Roche's

ineligibility to be appointed as a member occurred in the performance of the applicant's duties as president of the tribunal; and

(b) acted in excess of the jurisdiction conferred by s 444 of the Act by purporting to terminate the applicant's appointment in circumstances where the necessary jurisdictional fact had not been established, because the conclusion that the failure to notify the Minister of Ms Roche's ineligibility amounted to the performance of his duties as President in a manner that was careless, incompetent or inefficient, was illogical or irrational because notifying the Minister was not part of his duties as President.

[87] Grounds 3 and 4 were dealt with together by the applicant, as both arising out of the proper construction of s 444 of the *Mental Health Act* and the applicant's statutory functions and duties.

[88] It is necessary to read [32] and [35] in the context of the statement of reasons as a whole, but particularly in the context of [30]-[36] under the heading "reasons for the decision" (set out commencing on page 17 above).

[89] The applicant's argument is that the reference to "the member's **duties**" in s 444(1)(b) is, properly construed, a reference to the member's (including the president's where that is the member concerned) express statutory duties under the *Mental Health Act* and does not extend to any broader duties or responsibilities, for example, as set out in the position description. The applicant submits that:

> "64. The duties of the statutory office of President of the Tribunal are those set out in the Act. Properly understood, those duties do not include responsibility for the appointment of members or informing the Minister of issues associated with those appointments. The only reporting obligation imposed upon the President is the duty to provide the annual report imposed by s. 487. If more rigorous reporting duties were to form part of the President's role, then such obligations would have been stated.
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> 65. Once the scope of the President's duties are properly understood, it can be seen that the findings at [33] and [35] of the Decision are affected by legal error. That legal error constitutes acting on a wrong principle (ground 3) and gives rise to a failure to establish the necessary jurisdictional fact (ground 4). Accordingly, it is submitted that the Decision is affected by error and should be set aside."

[90] In *Director of Public Prosecutions v Zierk* (2008) 184 A Crim R 582 at [18] Warren CJ observed that:

> "On the authorities, the meaning of 'duty' is dependent upon the context in which it is used. It may refer to a legal duty: an obligation to act, imposed by law, and

> generally mandatory; or, it may refer to the functions of an office. Whether the office-bearer performs the functions, and in what manner, is generally discretionary…"

[91] In my view, in the context of s 444(1) of the *Mental Health Act* 2000, the reference to "the member's duties" is, properly construed, a reference to the functions of the position held by the member.

[92] This construction is supported by the High Court's decision in *Herscu v The Queen* (1991) 173 CLR 276, which in turn refers to passages from two other cases, also supportive of this construction.

[93] One of those is the observation by McHugh JA in *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 524[49] that:

> "A public office holder assumes the burdens and obligations of the office as well as its benefits. By accepting appointment to the office, he undertakes to perform all the duties associated with that office and, as long as he remains in office, he must perform all its duties… The duties of a public office include those lying directly within the scope of the office, 'those essential to the accomplishment of the main purpose for which the office was created and those which, although only incidental and collateral, serve to promote the accomplishment of the principal purposes…"

[94] The other is a passage from the reasons of Dixon CJ in *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1 at 6,[50] where his Honour said:

> "… I think that the words 'except in the performance of any duty as an officer' ought to receive a very wide interpretation. The word 'duty' there is not, I think, used in a sense that is confined to a legal obligation, but really would be better represented by the word 'function'. The exception governs all that is incidental to the carrying out of what is commonly called 'the duties of an officer's employment'; that is to say, the functions and proper actions which his employment authorises."

[95] In *Herscu* the Court was concerned with the proper construction of the phrase, an act done "in the discharge of the duties of his office" in s 87 of the *Criminal Code* (Qld), for the purposes of the crime of official corruption. Herscu had been convicted of official corruption in circumstances where it was alleged he had caused $50,000 to be paid to the then Minister for Local Government and Main Roads (Hinze), for the

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[49] In the context of considering the scope of the duty(ies) of members of the Retail Trade Industrial Tribunal.

[50] In the context of a secrecy provision in the *Income Tax and Social Services Contribution Assessment Act* 1936 (Cth) which provided that "An officer shall not either directly or indirectly, except in the performance of any duty as an officer, and either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any such information so acquired by him".

purpose of having him attempt to ensure that the Council approved changes to a planning consent proposed by a developer of a particular shopping centre. The question was whether an attempt by the Minister to secure the approval of the changes could, as a matter of law, be regarded as an act done "in the discharge of the duties of his office".

[96] It was common ground that there was no specific power given to the Minister to amend or make representations concerning the alteration of conditions attaching to a planning consent. Hinze therefore had no statutory duty either to amend or to consider an application for amendment to the conditions. In appealing his convictions, Herscu argued that because the Minister lacked any power as a matter of law to require the Council to alter the planning consent conditions, he could be under no duty to do so, and so his attempt to procure a change was not an act done in the discharge of the duties of his office as Minister.

[97] In *Herscu* the majority (Mason CJ, Dawson, Toohey and Gaudron JJ), after referring to the wide-ranging powers given to the Minister, none of which conferred power to amend the planning consent conditions, said (at 281-282):

> "Although these specific provisions are an indication of the breadth of the responsibilities of the Minister, **they do not express the limits of the functions imposed upon him by the office which he held**. He was charged with the business connected with local government matters and with the administration of the relevant legislation; he bore individual ministerial responsibility for the supervision and control of his department. For these purposes, he was **clothed with general authority in addition to the powers specifically conferred by statute**. As McHugh JA observed in *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* …. [see above]
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> Whilst it is possible to point to particular statutory functions which may be regarded as imposing a duty upon the Minister, these by no means exhaust the whole of his executive or administrative responsibilities. Conferred upon him by his office were many other functions of a general as well as a particular kind. It is hardly likely that s 87 was aimed against the corrupt performance by public officials of the responsibilities of their office only where a specific statutory duty could be identified and not otherwise. There is, moreover, nothing in the section which requires it to be construed in that way. In the context of s 87 the phrase 'duties of his office' may be read, as it ought to be, in the sense of 'functions of his office'. The words of Dixon CJ ... in *Canadian Pacific Tobacco Co Ltd v Stapleton* are apposite … [see above]
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> … We think that it is apparent … that an act of a public official, or at all events a Minister, can constitute an act 'in the discharge of the duties of his office' when he **performs a function which it is his to perform, whether**

> **or not it can be said that he is legally obliged to perform that function in a particular way or at all**."[51]

[98] In separate reasons, also rejecting the narrow construction contended for by Herscu, Brennan J said (at 287):

> "In ordinary speech, 'the discharge of the duties' of the holder of a public office connotes far more than performance of duties which the holder of the office is legally bound to perform: rather the term connotes the performance of the functions of that office. The functions of an office consist in the things done or omitted which are done or omitted in an official capacity… A broad interpretation of s 87 is better adapted to effect its purpose than a narrow interpretation. When the office is such that the holder wields influence or is in a position to wield influence in matters of a particular kind, the wielding of influence in a matter of that kind is a discharge of the duties of the office. Such a wielding of influence is something done in an official capacity."

[99] In my view, the same reasoning applies to the proper construction of "the member's duties" where it appears in s 444(1)(a) and (b). The phrase connotes the performance of the function of the office of a member of the tribunal, including as in this case the president of the tribunal. To give "the member's duties" the narrow construction contended for by the applicant – as limited only to legal duties imposed by the Act – would fail to give effect to the purpose of the provision, which is to confer on the Governor in Council a discretionary power to terminate a member's appointment in particular circumstances, calling into question the capacity and ability of the member to perform their functions as a member. If s 444 was confined to duties expressly conferred on the member by the Act, as opposed to the performance of their functions more broadly, its application would be curtailed in a manner inconsistent with its evident purpose.

[100] When regard is had to the functions of the president of the tribunal, as informed by the express legislative provisions referred to above, and the position description authorised by the applicant, there is no error in acting on the basis that the failure of the applicant to notify the Minister of Ms Roche's ineligibility to be appointed as a member occurred in the performance of the applicant's duties, for the purposes of s 444(1)(b). Having regard to the functions of the president (see for example paragraph [80] above), and the fact that it is the Governor in Council, acting upon the advice of the Minister, who has the power and responsibility for appointing (and terminating the appointment of) members, that conclusion cannot be described as illogical or irrational.

Ground 5

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[51] Emphasis added.

[101] Ground 5 contends that the decision-maker acted in excess of the jurisdiction conferred by s 444 of the Act by purporting to terminate the applicant's appointment in circumstances where the necessary jurisdictional fact had not been established because the conclusion that the failure to notify the Minister of Ms Roche's ineligibility amounted to the performance of his duties as president in a manner that was careless, incompetent or inefficient was illogical or irrational "because:

(i) on 4 August 2016, upon being aware of Ms Roche's ineligibility the applicant immediately prevented her from sitting as a member of the Tribunal;

(ii) on 8 August 2016 the applicant referred the matter to the Crime & Corruption Commission;

(iii) on 24 November 2016, the applicant informed the Ethical Standards Unit of the Department of Health of Ms Roche's ineligibility;

(iv) on 15 December 2016, the President notified Mr Mark Tuohy from the Office of Health Statutory Authorities, within the Department of Health, of Ms Roche's ineligibility to have been appointed; and

(v) on 16 December 2016, Mr Tuohy advised the applicant that it was a matter for the Tribunal to seek advice on and the Department would not assist in resolving the matter."

[102] This ground relates to the finding at [34] and [35] of the statement of reasons, that the applicant's failure to notify the Minister of Ms Roche's invalidity was careless, incompetent or inefficient. The applicant submits that the "difficulty" with the finding is that "it ignores the evidence of the steps taken by the applicant after he became aware of the issue" (being those matters identified in (i) to (v) above). Further, the applicant submits that:

> "69. Most importantly though, the Decision does not deal with the fact that on 16 December 2016, the Departmental officers informed the Tribunal that the Department would not be assisting in the obtaining of legal advice and that any advice and/or possible solutions were a matter for the Tribunal. This is directly inconsistent with the stated reason for his termination of the applicant's appointment. As a matter of logic it cannot be that in December 2016 it was a matter for the Tribunal to resolve and that the Department would not take any active steps in the matter until after the Tribunal had determined what to do and that, now, the applicant was inefficient, careless and incompetent for not referring it to the Department sooner.
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> 70. Consistent with the approach of Gummow ACJ and Kiefel J in *SZMDS*, the Decision was illogical because it does not explain how

> the two seemingly inconsistent states of affairs could co-exist. That is, the Decision does not logically explain how it could be that the Department wanted to have no role in the matter because it was the Tribunal's responsibility to resolve the issue, but that the President was careless, incompetent or inefficient by trying to resolve the issue and not referring the matter to the Minister."

[103] I do not accept the submission that the decision-maker "ignored" the steps taken by the applicant after he became aware of the issue of Ms Roche's ineligibility. That the decision-maker did have regard to these steps is apparent from [23]-[29] of the statement of reasons.

[104] As to the point next made by the applicant, having regard to the evidence of Mr Kerdel and Ms Heywood, I do not accept that there was such an inconsistency. It was not the case that the department wanted to have no role in the matter; but rather that the Minister was taking independent advice, from the Solicitor-General.

[105] More broadly, ground 5 challenges the formation of the opinion required by s 444(1)(b) – that the applicant performed his duties carelessly, incompetently or inefficiently – as illogical or irrational because of the steps taken by the applicant subsequent to becoming aware of Ms Roche's ineligibility. The applicant's contention is that by taking those steps he was acting with care, competently and efficiently; and it is illogical or irrational (unreasonable) to conclude that his failure to notify the Minister of Ms Roche's ineligibility immediately after he became aware was otherwise.

[106] In my view, the conclusion reached by the decision-maker has not been shown to be illogical or irrational; nor to be attended by legal unreasonableness. I have referred above to the function of the president, among other things, including the overall management of the tribunal. But it is the Governor in Council who appoints members, on the recommendation of the Minister. Therefore, when an issue arises in relation to the eligibility of a member, such as in the case of Ms Roche, it is entirely reasonable to expect that would immediately be raised with the Minister. Perhaps the clearest basis on which to conclude that there was a responsibility upon the applicant, as president of the tribunal, to immediately inform the Minister of the issue concerning Ms Roche's eligibility for appointment as a lawyer member of the tribunal is s 444(2)(a), which identifies, as a circumstance in which the Governor in Council *must* terminate the appointment of a member, if the member ceases to be eligible for appointment as a member. There is no discretion involved; it is a mandatory obligation on the Governor in Council.

[107] The steps the applicant took after he became aware of Ms Roche's ineligibility were not with a view to determining whether or not that was correct. That became immediately apparent, when the applicant asked her on 3 August 2016 to supply a copy of her certificate of admission, and she said she had never been admitted. There was no question, at that point, that Ms Roche was not eligible for appointment as a member.

The steps taken by the applicant in the subsequent three and a half months, before advising Mr Tuohy of the issue, were directed to what may colloquially be described as "damage control". That is: make sure she does not continue to sit as a member; check whether other members may also be ineligible; obtain advice about how to retrospectively address potential invalidity associated with decisions made by Ms Roche; consider the impact on patients; obtain advice about how to manage any media attention. Those are no doubt all valid and important things to do. But fundamentally, the first thing to do was to alert the Minister, who in turn would be obliged to advise the Governor in Council given the mandatory terms of s 444(2)(a).

[108] It may be fair to say that reasonable minds might differ about the outcome of, or justification for, the exercise of the discretionary power conferred on the Governor in Council under s 444(1)(b) in this case. It may have been open to form the opinion that the failure to notify the Minister immediately was not incompetent, inefficient or careless. However, there is an evident, transparent and intelligible justification for the decision. The formation of the opinion that the applicant's conduct, in failing to immediately notify the Minister once Ms Roche's "non-qualification" became apparent, was incompetent, inefficient and careless, was based on findings of fact supported by logical grounds. That logical, rational or reasonable minds might differ as to the conclusion to be drawn from the conduct in all the circumstances does not provide a basis for setting aside the decision on the ground contended.

Ground 6

[109] Ground 6 contends that the decision-maker erred as a matter of law because the exercise of the discretion conferred by s 444 of the Act was so unreasonable that no reasonable person could have come to that decision in the circumstances.

[110] This ground focuses upon the discretionary power conferred on the Governor in Council by s 444(1), once the state of satisfaction has been reached, to terminate the member's appointment.

[111] It follows from what I have said in relation to the previous grounds that I am not persuaded that this ground has been made out either. Although the decision to terminate the applicant's appointment may be one in respect of which reasonable minds might differ, the outcome falls within the range of legally and factually justifiable outcomes. There is an evident, transparent and intelligible justification for the decision, which falls within the area of decisional freedom of the decision-maker. It was not unreasonable in the relevant sense.

Orders

[112] For the reasons above, none of the grounds of review relied upon by the applicant have been made out and it follows that the application must be dismissed.

[113] I will hear the parties as to costs.