IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2013 04529

XX — Plaintiff

v

WW and MIDDLE SOUTH AREA MENTAL HEALTH SERVICE — Defendants

JUDGE:	McDONALD J
WHERE HELD:	Melbourne
DATE OF HEARING:	7, 8 and 10 October 2014, 11 November 2014
DATE OF JUDGMENT:	17 December 2014
CASE MAY BE CITED AS:	XX v WW and Middle South Area Mental Health Service
MEDIUM NEUTRAL CITATION:	[2014] VSC 564 First Revision: 17 December 2014

ADMINISTRATIVE LAW — *Mental Health Act 1986* (Vic) — Involuntary treatment order — Whether order ultra vires — Power to grant declaratory relief where order discharged by Mental Health Review Board — Whether order unlawful pursuant to s 38 of *Charter of Human Rights and Responsibilities Act 2006*; *Mental Health Act 1986* ss 4(1)(2), 6A, 8(1), 9, 12AA, 12AC, 21, 24, 29, 36, 123, 124, 126; *Charter of Human Rights and Responsibilities Act 2006* ss 4(1), 7(2), 10(1)(c), 12, 21(1)-(3), 32, 38.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms N Karapanagiotidis	Victorian Legal Aid
For the Defendants	Ms J M Davidson with Mr A Solomon-Bridge	Monash Health

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HIS HONOUR:

Introduction and background

1 At 12:45pm on 27 August 2013 a Mental Health Review Board discharged an Involuntary Treatment Order ('ITO') pursuant to which the plaintiff had been detained and treated against her will in the acute psychiatric unit at Monash Medical Centre ('the Centre'). At about 4:30pm on the same day, the first defendant recommended the making of a fresh ITO. The primary issue in the present proceeding is whether the first defendant could lawfully make this recommendation, which had the effect of continuing the detention and treatment of the plaintiff against her will. Whether the first defendant's recommendation for the making of an ITO was unlawful requires consideration of the provisions of the *Mental Health Act 1986* ('the Act') as well as the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter'). It is to be noted that the Act was repealed and replaced by the *Mental Health Act 2014*, which came into force on 1 July 2014.

2 On 12 August 2013, the plaintiff was admitted as a voluntary patient to 'P Block', the acute adult psychiatric inpatient unit at the Centre ('P Block'). At that time, the first defendant was a registered medical practitioner ('RMP') employed by the second defendant, working at the Centre. The first defendant undertook his first year of medical practice in 2013 as an Intern. In August and September of that year, in his capacity as an Intern, the first defendant was working in P Block.

3 As at August 2013, the plaintiff suffered from bipolar effective disorder. The plaintiff had a significant history of self-harm, having jumped from the Bolte Bridge in April 2012, suffering serious physical injuries. On 19 August 2013, an ITO was made in respect of the plaintiff, requiring her to be detained and to receive involuntary psychiatric treatment in P Block. The ITO was made by Dr Hughes, a consultant psychiatrist who was the head of P Block.

4 The plaintiff appealed against the ITO to the Board pursuant to s 29(1)(a)(i) of the Act. The appeal was heard on 27 August 2013, concurrently with an initial review of

the plaintiff's ITO pursuant to s 30(1)(a) of the Act. At the conclusion of the hearing the Board discharged the ITO. The Board discharged the ITO because it considered that the criteria for involuntary treatment prescribed by s 8(1)(e) of the Act, namely, that a person cannot receive adequate treatment for the mental illness in a manner less restrictive of his or her freedom of decision and action, did not apply to the plaintiff. The Board considered that the plaintiff could receive adequate treatment as a voluntary patient under the care of her private psychiatrist. The Board made its determination to discharge the plaintiff's ITO at approximately 12.45pm on 27 August 2013.

5 There is some dispute between the parties as to the events following the discharge of the ITO at 12.45pm on 27 August 2013. However, the following matters are not controversial.

6 Following the Board's discharge of the ITO the plaintiff returned to the ward where she had hitherto been accommodated. At some point early in the afternoon the plaintiff advised staff in the ward that she was intending to leave the ward and to take up residence with a former employer, Mr Tony Busuttil. Mr Busuttil had been in attendance at the Board hearing which preceded the discharge of the ITO. It is not in dispute that during the course of the hearing before the Board there had been no reference to the prospect of the plaintiff taking up residence with Mr Busuttil. Rather, the plaintiff, through her solicitor, informed the Board that if discharged from the ITO she would immediately after reside with a friend, Arthur Zaff, with whom she had resided prior to her admission to hospital. During the hearing, the Board had asked the plaintiff about her relationship with Mr Zaff and whether her children would be able to visit her at his house.[1]

7 Following her return to the ward, the plaintiff called her sister-in-law who started organising an airline ticket for the plaintiff to fly to Queensland.[2] This development was not consistent with the position which had been put to the Board by the

1 Third further affidavit of Hamish McLachlan, affirmed 4 July 2014 [25].
2 Affidavit of XX, affirmed 29 August 2013 [7].

plaintiff's solicitor to the following effect:

> In the longer term she might relocate to Queensland, where she has other family support. She would ask her private psychiatrist to refer her to a psychiatrist in Queensland should she decide to move.[3]

8 At approximately 3.30pm on 27 August 2013, the plaintiff was assessed by a registered psychiatric nurse who was a member of a Mental Health Crisis and Assessment team. This assessment had been requested by the first defendant.

9 The notes taken by the registered psychiatric nurse at the time of the assessment are in evidence.[4] The notes record the following:

> Has made very poorly formed plans of ongoing accommodation that involve residing with a previous employer — no contact for five years and would be largely uninformed of the potential risks he would be moving into his home and taking responsibility for. No formalised follow up has been established. [XX] has currently impulsively formed plans of returning to QLD either with or without her children. She is unaware of the necessity to remain compliant with her prescribed medications or with the role medication plays in the maintenance of her mental health. In light of this, confirmed inpatient treatment for stabilisation of mental state and establishment of firm follow up would be recommended.

10 The registered psychiatric nurse told the first defendant that he considered that the plaintiff's mental state and personal circumstances made it unsafe for her to be treated as an outpatient.[5] The first defendant then contacted 'EK', the consultant psychiatrist responsible for the care of the plaintiff.

11 An urgent alert was provided to the Department of Human Services Child Protection Team regarding the risk of the plaintiff impulsively taking her children to Queensland. A social worker also contacted the plaintiff's husband, who had care of the children, to inform him of the possibility of the children being removed.[6]

12 At approximately 4.00pm on 27 August 2013, the first defendant made a recommendation for the plaintiff to be subject to an ITO. The recommendation, which is in a prescribed form, records the first defendant's opinion that the criteria

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3 Exhibit HM3-1 7.
4 Exhibit WW1 104-7.
5 Affidavit of WW, affirmed 1 June 2014 [32].
6 Ibid [36].

for involuntary treatment prescribed by s 8(1) of the Act applied to the plaintiff. The recommendation further records the following facts which the first defendant personally observed on his examination of the plaintiff to support the recommendation:

- irritable;
- verbally abusive;
- demanding to leave ward; and
- risk of absconding.[7]

13 The recommendation records the following facts which were communicated to the first defendant by the registered psychiatric nurse who assessed the plaintiff, in support of the recommendation:

> Via CATT clinician: tangential thought form with loosening of association. Impulsive with increased goal directed activity. Risk of non-compliance and relapse.[8]

14 At approximately 5.00pm EK conducted a review of the first defendant's assessment of the plaintiff. She confirmed the opinion of the first defendant that the plaintiff required involuntary treatment.[9]

15 A second opinion was obtained from Dr George Camilleri, a senior psychiatrist working in P Block. He interviewed the plaintiff on the morning of 28 August 2013 and concurred with the opinion of the first defendant that involuntary treatment was necessary.[10]

16 Dr Camilleri's notes of his assessment record the following:

> I believe [XX] should remain in hospital as an involuntary patient given that:
>
> 1. She refused to stay in hospital yesterday as a voluntary patient.
> 2. She has no accommodation.
> 3. Accommodation plans are unrealistic – Daylesford, Queensland,

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7 Ibid [38].
8 Ibid [38].
9 Affidavit of WW, affirmed 1 June 2013 [40].
10 Ibid [41]; Exhibit WW1 118-120.

friend.

4. History of impulsivity, including high lethality suicide attempt.

5. Risk to children's psychological welfare.

6. Family (parents) are very concerned that she is able to present well and then go off and do something very impulsive and risky, as she has a pattern of this in the past.

7. [XX] herself is not objecting to at least having properly planned accommodation prior to leaving.[11]

17 The first defendant gave the following unchallenged evidence:

> When I made the Involuntary Treatment Order under the provisions of the *Mental Health Act* on 27 August 2013, I was aware of the unusual nature of that action given that the Board had, only that morning, revoked the previous Involuntary Treatment Order. However, in light of the change in attitude of [XX] to staying in hospital, the clinical assessment made by the CATT clinician during the afternoon of 27 August, information obtained from the husband of [XX] by the social worker, which was communicated to me and what I and other members of the clinical treating team considered to be significant risks presented to the children of [XX] by her mental state, it was then (and remains) my view that it was appropriate to take the unusual step of re-recommending [XX] under an involuntary treatment order. In fact, given the risks [XX] posed to herself and others, particularly her children, I considered it my duty to do so.
>
> I refer to the Recommendation and Involuntary Treatment Order made by me on 27 August 2013, which form part of Exhibit [WW]-1 and specifically note paragraph 3(c) of the Recommendation which details one of the criteria which must be met pursuant to Section 8(1) of the *Mental Health Act 1986* to permit a Recommendation to be made, namely, that 'because of the person's mental illness, involuntary treatment of the person is necessary for his or her health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public'. There were so many complexities around the management of [XX's] Bipolar Affective Disorder from both a clinical and pharmacokinetic perspective that it was extremely challenging to endeavour to treat [XX] effectively even in the intensive environment of a specialised inpatient unit where medication could be micro-managed. I did not believe there was any realistic prospect of her medication being able to be adequately managed in the community. Further, only modest improvement had been achieved in her mental health such that she still presented a high risk to herself and her mental health was still unstable. Given the entire clinical picture and the community living arrangements proposed by [XX] and the clinical assessment of the CATT clinician, I have no doubt that her discharge from hospital on the afternoon of 27 August 2013 would have led to a precipitous decline in her mental health. EK was of the same opinion. We both agreed that [XX] met all five criteria specified in the Recommendation. The situation had altered significantly since the MHRB Hearing earlier that day.

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11 Exhibit WW1 118-120 (emphasis in original).

> I understand that one of the allegations made is that I did not properly consider [XX's] human rights under the *Charter of Human Rights and Responsibilities Act 2006*. I am not a lawyer and I did not specifically refer to that legislation. However, I was well aware that detaining someone in hospital and treating them against their will is only allowed to occur if the criteria in the *Mental Health Act* are met. I was also acutely aware of the fact that [XX] was mentally unwell and at risk of seriously harming herself, and of harming her children. I did not and would not have recommended [XX] for involuntary treatment simply because I disagreed with the Board's conclusion. I genuinely and firmly believed (and still do) that it was necessary to keep [XX] in hospital and treat her against her will in order to protect [XX] and her children from harm.[12]

18 On 29 August 2013, the plaintiff filed an originating motion seeking the following relief:

(a) A declaration that the first defendant's decision of 27 August 2013 to make a recommendation that the plaintiff receive involuntary treatment from an approved mental health service was unlawful.

(b) A declaration that the recommendation made by the first defendant on 27 August 2013 in respect of the plaintiff is invalid.

(c) A declaration that the involuntary treatment order made by the first defendant on 27 August 2013 in respect of the plaintiff is invalid.

(d) An order in the nature of prohibition prohibiting the second defendant from relying on the involuntary treatment order made by the first defendant on 27 August 2013 in respect of the plaintiff.

(e) Costs.

19 On 30 August 2013, the Board conducted an urgent initial review under s 30(1)(a) of the Act in relation to the ITO which had been made at approximately 4.30pm on 27 August 2013. The Board determined that the criteria in s 8(1)(a)(d) of the Act for involuntary treatment did apply but that the criteria in s 8(1)(e) did not apply. Consequently, the ITO which had been made on the afternoon of 27 August 2013 was discharged pursuant to s 36(2) of the Act.

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12 Ibid [43]-[45].

20 As a result of the decision of the Board on 30 August 2013 to discharge the ITO which had been made on 27 August 2013, the relief sought in paras (b) to (d) as set out at [18] above became otiose. On 22 May 2014, the plaintiff filed a second amended originating motion seeking relief confined to paragraphs 1 and 5.

Relevant statutory provisions

21 The primary issue for determination is the proper construction of s 9 of the Act pursuant to which the first defendant made the recommendation for the making of the ITO on 27 August 2013.

22 Having regard to the wide-ranging submissions which were advanced before the Court, it is necessary to set out in detail the provisions of the Act and the Charter which were the subject of submissions. The provisions of the Act to which reference was made are as follows:

> **4 Objects of Act**
>
> (1) The objects of this Act are—
>
> (a) to provide for the care, treatment and protection of mentally ill people who do not or cannot consent to that care, treatment or protection; and
>
> (ab) to facilitate the provision of treatment and care to people with a mental disorder; and
>
> (ac) to protect the rights of people with a mental disorder; and
>
> (b) to establish a Mental Health Review Board; and
>
> (c) to establish a Psychosurgery Review Board; and
>
> (d) to provide for the appointment and functions of community visitors; and
>
> (da) to establish a Victorian Institute of Forensic Mental Health; and
>
> (e) to ensure that people with a mental disorder are informed of and make use of the provisions of this Act.
>
> (2) It is the intention of Parliament that the provisions of this Act are to be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this

Act is to be exercised or performed so that—

(a) people with a mental disorder are given the best possible care and treatment appropriate to their needs in the least possible restrictive environment and least possible intrusive manner consistent with the effective giving of that care and treatment; and

(b) in providing for the care and treatment of people with a mental disorder and the protection of members of the public any restriction upon the liberty of patients and other people with a mental disorder and any interference with their rights, privacy, dignity and self-respect are kept to the minimum necessary in the circumstances.

…

6A Principles of treatment and care

It is the intention of Parliament that the following principles be given effect to with respect to the provision of treatment and care to people with a mental disorder—

(a) people with a mental disorder should be provided with timely and high quality treatment and care in accordance with professionally accepted standards;

(b) wherever possible, people with a mental disorder should be treated in the community;

(c) the provision of treatment and care should be designed to assist people with a mental disorder to, wherever possible, live, work and participate in the community;

…

8 Criteria for involuntary treatment

(1) The criteria for the involuntary treatment of a person under this Act are that—

(a) the person appears to be mentally ill; and

(b) the person's mental illness requires immediate treatment and that treatment can be obtained by the person being subject to an involuntary treatment order; and

(c) because of the person's mental illness, involuntary treatment of the person is necessary for his or her health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public; and

(d) the person has refused or is unable to consent to the necessary treatment for the mental illness; and

(e) the person cannot receive adequate treatment for the mental illness in a manner less restrictive of his or her freedom of decision and action.

Note
In considering whether a person has refused or is unable to consent to treatment, see section 3A.

…

9 Request and recommendation for involuntary treatment

(1) The documents required to initiate the involuntary treatment of a person are—

(a) a request in the prescribed form and containing the prescribed particulars; and

(b) a recommendation in the prescribed form by a registered medical practitioner following a personal examination of the person.

(2) A request may be signed before or after a recommendation is made.

(3) A registered medical practitioner must not make a recommendation under subsection (1) unless he or she considers that—

(a) the criteria in section 8(1) apply to the person; and

(b) an involuntary treatment order should be made for the person.

(4) A request and recommendation have effect for 72 hours following the examination of the person by the registered medical practitioner who made the recommendation.

(5) While they have effect, a request and recommendation made in accordance with this section are sufficient authority for a person referred to in subsection (6) to—

(a) arrange for the assessment of the person to whom the recommendation relates by a registered medical practitioner employed by an approved mental health service or a mental health practitioner; or

(b) take the person to whom the recommendation relates to an appropriate approved mental health service.

(6) The persons who may take action under subsection (5) are—

(a) the person making the request; or

(b) a person authorised by the person making the request; or

(c) a prescribed person.

…

12AA Involuntary treatment orders—persons in approved mental health services

(1) This section applies if—

(a) a request and recommendation have been made for a person; and

(b) the person has been taken to, or is in, an approved mental health service.

(2) A registered medical practitioner employed by the approved mental health service or a mental health practitioner must make an involuntary treatment order for the person.

…

12AC Examination by authorised psychiatrist

(1) If an involuntary treatment order is made for a person, the authorised psychiatrist must examine the person—

(a) if section 12(5) or 12AA(6) applies—as soon as practicable after the order is made, but in any case within 24 hours after the order is made; or

(b) otherwise—within 24 hours after the order is made.

(2) On examining the person under subsection (1)—

(a) if the authorised psychiatrist considers that the criteria in section 8(1) do not apply to the person—the authorised psychiatrist must discharge the person from the order;

(b) if the authorised psychiatrist is satisfied that the criteria in section 8(1) apply to the person—the authorised psychiatrist must confirm the order.

…

(6) A registered medical practitioner who has made a recommendation under section 9 in respect of a person must not examine the person under this section.

…

23 Section 21 of the Act established a Board known as the Mental Health Review Board. Pursuant to s 22(1)(a) and (b) of the Act the functions of the Board included the hearing of appeals by or on behalf of involuntary patients, and reviewing

periodically the orders made for involuntary patients and their treatment plans. Pursuant to s 22(2), the Board was required when determining any review or appeal to have regard primarily to the patient's current medical condition and consider the patient's medical and psychiatric history and social circumstances.

24 The procedure of the Board was prescribed by s 24:

> (1) The Board—
>
> (a) must, in hearing any matter, act according to equity and good conscience without regard to technicalities or legal forms; and
>
> (b) is bound by the rules of natural justice; and
>
> (c) is not required to conduct any proceedings in a formal manner.
>
> (2) Schedule 2 has effect with respect to the procedure of the Board.
>
> (3) The Board is not bound by rules or practice as to evidence but may inform itself in relation to any matter in such manner as it thinks fit.
>
> (4) Evidence before the Board—
>
> (a) may be given orally or in writing or partly orally and partly in writing; and
>
> (b) may be given—
>
> (i) on oath or affirmation; or
>
> (ii) by declaration instead of an oath where permitted by law.
>
> (5) A member of the Board may administer an oath or take an affirmation or declaration for the purposes of this Act.
>
> (6) Evidence given before the Board cannot be used in any civil or criminal proceedings other than proceedings for an offence against this Act or for perjury.
>
> (7) The Board may of its own motion or on the application of any party to the proceedings before it direct the executive officer to serve upon any person a summons to appear before the Board to give evidence or to produce such documents as are specified in the summons.
>
> (8) The Board may make an order for the manner of service, including substituted service, of a summons under subsection (7).
>
> (9) A person who without lawful excuse disobeys a summons of the Board is guilty of an offence.
>
> Penalty: 5 penalty units.

25 Pursuant to s 29(1)(a)(i) and (ii) of the Act, an appeal could be made at any time by an involuntary patient against his/her ITO or against his or her continued detention under s 12A(4) or 12C. Pursuant to s 29(4) the Board was required to commence the hearing of an appeal without delay.

26 Pursuant to s 30(1)(a) of the Act, the Board was required to conduct an initial review of an ITO within eight weeks after the order was made. Pursuant to s 30(3)(a), the Board was required to conduct a periodic review of an ITO at intervals not exceeding 12 months following the initial review. Pursuant to s 31, the Board could conduct more than one appeal or review, or both, in respect of the same person concurrently.

27 Section 36 prescribed the powers of the Board on appeal or review of ITOs:

> **36 Power of Board on appeal or review of involuntary treatment orders—patients who are detained**
>
> (1) This section applies on an appeal or review for a patient who is detained in an approved mental health service under an involuntary treatment order.
>
> (2) If the Board considers that the criteria in section 8(1) do not apply to the patient, the Board must order that the patient be discharged from the involuntary treatment order.
>
> (3) If the Board is satisfied that the criteria in section 8(1) apply to the patient, the Board must confirm the involuntary treatment order.
>
> (4) If the Board confirms the involuntary treatment order, the Board may order the authorised psychiatrist to make a community treatment order for the patient within a reasonable period specified by the Board, if the Board considers that the treatment required for the person can be obtained through the making of a community treatment order.

28 The power of a RMP to recommend an ITO was subject to a range of procedural requirements under ss 123 and 124 of the Act. A failure to comply with these requirements exposed the RMP to potential liability for a finding of professional misconduct:

> **123 Registered medical practitioner to specify facts**
>
> (1) A registered medical practitioner who signs any

recommendation or certificate in connection with the making of an involuntary treatment order or the admission of any person to an approved mental health service must—

(a) specify the facts upon which the opinion that the person to whom the recommendation or certificate relates is mentally ill is based; and

(b) distinguish the facts personally observed from—

(i) facts not personally observed; and

(ii) facts communicated to the registered medical practitioner by any other person.

(2) A person may be made subject to an involuntary treatment order or admitted to an approved mental health service on a recommendation or certificate which relies upon facts not personally observed by the registered medical practitioner if the registered medical practitioner—

(a) has reasonable grounds for relying on those facts; and

(b) has—

(i) personally observed some fact which supports the recommendation or certificate; or

(ii) relied upon facts personally observed by another registered medical practitioner within 28 days of the recommendation or certificate and communicated directly by that registered medical practitioner to the registered medical practitioner signing the recommendation or certificate.

(3) If the registered medical practitioner signing the recommendation or certificate has relied upon the facts of the kind specified in subsection (2)(b)(ii) the recommendation or certificate must specify the name and address of the other registered medical practitioner.

124 Recommendation or certificate not to be signed without examination

(1) A registered medical practitioner who signs a recommendation or certificate in connection with the making of an involuntary treatment order or the admission of any person to an approved mental health service without complying with section 123 is guilty of professional misconduct unless the registered medical practitioner satisfies the Medical Board of Australia that there were valid reasons for doing so.

(2) A registered medical practitioner who wilfully and falsely states in writing that any person is mentally ill is guilty of

> professional misconduct unless the registered medical practitioner satisfies the Medical Board of Australia that there were valid reasons for doing so.
>
> …

29 A RMP could also be liable for a finding of professional misconduct pursuant to s 126(1) of the Act:

> **126 Offences in relation to recommendations or certificates**
>
> (1) A registered medical practitioner who wilfully and falsely states or certifies anything in a recommendation or certificate in connection with the making of an involuntary treatment order or the admission of any person to an approved mental health service is guilty of professional misconduct unless the registered medical practitioner satisfies the Medical Board of Australia that there were valid reasons for doing so.
>
> …

Relevant provisions of the Charter

30 Section 4(1)(a) of the Charter provides that for the purposes of the Charter, a public authority is a public official within the meaning of the *Public Administration Act 2004*. It was an agreed matter between the parties that the first defendant, by virtue of his employment with the second defendant, was a public official for the purposes of the Charter.

31 Section 7(2) of the Charter provides:

> (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
>
> …

32 Section 10(1)(c) of the Charter provides, inter alia, that a person must not be subjected to medical treatment without his or her full, free and informed consent.

33 Section 12 of the Charter provides that every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

34 Section 21(1) to (3) of the Charter provides:

> **21 Right to liberty and security of person**
>
> (1) Every person has the right to liberty and security.
>
> (2) A person must not be subjected to arbitrary arrest or detention.
>
> (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
>
> …

35 Section 32 of the Charter provides:

> **32 Interpretation**
>
> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
>
> (3) This section does not affect the validity of—
>
> (a) an Act or provision of an Act that is incompatible with a human right; or
>
> (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

36 Section 38(1) of the Charter provides:

> **38 Conduct of public authorities**
>
> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

> Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> …

37 Section 39(1) of the Chatter provides:

> **39 Legal proceedings**
>
> (1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.
>
> …

Does the court have power to grant the declaratory relief sought by the plaintiff?

38 The defendants submitted that the court should decline to grant the declaratory relief sought by the plaintiff, not simply by reason of discretionary considerations, but because there is no power for the court to grant the relief. There are two bases upon which the defendants contended that the court does not have power to grant the declarations sought by the plaintiff. First, because the plaintiff is seeking declaratory relief in respect of a recommendation which is no longer operative. Second, because the plaintiff seeks declaratory relief in circumstances that can produce no foreseeable consequence.

39 As to the first basis, the defendants submitted that the recommendation made by the first defendant on the afternoon of 27 August 2013 had been rendered nugatory by reason of the Board discharging the ITO in the exercise of the power conferred upon it by s 36(2) of the Act. The defendants submitted that where a determination of the Board has superseded an ITO made under s 12AA of the Act, and a request and recommendation made under s 9, declaratory relief cannot, as a matter of power, be granted. The defendant submitted that, if it were otherwise, an order of the Board *confirming* an ITO would forever have been contingent upon there being no successful challenge by judicial review of the s 12AA decision, or the s 9 request and recommendation.

40 In support of this submission, the defendants relied upon the judgment of the New South Wales Court of Appeal in *Vitaz v Westform (NSW) Pty Ltd*.[13] In *Vitaz*, the plaintiff sought judicial review of both a medical assessment certificate given by an approved medical specialist in accordance with the *Workplace Injury Management and Workers Compensation Act 1988* (NSW) ('WIMWC Act'), and an Appeal Panel's decision dismissing the appeal from the assessment. The Court of Appeal held that the supervisory jurisdiction of the New South Wales Supreme Court did not extend to judicial review of the original medical assessment. The court cited with approval the judgment of the High Court in *Wishart v Fraser*[14] in which it was held that it was not open to a defendant to challenge the conviction and order of a magistrate where the conviction was affirmed by a court of Quarter Sessions. Starke J stated as follows:

> If the court of Quarter Sessions had reversed the decision of the stipendiary magistrate, its judgment would have held 'the field to the exclusion' of the conviction of the stipendiary magistrate. And when the Quarter Sessions affirmed the conviction, its judgment was equally conclusive, for it operated as a judicial determination by a competent and higher authority that the conviction was right… that judgment therefore holds the field so long as it stands unreversed, and precludes this court making any judicial determination to the contrary.[15]

41 In *Vitaz*, Baston JA, having referred to the passage set out above, stated:

> The authorities with respect to judicial proceedings support the conclusion that an order 'confirming' a certificate, may constitute the exclusive authority for the decision under review. A similar conclusion should be accepted by reference to the statutory scheme in respect of a decision of an Appeal Panel, being a body exercising judicial functions. It would follow that a challenged by way of judicial review to the decision of the specialist is incompetent where there has been an appeal to an Appeal Panel.[16]

42 At para 53, Baston JA stated as follows:

> Whether relief can lie against the original decision-maker where there has been an independent review of his or her decision, on the merits, will depend upon the obligations said to have been breached and the nature of the statutory scheme.

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13 [2011] NSWCA 254 ('*Vitaz*').
14 [1941] 64 CLR 470 ('*Wishart*').
15 Ibid [478].
16 [2011] NSWCA 254 [20].

43 Pursuant to ss 327(1), (3)(c) and (d) of the WIMWC Act and an appeal from an approved medical specialist's assessment could be brought on grounds that the assessment was made 'on the basis of incorrect criteria' or that the certificate contained 'a demonstrable error'. Baston JA considered that the reference to 'demonstrable error' allowed a reasonably broad scope for an appeal.[17]

44 The judgment of the New South Wales Court of Appeal in *Vitaz* does not support the defendants' contention that by reason of the Board discharging the ITO which was made on the afternoon of 27 August 2013, the court has no power to entertain the plaintiff's application for declaratory relief. First, the proceeding in *Vitaz* was an application for judicial review. Although the present proceedings were commenced by way of an application for judicial review, by the time the proceedings were heard the only relief sought by the plaintiff was for the grant of a declaration that the first defendant's recommendation for the making of an ITO was unlawful.

45 The court's jurisdiction to make a binding declaration of right without granting consequential relief arises pursuant to s 85 of the *Constitution Act 1975* read in conjunction with s 36 of the *Supreme Court Act 1986*. A declaration is not an equitable remedy. It is a statutory remedy that is conferred in terms emphasising that its grant or refusal is within the discretion of the court.[18] Further, the court's power to grant declaratory relief can be enlivened in circumstances where no power exists to grant relief in the nature of mandamus and certiorari. This is clear from the High Court's judgment in *Ainsworth v Criminal Justice Commission*.[19] In this case, the High Court held there was no power to grant certiorari or mandamus in respect of a report prepared by the Criminal Justice Commission. Although the report had been prepared in breach of the rules of procedural fairness, there was no legal effect attaching to the report. However, the court did grant a declaration that in preparing the report the Criminal Justice Commission had failed to observe the requirements of

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17 Ibid [16].

18 *AWB Ltd v Cole and Anor* (No2) (2006) 233 ALR 453 [45], [46]. See also *Ambridge Investments Pty Ltd (in liq) (receiver appointed) v Baker and ors* [2010] VSC 59 [61]-[73].

19 (1992) 175 CLR 564 ('*Ainsworth*').

procedural fairness.[20]

46 The second point of distinction between the present proceedings and those which were before the New South Wales Court of Appeal in *Vitaz* is that the statutory scheme pursuant to which the Board discharged the ITO on 30 August 2013 is significantly different from the statutory scheme considered by the New South Wales Court of Appeal. In particular, the Board was not engaged in the task of reviewing, on the merits, whether the first defendant should have recommended the making of an ITO on 27 August 2013. It is clear from the terms of s 36 of the Act, read in conjunction with s 22(2), that a review or an appeal to the Board does not involve any assessment of the initial recommendation for the making of an ITO. Rather, it involves an assessment of whether or not the criteria in s 8(1) apply to the patient at the time of the review or appeal. The decision of the Board on 30 August 2013 that the criteria in s 8(1)(e) of the Act were not applicable to the plaintiff did not, in the words of Starke J in *Wishart*, cover "the field to the exclusion" of the decision of the first defendant on 27 August 2013.[21] The two decisions were discrete, as they considered the application of the criteria in s 8(1) at different points in time.

47 The second basis upon which the defendants contend that the court has no power to grant the declaratory relief sought by the plaintiff, is that there is no foreseeable consequence arising from the relief sought. This contention seeks to elevate matters which are discretionary considerations, as constituting a bar to the exercise of power. The contention is misconceived. It is uncontroversial that if there is no foreseeable consequence flowing from the grant of declaratory relief, this is a powerful consideration weighing against the grant of such relief.[22] However, the question of whether there is a foreseeable consequence is a matter properly to be taken into account in determining whether to exercise the power to grant a declaration. It is not, of itself, a bar to the existence of the power to grant declaratory relief.

48 For the reasons set out above, the plaintiff's proceeding, in which she seeks

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20 Ibid [581]-[582].
21 [1941] 64 CLR 470, 478.
22 *Ainsworth* (1992) 175 CLR 564, 582.

declaratory relief, is competent.

Did the first defendant have power to make a recommendation for an ITO on 27 August 2013?

49 The plaintiff submits that the first defendant acted ultra vires in making a recommendation in respect of the plaintiff for an ITO on 27 August 2013. The plaintiff submits that, properly construed, there was no power conferred upon the first defendant to make the recommendation in circumstances where the Board had, at approximately 12.45pm on 27 August 2013, discharged a pre-existing ITO. The plaintiff's contention is as per para 66 of her written submissions dated 15 July 2014:

> Accordingly, the plaintiff submits that s 9, properly construed, did not permit a registered medical practitioner to make a recommendation in respect of a patient whose discharge has been ordered by a decision of the Board, of which the registered medical practitioner was aware, unless the registered medical practitioner has formed the reasonable and good faith opinion that he or she had information not known to the Board which put a significantly different complexion on the case as compared with that which was before the Board ('contended limitation').

50 During the course of the proceedings, the plaintiff's counsel clarified that the contended limitation was not advanced simply on the basis that the power conferred upon a RMP to recommend an ITO should be read down. Rather, the plaintiff's counsel submitted that the words of the contended limitation should be read into s 9 following on from s 9(3)(b).[23] In response to questioning from the Court as to exactly how the plaintiff advanced her case in respect of the construction of s 9 of the Act, counsel submitted that s 9 should be read as including s 9(3)(c) in the following terms:

> A registered medical practitioner is not permitted to make a recommendation in respect of a patient whose discharge has been ordered by a decision of the Board of which the registered medical practitioner was aware, unless the registered medical practitioner has formed the reasonable and good faith opinion that he or she had information not know to the Board, which put a significantly different complexion on the case, as compared to that which was before the Board.[24]

51 As set out earlier in this judgment, the first defendant gave unchallenged evidence

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23 T363, L21–T364,L5; T377, L5–T378, L11.

24 T377, L16–T378, L11.

that at the time of recommending an ITO on 27 August 2013, he genuinely and firmly believed that it was necessary to keep the plaintiff in hospital and to treat her against her will in order to protect her and her children from harm. The plaintiff's counsel submitted that — irrespective of any strongly held view of a RMP regarding the necessity for an ITO to protect the welfare of a patient and that of a patient's immediate family — if a Board discharges an ITO, the RMP must respect the Board's decision because the Board is an expert, independent body.[25]

52 Counsel submitted that the scheme of the Act is such that where the Board discharges an ITO and there is no relevant change in circumstances, the professional obligations and duties of the relevant treating practitioners must give way to the decision of the Board. Counsel submitted that the Board would serve no purpose if its decision could be overridden simply because a doctor disagreed with it.[26] The plaintiff's submission that absent the contended limitation, there would be an absurd result whereby the appeal regime could be rendered nugatory, resonated with the reasoning of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*.[27] The submission is also supported by the reasoning of Gibbs J in *Buck v Bavone*[28] that where an authority is vested with a wide discretion, the exercise thereof can be set aside if the authority has acted arbitrarily or capriciously. Neither of these propositions can be gainsaid. If a RMP, aware that an ITO has been discharged by the Board, proceeded to issue a new ITO simply because he disagreed with the decision of the Board, and absent a belief that there had been some change in circumstances, it would be strongly arguable that each of the principles referred to above would be enlivened. However, this conclusion, of itself, does not provide any warrant for the insertion of the contended limitation into s 9(3).

R (Von Brandenburg) v East London and the City Mental Health NHS Trust

53 The plaintiff submitted that 'the contended implied limit on the power in s 9 is

25 T353, L6–19.
26 T354, L15–T355, L21.
27 (1981) 147 CLR 297, 320-1.
28 (1976) 135 CLR 110 [118].

derived from the test set out by the House of Lords in *R (Von Brandenburg) v East London and the City Mental Health NHS Trust*,[29] which considered the same issue that arises in this case under the analogous English legislation'.[30] Judgment in *Von Brandenburg* was delivered on 13 November 2003. Section 9 of the Act, as it was on 30 June 2014 when the Act was repealed, was inserted into the Act by the *Mental Health (Amendment) Act 2003* ('2003 Act'). The 2003 Act came into operation on 6 December 2004. This is more than 12 months after judgment was delivered in *Von Brandenburg*. However, the *Mental Health (Amendment) Bill* received Royal Assent on 21 October 2003, prior to judgment being delivered in *Von Brandenburg*. Section 7 of the Bill in the form in which it received Royal Assent is identical to s 9 of the Act from the date of its operative effect.

54 The plaintiff's submission that the contended limitation is to be read into s 9, would require a finding that the limit formed part of s 9 from the day it commenced operation. Plainly, there is a logical flaw in the proposition that s 9 contained a limit derived from a judgment which post-dated the passage of the Act through parliament. Putting to one side this practical impediment to the plaintiff's reliance on *Von Brandenburg*, the legislative scheme the subject of the House of Lord's judgment is readily distinguishable from the Act.

55 In *Von Brandenburg* a Mental Health Review Tribunal, established under the provisions of the *Mental Health Act 1983* (UK) ('UK Act'), had ordered the appellant be discharged from hospital within seven days. The day before the seven day period expired, an approved social worker (ASW) applied to have the appellant re-admitted to hospital. The appellant sought judicial review of this decision. Lord Bingham of Cornwall, who delivered the lead judgment of the court, stated as follows:

> An ASW may not lawfully apply for the admission of a patient whose discharge has been ordered by the decision of a Mental Health Review Tribunal of which the ASW is aware unless the ASW has formed the reasonable and bona fide opinion that he has information not known to the tribunal which puts a significantly different complexion on the case as

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29 [2004] 2 AC 280 ('*Von Brandenburg*').

30 Plaintiff's written submissions dated 15 July 2014 [68].

compared with that which was before the tribunal.[31]

56 His Honour also stated:

> Fourthly, the rule of law requires that effect should be loyally given to the decisions of legally constituted tribunals in accordance with what is decided. It was clearly established by the House in *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370 that a Mental Health Review Tribunal is a court to which the law of contempt applies. It follows that no one may knowingly act in a way which has the object of nullifying or setting at naught the decision of such a tribunal. The regime prescribed in Part V of the 1983 Act would plainly be stultified if proper effect were not given to tribunal decisions for what they decide, so long as they remain in force, by those making application for the admission of a patient under the Act. It is not therefore open to the nearest relative of a patient or an ASW to apply for the admission of the patient, even with the support of the required medical recommendations, simply because he or she or they disagree with a tribunal's decision to discharge. That would make a mockery of the decision.[32]

57 The passages set out above were concerned with the construction of s 13(1) of the UK Act. Section 13(1) provided:

> It shall be the duty of an approved social worker to make an application for admission to hospital or a guardianship application in respect of a patient within the area of the local social services authority by which that officer is appointed in any case where he is satisfied that such an application ought to be made and is of the opinion, having regard to any wishes expressed by relatives of the patient or any other relevant circumstances, that it is necessary or proper for the application to be made by him.

58 Section 13 of the UK Act is in very different terms than s 9 of the Act. Section 13 does not operate by reference to prescribed criteria such as those contained in s 8(1). The existence of those criteria combined with the fact that the exercise of the power must conform with the mandatory direction in s 4(2)(a) to (b) supports the conclusion that the legislative scheme in respect of the involuntary treatment of patients under the UK legislation is quite different from that which arises under the Act. Further, the UK Act imposed a duty on an ASW to make an application for admission if he was of the opinion, having regard to any wishes expressed by the relatives of the patient or any other relevant circumstance, that it was necessary or proper for the application to be made. Absent the implied limitation upon s 13 of the UK Act as found by Lord Bingham, the duty to make a recommendation could arise

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31 Ibid [10].

32 Ibid [11].

solely by reason of the ASW disagreeing with a decision of a Mental Health Review Tribunal, irrespective of whether there was any rational basis for the disagreement. By way of contrast, under the Australian Act there is no obligation on a RMP to make a recommendation. The discretion to make a recommendation is constrained both by reference to the criteria in s 8(1) and the mandatory direction contained in s 4(2), for which there is no equivalent under the UK Act.

59 A second basis for distinguishing *Von Brandenburg* is that, as Lord Bingham pointed out, the House of Lords has held that the Mental Health Review Tribunal is a court to which the law of contempt applies. Contrary to the plaintiff's submissions,[33] a determination of the Board is not judicial in character. In *Zhong v Royal Melbourne Hospital*[34] Hansen JA (with whom Tate JA agreed) stated in reference to s 130A of the Act:

> The reference to the immunity of a Judge does not disguise the fact that the members of the Board act administratively and not judicially, and that the immunity is conferred by the statute, not common law.[35]

60 A further point of distinction between the statutory regime under the UK Act and the Australian Act is that the former provisions are concerned with the role of a social worker in initiating the process by which a patient receives involuntary treatment. Lord Bingham noted the difference between the role of a social worker and that of a doctor:

> Where an order for discharge is made by the tribunal, it will (unless the resisting doctors revise their opinion during the hearing) indicate that the tribunal has not accepted their judgment. A conscientious doctor whose opinion has not been accepted by the tribunal will doubtless ask himself whether the tribunal's view is to be preferred and whether his own opinion should be revised. But if, having done so, he adheres to his original opinion he cannot be obliged to suppress or alter it. His professional duty to his patient, and his wider duty to the public, require him to form, and if called upon express, the best professional judgment he can, whether or not that coincides with the judgment of the tribunal.[36]

61 Finally, it must be noted that, unlike the case advanced by the plaintiff, the House of

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33 Plaintiff's written submissions 15 July 2014 [79], [84] and [104].
34 [2013] VSCA 220 ('*Zhong*').
35 Ibid [5].
36 *Von Brandenburg* [2004] 2 AC 280, 294.

Lords in *Von Brandenburg* was not addressing a submission that text should be inserted into s 13 of the UK Act. Rather, the question of construction was advanced on the basis that the duty in s 13 should be read down such that it would not be enlivened in circumstances where, if a social worker acted on the basis of that duty, the result would constitute a contempt of court. As noted earlier in this judgment, the plaintiff does not advance her case on the basis that s 9(3) should be read down but rather than a new sub-section should be read into the text of s 9.

62 For the reasons set out above, I have concluded that the judgment in *Von Brandenburg* does not support inserting into the text of s 9(3) the plaintiff's contended limitation.

When is it permissible for a court to read text into a statute

63 The plaintiff's submission that the contended limitation as set out above should be read into the Act as a new s 9(3)(c) calls for consideration of principles of statutory interpretation, particularly the principles governing the circumstances in which it is permissible to read text into a statute.

64 The correct approach to the interpretation of statutory provisions was recently considered by the Victorian Court of Appeal in *Treasurer of Victoria v Tabcorp Holdings Ltd*.[37] Maxwell P, Beach JA and McMillan AJA relevantly held:

> As so often in the work of an appellate court, these appeals concern a question of statutory interpretation. At issue is the interpretation of ordinary English words, in a provision imposing a tax. As the High Court has repeatedly emphasised, the task of statutory interpretation begins, and ends, with the words which Parliament has used [*Thiess v Collector of Customs* (2014) 306 ALR 594 at 599 [22] (*Thiess*): see [100] below. See also *Baini v R* (2012) 246 CLR 469 at 476 [14]; *Legal Services Board v Gillespie-Jones* (2013) 300 ALR 430 at 440 [49], 442 [59]]. For it is through the statutory text that the legislature expresses, and communicates, its intention.
>
> Interpreting a particular provision requires consideration of the legislative context and — where relevant — the legislative history. But if the words are clear and unambiguous, and can be intelligibly applied to the subject-matter, the provision must be given its ordinary and grammatical meaning, even if the result may seem inconvenient or unjust [*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 (*Cooper*

[37] [2014] VSCA 143 ('*Tabcorp Holdings*').

Brookes)]. These principles apply to a taxing statute as to any other [*Alcan (NT) Alumina Pty Ltd v Cmr of Territory Revenue (NT)* (2009) 239 CLR 27 at 49 [57] (*Alcan*)].

…

In *Alcan* [(2009) 239 CLR 27 at 46–7 [47]], the High Court plurality said:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

More recently, in *Thiess* [(2014) 306 ALR 594 at 599 [22]], the joint judgment of French CJ, Hayne, Kiefel, Gageler and Keane JJ endorsed the following statement from an earlier decision of the court [*Federal Cmr of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257 at 268 [39]]:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.

As the High Court has pointed out, there are powerful reasons of principle for giving primacy to the statutory text. First, the separation of powers requires nothing less. Axiomatically, it is for the Parliament to legislate and for the courts to interpret. Close adherence to the text, and to the natural and ordinary meaning of the words used, avoids the twin dangers of a court 'constructing its own idea of a desirable policy' [*Australian Education Union v Dept of Education and Children's Services* (2012) 248 CLR 1 at 14 [28]], or making 'some a priori assumption about its purpose' [*Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378 at 390 [26]].

Secondly, giving the text its natural and ordinary meaning maximises the comprehensibility and accessibility of statute law, and the accountability of the legislature. As French CJ said in *International Finance Trust Co Ltd v New South Wales Crime Commission* [(2009) 240 CLR 319 at 349 [42]]:

> [T]hose who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished.

We would also respectfully adopt what his Honour said in *NAAV v Minister for Immigration* (when a member of the Federal Court), as follows:

> In a representative democracy those who are subject to the law, those who invoke it and those who apply it are entitled to expect that it means what it says. That proposition informs the approach of courts to the interpretation of laws in taking as their starting point the ordinary and grammatical sense of the words [(2002) 123 FCR 298 at 410 [430]].[38]

65 Applying the principles set out above to s 9(3) of the Act, the following observations may be made. First, the text of s 9(3) is unambiguous and can be intelligibly applied to the circumstances of a RMP considering whether to make a recommendation for an ITO in circumstances where a Board has discharged a pre-existing ITO. Second, the exercise of the discretion conferred by s 9(3) is not unconstrained. It is subject to the criteria in s 8(1), the objects in s 4(1), the mandatory direction in s 4(2) and the principles of treatment and care in s 6A. Third, whilst the discretion is not unconstrained, there is no provision of the Act which seeks to set clearly defined parameters governing the exercise of a RMP's discretion of the type embodied in the plaintiff's contended limitation. The constraint proposed by the plaintiff is of an entirely different character to that which is imposed by s 4(2) and 6A. Insofar as the language used in s 4(2) is a guide to legislative intention, it is very difficult to discern any intention that the power of a RMP to make a recommendation for an ITO should be constrained as contended for by the plaintiff.

66 The difficulties confronting the plaintiff's contended implied limit are reinforced by consideration of the principles which govern the circumstances in which it is permissible for a court to read text into a statute.

67 The conditions for reading words into a statute were laid down by McHugh JA in *Bermingham v Corrective Services Commission of New South Wales*.[39] Citing the judgment of Lord Diplock in *Wentworth Securities Ltd v Jones*,[40] McHugh JA said:

> Once the court concludes that the grammatical meaning does not accord with the purpose of the legislation, '… it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used': *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* [1938] Ch 174 at 201. But as the cases to which I referred (at 422-423) in

38 Ibid [1]–[2], [99]–[102].
39 (1988) 15 NSWLR 292 ('*Bermingham*').
40 [1980] AC 74.

> *Kingston v Keprose Pty Ltd* show, it is not only when Parliament has used words inadvertently that a court is entitled to give legislation a strained construction. To give effect to the purpose of the legislation, a court may read words into a legislative provision if by inadvertence Parliament has failed to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved.
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> In *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 this Court applied the principles formulated by Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-106 concerning the circumstances in which a court may read words into a legislative provision to give effect to its purpose. Lord Diplock said that a court may read words into a statutory provision when three conditions are fulfilled. *First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.*[41]

68 In *Director of Public Prosecutions v Leys*,[42] the Victorian Court of Appeal applied the three conditions set out in *Bermingham*.[43] To those they added a fourth requirement that the modified construction must be reasonably open, and not be unnatural, incongruous or unreasonable, and it must be consistent with the statutory scheme.[44] The court also clarified that the second of Lord Diplock's conditions 'extends to those circumstances where words have been inadvertently used or omitted, where the statute proceeds on a mistaken assumption, where the purpose of a provision indicates that parliament did not intend the grammatical meaning to apply, or where words must be omitted to avoid absurdity'.[45]

69 In *Taylor v Owners – Strata Plan No 11564*,[46] the majority, comprising French CJ, Crennan and Bell JJ, supported the conclusion in *Leys* that purposive construction allows of adding words that expand the provision's field of operation. Their Honours said:

> Consistently with this court's rejection of the adoption of rigid rules in statutory construction, it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the

41 (1988) 15 NSWLR 292, 302 (emphasis added).
42 (2012) 296 ALR 96 (Redlich and Tate JJA and T Forrest AJA) ('*Leys*').
43 (1988) 15 NSWLR 292, cited in *Leys* (2012) 296 ALR 96 [109].
44 *Leys* (2012) 296 ALR 96 [96]-[97].
45 Ibid [58].
46 (2014) 306 ALR 547 ('*Taylor*').

review of the authorities in Leys demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. And as their Honours observed by reference to the legislation considered in Carr v Western Australia, the question of whether a construction 'reads up' a provision, giving it an extended operation, or 'reads down' a provision, confining its operation, may be moot.

The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. *It is answered against a construction that fills 'gaps disclosed in legislation' or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'.*

Lord Diplock's three conditions (as reformulated in Inco Europe) accord with the statements of principle in Cooper Brookes and McColl JA was right to consider that satisfaction of each could be treated as a prerequisite to reading s 12(2) as if it contained additional words before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision. *However, it is unnecessary to decide whether Lord Diplock's three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that 'the modified construction is reasonably open having regard to the statutory scheme' because any modified meaning must be consistent with the language in fact used by the legislature.* Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in Newcastle City Council v GIO General Ltd, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour's further observation, '[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances'.[47]

70 Gageler and Keane JJ, dissenting, said:

Statutory construction involves attribution of legal meaning to statutory text, read in context. 'Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning … But not always'. Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. *The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair*.[48]

71 There is no express provision in the Act which regulated the power of a RMP to recommend an ITO in circumstances where the Board had discharged a pre-existing ITO. Applying the second principle articulated by Lord Diplock in *Wentworth*

47 Ibid [37]-[39] (citations omitted, emphasis added).

48 Ibid [65] (citations omitted, emphasis added).

Securities, if the contended limitation is to be read into s 9, I must 'be satisfied that by inadvertence parliament has overlooked' the potential for an ITO to be recommended in circumstances where the Board has discharged a pre-existing ITO. Further, I must be certain that the contended implied limitation contains the words parliament would have used if its attention had been drawn to the alleged deficiency in the legislative scheme. I must also be satisfied that the additional words are consistent with the statutory scheme and with the words used in s 9(3).

72 It was not contended on behalf of the plaintiff, nor could it have been, that there is any ambiguity in the words of s 9(3) of the Act. In its ordinary meaning 'considers' means 'to view or contemplate attentively, to survey, examine, inspect, scrutinise'.[49] A RMP 'must not make a recommendation' unless he or she considers that the criteria in s 8(1) apply. The exercise of the power to make a recommendation is subject to the mandatory direction in s 4(2) that the power to make a recommendation is to be exercised so that:

> (a) People with a mental disorder are given the best possible care and treatment appropriate to their needs in the least possible restrictive environment and least possible intrusive manner consistent with the effective giving of that care and treatment; and
>
> (b) In proving for the care and treatment of people with a mental disorder and the protection of members of the public any restriction upon the liberty of the patients and other people with a mental disorder and any interference with their rights, privacy, dignity and self-respect are kept to the minimum necessary in the circumstances.

73 The exercise of the power is also subject to the principles of treatment and care in ss 6A(a) to (c) of the Act, set out earlier in this judgment at [22] above.

74 The legislative scheme contains significant checks and balances. First, the RMP must comply with the procedural steps prescribed by s 123 (requirement to specify facts upon which the recommendation is based), s 124 (recommendation not to be signed without examination) and s 126 (offences in relation to recommendations). A failure to comply with any of these provisions renders a RMP liable to a finding of professional misconduct. Second, where an ITO has been made by a RMP, an

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49 *Oxford English Dictionary*, 2nd edition.

authorised psychiatrist must examine the person within 24 hours pursuant to s 12AC(1). If the psychiatrist considers that the criteria in s 8(1) do not apply to the person, the ITO must be discharged pursuant to s 12AC(2)(a). If the authorised psychiatrist is satisfied that the criteria in s 8(1) apply to the person, the psychiatrist must confirm the order pursuant to s 12AC(2)(b). However, the psychiatrist may make a community treatment order, allowing the person to obtain treatment for their mental illness while not detained in an approved mental health service: s 12AC(3) and s 14.

75 In the present proceedings, EK confirmed the first defendant's recommendation for an ITO within approximately one hour of the recommendation having been made.[50] A consultation with another psychiatrist, Dr George Camilleri, occurred the following morning. He also confirmed the ITO.[51]

76 The plaintiff's involuntary detention between 4.30pm on 27 August and the discharge of the ITO by the Board on 30 August was, irrespective of its duration, a very serious interference with her liberty. However, it must be noted that the involuntary detention directly referrable to the recommendation of the first defendant lasted no longer than one hour. Thereafter, her continued involuntary detention and treatment was a consequence of the assessment and confirmation of the ITO by two psychiatrists, EK and Dr Camilleri.

77 The checks and balances referred to above support a finding that the scheme of the Act contains various provisions which were engaged whenever a RMP made a recommendation for an ITO, including in the circumstances where a Board had discharged a pre-existing ITO. The scheme of the Act weighs heavily against a finding that parliament overlooked the potential for an ITO to be recommended in circumstances where a Board had discharged a pre-existing ITO.

78 The plaintiff submits that the scheme of the Act makes it clear that the Board acted as an oversight body in relation to involuntary treatment. In order for it to perform this

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50 Affidavit of WW, affirmed 1 June 2013 [40]; Ex WW1.

51 Affidavit of WW, affirmed 1 June 2013 [40]; Ex WW1 118–20.

function, decisions of the Board had to be respected by RMPs and authorised psychiatrists, which necessitates the contended implied limitation on the power in s 9.[52]

79 In support of this submission, the plaintiff points to the following features of the legislative scheme:

- the objects of the Act as set out in s 4(1) and (2);
- the composition of the Board, comprised of a psychiatrist, a lawyer and a community member: Schedule 2, cl 1(2);
- the 'judicial characteristics' of the Board, namely:
  - (a) it being bound by the rules of natural justice: s 24(1)(b)
  - (b) it having the power to administer oaths: s 24(5);
  - (c) it having the power to issue summonses: s 24(7);
  - (d) it having the power to order costs: s 131;
  - (e) contempt of the Board was an offence: s 130;
  - (f) questions of law were determined by the chair person (legal member): Schedule 2, cl 3; and
  - (g) it could state a special case on a question of law for the opinion of the Supreme Court: s 118.
- Board considered and applied exactly the same s 8(1) criteria as:
  - (a) a RMP in deciding whether to make a recommendation under s 9;
  - (b) an authorised psychiatrist in conducting a 24 hour review of an ITO under s 12AC; and
  - (c) an authorised psychiatrist in determining whether to discharge a person from involuntary status under s 37.

80 The plaintiff submits that because an authorised psychiatrist was required to discharge a person if, at any time, he or she considered that the s 8(1) criteria of the Act did not apply or no longer applied to the person, Board hearings only occurred

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52 Plaintiff's written submissions dated 15 July 2014 [75].

in circumstances where the authorised psychiatrist continued to hold the opinion that s 8(1) criteria applied. Therefore, whenever the Board determined that the s 8(1) criteria did not apply to a person, and ordered that the person be discharged, the Board's decision was necessarily contrary to the opinion of the authorised psychiatrist and treating service. Against this legislative background, the plaintiff submits that, in the words of Lord Bingham, it would make 'a mockery of the decision' and 'stultify' the regime provided for by Part 4 of the Act if a construction of s 9 were adopted which permitted a RMP to make a recommendation for involuntary treatment on the basis that:

- he or she, or the authorised psychiatrist, disagreed with the Board's decision; and
- he or she continued to consider that the s 8(1) criteria were met.[53]

81 There is considerable force in the plaintiff's contention that in order to perform its functions, decisions of the Board had to be respected by RMPs and authorised psychiatrists. It would not be consistent with the express power conferred upon a Board to hear appeals and reviews from involuntary treatment orders if a decision of the Board to discharge an order could be disregarded by a RMP, in the absence of any changed circumstances for no reason other than the fact that the practitioner disagreed with the Board's decision. Does it follow, however, that this necessitates the contended limitation being read into s 9? For the following reasons, this question must be answered in the negative.

82 As noted earlier in this judgment, the preconditions for the exercise of the power to recommend an ITO are twofold. First, consideration by a RMP that the criteria in s 8(1) of the Act apply. Second, consideration that an ITO 'should be made'. Plainly, the power to recommend an ITO is not enlivened simply by a RMP considering that the criteria in s 8(1) apply. Section 9(3)(b) is a legislative recognition that there may be matters, over and above the criteria in s 8(1), which bear upon whether an ITO should be recommended. Further, in considering whether or not an ITO should be

[53] Plaintiff's written submissions dated 15 July 2014 [82].

made in accordance with s 9(3)(b) a mandatory obligation is imposed upon a RMP by s 4(2) to have regard to the matters prescribed by s 4(2)(a) and (b). In addition, the RMP must give effect to the principles of treatment and care in s 6A. The combined effect of s 9(3)(b), 6A and s 4(2) is that, in circumstances where a Board has discharged an ITO, a RMP considering whether a further ITO should be made, was required to have regard to any decision of the Board to discharge an ITO, and its reasons for doing so. A decision of a RMP to make a recommendation for a new ITO simply because he/she disagreed with the Board's decision would be unlawful. Were it otherwise, the system of review and appeal of ITOs prescribed by the Act could be rendered nugatory.

83 Whilst I have concluded that a RMP is required to take into consideration the Board's discharge of an ITO, such consideration does not preclude the possibility that, having done so, the RMP may lawfully proceed to recommend a new ITO. The recommendation for a new ITO will be lawful provided a practitioner has acted in good faith, has not acted arbitrarily or capriciously,[54] or taken into consideration matters which are excluded by statute expressly or by necessary implication. Whether a RMP can be regarded as having acted arbitrarily or capriciously will depend upon the facts of a particular case. If the decision to recommend a new ITO is made in the absence of any changed circumstances and motivated solely by the RMP's consideration that he/she disagrees with the decision of a Board, that would constitute a capricious exercise of the power to make a recommendation. However, the contended limitation put forward by the plaintiff goes much further than this. Under the contended limitation a RMP will act unlawfully in making a recommendation, unless he/she has 'information not known to the Board which put a *significantly* different complexion on the case as compared to that which was before the Board'.[55]

84 It is not possible to reconcile the contended limitation with the ordinary meaning of

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54 *Buck v Bavone* (1976) 135 CLR 110, 119 per Gibbs CJ; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 276.

55 Ibid (emphasis in original).

the words contained in s 9(3) of the Act read in conjunction with s 8 and s 4(2). Properly construed, these sections do not confine the circumstances in which a RMP can make a recommendation following a decision of a Board to discharge an ITO, to a situation where the RMP has facts not known to the Board which put a significantly different complexion on the case which was before the Board. The contended limitation is 'too much at variance with the language in fact used by the legislature'.[56]

85 My conclusion that s 9(3)(b) of the Act read in conjunction with s 6A and s 4(2) imposes an obligation upon a RMP to have regard to a decision of the Board discharging an ITO, weighs against reading into s 9(3) the contended limitation. Absent the contended limitation, the scheme of the Act regulated the power of a RMP to make a recommendation where a Board had discharged an ITO.

86 The matters set out above are also relevant to the plaintiff's reliance upon the principle of legality. In this regard, the plaintiff cites the judgment of O'Bryan J in *Wilson v Mental Health Review Board*.[57] In particular, the plaintiff referred to the following passage:

> Because the Act regulates the apprehension, admission and detention of persons in an approved mental health service against their wishes, or understanding, and restricts their freedom in the community, the Act must be interpreted in favour of a person affected by the provisions of the Act. The Court should be constrained to interpret the Act in a way that least infringes upon the civil rights of a person because of the stigma surrounding mental illness.[58]

87 The principle set out above is enshrined within the terms of s 4(2)(a) and(b), to which reference has already been made. The application of the principle does not necessitate reading into s 9(3) the implied limitation contended for by the plaintiff.

Section 32 of the Charter

88 The plaintiff submits that the contended limitation is required by s 32 of the Charter.

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56 *Taylor* (2014) 306 ALR 547 [38].
57 [2000] VSC 404.
58 Ibid [30].

Section 32(1) of the Charter provides:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

89 In her written submissions, the plaintiff submitted that the primary human right relevant to the application of s 32 of the Charter is that provided by s 21(7) of the Charter:

> Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must –
>
> (a) make a decision without delay; and
>
> (b) order the release of the person if it finds that detention is unlawful.[59]

90 However, in oral submissions before me the plaintiff's counsel expressly disavowed any reliance upon the right provided by s 21(7). Consequently, the plaintiff's submission proceeded on the basis that the contended limitation was required by s 32(1) of the Charter in respect of the following Charter Rights:

(a) the right in s 10(c) not to be subjected to medical treatment without full, free and informed consent;

(b) the right in s 13(a) not to have one's privacy arbitrarily interfered with;

(c) the right in s 21(1) to liberty and security of the person; and

(d) the right in s 21(2) against arbitrary detention.

91 The plaintiff submitted that failing to adopt the contended limitation would render the Board's powers of appeal and review ineffective. It would render the limitations imposed by involuntary treatment on the Charter Rights set out above disproportionate and therefore unjustifiable or arbitrary.[60]

92 In *Slaveski v Smith*[61] the Court of Appeal considered the construction of statutes in

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59 Plaintiff's written submissions dated 15 July 2014 [100]-[107].
60 Plaintiff's written submissions dated 15 July 2014 [112].
61 (2012) 34 VR 206 ('*Slaveski*').

the context of provisions of rights under the Charter. The Court referred to the High Court decision in *Momcilovic v R*.[62] The Court of Appeal summarised the holding in *Momcilovic* as follows:

> French CJ, Crennan and Kiefel JJ and Gummow J, Hayne J and Bell J each held in separate judgments that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky Inc v Australian Broadcasting Authority*.[63]

93 In *Slaveski*, the Court of Appeal stated that the effect of s 32(1) of the Charter is as follows:

> Consequently, if the words of a statue are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.[64]

94 The Court of Appeal stated that s 32:

> … does not authorise a process of interpretation which departs from established understands of the process of construction. Although it may serve as a guide as to which of two possible constructions is to be preferred, *it does not allow the reading in of words which are not explicit or implicit in a provision*, or of the reading down of words so far as to change the true meaning of a provision.[65]

95 In *Nigro v Secretary to the Department of Justice*,[66] the Court of Appeal held in respect of s 32(1):

> Section 32(1) is not to be viewed as establishing a new paradigm of interpretation which requires courts, in the pursuit of human rights compatibility, to depart from the ordinary meaning of the statutory provision and hence from the intention of the parliament which enacted the statute.

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62 *Slaveski* (2011) 245 CLR 1.
63 (2012) 34 VR 206, 214.
64 Ibid [24].
65 Ibid [45] (emphasis added).
66 (2013) 304 ALR 535.

> [*Momcilovic* (CA) [82]] Accordingly, as was observed in *Slaveski v Smith*, the court must discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky*. The statute is to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality is applied. The human rights and freedoms set out in the Charter incorporate or enhance rights and freedoms at common law. Section 32(1) thus applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.[67]

96 Contrary to the plaintiff's submissions, s 32(1) of the Charter does not require the text of the contended implied limit to be read into s 9 of the Act. Section 32(1) does not allow the reading in of words which are not explicit or implicit in a provision, or the reading down words so far as to change the true meaning of a provision.[68] Nor does it authorise a process of interpretation which departs from established understandings of the process of construction.

Conclusion on the proper construction of the power in s 9 of the Act for a RMP to recommend an ITO

97 Section 9(3)(b) of the Act read in conjunction with ss 4(2)(a) and (b) and s 6A imposes an obligation upon a RMP when considering whether he/she should make a recommendation for an ITO to have regard to a decision of a Board discharging a pre-existing ITO, and its reasons for doing so. Absent some change in circumstances, a RMP cannot lawfully make a recommendation for an ITO simply because he/she disagrees with the decision of the Board. The power cannot be exercised capriciously or so as to render the Board's powers nugatory. However, the power to make a recommendation is not confined to the circumstance where the RMP has information not known to the Board which places a significantly different complexion on the case presented to the Board.

98 I am not satisfied that by inadvertence parliament overlooked the potential for a RMP to be considering making a recommendation for an ITO in circumstances where a Board had recently discharged a pre-existing ITO. Section 9(3) read in conjunction with s 6A and s 4(2) regulate the power to make a recommendation

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67 Ibid [85].

68 *Slaveski* (2012) 34 VR 206 [45].

where the Board had discharged an ITO. As such, the second pre-condition identified by Lord Diplock in *Wentworth Securities* for the reading of words into a statute is not met. There is no basis for concluding:

(i) that by inadvertence parliament has overlooked the possibility of a RMP considering recommending an ITO after a pre-existing ITO has been discharged; and

(ii) it is necessary to read into s 9(3) the contended limitation in order to achieve the purpose of the Act.

99 In light of the conclusions set out above, it is unnecessary for me to consider whether the third pre-condition identified by Lord Diplock is satisfied; whether the text of the proposed limitation can be said with certainty to be the words parliament would have used to overcome the alleged omission in the Act if its attention had been drawn to that omission. However, had it been necessary to do so, I would not have concluded that parliament would have used the words 'significantly different complexion' proposed by the plaintiff in her contended limitation.

The application of the proper construction of s 9 of the Act to the facts

100 In light of my rejection of the plaintiff's contended implied limitation, her claim that the first defendant acted ultra vires in making a recommendation for an ITO must fail. I have concluded that on its proper construction, s 9, when read in conjunction with s 4(2) and s 6A, required the first defendant to have regard to the decision of the Board to discharge the ITO. The first defendant's unchallenged evidence, as set out earlier in this judgment, is that he did have regard to the decision of the Board. Having done so, he recommended a new ITO because he genuinely and firmly believed that it was necessary to keep the plaintiff in hospital to treat her against her will in order to protect her and her children from harm. He believed the situation 'had altered significantly' since the Board hearing earlier that day.[69] The first defendant was not cross-examined. Consequently, it was never put to the first

[69] Affidavit of WW, affirmed June 2013 [44].

defendant that his evidence was fabricated. I accept the first defendant's evidence that at the time he recommended a new ITO for the plaintiff, he genuinely believed that it was both in her interests and the interests of her children that she be subject to a further ITO. I accept his evidence that his recommendation for a further ITO was not simply based on him disagreeing with the Board's decision.

101 I also accept the first defendant's evidence that he took into account in making the recommendation two matters which had not been raised before the Board. First, the stated intention of the plaintiff following the discharge of the ITO to reside with her previous employer, Mr Busuttil. Second, the fact that, immediately following the discharge of the ITO, the plaintiff had contacted her sister-in-law to make travel arrangements to fly to Queensland. In the proceeding before the Board, the plaintiff's solicitor had informed the Board that any move to Queensland was a longer term option, and subject to making appropriate arrangements for private psychiatric treatment. In relation to this issue, the first defendant gave the following evidence:

> The prospect of immediate discharge to reside with someone without a good understanding of XX's illness, was a very different scenario from that which had been presented by XX and her lawyer at the hearing… A further practical problem was introduced because Mr Busuttil lived on the other side of Melbourne in a separate mental health catchment area based at Western Health such that a cross-service referral would have been required to be established and implanted with and by other health service. It would not have been possible for those steps to have been completed on 27 August.[70]

102 The question of where and with whom the plaintiff was going to reside following the discharge of the ITO was a matter of very considerable practical significance. These matters were relevant to the consideration of whether the criteria in s 8(1)(e) of the Act applied to the plaintiff. The discharge of a patient with a mental illness into the community without appropriate accommodation and treatment arrangements in place could have very significant adverse consequences for the individual. The plaintiff's proposal to reside with her former employer and/or immediately relocate to Queensland were matters which the first defendant was entitled to have regard to

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70 Affidavit of WW, affirmed 1 June 2014 [28],[34].

when considering whether it was appropriate for a new ITO to be issued. They certainly placed a different complexion on the case as compared to that which had been before the Board. In light of these matters, there is no basis for a finding that in recommending the ITO the first defendant acted capriciously or was motivated by a desire to render the Board's decision nugatory.

103 When the Board convened a further hearing on 30 August 2013 it discharged the ITO which had been recommended and made by the first defendant on 27 August 2013. As set out earlier in this judgment, this was not a merit-based appeal from the decision of the first defendant to recommend the making of an ITO. Rather, it reflected the Board's assessment as at 30 August 2013 as to whether or not the criteria in s 8(1)(e) of the Act applied to the plaintiff. The Board concluded that, as at 30 August 2013, the criteria in s 8(1)(e) did not apply to the plaintiff. The fact that the Board reached a different conclusion in this regard to that of the first defendant as at 27 August 2013, does not support the conclusion that the first defendant's recommendation was unlawful.

Unreasonable exercise of discretion

104 The plaintiff submits that the making of the recommendation by the first defendant on 27 August 2013 was unlawful on the grounds that it constituted an unreasonable exercise of discretion. The plaintiff's submissions based on the ground of unreasonableness are intertwined with her submissions as to the proper construction of s 9 of the Act. The plaintiff submitted that:

> It would be unreasonable for a registered medical practitioner to exercise his or her discretion to make a recommendation under s 9 in respect of a patient whose discharge has been ordered by a decision of the Board, of which the registered medical practitioner was aware, unless the registered medical practitioner has formed the reasonable and good faith opinion that he or she had information not known to the Board which put a significantly different complexion on the case as compared with that which was before the Board.[71]

105 There are two observations to be made in respect of the submission set out above. First, I have rejected the construction of s 9 of the Act which underpins this

[71] Plaintiff's written submissions dated 15 July 2015 [167].

submission. Further, notwithstanding my rejection of the construction contended for, I have concluded that the first defendant acted in good faith and did have information that was not known to the Board (the plaintiff's intention to reside with her former employer post her discharge and immediately setting in train steps to relocate to Queensland) and that this did put a different complexion on the case compared to that which was before the Board.

106 In aid of this ground of unlawfulness, the plaintiff cited the judgment of the High Court in *Minister for Immigration and Citizenship v Li*,[72] in which Hayne, Kiefel and Bell JJ held:

> The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.[73]

107 There is no basis for concluding that the first defendant's decision to recommend an ITO was unlawful by reason of unreasonableness by reference to the standard indicated by the true construction of s 9 of the Act. This ground must be rejected.

Was the first defendant's recommendation unlawful pursuant to s 38(1) of the Charter?

108 Section 38(1) of the Charter provides that it is unlawful for a public authority to act in a way that is in incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. The first defendant was a public authority within the meaning of s 38(1) of the Charter by reason of being an employee of the second defendant.[74]

109 The plaintiff submitted that the first defendant's recommendation for the making of an ITO on 27 August 2013 engaged the rights under the Charter prescribed by ss 13(a) and 21(1)–(3). The plaintiff acknowledged that actions that engage rights under the Charter may still be compatible with human rights (and therefore not in

72 (2013) 249 CLR 332.
73 Ibid [67]; See also French CJ concurring [24].
74 See also s 4(1)(a) of the Charter.

breach of s 38 of the Charter) if they amount to a reasonable limitation under s 7(2) of the Charter and/or if they are non-arbitrary (in the case of the right against arbitrary interference with privacy and arbitrary detention).[75] The plaintiff's submission regarding the interaction between s 38(1) and s 7(2) of the Charter is consistent with the authorities of *Sabet v Medical Practitioners' Board of Victoria*[76] and *PJB v Melbourne Health*.[77]

110 The plaintiff submits that s 7(2) can have no application to validate the conduct of the first defendant because any validating limitation must arise 'under law', and did not do so because the first defendant's recommendation on 27 August 2013 was ultra vires the power conferred by s 9. As I have rejected the plaintiff's submission that the conduct of the first defendant was ultra vires, this submission must be rejected.

111 The plaintiff also relies upon the contention that the first defendant acted ultra vires, in support of two further propositions. First, that the first defendant acted incompatibly with the plaintiff's Charter rights against arbitrary interference with privacy and against arbitrary detention. Second, that the first defendant acted incompatibly with s 21(3) of the Charter because the plaintiff was deprived of liberty otherwise than in accordance with law as a result of his decision. Both of these submissions must also be rejected as a consequence of my rejection of the plaintiff's submission that the first defendant acted ultra vires.

112 The plaintiff advances a further submission that the first defendant's actions were unlawful under s 38 of the Charter, because his actions did not amount to a reasonable limitation on the Charter rights referred to above. The basis upon which the plaintiff contended that the first defendant's conduct was unreasonable is set out in para 184 of her written submissions dated 15 July 2014:

> The reason that the first defendant's actions did not amount to a reasonable limitation on the above rights is that they involved abrogation of a

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75 Plaintiff's written submissions dated 15 July 2014 [176].
76 (2008) 20 VR 414.
77 [2011] VSC 327.

> fundamental safeguard (independent 'judicial' oversight), which is essential to ensure that the limitations on the above rights inherent in the involuntary treatment are proportionate and therefore justified.

113 This ground of alleged unreasonableness must be rejected. First, for the reasons set out earlier in this judgment, the plaintiff's contention that the making of the recommendation involved an abrogation of the plaintiff's rights of review and appeal of the ITO under Part 4 of the Act, must be rejected. The first defendant did have regard to the Board's decisions. The first defendant believed (and was justified in doing so) that circumstances had changed since the Board discharged the ITO.

114 Second, the ground is misconceived. It proceeds on the erroneous assumption that the powers exercised by the Board under s 36 of the Act constitute 'independent judicial oversight'. If this was the case, there would be considerable force in the defendants' contention that the discharge of the ITO by the Board on 30 August 2013 'covered the field' to the exclusion of the recommendation and ITO made on 27 August 2013. Had I concluded that the powers exercised by the Board constituted independent judicial review, the basis upon which I have rejected the defendants' challenge to the competency of the proceedings would fall away. However, it is well-established by authority, referred to earlier in this judgment, that the Board is an administrative rather than judicial body and that its sole task is to determine for itself, as at the date it conducts a hearing, whether or not the criteria in s 8(1) of the Act apply as at the date of the hearing.

115 The second limb of the plaintiff's reliance on s 38(1) of the Charter is her contention that the first defendant did not give 'proper consideration' to the plaintiff's relevant human rights.

116 In *Bare v Small*,[78] Williams J cited with approval the following passage from the judgment of Emerton J in *Castles v Secretary, Department of Justice*:[79]

> Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence.

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78 [2013] VSC 129. As at the date of this judgment, her Honour's judgment is subject to a reserved judgment of the Court of Appeal of the Supreme Court of Victoria.

79 (2010) 28 VR 141.

> Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
>
> While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.[80]

117 The unchallenged evidence of the first defendant supports a conclusion that he seriously turned his mind to the possible impact of the recommendation for an ITO on the plaintiff's human rights and the implications for her, and that countervailing interests or obligations were identified.

118 The first defendant's consideration of the criteria in s 8(1) of the Act mandated that he have regard to the plaintiff's human rights, because the inevitable consequence of the making of the recommendation would be the involuntary detention and medical treatment of the plaintiff. I accept the first defendant's evidence that when considering the application of the criteria he took into account countervailing interests, namely his belief that it was necessary to keep the plaintiff in hospital and treat her against her will in order to protect her and her children from harm.

119 For the reasons set out above, I reject the plaintiff's submission that the first defendant's recommendation was unlawful under s 38 of the Charter. Consequently, it is unnecessary to give any consideration to the defendants' reliance upon s 39 of the Charter.

Did the first defendant fail to have regard to mandatory relevant considerations?

120 The plaintiff submits that the first defendant's recommendation was unlawful by reason of his failure to take into account a mandatory relevant consideration; ie the

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80 Ibid [185]-[186].

extent to which his concerns for the plaintiff's wellbeing and the wellbeing of the plaintiff's children had already been considered by the Board when it discharged the plaintiff at 12.45pm on 27 August 2013.

121 The plaintiff's written Submissions in Reply withdrew her submission that a medical practitioner may not have regard to factors that have formed part of a hearing before the Board at which the Board ordered that the person be discharged from involuntary status.[81]

122 When the Board made an order at 12:45pm on 27 August 2013 discharging the ITO the plaintiff had an unqualified right to leave the Centre. I have set out earlier in this judgment the four matters which the first defendant personally observed on his examination of the plaintiff in respect of the recommendation for an ITO. The four matters identified were: 'irritable; verbally abusive; demanding to leave ward; and risk of absconding.' If these matters were viewed in isolation a strong argument could be mounted that the making of the recommendation was unlawful as being an arbitrary and/or capricious exercise of the power conferred by s 9 of the Act. The plaintiff was entitled to leave the ward. Further, it is unsurprising that the plaintiff would be irritable and even verbally abusive in response to any attempt to interfere with her unqualified right to leave the Centre. However, in light of the unchallenged evidence of the first defendant regarding the concerns which he held for the plaintiff arising from her plans to reside with her former employer and the prospect of an immediate relocation to Queensland, I do not consider it apt to characterise the first defendant's exercise of the power under s 9 as capricious or arbitrary. The concerns which he recorded regarding the plaintiff demanding to leave the ward must be considered in the context of the plaintiff's stated intention to reside with her former employer and/or immediately relocate to Queensland. As noted above, neither of these matters had been canvassed in the proceedings before

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81 See the plaintiff's Submissions in Reply [43]. The plaintiff withdrew her submission that the first defendant improperly considered the plaintiff's mental state, the visits to the plaintiff's children, risks to the plaintiff and concerns in relation to the availability of the plaintiff's private psychiatrist. However, the plaintiff maintained that the first defendant took into account two irrelevant considerations: her demanding to leave the ward, and the risk of he 'absconding.'

the Board.

123 A matter which is relevant to consideration of this ground is the brevity of the Board's oral reasons for its discharge of the ITO at 12.45pm on 27 August 2013. The Board's reasons are recorded in the third further affidavit of Hamish McLachlan affirmed 4 July 2014. At para 36 Mr McLachlan sets out his record of the Board's oral reasons for decision:

> I recorded the Board's oral reasons in my DLR (see page 14 of DLR HM4-3):
> 12.14 — decision
> Discharge you from (in)voluntary status (sic)
> — two main bases:
> 1. necessary TX — less restrictive manner
> 2. know bipolar — risk — r'ship w-treating psych
> — seems to us: best interests to get bloods right — if you leave — have blood tests
> — and can stay here voluntarily
> — decision back to you
> — talk to lawyer.

124 Under the ground of challenge to the first defendant's recommendation which alleges a failure to take into account relevant considerations, the plaintiff attacks the decision to make a recommendation on the basis that the first defendant failed to take into account the extent to which his concerns had already been taken into account by the Board. The difficulty with this submission is that the brevity of the Board's statement of reasons sheds little, if any, light on the extent to which concerns which were expressed by the first defendant and other treating practitioners were taken into account by the Board. Putting to one side this significant practical consideration, I am firmly of the view that this ground must fail.

125 The plaintiff submits, in reliance on the High Court judgment in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[82] that the contended mandatory relevant consideration is to be implied from the scheme of the Act.

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82 (1986) 24 CLR 39-40.

126 I have concluded for the reasons set out earlier in this judgment that on a proper construction of the Act, the first defendant was subject to a requirement to have regard to the earlier decision of the Board discharging the ITO and its reasons for doing so. However, even if it is accepted that concerns expressed by the first defendant regarding the plaintiff's welfare had been taken into account by the Board when it discharged the ITO on 27 August 2013, it does not follow that the decision of the first defendant to make the recommendation at 4.00pm on 27 August 2013 was unlawful. The plaintiff's decision to reside with her former employer was not a matter which had been canvassed before the Board prior to its discharge of the ITO at 12.45pm on 27 August 2013. The plaintiff immediately taking steps to travel to Queensland was inconsistent with the case presented on her behalf to the Board. These were new matters which the first defendant was entitled to have regard to in exercising his discretion as to whether or not a new ITO should be made.

Errors in relation to belief under s 9(3)(a) of the Act that s 8(1) criteria applied

127 Under this ground of challenge to the first defendant's recommendation the plaintiff advances three grounds which repeat arguments advanced under grounds set out above:

(a) irrational/unreasonable belief that s 8(1) criteria applied;

(b) failure to take into account relevant considerations in determining that s 8(1) criteria applied;

(c) irrelevant considerations taken into account in determining that s 8(1) criteria applied.

128 No new arguments of any substance were advanced in relation to these three grounds beyond those already referred to in this judgment. For the reasons set out earlier in this judgment, each of these grounds must be rejected.

Did the first defendant take into account an irrelevant consideration by having regard to what he considered to be the risk to the plaintiff's children?

129 On 18 November 2014 the High Court of Australia delivered judgment in *Hunter and New England Local Health District v McKenna*[83] The judgment was drawn to my attention by the plaintiff's legal representatives. The parties availed themselves of the opportunity to file written submissions regarding the potential impact of the judgment on the issues for determination in the present proceedings. The judgment dealt with the question of whether a hospital and medical staff owed a common law duty of care to protect persons against harm caused by a mentally ill person upon discharge. The respondent to the appeal was the relative of a person who was killed whilst transporting a former patient. The respondent had claimed damages for psychiatric injury sustained upon hearing that her relative had been killed.

130 In considering whether the appellant owed the relatives a duty to take reasonable care to prevent psychiatric injury, the High Court considered the operation of several provisions of the NSW Act. In particular the Court considered ss 4(2)(b) and 20 which provided:

> **4 Care, treatment and control of mentally ill and mentally disordered persons**
>
> …
>
> (2) It is the intention of Parliament that the provisions of this Act are to be interpreted and that every function, discretion and jurisdiction conferred or imposed by this Act is, as far as practicable, to be performed or exercised so that:
>
> …
>
> (b) in providing for the care and treatment of persons who are mentally ill or who are mentally disordered, any restriction on the liberty of patients and other persons who are mentally ill or mentally disordered and any inference with their rights, dignity and self-respect are kept to the minimum necessary in the circumstances.
>
> …
>
> **20 Detention of persons generally**
>
> A person must not be admitted to, or detained in or continue to be

83 [2014] HCA 44 (12 November 2014) ('*Hunter*').

> detained in, a hospital under this Part unless the medical superintendent is of the opinion that no other care of a less restrictive kind is appropriate and reasonably available to the person.

131 At paras 31 to 33 of *Hunter* the High Court stated:

> … In some cases, there will be a risk that the mentally ill person will engage in conduct that may have adverse physical consequences for others, whether because the conduct is directed at another or because it otherwise causes adverse physical consequences. In some cases, perhaps many, the reasonable person in the position of the hospital or doctor would respond to those risks by continuing to detain the patient for so long as he or she remains a mentally ill person, thus avoiding the possibility that the risk of harm to others will eventuate. But that is not what the *Mental Health Act* required. It required the *minimum* interference with the liberty of a mentally ill person. It required that the person be released from detention unless the medical superintendent of the hospital formed the opinion that no other care of a less restrictive kind was appropriate and reasonably available to that person.
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> Because s 20 of the *Mental Health Act* required that Mr Pettigrove be released from detention unless the medical superintendent formed the opinion that no other care of a less restrictive kind was appropriate and reasonably available to Mr Pettigrove, it is not to the point to decide whether, as the relatives alleged, the medical superintendent did not positively authorise his release from the Hospital (whether under s 35 of the *Mental Health Act* or otherwise).
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> The powers, duties and responsibilities of doctors and hospitals respecting the involuntary admission and detention of mentally ill persons were prescribed by the *Mental Health Ac*. It is the provisions of that Act which identified the matters to which doctors and hospitals must have regard in exercising or not exercising those powers. Those provisions are inconsistent with finding the common law duty of care alleged by the relatives. [84]

132 The first defendant gave evidence that one of the matters he took into account in making the recommendation for an ITO was his concern for the welfare of the plaintiff's children if the plaintiff was discharged.[85]

133 The reasoning of the High Court in *Hunter* raises the question of whether, in considering whether to make a recommendation for an ITO, the first defendant was precluded by the Act from having any regard to concerns for the welfare of the plaintiff's children. If the Act precluded the first defendant from having regard to the welfare of the plaintiff's children, the plaintiff may be entitled to a declaration that the recommendation was unlawful.

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84 *Hunter* [2014] HCA 44 (12 November 2014) (citations omitted, emphasis in original).

85 Affidavit of first defendant [43], [45].

134 The High Court's conclusion as to 'what the Mental Health Act required' was critical to its conclusion that Hunter did not owe a common law duty of care to relatives of the deceased to prevent psychiatric injury upon learning that their relative had been killed by a person who had been discharged.

135 Neither ss 4(2)(b) or 20 of the NSW Act make any reference to protection of members of the public as being a relevant consideration in the determination of whether a person is to continue to be detained. To the contrary, as recorded in the Court's conclusion at para 33, the NSW Act identified the matters to which doctors and hospitals must have regard in exercising or not exercising powers of detention. Those matters did not give rise to a duty of care to relatives of a person in detention.

136 The High Court's reasoning invites consideration of whether the first defendant was required by the NSW Act to exclude from the process of making a recommendation for an ITO, any concerns which he held for the welfare of the plaintiff's children.

137 Earlier in this judgment I have set out s 4(2)(b) of the Act. It is identical to s 4(2)(b) of the NSW Act, save for inclusion of the words 'and the protection of members of the public.' It is to be noted that this same phrase appears in s 8(1)(c) of the Act.

138 There is no provision of the Act in the same terms as s 20 of the NSW Act. Where an ITO has been made, an authorised psychiatrist who examines the person pursuant to s 12AC must confirm the order if satisfied that the criteria in s 8(1)(c) apply. This includes the criteria in s 8(1)(c) that 'because of the person's mental illness involuntary treatment is necessary … for the protection of members of the public.'

139 Unlike ss 4(2)(b) and 20 of the NSW Act, the provisions of the Act required the first defendant, when exercising the power conferred by s 9, to have regard to whether an ITO was necessary for protection of members of the public. As such, the first defendant's recommendation was not unlawful by reason of him having taken into consideration the risk of harm to the plaintiff's children.

Remedy: declaration

140 I have rejected each of the grounds advanced by the plaintiff in support of the contention that the recommendation for an ITO made by the first defendant on the afternoon of 27 August 2013 was unlawful. Accordingly, there is no basis for the grant of declaratory relief sought by the plaintiff. If any of the grounds of alleged unlawfulness had been made out, the plaintiff would have been confronted by significant discretionary considerations weighing against the grant of declaratory relief. First, the ITO made on the afternoon of 27 August 2013 was discharged by the Board on 30 August 2013. Consequently, the recommendation made by the first defendant ceased to have any legal consequences for the plaintiff. Second, the Act was repealed with effect from 1 July 2014. There are significant differences between the legislative framework under the repealed Act compared to the *Mental Health Act 2014*. However, in light of my primary finding that each of the alleged grounds of unlawfulness has not been made out, it is unnecessary for me to express a concluded view as to whether these discretionary considerations would have precluded the grant of declaratory relief.

141 The defendants are entitled to an order that the plaintiff pay their costs, save for the costs of the directions hearing on 11 November 2014. That hearing arose out of the failure of the defendants to have complied with their obligations under the Charter to serve notices on the Attorney General for the State of Victoria and the Victorian Equal Opportunity and Human Rights Commission. The defendants must pay any costs incurred by the plaintiff in respect of the hearing on 11 November 2014.
