

SUPREME COURT OF QUEENSLAND

CITATION: *Bay v Australian Health Practitioner Regulation Agency*
[2024] QSC 315

PARTIES: **DR WILLIAM ANICHA BAY**
(applicant)
v
**AUSTRALIAN HEALTH PRACTITIONER
REGULATION AGENCY**
(first respondent)
THE MEDICAL BOARD OF AUSTRALIA
(second respondent)
STATE OF QUEENSLAND
(third respondent)

FILE NO/S: BS 14178 of 2022

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 13 December 2024

DELIVERED AT: Brisbane

HEARING DATES: 21 – 23 October 2024, supplementary written submissions
filed 8 and 15 November 2024

JUDGE: Bradley J

ORDERS: **THE ORDER OF THE COURT IS THAT:**

- 1. The decision of the second respondent under sections 156(1)(a) and (e) of the *Health Practitioner Regulation National Law (Queensland)* to take immediate action by suspending the applicant’s registration as a medical practitioner is set aside from 16 August 2022.**
- 2. The decisions of the second respondent under section 160 of the *Health Practitioner Regulation National Law (Queensland)* to commence investigations of notifications 00502227, 00502429, 00503368, 00505504, and 00505600 are set aside from 16 August 2022.**
- 3. The decision of the second respondent under s 193B of the *Health Practitioner Regulation National Law (Queensland)* to refer matters about the applicant as a registered health practitioner to the Queensland Civil and Administrative Tribunal is set aside from 13 December 2024.**

4. **The first and second respondents' application in the proceeding filed 10 February 2023 is dismissed.**
5. **The first and second respondents are to pay the applicant's costs of the proceeding.**
6. **The first and second respondents are to pay the third respondent's costs of the proceeding.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – where the applicant (Dr Bay) was a registered general practitioner – where Dr Bay made various statements about COVID-19 vaccinations on Facebook and other social media platforms – where Dr Bay attended the Queensland office of the first respondent (AHPRA) to protest against AHPRA and the use of COVID-19 vaccines – where Dr Bay made various statements about COVID-19 vaccinations at a national conference attended by medical practitioners – where Dr Bay's conduct was the subject of five complaints to the Queensland Health Ombudsman which were later referred to AHPRA for consideration – where, based on the complaints, the second respondent (the Board) decided to suspend the applicant's registration as a general practitioner and to investigate the complaints (together, the decisions) pursuant to ss 156 and 160 of the *Health Practitioner Regulation National Law (Queensland)* (the National Law (Qld)) – where Dr Bay applied to the Court for a judicial review of the decisions – where, pursuant to s 193B of the National Law (Qld), the Board referred the matter to the Queensland Civil and Administrative Tribunal (QCAT) (the QCAT referral) – where AHPRA and the Board filed an application for the summary or final dismissal of the judicial review application – where the judicial review and dismissal applications were heard together – where, on the final day of the trial, AHPRA and the Board tendered critical evidence revealing errors in the decisions – where AHPRA and the Board maintained that Dr Bay's application should be dismissed – where, by written submissions filed after the trial, AHPRA and the Board conceded that it was open to the Court to find that the decisions were affected by apprehended bias and that they did not afford Dr Bay procedural fairness – whether the decisions and the QCAT referral should be set aside

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – GENERAL MATTERS – RELATIONSHIP BETWEEN COMMONWEALTH AND STATES GENERALLY – where, by his judicial review application, Dr Bay also challenges the Constitutional validity of the National Law (Qld) (and

associated legislation) and the jurisdiction of QCAT to determine the matter – where the third respondent seeks dismissal of Dr Bay’s judicial review application to the extent it relies on Constitutional and jurisdictional grounds – whether any of Dr Bay’s Constitutional and jurisdictional challenges should succeed

Australian Constitution, s 51

Health Ombudsman Act 2013 (Qld), s 13, s 24

Health Practitioner Regulation National Law Act 2009 (Qld), Sch 1

Health Practitioner Regulation National Law (Queensland), s 5, s 7, s 8, s 23, s 25, s 28, s 31, s 156, s 160, s 245, Part 8

Health Practitioner Regulation National Law Regulation 2018, s 4, s 25

Judicial Review Act 1991 (Qld), s 13, s 48

Attorney-General (NSW) v Quin (1990) 170 CLR; [1990] HCA 21

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63

Gould v Brown (1998) 193 CLR 346; [1998] HCA 6

Kuczborski v Queensland (2014) 254 CLR 51; [2014] HCA 46

Reimers v the Medical Board of Australia [2024] NSWCA 164
Re Cram; Ex parte NSW Colliery Proprietors’ Association Ltd (1987) 163 CLR 117; [1987] HCA 28

R v Duncan; Ex parte Australian Iron and Steel Pty Ltd (1983) 158 CLR 535; [1983] HCA 29

Union Steamship Co of Australia Ltd v King (1988) 166 CLR 1; [1988] HCA 55

COUNSEL: The applicant appeared on his own behalf
A Scott KC, with R Berry, for the first and second respondents
FJ Nagorcka for the third respondent

SOLICITORS: The applicant appeared on his own behalf
McCullough Robertson for the first and second respondents
Crown Law for the third respondent

- [1] On 15 November 2022, Dr William Bay applied to the Court for a review of the conduct of the Medical Board of Australia (the **Board**). This included the Board’s decisions to suspend his registration as a general practitioner (the **suspension decision**) and to investigate his conduct (the **investigation decision**). Each decision was purportedly under made the *Health Practitioner Regulation National Law (Queensland)* (the **National Law (Qld)**).¹

¹ The Board purported to make the suspension decision under s 156 and the investigation decision under s 160(1)(b)(B).

Judicial review

[2] By the *Judicial Review Act 1991* (Qld) (the **JRA**), Parliament gave the Court power to review decisions of an administrative character made under authority conferred by statute and the conduct of those who make such decisions. A person may seek judicial review if their interests are adversely affected by a decision, or by conduct engaged in to make a decision.

[3] In 1990, Sir Gerard Brennan described judicial review of administrative action in this memorable way:

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

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.”²

[4] In this case, Dr Bay has asked the Court to review the conduct of two bodies that exercise such power. Although they exercise power conferred by the Parliament of Queensland, they are national bodies. A Council of Ministers from the six States and two Territories direct them. Parliaments in the other States and the Territories have given the Board and the Australian Health Practitioner Regulation Agency (**AHPRA**) powers and functions like those conferred by Queensland.

[5] The Board and AHPRA acted in unison throughout the proceeding. Although it appears all the operative decisions were made by the Board, through delegates, AHPRA took no point about being joined as a respondent and together with the Board advanced a common response to Dr Bay’s application. In the summary of the reasons, it is convenient to refer to both as the Board.

[6] Dr Bay asked the Court to review decisions of the Board about matters that have been the subject of public discussion and debate. Nothing in this decision should be understood as the Court entering that debate. The Court is concerned only with whether the decision or the conduct was free from an error that goes to the decision-maker’s authority to make the decision. The Court does not have any opinion on any argument about the substantive merits raised in public debate relating to any decision under review.

The outcome on the suspension decision

[7] By written submissions filed on 8 November 2024, the Board made two important concessions.

² *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

[8] First, the Board conceded it was open to the Court to find that the suspension decision was affected by a reasonable apprehension of bias. This concession was made because:

- (a) the Court could infer that, before the 16 August 2022 meeting at which the suspension decision was made, the Board’s chair, Professor Anne Tonkin, discussed with Australian Medical Association (AMA) Chair, Associate Professor Julian Rait making a complaint to the Board about Dr Bay’s conduct at an AMA conference;
- (b) the Court could infer that Professor Tonkin was present at the AMA conference and witnessed Dr Bay’s conduct;
- (c) Professor Tonkin chaired the meeting at which the suspension decision was made;
- (d) Dr Bay’s conduct at the AMA conference was discussed at the meeting, including by Professor Tonkin;
- (e) Dr Bay was not informed of any discussion between Professor Tonkin and Associate Professor Rait about his conduct at the conference or about the making of a complaint; and so,
- (f) “a fair-minded lay observer might reasonably apprehend that [the Board] might not bring an impartial mind to the resolution of the question”³ of whether to suspend Dr Bay’s registration.

[9] Second, the Board conceded it was open to the Court to find that, in making the suspension decision, the Board did not afford Dr Bay procedural fairness. This concession was made because:

- (a) the complaint about Dr Bay’s conduct at the AMA conference formed the basis for at least some of the reasons for the suspension decision;
- (b) the Board failed to:
 - (i) make the substance of the complaint regarding his conduct at the AMA conference known to Dr Bay, including any adverse conclusions the Board might reach about it; and
 - (ii) give Dr Bay the opportunity to respond to the complaint; and so,
- (c) the Board denied Dr Bay procedural fairness in making the suspension decision by failing to make Dr Bay aware of all the matters the Board was going to consider in making the suspension decision.

[10] The suspension decision should be set aside on those two grounds.

The outcome on the investigation decision

[11] There remains the question of whether the investigation decision should also be set aside, as well as the related decision to refer Dr Bay to the Queensland Civil and Administrative Tribunal (QCAT). The Board and AHPRA made no concession about these decisions.

³ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6].

- [12] The investigation decision, as Dr Bay described it, was really three decisions concerning five notifications (or complaints) about Dr Bay, which were referred to the Board. These were as follows:
- (a) on 21 June 2022, a “delegate of the Board” decided to investigate the first and second notifications.⁴ The delegate made this decision two days before the Office of the Health Ombudsman (**OHO**) decided to refer the second notification to AHPRA for consideration by the Board.
 - (b) on 20 July 2022, a “delegate of the Board” decided to investigate the third notification.⁵
 - (c) on 16 August 2022, a “delegate of the Board” decided to investigate the fourth and fifth notifications. These complaints were made by the Queensland State Manager of AHPRA and Associate Professor Rait, respectively.
- [13] The Board did not disclose the name of the delegate who made any of these decisions. The decisions appear to be undocumented, save that the decisions to investigate the first, second and third notifications were noted by the Board committee, chaired by Professor Tonkin, at the meeting when it made the suspension decision. So they appear in the agenda paper and the record of that meeting’s decisions and actions. The decision (as made by a “delegate of the Board”) to investigate the fourth and fifth notifications were made on the same day as this meeting. I infer that all the decisions were confirmed by or made at the meeting chaired by Professor Tonkin at which the suspension decision was made.
- [14] Each notification was about Dr Bay’s conduct at political meetings, in on-line political broadcasts, or at political protests or demonstrations. None concerned his clinical practice. None made any allegation that Dr Bay had or was providing any clinical services that failed to meet the applicable professional standards. None could be properly characterised as a “mandatory notification” under the National Law (Qld),⁶ despite some being submitted and accepted by the Board as such. The Board considered the notifications on the assumption that Dr Bay had acted “in contravention of relevant legislation”, and failed to comply with “regulatory safeguards”, including the relevant Code of Conduct. Neither assumption survived scrutiny at the hearing.
- [15] The nature of the notifications, the timings of the investigation decision (or decisions), and the role played by Professor Tonkin and the AHPRA State Manager in relation to them, have led me to conclude that the investigation decision (or decisions) should also be set aside on the ground of having taken into account an irrelevant consideration (a contravention of legislation and a breach of a Code of Conduct that had not occurred) and the ground of apprehended bias.
- [16] The Board submitted that the Board’s conduct occurred “in the context of an extraordinary period of history.” This was a reference to the COVID-19 pandemic. The World Health Organisation (**WHO**) declared a public health emergency of international concern about the spread of severe acute respiratory syndrome

⁴ Both notifications were from the same complainant.

⁵ The Board has kept the identity of this complainant confidential.

⁶ See National Law (Qld) ss 5 (definition of “mandatory notification”), 140-141.

coronavirus 2 in January 2020. In May 2023, the WHO declared the public health emergency to be at an end.

- [17] During this extraordinary period of history, various measures were implemented by Australian Parliaments and their delegates, and various powers were exercised by executive government. From about February 2021, vaccines for COVID-19 became generally available in Australia. Legislative and executive measures were applied with a view to encouraging widespread vaccine use. None of these measures authorised the Board to abrogate the right of persons, such as Dr Bay, to a hearing before an apparently unbiassed tribunal. None authorised the Board to deny him procedural fairness. None extended the Board's regulatory role to include protection of government and regulatory agencies from political criticism.
- [18] The Board's apparent bias and failure to afford fair process were evident from an examination of the five notifications, the agenda papers for the meeting of the Board committee that made the suspension decision, and the documents recording the outcomes of the meeting. These documents were within the possession of the Board before 17 August 2022, when the Board informed Dr Bay of the suspension decision. The Board has not set aside or revisited the suspension decision at any time since it was made.
- [19] The Board had asked the Court to dismiss Dr Bay's application for review and to hear and decide its application separately and before hearing Dr Bay's application for review.⁷ Throughout the period when the Board adopted this approach, it had the evidence that ultimately showed the Board's suspension decision should be set aside.
- [20] The evidence eventually produced by the Board revealed other unsatisfactory features of their conduct in dealing with Dr Bay. As the above brief recitation shows, their combative approach towards Dr Bay continued in this Court. It continued long after the end of the "extraordinary period of history" that the Board contended explained its conduct towards Dr Bay.
- [21] The investigation undertaken pursuant to the investigation decision was followed by a decision to refer matters about Dr Bay's conduct to QCAT. The referral was made on 19 December 2023, more than six months after the end of the COVID-19 pandemic. There is no evidence that any step was taken by the Board to isolate or immunise those involved in the referral to QCAT from the matters that rendered the suspension decision or the investigation decision invalid or liable to be set aside. The referral was based on the investigation undertaken as a consequence of the investigation decision. In the circumstances, the decision to refer Dr Bay to QCAT, following the investigation of the five notifications, should also be set aside.
- [22] Before the concessions by the Board, the parties made detailed submissions to the Court over three days about whether Dr Bay's application for review should be dismissed and whether the suspension decision and the investigation decision should be set aside. The Board has not succeeded in obtaining the relief it sought. The parties' submissions also addressed Dr Bay's challenges to the constitutional validity and lawfulness of the regulatory powers of the Board. Although Dr Bay has succeeded in setting aside the relevant decisions, his constitutional challenges failed.

⁷ On 10 February 2023, the Board and AHPRA applied to the Court to dismiss Dr Bay's application for review.

It is convenient to record the reasons for reaching these conclusions, even though they do not affect the outcome of the application for review.

The parties

Dr Bay

- [23] From January 2016, the Board registered Dr Bay as a general practitioner.⁸
- [24] By mid-2022, Dr Bay was specialist general practitioner, practising his profession in Queensland. There were no suspensions or cancellations (or “gaps”) in his registration history, and he had no adverse disclosure history.

The Board

- [25] The Board was established under legislation which has since been repealed.⁹ It was one of the 15 “National Health Practitioner Boards” continued in existence by the *Health Practitioner Regulation National Law Regulation 2018* (the **National Law Regulation**).¹⁰ The Board is the National Health Practitioner Board for the medical health profession. It is required to keep the national Register of Medical Practitioners.¹¹

AHPRA

- [26] AHPRA was established by the National Law (Qld).¹² Its functions include:
- (a) providing administrative assistance and support to the Board and its committees in exercising their functions;
 - (b) establishing an efficient procedure for receiving and dealing with matters referred to it by the OHO about persons who are or were registered health practitioners;
 - (c) doing anything else necessary or convenient for the effective and efficient operation of the national registration and accreditation scheme; and
 - (d) any other function given to it by or under the National Law (Qld).¹³
- [27] AHPRA has a national office and must have at least one office in all States and Territories.¹⁴

What happened?

⁸ He had completed the degrees Bachelor of Medicine and of Bachelor of Surgery (Hons) at Monash University in 2015.

⁹ See 27 of the *Health Practitioner Regulation (Administrative Arrangements) National Law Act 2008* (Qld).

¹⁰ See s 4. The National Law Regulation is a law of Queensland made by the Ministerial Council under s 245 of the National Law (Qld).

¹¹ National Law Regulation, s 5.

¹² National Law (Qld) s 23(1).

¹³ National Law (Qld) ss 25(a), (i), (ka) and (l).

¹⁴ As all Australian States and Territories have enacted legislation which either applies the National Law (Qld) as a law of the relevant State or Territory, or at least a law that substantially corresponds with the National Law (Qld), they are “participating jurisdictions” (see the definition in s 5) for the purposes of s 28 of the National Law (Qld).

- [28] On 17 August 2022, AHPRA, on behalf of the Board, wrote to Dr Bay to inform him that the day before the Board had made the suspension decision. AHPRA told Dr Bay the suspension decision took effect from 17 August 2022 and “will continue to have effect until the suspension is revoked by the Board.” By 21 October 2024, when the trial of this proceeding began in the Court, Dr Bay’s registration had been suspended for over two years and two months. In that period, and since, he has not been able to practise as a medical doctor.
- [29] The events that led to the suspension decision appear to have started on 15 June 2022 and ended on the day of the suspension decision. It is convenient to summarise them in three time periods:
- (a) events before 2 August 2022, when AHPRA wrote to Dr Bay inviting him to show cause why his registration should not be suspended (the **show cause letter**);
 - (b) events after the show cause letter and before the suspension decision; and
 - (c) events after the suspension decision.

Events before the show cause letter

The first notification

- [30] On 15 June 2022, the first mandatory notification form was lodged with the OHO (the **first notification**).¹⁵ The OHO was headed by the Health Ombudsman.¹⁶ Mandatory notifications about registered health practitioners must be made (and voluntary notifications may be made) to the Health Ombudsman.¹⁷
- [31] In the mandatory notification form, the complainant indicated that she had:
- “formed the reasonable belief that [Dr Bay] has behaved in a way that constitutes notifiable conduct as [he has] placed the public at risk of harm because [he has] practiced [sic] [his] profession in a way that constitutes a significant departure from accepted professional standards.”
- [32] Asked to describe on the form their concerns “including what happened, how it happened and who was involved”, the complainant wrote:

“On June 12 a video recoding [sic] of Dr William Bay making claims that COVID vaccination has caused harm was published on the Facebook page for the Queensland Peoples’ Protest (a political organisation).

On June 15 a live stream was published on Facebook of Dr Bay making claims that COVID vaccination and his compliance as a GP with vaccination had killed a patient and caused harm to patients. The live stream was recorded at a meeting for the political group Queensland Peoples’ Protest which was live streamed on the face book

¹⁵ The same complainant also made the second notification referred to below. For the purposes of this decision, it is not necessary to identify the complainant by name.

¹⁶ See *Health Ombudsman Act 2013* (Qld) s 24.

¹⁷ *Ibid* s 13(2); *National Law* (Qld) Part 8.

page for the Informed Medical Options Party – IMOP also a political organisation. During the recording of the meeting Dr Bay and another person identifying as a GP were present. Both doctors made serious allegations about Australia’s health care systems and regulators.

Dr Bay also made disparaging remarking [sic] about medical peers and the profession of dietetics.”

- [33] Asked, “Where was the health service provided?”, the complainant wrote that it was provided at a “Public political meeting live streamed for facebook” on 15 June 2022. Asked “How many people were affected?”, the complainant indicated “Two or more”, and wrote:

“There is the potential for wide spread harm due to the irremovable nature of information on the Internet and the capacity for misinformation on social media to be spread virally.”

- [34] Asked, “In what way were people affected?”, the complainant wrote:

“Potential serious harm to individuals who receive the information at the public meetings or view the video contents on-line. Potential for broader community harm.”

- [35] The Court was told that the complainant was not a registered health practitioner.

- [36] By 17 June 2022, the Health Ombudsman had referred the first notification, as a mandatory notification, to AHPRA, and AHPRA had “Finalised” it. AHPRA’s analysis or notes at that time were that:

“The notification raises concerns about [sic] that [Dr Bay] has been disseminating anti-vaccination information on social media. Any promotion of anti-vaccination statements or health advice which contradicts the best available scientific evidence or seeks to actively undermine the national immunisation campaign (including via social media) is not supported by National Boards and may be in breach of the codes of conduct and subject to investigation and possible regulatory action. As such, the allegations warrant further consideration by the Board. AHPRA were consulted in joint consideration, noting links provided to interviews/information sessions that [Dr Bay] has been a part of in which he criticizes [sic] vaccinations and covid mandates and progressing this matter to a Board”

- [37] Mr Frolow of AHPRA provided only part of the AHPRA analysis or notes to the Court. It may be inferred that the above quoted passage continued so that it read “progressing this matter to a Board meeting is appropriate” or words to a similar effect.

The second notification

- [38] On 20 June 2022, the same complainant called the OHO with what would be treated as her second mandatory notification (the **second notification**). Mr Frolow of AHPRA swore that the complainant “filed” a “further notification” with the OHO

that day. This was not consistent with the “copy of the notification to OHO” that he exhibited. The exhibit appears to be a typed file note of a telephone call from the complainant to someone at the OHO, noting the things the complainant stated and the advice they were given.

- [39] In the note, the complainant is referred to as “the notifier” and Dr Bay is referred to as “the provider” in these terms:

“The notifier states that the provider did a ‘live video’ outside a patient’s house over the weekend. The notifier states she believes the provider was outside the house, as he was visiting as a GP. The notifier states that the provider’s video showed the front of the patient’s house, but not the actual address.

The notifier states that [the] provider identified the consumer as [Aboriginal and Torres Strait Islander] and stated she was having chest pain. The notifier states that he called an ambulance and filmed the ambulance arriving an hour later, stating that he was advised it would be there within 10 minutes.

The notifier states that the video is an hour long and is still on Facebook. The notifier also indicated she would be able to screen record the video in case it gets deleted.

Advised the notifier to contact AHPRA with this information, as the matter has been referred. The notifier indicated she would do this.”

- [40] The complainant does not appear to have made the second notification in any written form. It seems likely the complainant took up the OHO’s advice to contact AHPRA and that AHPRA contacted the Board without any formal referral, because, on 21 June 2022, the Board decided to commence an investigation of the second notification, as well as the first notification. This was two days before 23 June 2022, when the Health Ombudsman decided to refer the second notification to AHPRA.

The third notification

- [41] At 2:10pm on 2 July 2022,¹⁸ another notification was submitted to the OHO (the **third notification**). Mr Frolow exhibited a redacted copy of the notification form. It does not identify the name of the notifier or whether it was made as a mandatory notification or a voluntary notification. In completing the form, the unidentified notifier confirms they are making a complaint “about a health service on behalf of someone else”. The unidentified notifier states that the name of the “someone else” is “Self explanatory in the videos”.

- [42] The unidentified notifier summarised their complaint in these words:

“A rather unusual complaint I’m afraid.

I have been made aware of some on line content by someone referring to themselves as Dr William Ray [sic].¹⁹

¹⁸ All times referred to in these reasons are in Australian Eastern Standard Time.

¹⁹ The unidentified notifier also names “Dr William Ray” as the “Health Service Provider” in the notification form.

This name is a registered medical practitioner in Strathpine.

It includes videoing an ambulance handover for one of his patients (with some rather bizarre commentary) as well as many unusual comments of an anti-vax nature.

I cannot confirm that the person in the video is actually who they claim to be.

But someone clearly needs to investigate – it’s rather concerning.

I have no experience with this practitioner personally.

Thank you.”

[43] On 5 July 2022, the Health Ombudsman referred the third notification to AHPRA. This was done after “joint consideration” of the notification with AHPRA.

[44] On 20 July 2022, the Board decided to commence an investigation of the third notification.

The fourth notification

[45] On 1 August 2022, at 1:02pm, the Queensland State Manager of AHPRA, Heather Edwards, submitted a complaint about Dr Bay to the OHO (the **fourth notification**). Ms Edwards identified Dr Bay and included in her complaint his registration number, presumably obtained from the Register of Medical Practitioners maintained by AHPRA on behalf of the Board.

[46] In the fourth notification, Ms Edwards stated that “the health service was provided” on 30 July 2022. She described “what happened, who was involved, where it happened” and her “main concern(s)” in these words:

“On Saturday 30 July 2022 the Queensland Peoples Protest group led by Dr William Bay turned up at 192 Ann Street to protest against AHPRA and vaccination against COVID-19. Apparently they were not aware that the building would be closed on a Saturday and that AHPRA staff would not be in the office.

Building security managed to move the group on fairly quickly, but apparently they said that they would be back on Wednesday, although no further information was given.

Attached are a few still [sic] from the CCTV cameras for your reference. There are other photos on the groups [sic] website at [URL].

There is also an open letter written by Dr William Bay on the website at [URL] stating he is the leader of the Queensland Peoples’ Protest (QPP) and a registered practising QLD-based doctor.”

[47] Asked, “What do you want to happen?”, Ms Edwards wrote:

“The complaint at joint consideration ... to be determined to be forwarded to AHPRA and the [Board] to manage in conjunction with

similar complaints about Dr William Bay and his anti COVID-19 vaccination stance and ill informed [sic] and harmful messgaing [sic].”

- [48] Ms Edwards sent her complaint to the OHO by email on what appears to be her official email letterhead. She attached an incident report from a building security officer and three photographs “from the CCTV”. She thanked the OHO “for your help with this” and signed the email “Regards Heather”.

The show cause decision

- [49] On 2 August 2022, at 2:00pm, a committee of the Board²⁰ met by Zoom. Through Mr Frolow, AHPRA produced to the Court part of the record of the committee’s “Decisions and Actions” that were “confirmed by members during the meeting”.²¹

- [50] It records that the information considered by the committee comprised the first, second and third notifications, and transcripts of the “videos referred to in notifications.”

- [51] The committee’s decision had seven elements. Only three are relevant. The first was that the committee had:

“formed a reasonable belief that:

- a. because of his conduct, Dr William Bay poses a serious risk to persons and it is necessary to take immediate action to protect public health or safety; and/or
- b. it is otherwise in the public interest to take immediate action in respect of Dr Bay’s registration.”

- [52] The second relevant element was that the committee proposed to take immediate action to suspend Dr Bay’s registration as a specialist general practitioner. The third was to invite Dr Bay to make a submission about the proposed immediate action.

- [53] The committee’s reasons are set out in the same document. With one material exception, these are substantially reproduced in the show cause letter, which AHPRA sent to Dr Bay on 2 August 2022. The material difference is that the show cause letter states that a post on Twitter (now X) alleged to be by Dr Bay “regarding being removed from the AMA National Conference” was also considered.

- [54] There is another difference. The show cause letter described the decision and the reasons as those of the Board, rather than of the relevant Board committee and the show cause letter was sent on this basis. I assume the committee was acting as the Board’s delegate, although no delegation was produced or cited. Nothing seems to

²⁰ The Immediate Action Committee of the National Special Issues Committee (COVID).

²¹ Professor Tonkin chaired the committee meeting. She was joined by other practitioner members from the Northern Territory (Dr Samuel Goodwin), Tasmania (Dr Benoj Varghese) and South Australia (Dr Mary White), and community members from South Australia (Ms Kate Ireland) and the Australian Capital Territory (Ms Eileen Jerga). Eight AHPRA staff were also in attendance, but some for only particular agenda items – Mr Frolow (in his capacity as Operations Manager, Notifications, Immediate Action) and Ms Kaitlin Saunders (in her capacity as Regulatory Advisor, Notifications, Immediate Action), for example, only attended the agenda item concerning Dr Bay. Other staff, such as Ms Jane Eldridge (in her capacity as National Manager, Notifications, COVID Taskforce) attended the entire meeting.

turn on this. So, in the following paragraphs of these reasons, the language of the show cause letter is adopted, referring to the Board and not to the committee.

The show cause letter

[55] The show cause letter invited Dr Bay to provide a written submission by 10:00am on 9 August 2022, or make “a verbal submission” on 16 August 2022.

[56] The Board identified as concerns raised by the first three notifications that Dr Bay had “espoused and encouraged” views, including:

“mistrust of vaccinations (in relation to COVID-19), of public health measures, of the health system generally, and of the regulation of the health care system.”

[57] According to the show cause letter, the Board’s view about “Serious Risk” was based on Dr Bay’s statements having “the potential to undermine public health directives and positions in relation to the COVID-19 vaccine” and being “in contrast with ... public health directives.” According to the show cause letter, the Board reasoned that, in circumstances where Dr Bay holds registration as a medical practitioner, his conduct “poses a serious risk to persons and it is necessary to take immediate action.”

[58] No public health directive was identified in the show cause letter. The Board did not explain what was meant by “public health positions”. From the repeated references to it in the show cause letter, one may infer these were “positions” taken by the executive governments of the Commonwealth, the States and Territories, as well as the “positions” of local governments.

[59] This inference is consistent with the Board’s view about the public interest, which was that Dr Bay’s public commentary:

“undermines AHPRA and the Board’s position on COVID-19 and the COVID-19 vaccination, and further contravenes the position of local, state and federal government and health authorities, which are in place to protect public health and safety.”

[60] In this context, the Board expressed the following view to Dr Bay:

“You have willingly and/or knowingly failed to consider the public’s safety and have behaved in a manner that is wholly inconsistent with the expectations of a medical practitioner, and in contravention of relevant legislation and guidelines.”

[61] As to public confidence, in the show cause letter the Board stated that Dr Bay’s conduct “brings into question” his ability to behave in accordance with the standards of the profession and broader health system, “including principles that are detailed in” the Board’s Code of Conduct.²² No relevant provision of the Code of Conduct was identified in the show cause letter or in any of the Board’s subsequent communications with Dr Bay. Nor was any provision identified in submissions to the Court.

²² The Decisions and Actions document records that the committee considered Dr Bay’s alleged conduct in light of a “*Code of Conduct for nurses*”, which the Board had implemented. This is likely a typographical error that has not been corrected. The show cause letter refers to a “Code of Conduct”.

- [62] On this topic, in the show cause letter, the Board returned to its earlier expressed view that:

“Your public commentary, opinion, and actions contravene the position that local, state and federal government and health authorities have provided in a global pandemic. ...

[You are] advocating adverse views in relation to the COVID-19 vaccine and its efficacy, which runs contrary to public health directives, which are designed to protect public health and safety. The Board considered that knowledge of your profession may lend credibility to your position which is in contrast with and has the potential to undermine public health directions.”

- [63] The Board explained it had implemented the Code of Conduct “to ensure the public can have confidence that registered practitioners conduct themselves to the highest legal, professional and ethical standards.” The Board’s reference to “legal” standards appears to be directed to the baseless allegation that Dr Bay had contravened relevant legislation.

- [64] The Board’s view was that Dr Bay’s conduct:

“may erode the intrinsic trust that the public has in medical practitioners ... and is highly likely to adversely impact public opinion of the medical profession and its regulation and is likely to have a material or lasting negative effect on the profession’s reputation.”

- [65] The Board had reasoned that if there were a “perception of a failure to act” against Dr Bay, it would erode the public’s confidence in professional standards and “the protective function of the Board”.

- [66] Under the heading “Suitability”, the show cause letter again stated the Board’s view that Dr Bay’s conduct suggested he had failed “to comply with the position of local, state and federal government and health authorities”. It went further stating that the conduct also suggested he had failed “to comply with regulatory safeguards”, and that he had failed “to act in accordance with legal, professional and ethical standards.” The show cause letter did not identify any safeguards, or standards applicable to Dr Bay, save for the Board’s Code of Conduct as a whole. On this basis the Board wrote that it had decided that the “nature and character of the conduct” was such that “it is in the public interest to take immediate action now.”

- [67] Under the heading “Competing Public Interests”, the Board stated “immediate action is only taken when it is necessary and proportionate to do so.” This was followed by the statement that:

“However, in circumstances where you have publicly made comment and/or shared misleading information concerning COVID-19 and/or the vaccination, and ... appear to maintain such views, and further, have acted in a manner that undermines public health directives, such conduct may legitimately compromise public confidence in the health profession.”

- [68] According to the show cause letter, the Board had concluded that:

“any competing public interests do not override the above identified public interest that requires protection by way of immediate action, whilst the matter is being further considered.

The taking of immediate action to preserve the public’s confidence in medical practitioners is considered a primary public interest. This is particularly so given ... that a decision not to take immediate action would be contrary to community expectations.”

- [69] In a final formulation of its earlier expressed view, the show cause letter stated that it was necessary for the Board to suspend Dr Bay’s registration because:

“you have behaved contrary to and/or undermined the position of the Board and local, state and federal government and health authorities, which are in place to protect public health and safety.”

- [70] The Board considered suspension was appropriate because Dr Bay:

“may have behaved in a manner that demonstrates a general absence of qualities essential for a medical practitioner, including the ethical exercise of judgment and integrity, and respect for public health directives [and] lesser forms of regulatory action would be insufficient to protect public confidence in the reputation of the medical profession whilst the matter is being further considered.”

- [71] The show cause letter confirmed that the Board had considered the first, second and third notifications, transcripts of videos referred to in those notifications, and the Twitter post. Although the show cause letter stated that the “material considered by the Board in proposing this action” was enclosed, and although Mr Frolow had sworn this was so, it became clear at the hearing that Dr Bay was not given copies of the notifications, even in the redacted form in which they were eventually placed before the Court.

- [72] Enclosed with the show cause letter were extracts of “Sections 155 – 159 of the National Law”. The Board and AHPRA conceded at the hearing that these were not extracts from the National Law (Qld). Relevantly, the extracted s 155 omitted paragraphs (d) and (e) of the definition of “immediate action” that are part of the law in Queensland.

- [73] Likewise, the “Information Sheet about Immediate Action” enclosed with the show cause letter outlined the law in a way that was not consistent with the National Law (Qld). Relevantly, it omitted any reference to the additional types of immediate action available under the National Law (Qld).

- [74] According to Mr Frolow, both the extracts of “Sections 155 – 159 of the National Law” document and the “Information Sheet about Immediate Action” were “pro forma documents which were provided, as a matter of routine” to practitioners against whom immediate action was proposed. Mr Frolow describes the disparity between these documents and the National Law (Qld) as “an administrative oversight”. According to Mr Frolow, the oversight seems to have endured since the pro forma documents were created in about 2012.

Events after the show cause letter and before the suspension decision

The fifth notification

[75] At 5:25pm on 2 August 2022, Associate Professor Rait made a mandatory notification to the OHO about Dr Bay (the **fifth notification**). In it, Associate Professor Rait indicated that he had:

“formed the reasonable belief that [Dr Bay] has behaved in a way that constitutes notifiable conduct as [he has] placed the public at risk of harm because [he has] practiced [sic] [his] profession in a way that constitutes a significant departure from accepted professional standards.”

[76] Asked to describe his concerns “including what happened, how it happened and who was involved”, Associate Professor Rait wrote:

“Dr Bay aggressively interrupted the AMA National Conference being attended by 400 doctors. I am the chairperson of the conference. While management of the COVID-19 pandemic was being discussed Dr Bay was livestreaming to followers outside the conference. Dr Bay yelled at conference attendees to: ‘Stop forcing these vaccines on the people of Australia who are getting killed by them.’ He yelled at the Commonwealth CMO: ‘Professor Paul Kelly is a liar and is gaslighting you.’ He made false claims by yelling ‘Natural immunity has been proven to give 97.3% immunity for life against all variants.’ A number of doctor attendees were intimidated by his actions and vacated the conference as a result.”

[77] Asked, “Where was the health service provided?”, Associate Professor Rait wrote that it was at a “AMA National Conference, ICC Sydney” on 29 July 2022. Asked “How many people were affected?”, Associate Professor Rait wrote “approximately 400 doctor attendees at the conference.” Asked, “In what way were people affected?”, Associate Professor Rait identified “minor psychological or emotional harm”.

[78] Asked, “Have you already complained to the health service provider or to another entity?”, Associate Professor Rait wrote that he had made a complaint to the chair of the Board, Professor Tonkin verbally and in person.

[79] In his email to OHO which attached the fifth notification, Associate Professor Rait wrote that Dr Bay’s actions were witnessed by the chair of the Board, Professor Tonkin.

[80] On 9 August 2022, the OHO Acting Executive Director, Assessment & Resolution, Ms Grogan, sent an email to the Health Ombudsman, asking her to review another officer’s request for approval to refer the fifth notification (from Associate Professor Rait) to AHPRA. Ms Grogan told the Health Ombudsman that AHPRA was “keen to have the matter progressed to them as soon as practicable.” Ms Grogan wrote that the Health Ombudsman would recall “there has been media coverage about this practitioner’s conduct” and that Ms Edwards of AHPRA had “confirmed the Board has issued a show cause notice to the practitioner.”²³ The copy of the email chain

²³ The fourth notification had been made by Ms Edwards of AHPRA.

exhibited by Mr Frolow seems to indicate that the Health Ombudsman responded immediately, advising she had decided to refer the fifth notification to AHPRA for further consideration by AHPRA and the Board.

- [81] On 10 August 2022, the OHO referred the fifth notification to AHPRA. On that day, AHPRA’s internal database record of the referral included the following analysis or notes:

“The notifier is Associate Professor Julian Rait, Chair of the AMA Federal Council and Chairperson of the recent AMA National Conference. The practitioner is a GP registrar [sic] in Queensland and identifies as the leader of the Queensland Peoples Protest. The notifier states the practitioner aggressively interrupted an AMA National Conference with approximately 400 doctors in attendance on 29 July 2022.”

- [82] It appears the fifth notification was given a “fast track” through the OHO to AHPRA. Certainly, it travelled faster than the fourth notification.

Referral of the fourth notification

- [83] On 12 August 2022, the Health Ombudsman referred the fourth notification (from Ms Edwards of AHPRA) to AHPRA “for further consideration” by AHPRA and the Board. AHPRA’s analysis or notes at that time recorded that there had been a joint consideration of it with AHPRA and a consultation with the Executive Director (likely Ms Grogan) and the Health Ombudsman. It described the “issue” as a “National Law Offence”. It recorded that:

“The notifier has provided CCTV images which show the practitioner protesting with a group outside [AHPRA’s] Brisbane office. Building security managed to move the group on, however the group said they will be returning.”

- [84] AHPRA’s characterisation of the matter as an “Offence” was never justified.

- [85] So, by 12 August 2022, AHPRA had received five notifications about Dr Bay.

Board’s decision to investigate the fourth and fifth notifications

- [86] Mr Frolow swore that on 16 August 2022 the Board “decided to commence an investigation” of the fourth and fifth notifications.

Dr Bay’s response to the show cause letter

- [87] On 15 August 2022, Dr Bay had provided his written submissions in response to the show cause letter.

- [88] AHPRA’s Regulatory Advisor, Notifications, Immediate Action, Ms Saunders prepared an agenda paper for the 16 August 2022 Board meeting, which was approved by Mr Frolow. In it, Ms Saunders summarised Dr Bay’s submissions for the Board:

“Dr Bay has always performed as a medical professional in accordance with the National Law, the Board’s Code of Conduct and

medical ethics and integrity and, his political commentary is in the public interest.

... [Dr Bay's] public commentary does not pose a serious risk to the community. He submits that rather, the concerns raised by him in his public commentary pose a serious risk to the community.²⁴ He submits that he is merely trying to warn the public of these 'serious risks', which he is obligated to do in compliance with the Board's Code of Conduct ... Dr Bay has referred to various sections of the Code of Conduct in attempt [sic] to demonstrate that his public commentary is compliant with his duties under the National Law and the Code of Conduct and, has provided information, including peer reviewed literature and references, in support of his submissions. Dr Bay acknowledges that his public commentary is inconsistent with the joint statement published by AHPRA and the National Boards on 9 March 2021, ... however submits that the joint statement is 'not law'."

[89] This summary was placed before the Board when it met.

The suspension decision

[90] At 2:00pm on 16 August 2022, the Board met by Zoom.²⁵

[91] Through Mr Frolow, AHPRA produced to the Court part of the record of the Board's "Decisions and Actions" that were "confirmed by members during the meeting".²⁶

[92] The agenda paper for the 16 August 2022 Board meeting listed the first, second and third notifications.²⁷ The notifiers were described as "Members of public". It stated that the notifications had not been "Clinically reviewed". It summarised the notifications as raising "concerns about comments made by Dr Bay in online videos."

[93] The agenda paper described the "Issue" before the Board as:

"Whether the Board reasonably believes that, because of his conduct, Dr William Bay poses a serious risk, and it is necessary to take immediate action and/or it is otherwise in the public interest to take immediate action."

²⁴ Presumably this is intended to read, "He submits that rather, the concerns raised by him in his public commentary *do not* pose a serious risk to the community."

²⁵ Although AHPRA had arranged for Dr Bay to join the decision meeting on 16 August 2022, that did not prove effective. Nothing turns on this.

²⁶ Professor Tonkin chaired the committee meeting. She was joined by other practitioner members from the Northern Territory (Dr Goodwin), New South Wales (Dr Tessa Ho), Western Australia (Dr George Eskander, who appears left the meeting before a decision was made), and Tasmania (Dr Varghese), and community members from South Australia (Ms Ireland) and the Australian Capital Territory (Ms Jerga). Nine AHPRA staff also attended, with some only attending in respect of certain agenda items. Ms Inta Tumuls (in her capacity as Operations Manager, Notifications, Immediate Action), Ms Emily Cousins (in her capacity as Regulatory Advisor, Notifications, Immediate Action), Ms Kate Evans (in her capacity as National Manager, Professional Misconduct) and Ms Greta Driscoll (in her capacity as Senior Legal Advisor) were present only for the agenda item concerning Dr Bay. Mr Frolow and Ms Saunders did not attend the meeting.

²⁷ The agenda paper referred to another notification had been received on 15 June 2022 and "closed" on 23 June 2022 because "it raised the same concerns and referred to a video also referred to in" the first notification.

- [94] The agenda paper briefly summarised Dr Bay’s written submissions (see [87] above). In the agenda paper, the only comment on Dr Bay’s written submissions was:

“In circumstances where Dr Bay maintains his views and, noting his lack of insight, is likely to continue to communicate such views to the community, it is open to the Board to continue to form a reasonable belief that because of his conduct, he poses a serious risk to persons and it is necessary to take immediate action and, that taking immediate action is otherwise in the public interest.”

- [95] The agenda paper did not deal with the complaint Dr Bay had made in his written submissions that he had insufficient particulars of the conduct alleged against him. This complaint does not seem to have been brought to the Board’s attention in any other way.²⁸

- [96] The agenda paper then turned to the topic “Practitioner” where the following statements were made about the fourth and fifth notifications:

“On 8 August 2022, AHPRA raised a notification about Dr Bay in relation to a protest he led outside the Brisbane AHPRA office on 30 July 2022.

On 9 August 2022, a notification was made by the Chair of the AMA Federal Council alleging that on 29 July 2022, Dr Bay aggressively interrupted an AMA National Conference yelling anti-vaccination statements and live streamed the incident on social media.

These notifications are currently in assessment. Prima facie, the nature of the concerns raised in the notifications escalates the risk.”

- [97] The agenda paper gave the notifications a “High” current risk rating, noting this risk had been “assessed” on 15 July 2022.²⁹

- [98] I note, in passing, the agenda paper repeated the allegation that Dr Bay had “behaved in a manner ... in contravention of relevant legislation and guidelines”, which the Board had made in the show cause letter.

- [99] Mr Frolow exhibited the internal record of the Board’s “Decisions and Actions”. It was approved by Professor Tonkin and confirmed by the members during the meeting. It records that the he decision of the Board had seven elements. Only two are presently relevant. These were that the Board:

“4. continued to form a reasonable belief that because of his conduct, Dr Bay poses a serious risk to persons and it is necessary to take immediate action to protect public health or safety and, it is otherwise in the public interest to take immediate action.

5. decided to take immediate action under sections 156(1)(a) and (e) of the National Law by suspending Dr Bay’s registration.”

²⁸ The author of the agenda paper, Ms Saunders, and the officer who approved it, Mr Frolow, were not present at the meeting.

²⁹ It follows that this rating must have been applied to the first, second and third notifications.

[100] It also sets out the Board's reasons over 44 paragraphs. These are substantially reproduced in AHPRA's letter to Dr Bay of 17 August 2022 (the **decision letter**). They reproduce the allegations and findings in the show cause letter and the agenda paper noted above.

[101] Both the Decisions and Actions document and the decision letter assert that only the first three notifications were before the Board. The correctness of these statements may be doubted when one reads the Board's reasons set out in each document.

Events after the suspension decision

[102] On 17 August 2022, AHPRA wrote the decision letter to Dr Bay to inform him of the Board's decision.³⁰

Advice of the investigation decision

[103] On 19 December 2022, AHPRA informed Dr Bay of the investigation decision. According to Mr Frolow, the three parts of the investigation decisions had been made between four and six months earlier.

Judicial review application

[104] On 15 November 2022, Dr Bay filed his application for review. By it, he asked the Court to review the decisions and grant him relief, including setting aside the Board's suspension decision.

[105] On 10 February 2023, AHPRA and the Board filed their application in this proceeding. By it, they sought an order dismissing Dr Bay's application for review pursuant to s 13 of the JRA. Further or alternatively, they sought an order staying or dismissing Dr Bay's application pursuant to s 48 of the JRA or the Court's inherent jurisdiction on the grounds that:

- (a) it would be inappropriate for proceedings in relation to the application be continued or to grant the application; and
- (b) that Dr Bay has not disclosed any reasonable basis for the application.

[106] After delays in hearing the Board and AHPRA's dismissal application, both it and Dr Bay's application for review were listed and heard together over three days from 21 to 23 October 2024.

The hearing

[107] On the final day of the hearing, the Board and AHPRA tendered the critical evidence, revealing the errors in their suspension decision. It was produced to the Court in an affidavit of Mr Frolow, affirmed the day before. No explanation was provided for the delay in disclosing his material.

[108] An earlier examination of the five notifications, the agenda paper and the decisions and actions documents would have revealed that the Board had acted beyond the

³⁰ This seems to be what happened. There are difficulties in identifying whether any particular conduct is conduct of the Board or conduct of AHPRA, as the communications to Dr Bay are surprisingly coy in identifying the author of each communication and the body on whose behalf it is sent.

power conferred on it by Parliament. The Board and AHPRA had the means to identify and understand that the suspension decision could be set aside Dr Bay's without application for review.

- [109] Rather than reveal or act on this information, from 10 February 2023, they sought to prevent Dr Bay from having his application for review heard. Between 15 November 2022, when Dr Bay filed his application for review and 23 October 2024, the last day of the hearing, they did not produce the documents evidencing that the Board had acted beyond power. It is reasonable to infer that while the Board and AHPRA were seeking to dismiss Dr Bay's application for review, they did not think themselves under any obligation to reveal these documents to Dr Bay or put them before the Court.
- [110] After this material was revealed, Dr Bay sought leave to amend his application for review to raise the two grounds apparent on the newly produced material. The Court gave that him leave. Even at that time, the Board and AHPRA maintained the Board's suspension decision and submitted to the Court that Dr Bay's application for review should be dismissed.
- [111] The parties were given an opportunity to adduce any further evidence and make any further written submissions. The respondents' material was filed on 30 October, 7 November, and 8 November 2024. The last of these submissions was from the Board and AHPRA, 16 days after the hearing concluded, in which they conceded that the suspension decision could be set aside. Dr Bay filed submissions in reply on 15 November 2024.
- [112] Counsel for the Board and AHPRA were unable to identify any basis for the Board's assumption (or apparent finding) that Dr Bay had contravened relevant legislation. Nothing in the first three notifications before the Board alleged or justified this conclusion. This very serious allegation by the Board appears to have been entirely unfounded. Neither in the show cause letter nor since did the Board identify the relevant legislation or guidelines it asserted Dr Bay had contravened.
- [113] At the hearing, counsel for the Board and AHPRA submitted that the Board had found that Dr Bay had practised while unvaccinated. After the hearing, in their written submissions filed 8 November 2024, the Board and AHPRA accepted that in fact there was evidence that Dr Bay had medical exemptions from COVID-19 vaccinations. The Board and AHPRA also conceded that it was open for the Court to find that the Board denied Dr Bay procedural fairness by failing to put to him an allegation that he had practised unlawfully.
- [114] The Board and AHPRA were similarly unable to substantiate the assumption or apparent finding that Dr Bay had breached a Code of Conduct.
- [115] It might be difficult to characterise the conduct of the Board and AHPRA as anything less than profoundly unsatisfactory. The Board and AHPRA submitted that the Board made the suspension decision "in the context of an extraordinary period of history." This is true. However, I reject their submission that that "it cannot be suggested" that the Board, AHPRA and the Board chair "were not acting diligently in accordance with a genuine belief that action was required to protect the public."

- [116] AHPRA acted speedily to bring the first four notifications to the attention of the Board, and Professor Tonkin appears to have taken the fifth notification directly to the Board committee meeting she was also chairing. The expedition with which AHPRA and the Board dealt with the notifications and the apparent interest of the Board chair in the fifth notification seem likely to have distracted both bodies from a proper consideration of the purpose and limit of their functions and powers. There is no evidence that anyone in AHPRA or the Board identified, before the investigation decision and the suspension decision were made, that the five notifications were wrongly made and treated as “mandatory notifications”, that none of them made any allegation or included any evidence that Dr Bay had provided or was providing any clinical services that failed to meet the applicable standards, or that Dr Bay had contravened any legislation or breached any Code of Conduct. It must have been apparent from the outset that all the notifications concerned political conduct by Dr Bay.
- [117] The rush to judgment by the Board might explain the serious errors made. There was no satisfactory explanation for defending the suspension decision after Dr Bay filed the application for review. It indicates an animus towards Dr Bay that is in tune with the apparent bias that contaminated the original decision.

Constitutional challenges to the decision

- [118] Dr Bay challenged the validity of the Board’s decisions on constitutional grounds. His primary challenge was to the validity of the each of the *Health Practitioner Regulation National Law Act 2009* (Qld) (the Act),³¹ the National Law (Qld) and the National Law Regulation. In respect of this challenge, the parties agreed six questions for determination.³²
- [119] For the State, Ms Nagorka filed written submissions and made concise oral submissions at the hearing. These dealt with each of the six questions. They were clear and helpful. The State asked the Court to make an order dismissing so much of Dr Bay’s application for review as concerned the constitutional validity of the State legislation.
- [120] Due to the outcome of the application for review, it is not necessary to decide the six questions or to consider them in depth. No separate dismissal order is required. However, for the following brief reasons in respect of each question, none of Dr Bay’s constitutional challenges could succeed.

In enacting the Act, the National Law (Qld) and the National Law Regulation has the Queensland Parliament purported to enact Commonwealth legislation?

- [121] The Queensland Parliament has not purported to enact Commonwealth legislation. Neither the Act, the National Law (Qld) or the National Law Regulation purport to be an exercise of the Commonwealth’s legislative authority. Rather, the National Law (Qld) and its equivalents in other States represent an attempt by those States to

³¹ The National Law (Qld) is a schedule to this Act.

³² Dr Bay initially contended that the national scheme, as enacted by the various States and Territories, was either: impliedly prohibited by the Constitution because s 51(xxxvii) contemplates that States may enact legislation referring matters to the Commonwealth Parliament; or otherwise invalid on the basis of an implied limitation arising from “covering clause” 5 and ss 1, 109 and 122 of the Constitution. These submissions were withdrawn during the trial.

create a common standard for the regulation of medical practitioners across their jurisdictions. There is nothing in the Constitution, express or implied, or at common law which prohibits States (and the Commonwealth) from exercising their legislative authority in a way that is complementary to each other.³³ Similarly, cooperation between States to create a uniform set of rules across jurisdictions is a well-established regulatory model,³⁴ and is not an “abdication” or a “relinquishment” of a State’s legislative authority. As Kirby J observed in *Gould v Brown*:

“Care must be observed in the application of these rules to co-operative legislative schemes within Australia whereby the several legislatures of the nation, in pursuit of the desirable objective of uniform laws, agree to adopt a common standard and to co-operate in its modification and improvement from time to time. This is not a relinquishment of legislative responsibilities. It is the exercise of them. It is not the creation by one legislature of a new and different legislative authority (which would be forbidden). It is the decision of that legislature to exercise its own powers in a particular way.”³⁵

Is the National Law (Qld) invalid or misleading because it includes the word “National” in its short title? Is the word “Australian” in AHPRA and the word “Australia” in the name of the Board invalid or misleading?

- [122] The National Law (Qld) is not misleading or invalid because its short title includes the word “national” in its short title. *Firstly*, the inclusion of the word “national” merely describes a regulatory scheme that operates throughout Australia. It is not intended to imply that it is Commonwealth legislation. Similarly, nothing turns on the inclusion of “Australia” in the names “Australian Health Practitioner Regulation Agency” or “Medical Board of Australia”. Parliaments are empowered to name entities as they see fit. *Secondly*, Dr Bay’s submission that a statute is constitutionally invalid where its short title is misleading is misconceived. As authority for this proposition, he points to *obiter* of French CJ in *Kuczborski v Queensland* where his Honour remarks that the inclusion of the words “vicious lawless association” in the title of the *Vicious Lawless Association Disestablishment Act 2013 (Qld)* is as “at best meaningless and at worst misleads as to the scope and substance of the law”.³⁶ Nothing turns on the title of that statute in the High Court’s decision – his Honour was simply expressing an opinion about its name. There is otherwise no constitutional principle of invalidity that arises from statutes being given misleading names.

Can the National Law (Qld) have lawful extraterritorial operation in relation to conduct that occurred in New South Wales?

- [123] Where there is “even a remote and general connection between the subject-matter of the legislation and the State”, State legislation can apply extraterritorially.³⁷ By only

³³ *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 (*Duncan*), 552 (Gibbs CJ).

³⁴ See for example, the *Rail Safety National Law (South Australia) Act 2012* (SA), which has since been adopted in all Australian jurisdictions, and the *Heavy Vehicle National Law Act 2012* (Qld), which has been adopted by most Australian jurisdictions.

³⁵ (1998) 193 CLR 346 at [287].

³⁶ (2014) 254 CLR 51 at [14].

³⁷ *Union Steamship Co of Australia Ltd v King* (1988) 166 CLR 1 at 14.

applying “so far as possible” to things situated or acts, transactions or matters done outside Queensland,³⁸ the National Law (Qld) applies extraterritorially where it meets this test. Given the decision to set the suspension decision and the investigation decision aside, it is not necessary to consider its application to Dr Bay’s alleged conduct in New South Wales.

Does the Regulation purport to amend or modify Commonwealth laws? And if so, are such amendments or modifications lawful?

- [124] The National Law (Qld) does not purport to amend or modify Commonwealth laws. It applies particular Commonwealth legislation as laws of Queensland. The National Law Regulation makes amendments to the Commonwealth legislation only as it applies as a law of Queensland. The amendments are so it may apply sensibly in Queensland as a law of Queensland.³⁹ Although somewhat complex, this is a valid way of legislating. The Queensland Parliament, by the National Law (Qld), and the Governor in Council, by the National Law Regulation, do not purport to modify or amend Commonwealth legislation. An attempt to do so would be ineffective.

Does the National Law (Qld) purport to establish AHPRA and the Board as Commonwealth agencies with lawful national jurisdiction? If so, is the National Law (Qld) invalid and/or does the Board lack jurisdiction to regulate Australian health practitioners?

- [125] The National Law (Qld) does not establish AHPRA and the Board as Commonwealth agencies. Queensland by the National Law (Qld) and each participating State by its equivalent statute, establishes the “Australian Health Practitioner Regulation Agency” and continues the “Medical Board of Australia”.⁴⁰ However, each participating State has not created two separate entities with the same names to operate within its jurisdiction.⁴¹ The express intent of each parliament is to create “one single national entity”,⁴² and to authorise a regulation to continue in existence an existing single national board.⁴³ There is no constitutional difficulty with establishing a single entities through legislation of various jurisdictions,⁴⁴ and AHPRA and the Board may exercise their functions in relation to one participating jurisdiction or two or more or all participating jurisdictions collectively.⁴⁵

Does the Queensland Parliament have legislative power to regulate health practitioners nationally? Is the National Law and/or suspension and investigation decisions by the Board invalid for contravening s 51(xxiiiA) of the Constitution?

- [126] In short, the Queensland Parliament is not empowered to regulate health practitioners nationally. However, implicit in the first question is Dr Bay’s contention that, by enacting the National Law (Qld), the Queensland Parliament is attempting to regulate health practitioners nationally. With respect, that contention is not correct. By

³⁸ See National Law (Qld) s 8.

³⁹ For example, s 25 of the National Law Regulation provides that the *Ombudsman Act 1976* (Cth) applies as if a reference to the “Federal Court” were a reference to the “Supreme Court”.

⁴⁰ See National Law (Qld) ss 23, 31; National Law Regulation s 4.

⁴¹ *Reimers v the Medical Board of Australia* [2024] NSWCA 164 at [38]-[50].

⁴² National Law (Qld) s 7(1).

⁴³ *Ibid* s 31(2)(a).

⁴⁴ See *Duncan and Re Cram; Ex parte NSW Colliery Proprietors’ Association Ltd* (1987) 163 CLR 117.

⁴⁵ National Law (Qld) s 7(3).

enacting the National Law (Qld), the Queensland Parliament, like each other participating State, was not attempting to regulate health practitioners nationally. Parliament merely enacted a standard for the regulation of medical practitioners that is largely common across the participating jurisdictions. This is a permissible approach to legislating: see paragraph [121] above.

- [127] Dr Bay’s challenge to the National Law (Qld) based on s 51(xxiiiA) of the Constitution also fails. This section of the Constitution concerns the conferral of legislative power on the Commonwealth Parliament. It is not relevant to a State parliament exercising its legislative authority, such as the Queensland Parliament in enacting the National Law (Qld) as a law of this State.

Challenge to QCAT’s jurisdiction

- [128] By his originating application as amended with leave on the final day of the trial, Dr Bay also sought a declaration that QCAT “does not have the requisite jurisdiction to make determinations on this matter, including the jurisdictional questions of territoriality, and involving a respondent from another state, and in constitutional matters involving federal jurisdiction.”
- [129] In its submissions at trial and its supplementary submissions filed on 8 November 2024, the State submitted that the alternative remedy Dr Bay might have sought in QCAT was a merits review of the Board’s decisions. In such a review, QCAT would be exercising administrative power, not judicial power. It would be standing in the position of the Board and considering the decision or decisions that should be made. It followed, the State submitted, that QCAT would not be the appropriate forum in which to hear and determine Dr Bay’s Constitutional challenges to the validity of the legislation under which any decision might be made. Rather, the State submitted, the Court should hear and determine Dr Bay’s legal and constitutional challenges. I accept this submission is correct and sound. Despite it, the Board and AHPRA maintained that the Court should dismiss Dr Bay’s application for review, leaving him to pursue a merits review in QCAT. It is not appropriate to make the declaration Dr Bay sought. It would not be consistent with the findings I have made.
- [130] In light of the later concessions by the Board and AHPRA, their application dismiss Dr Bay’s application for review should itself be dismissed.

Costs

- [131] Dr Bay has succeeded in setting aside the Board’s decisions. Costs should follow the event, in the absence of a reason to order otherwise.
- [132] The Board caused the litigation by making the decisions under review in circumstances of reasonably apprehended bias and without affording Dr Bay procedural fairness. The Board and AHPRA conducted a common response to Dr Bay’s application for review. There is no good reason to make any separate orders about costs as between them. The Board and AHPRA extended the length and costs of the proceeding by defending the Board decisions, making partial concessions only some weeks after the hearing. They ought to pay all costs reasonably incurred by Dr Bay in connection with the proceeding.

- [133] The steps in the proceeding could have been avoided had the Board acted more like a model litigant and promptly identified that the decisions were affected by apprehended bias and a denial of procedural fairness. Had this happened, most of the costs incurred by the parties and all the delay in the proceeding likely could have been avoided. For this reason, there should be no reduction to allow for costs Dr Bay may have incurred in raising his challenges to the validity of the National Law (Qld) (and associated legislation) or for any costs the Board and AHPRA may have incurred in responding to those challenges.
- [134] The State participated in the proceeding only to defend the validity of the National Law (Qld) and associated Queensland legislation. It has succeeded entirely in that respect. The State should recover its costs, in the absence of a reason to order otherwise.
- [135] The Board's communications with Dr Bay about the decisions, and some internal AHPRA documents later provided to Dr Bay, were affected by uncertain legal references and by references to laws that did not apply to Dr Bay's conduct. In the circumstances, it was reasonable and proper for Dr Bay to include the State as a respondent and to advance against all respondents his challenges about the validity and application of various parts of the national regulatory scheme. In justice, the Board and AHPRA, as the unsuccessful respondents, ought to be liable to meet the costs Dr Bay incurred, including those he might otherwise be ordered to pay to the State, as the successful respondent. Those costs could also have been avoided, had the Board and AHPRA acted more appropriately. Given the likely financial effect on Dr Bay of the Board's decisions, it is in the interests of justice to make an order that the Board and AHPRA pay the State's costs of the proceeding.

Final Disposition

- [136] The Order of the Court should be as follows:
- (a) The decision of the Board under sections 156(1)(a) and (e) of the National Law (Qld) to take immediate action by suspending Dr Bay's registration as a medical practitioner is set aside from 16 August 2022.
 - (b) The decisions of the Board under section 160 of the National Law (Qld) to commence investigations of notifications 00502227, 00502429, 00503368, 00505504, and 00505600 are set aside from 16 August 2022.
 - (c) The decision of the Board under s 193B of the National Law (Qld) to refer matters about Dr Bay, which were the subject of investigation of notifications 00502227, 00502429, 00503368, 00505504, and 00505600, to QCAT is set aside from 13 December 2024.
 - (d) The application by the Board and AHPRA to dismiss Dr Bay's application for review, filed on 10 February 2023, is dismissed.
 - (e) The Board and AHPRA are to pay Dr Bay's costs of the proceeding.
 - (f) The Board and AHPRA are to pay the State's costs of the proceeding.