

HEALTH PRACTITIONER TRIBUNAL CASE SUMMARIES

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HPCS 4

Below is a summary of some recent health practitioner cases and links to the full decisions.

VICTORIA

[Psychology Board of Australia v Coleman \[2012\] VCAT 1768](#)

- Findings of **unprofessional conduct** under the *Health Practitioner Regulation National Law (Victoria) Act 2009* and *Health Professions Registration Act 2005* against C, an experienced psychologist in regional Victoria for:
 - employing former patient at her clinic for 18 months immediately following the termination of clinical relationship. VCAT accepted C's motives were altruistic but found she had "*little knowledge of her ethical responsibilities and had not informed herself about recent guidelines about multiple relationships*";
 - unilaterally terminating the patient's treatment and failing to provide her with advanced notice of the termination; and
 - altering patient records. After terminating relationship, C went back to notes from last consultation and modified them to reflect no further appointments were made.
- Although it found altering the notes was unprofessional, VCAT accepted C's evidence that she made the alterations to correct the record and that the alterations were accurate. For this reason, it rejected allegation that C lied to the Board by claiming no further appointments were made despite the fact that this was inconsistent with the original version of the notes.
- Allegations based on C socialising with the patient and giving her a housewarming gift were rejected because this was in the work context.
- VCAT also rejected allegations that C breached the patient's confidentiality by disclosing the patient's chronic fatigue syndrome to employees at the clinic. The patient had told her colleagues herself.
- Likewise, VCAT rejected allegation that C attempted to persuade the patient to buy a share of the practice.
- VCAT **adjourned the matter** for submissions re determinations.

[Medical Board of Australia v Scarff & Anor \[2012\] VCAT 1732](#)

- Findings of **professional misconduct** and **unprofessional conduct** against Dr M, an anaesthetist, under *Health Professions Registration Act 2005* for his management of patient B who became a paraplegic following administration of a spinal-epidural.
- VCAT made findings of **professional misconduct** against Dr M, for:
 - failing to undertake a competent pre-operative assessment of patient B;
 - administering a spinal-epidural anaesthetic to B where it was unsuitable;

- failing to advise nursing staff that B needed to be assessed regularly;
- failing to respond adequately to symptoms B was exhibiting; and
- leaving to travel interstate before arranging proper post-operative anaesthetic care for B.
- VCAT also made findings of **unprofessional conduct** against M for failing to record and document his clinical findings.
- Board had **previously disciplined M** for similar conduct. In 2004, Dr M left operating theatre 30-40 minutes early when acting as the treating anaesthetist. Board did not believe his claim he was ill, noting he had gone straight to the airport. At that time, he gave an undertaking to the Board that "*such circumstances would never occur again*" and was **cautioned** and **reprimanded**.
- VCAT noted the conduct under review was "*uncannily reminiscent*" of the 2004 misconduct and was concerned Dr M lacked insight.
- Dr M was **reprimanded, suspended for 12 months** and ordered to **counselling and mentoring**. Also **restricted to working in an ANZCA accredited public hospital** for 3 years following his suspension, where his patient files would be **audited** on a 6 monthly basis for 2 years.
- **Allegations against Dr S**, the covering anaesthetist, were **not made out**. VCAT not satisfied Dr S had received instructions to review B or had been advised that B was experiencing motor block. The only evidence was short conversations which occurred years ago, of which there were very few contemporaneous notes or records.

[Dewan v Medical Board of Australia \[2012\] VCAT 1840](#)

- Findings of unprofessional conduct of a serious nature and professional misconduct under **Medical Practice Act 1994** in [Dewan v Medical Board of Australia \[2012\] VCAT 1327](#).
- Previous finding of **unprofessional conduct of a serious nature** in respect of patient EF where Dr D failed to:
 - obtain medical history of treatment;
 - trial or give consideration to non-operative options;
 - inform EF's parents of non-operative options;
 - discuss the option of referral to a paediatrician for management;
 - arrange for ganglion cell investigations and/or pre-operative investigations for Hirschsprung's Disease prior to proceeding with elective surgery; and
 - inform EF's parents after the operation that the histology lab report showed normal myenteric plexus with normal ganglion cells.
- VCAT had also found **professional misconduct** on the basis that Dr D operated on EF when it was not medically warranted.
- D submitted that appropriate outcome was to give undertakings to Board or that conditions be attached to his registration.
- Dr D was **reprimanded**, ordered to undergo **counselling and retraining** and required to undergo **audits** every six months for two years. VCAT noted D's "*serious departures*" from the appropriate standards of professional conduct and his subsequent lack of insight into the events in question.

VCAT decided against taking action against D for **criticising VCAT proceedings** on his website noting importance of freedom of expression.

[Chinese Medicine Board of Australia v Mei \[2012\] VCAT 1875](#)

- Findings of **professional misconduct** against M under the **Health Professions Registration Act 2005** ("HPRA").
- M was registered in 2007 in the Division of Acupuncture having been refused registration as Chinese herbal medicine practitioner This means M could not provide Chinese herbal medicine however she continued to prescribe Chinese herbs. In 2010, M was convicted of offences in the Magistrates' Court under HPRA including misleading and deceptive advertising and holding herself out to be a registered Chinese herbal medicine practitioner.

- Allegations at VCAT related to M's treatment of patient XL, an elderly stroke patient. VCAT made finding of **professional misconduct** for providing excessive treatment to XL that was not clinically appropriate. M had 46-48 consultations in 4 months with XL which did not result in any real or lasting improvements in her condition.
- VCAT found M:
 - failed to obtain informed consent for treatment;
 - failed to make and maintain appropriate client records;
 - refused to discuss XL's treatment with her family including her legal guardian;
 - failed to use appropriate sharps disposal methods in contravention of guidelines and the Board newsletter;
 - sought and accepted lifts from XL's family; and
 - discharged XL without referral when ongoing treatment was required after a dispute with the family.
- It made a further finding of **professional misconduct** in relation to M's repeated failure to comply with requests for information made by the Board.
- Board did not pursue allegations based on M's convictions noting M had been appropriately dealt with by court. VCAT accepted this was appropriate but stressed this would not always be the case noting different purpose of criminal and disciplinary proceedings. Also did not pursue infection control allegations.

M **reprimanded, cautioned, fined \$15,000** and had **conditions** imposed including audits and mentoring. VCAT satisfied M had made improvements to her practice and accepted M's refusal to cooperate with Board was influenced by advice she was receiving from her then-lawyer.

[Chinese Medicine Registration Board of Victoria v Huang \[2012\] VCAT 1903](#)

- Finding of **unprofessional conduct** under the *Health Professions Registration Act 2005*.
- H made claims on a private health insurance fund for services that he provided to himself and his family over 5 years.
- Insurer found H had breached rules relating to self provided services and treatment. Also found F's records were deficient and did not enable it to validate back-dated services. Following an investigation by the Board, H was brought to VCAT on allegations of:
 - inadequate patient records;
 - failing to adequately store patient records to protect patient confidentiality;
 - making claims for self-provided service; and
 - failing to maintain infection control standards.
- VCAT made finding of **unprofessional conduct** in relation to all the allegations.
- Board had also alleged H was dishonest in making claims on his health insurance but withdrew the allegation on the basis of a sworn statement by H that he reasonably believed he could make claims for treatment on himself and his family. VCAT accepted this but expressed concern about H's understanding of ethical obligations.

H **reprimanded, fined \$2,000** and required to submit to **audits** of patient records and infection control protocols every six months for two years. H also required to undertake a course in ethics.

[Dental Board of Australia v Lozanova \[2012\] VCAT 1943](#)

- Findings of **professional misconduct** and **unprofessional conduct** under the *Health Professions Registration Act 2005* for making claims to Medicare for treatment that was yet to be provided to a patient.
- Accepting the joint submissions, Tribunal made finding of **professional misconduct** against L for breaching her obligations under Medicare scheme and wrongly obtaining a financial benefit by recklessly making unjustified claims.
- VCAT also made finding of **unprofessional conduct** in relation to L's failure to promptly comply with numerous requests from the patient and Board for copies of the patient's records.

- L **reprimanded, fined \$5,000**, had her **registration suspended for 6 months** and required to undertake an approved unit of ethics.

VCAT accepted L did not intend to act dishonestly – she intended to provide the treatment and had repaid Medicare by the date of the hearing. It also noted L was unable to access the records for some weeks because she was locked out of the clinic when she fell behind on rent because she was ill and unable to work.

[Medical Board of Australia v Schulberg \[2012\] VCAT 1879](#)

- VCAT made multiple findings of **professional misconduct** under *Health Professions Registration Act 2005* ("HPRA") and **unprofessional conduct of a serious nature** under *Medical Practice Act 1994* ("MP Act") against Dr S, a GP, for inappropriate prescriptions to 7 patients over 6 years:
 - most of the patients had known drug dependencies. Prescriptions created risk of relapse and/or overdose;
 - some of the prescribed medication combinations gave rise to significant risk of overdose and/or cardio-respiratory collapse;
 - Dr S prescribed Tramadol as opiate substitution therapy when this was not accepted as good practice;
 - prescribed concurrent benzodiazepines to treat depression, anxiety and/or insomnia where these were not accepted as appropriate forms of treatment for these conditions;
 - prescribed Sch 4 and 8 drugs to a patient who presented in a drowsy/comatose state;
 - prescribed Sch 4 and 8 drugs to a patient when he knew another doctor held a permit for this patient; and
 - prescribed anabolic steroids that were not medically warranted.
- VCAT also made findings of **unprofessional conduct** under HPRA and **unprofessional conduct not of a serious nature** under the MP Act for multiple failures maintain proper records recording his reasons for making prescriptions of concurrent benzodiazepines.
- Matter **adjourned** for hearing re **determinations**.

[DRP v Medical Board of Victoria \[2012\] VCAT 1904](#)

- Following a hearing by Professional Performance and Standards Panel, Dr P was referred to VCAT for his self-administration of Pethidine. By consent, VCAT made findings of **professional misconduct** under *Health Professions Registration Act 2005* for:
 - self-administering Pethidine, a Sch 8 drug;
 - obtaining Pethidine by false representation; and
 - creating false records (attempting to reconcile and disguise his Pethidine use) and submitting these to the Drugs and Poisons Regulation Group.
- VCAT made order **de-identifying Dr P's name**.
- Dr P **cautioned, reprimanded**, and had extensive **conditions** imposed on his registration:
 - not permitted to prescribe, possess or administer Sch 8 drugs;
 - not permitted to self-prescribe or self-administer Sch 4 or 8 drugs;
 - required to participate in the Victorian Doctors Health Program for 5 years;
 - required to submit to random urine and hair tests;
 - required to attend a general practitioner, psychiatrist and drug addiction specialist;
 - required to authorise the Board to communicate with treating practitioners;
 - only allowed to work in a position approved by the Board and subject to further restrictions on practice including supervision and limits on clinical contact hours; and
 - required to seek Board approval if he sought to change his field of medical practice.

[Seymour v Psychology Board of Australia \[2012\] VCAT 1942](#)

- S sought review of decision of Professional Performance and Standards Panel decision under the *Health Practitioner Regulation National Law (Victoria) Act 2009*.
- S was providing psychological services to 2 young children, when she began counselling their mother who was separating from the children's father.

- VCAT upheld Panel's finding of **unprofessional conduct** for:
 - providing services to children and their mother thereby creating conflict of duties in terms of S's duty to the father;
 - failing to inform the father of implications of counselling his children and mother in terms of limits this would place on her ability to convey information to him about the children's wellbeing;
 - engaging in multiple relationship with the mother by acting as advocate and counsellor which may have affected her ability to provide services to mother and the children; and
 - losing professional objectivity by involving herself in an emotionally charged "*changeover*" of the children at which she acted as an advocate for the mother.

Accepting that S had learned from her mistakes, VCAT varied Panel's determination by lessening period/frequency of **supervision** requirement from weekly for 2 years to fortnightly for 1 year. Supervisor to provide **6 monthly reports** and S to maintain a **written log** of supervision.

[Chinese Medicine Board of Australia v Ghaffurian \(No 2\) \[2012\] VCAT 1944](#)

- **Determinations** in respect of previous findings of professional misconduct and unprofessional conduct under **Health Professions Registration Act 2005** in [Chinese Medicine Registration Board of Victoria v Ghaffurian \[2012\] VCAT 478](#).
- Conduct included:
 - misrepresenting his qualifications by claiming to be a "Western" medical practitioner;
 - inducing a patient to take a range of unproven treatments outside the scope of Chinese medicine;
 - injecting undiluted Vitamin C into patient's vein without the necessary qualifications;
 - attempting to induce patient to undergo stem cell therapy; and
 - failing to keep adequate records and provide documentation re herbal medicines.
- G argued that VCAT could not suspend/cancel his registration because National Law transitional provisions did not permit suspension or cancellation where someone was already suspended as G was. This argument was rejected by VCAT.
- G's **registration was cancelled**, and he was **disqualified for 3 years**. VCAT also determined that G be **reprimanded** and **fined \$8,000**. VCAT viewed G's conduct as at "*higher end*" of unorthodox treatment and noted he had previously been disciplined for similar conduct.

As G had suffered a stroke since the hearing and was unlikely to return to practise, these determinations aimed to provide deterrence to other practitioners.

[Psychology Board of Australia v Milosevic \[2013\] VCAT 12](#)

- Proceedings brought against M for **obtaining registration fraudulently/irregularly** under **Psychologists Registration Act 1987** by using a forged degree from the University of Belgrade to obtain registration.
- M was registered in 1998 after emigrating from Serbia 2 years prior. In 2011, M was tried and convicted in County Court of using 2 counts of using a false document to obtain registration.
- In the disciplinary proceedings, M argued he had been wrongfully convicted by County Court.
- Board submitted VCAT should not find that M had engaged in fraudulent conduct based solely on the conviction on the basis of s 91 of the *Evidence Act 2008* submitting that VCAT should have regard to his evidence and transcript. VCAT rejected this approach noting that it was not bound by *Evidence Act* and stating it was not appropriate to challenge conviction in VCAT.
- Nonetheless VCAT was independently satisfied that M's registration was obtained irregularly/fraudulently based on the criminal transcript and M's evidence.
- Due to M's "*calculated and premeditated*" fraud, VCAT exercised discretion to **cancel** M's registration.

In its decision, VCAT was **critical of the Board** for ever registering M stating "*a cursory reading of the supporting documentation required for the application should have raised concerns.*"

Kozanoglu v Pharmacy Board of Australia [2012] VSCA 295

- **Appeal** to Supreme Court from immediate action by Tribunal decision under **Health Practitioner Regulation National Law (Victoria) Act 2009**.
- In 2011, AHPRA was notified by police that K was being investigated for involvement in drug trafficking offences. K had imported an unusually large quantity of DXM, a drug used in manufacture of ecstasy tablets and was associated with persons charged with offences.
- Board determined to wait until outcome of police investigation before determining how to deal with the matter but referred matter to Immediate Action Committee ("**IAC**") which imposed conditions K not work as pharmacist, hold keys to pharmacy or enter pharmacy premises.
- K appealed to VCAT which overturned IAC decision and determined K could work under supervision of a Board approved pharmacist and that he be prohibited from importing scheduled drugs. VCAT also ordered K be prohibited from employing his brother (also suspected of involvement) but on appeal, Board conceded VCAT had no basis for making that order.
- **Grounds of appeal** to the Supreme Court:
 - VCAT treated the matter as a hearing *de novo* rather than confining the matter to the material before the IAC. At VCAT Board had called evidence from expert pharmacist who had not given evidence before IAC.
 - Denial of procedural fairness.
 - No grounds for immediate action ie insufficient evidence that K posed a serious risk to persons or that it was necessary to protect public health and safety. K had not been charged with offences to date and it was not clear whether he would be.
 - VCAT failed to take into account K's prior good record in determining whether his conduct posed a risk to persons.
- **Appeal dismissed:**
 - VCAT was entitled to receive any evidence that bore upon the decision that was actually taken by the IAC at the time that the decision was made so it had not erred in receiving expert evidence.
 - There was sufficient evidence to justify IAC decision ie the evidence supported suspicion that K was supplying DXM for illegitimate purposes.
 - Even if the board had taken into account K's previous good record, there was basis for immediate action.
- Court considered **nature of an appeal against IAC decision** stating it is not rehearing *de novo* or appeal in strict sense: "*It is rather a hybrid, whereby the material to be considered is confined to that placed before the original decision-maker, but with the opportunity available to both parties to present additional evidence which bears upon that decision as originally taken.*"
- Court **criticised Board** for failing to promptly refer the matter to VCAT or a Panel.

It was also **critical of IAC decision** stating: "*the danger to the public was not the continued operation of K's pharmaceutical business save to the extent that it employed the drug DXM as part of its operations as a compounding pharmacy. Seen in this light, the requirement that K not practise as a pharmacist might not have been necessary.*"

Medical Board of Australia v Topchian [2013] VCAT 86

- Finding of **professional misconduct** under **Health Professions Registration Act 2005** against Dr T for engaging in 3 month sexual relationship with a 21 year old client he provided cosmetic surgery to.
- VCAT also made finding of **unprofessional conduct** under **Health Practitioner Regulation National Law (Victoria) Act 2009** for his "*careful and systematic*" attempts to cover up relationship. After patient threatened to expose their relationship, T engaged solicitors and offered to pay patient \$20,000 on condition she:
 - sign documentation confirming she would not take action in relation to, or disclose, their sexual relationship; and
 - delete material related to their relationship from her mobile phone and laptop computer.

- T **self-reported** after these negotiations broke down. VCAT did not give him much credit for this as "he only did so because he was about to be found out."

VCAT noted it had "seriously considered cancellation" but determined **1 year suspension** with a **reprimand** and 2 year **mentoring** condition was appropriate.

NEW SOUTH WALES

Marks v HCCC [2012] NSWNMT 16

- Reasons for finding that Nursing and Midwifery Council of NSW was the "**appropriate review body**" to conduct an inquiry into an application for review under s 163 of the *Health Practitioner Regulation National Law Act 2009*.
- Council was the appropriate review body because:
 - although both the Tribunal and Council could appropriate deal with the matters to be determined, the costs to all involved would be less if dealt with by the Council;
 - it promoted the efficient operation of the Tribunal; and
 - the Council had knowledge and expertise in respect of the matters to be determined.

Barratt v Medical Board of Australia [2012] NSWMT 22

- Appeal to Tribunal under s 175 of *Health Practitioner Regulation National Law Act 2009* against Board's decision to refuse an application by Dr B for general registration on basis he was **not fit and proper** and **not competent**.
- Dr B submitted that his registration should have been granted, subject to conditions.
- Dr B had **history of numerous disciplinary proceedings** and had been subject to conditions on registration for all but 2 of his 29 years in practice. He repeatedly breached these conditions and made it clear he considered he was free to determine when and if he would comply with conditions on registration.
- Recent conduct included writing love letters and sending sexually explicit material to colleagues and having **affair with a patient**. Prior to that, B had **substance abuse** issues. Also **failed to practise competently** and safely on numerous occasions, including not conducting risk assessments prior to discharging patients.
- Tribunal was particularly concerned about:
 - Dr B's reference to the last Tribunal that imposed conditions on him as "sham Tribunal"; and
 - Dr B's admission that his perception of his duty of care to his patients would override any condition attending on his right to practise.

B's application **dismissed** and B **ordered to pay the Board's costs**.

HCCC v R Colquhoun [2012] NSWPSST 7

- Tribunal made findings of **unsatisfactory professional conduct** and **professional misconduct** against psychologist under the *Health Practitioner Regulation National Law Act (NSW) 2009* who was the director of a clinic which provided rapid opiate detoxification ("**ROD**") treatment to 2 patients, one of whom died. C was the Authorising Officer for the Clinic's ROD Protocol and the assessing psychologist for both of these patients.
- In the Tribunal's words, there are "serious risks" for patients arising from ROD and C's clinic was the only place in Sydney providing ROD. The Tribunal identified that there are guidelines in place regarding the use of RDO and it found that C failed to:
 - adequately assess patients' suitability for ROD;
 - take sufficient account of pre-existing conditions and other relevant factors (for example previous attempts at withdrawal, depression);
 - utilise DSM IV or otherwise ensure that a full psychological and/or psychiatric assessment was undertaken;
 - adequately discuss treatment plans and alternative treatment with patients and/or record such discussions;

- maintain adequate clinical records; and
- adequately communicate with other practitioners involved in the treatment of the patients.
- C also drove one of the patients to a boarding house where he “knew or ought reasonably to have known, that [the patient] would not be adequately supported” thereby failing to “take reasonable steps to prevent harm occurring to the patient.”
- C gave evidence he was “no longer involved in ROD therapy” but admitted under cross-examination that he was still involved in procedures involving Naltrexone implants (the medication in the treatment).
- Tribunal concluded C’s “conduct and attitudes involve a disregard for his patients’ needs”. C denied almost all the complaints and the Tribunal considered he had insufficient insight and that the conduct reflected “badly on his ethics and his integrity generally”.
- C had made changes to his practice but the Tribunal was not satisfied C had “reformed” or had “made serious changes that reflect the seriousness of the misconduct”. It was not satisfied C’s “present skills and integrity are such that he could be relied upon to provide members of the public an adequate standard of professional service as a psychologist whether in relation to ROD or otherwise.”

Registration **cancelled** and C ordered to pay HCCC’s costs.

[HCCC v Jane Waddell No 1 \[2012\] NSWNMT 17](#)

- Findings of **unsatisfactory professional conduct** and **professional misconduct** under **Health Practitioner Regulation National Law 2009** against W for engaging in an improper relationship with a patient over whom she had primary care in a mental health unit.
- W admitted a number of the particulars (for example, exchanging telephone numbers, home visits and large volumes of text messages and calls) but denied sexual relationship. Although this was supported by a statement from patient the allegation was established on evidence given by W’s former housemate and references in patient’s medical notes regarding sexual performance issues and his “partner Jane”.
- Tribunal made a finding of **professional misconduct**, rejecting W’s submissions that the patient (who suffered from “*chronic alcoholism*” and associated problems) was not vulnerable.
- At the time of the alleged conduct, W had over 30 years experience and was herself a member of disciplinary committees. Despite this, W claimed she had no knowledge of codes and guidelines regarding relationships with patients.
- Tribunal **adjourned the matter** for a hearing re determinations.

Since the conduct, W had qualified as a lawyer. She made an application for a **suppression order** contending that as she no longer intended to practise nursing, the protective value of identification was inapplicable. This was rejected by Tribunal.

[HCCC v Zhang \[2012\] NSWNMT 18](#)

- Determinations in respect of previous findings of **unsatisfactory professional conduct** and **professional misconduct** against Nurse Z in [HCCC v Gatenby, Zhang & Horn \[2011\] NSWNMT 18](#) under **Nurses and Midwives Act 1991** for:
 - failing to engage therapeutically, provide therapeutic nursing, conduct sufficient risk assessments, or make adequate clinic records in relation to a patient who had attempted suicide; and
 - failing to give a true account of her dealings with a patient at an inquest into the patient’s death.

Those events, when coupled with her false denials of proven facts, had been found to amount to **professional misconduct**.

- Z had appealed that decision to the Supreme Court but the **appeal was dismissed** without a hearing.

- Tribunal noted that since the proceedings Z had not done any training or research to improve her skills or awareness of her professional responsibilities. Further, Z's evidence indicated she still denied most of the matters proven against her and **lacked insight** into her conduct.

Z's registration was **cancelled** with **1 year disqualification**.

[HCCC v Dhall \[2012\] NSWPH 2](#)

- Findings of **unsatisfactory professional conduct** and **professional misconduct** against pharmacist under *Health Practitioner Regulation National Law 2009*.
- Patient A died as a result of respiratory depression caused by an inappropriate cocktail of drugs (with methadone being the primary constituent) dispensed by D over a 5 day period. D was found guilty of **unsatisfactory professional conduct** for:
 - failing to contact the prescriber to question the prescription of Paracetamol, Codeine and Zolpidem in light of concurrent use of methadone and question the use of methadone as a cough suppressant;
 - incorrectly labelling the methadone tablets by omitting the words "when necessary" from the label; and
 - failing to counsel the patient in relation to medication interactions and where counselling occurred, failing to record the details of that counselling.
- Tribunal found D's conduct portrayed indifference to his professional obligations, and the instances of unsatisfactory professional conduct were of a sufficiently serious nature. Accordingly, D was also found guilty of **professional misconduct**.
- D was **reprimanded**. He was ordered to attend **monthly mentoring sessions** for 6 months, attend training on prescription drug use and **maintain membership** of the **Pharmaceutical Society of Australia** for 5 years.

D was also ordered to pay the Commission's **costs**.

[HCCC v Woods \(No 1\) \[2012\] NSWCH 2](#)

- Findings of **unsatisfactory professional conduct** and **professional misconduct** against a chiropractor under *Health Practitioner Regulation National Law 2009*.
- 4 patients alleged W behaved inappropriately towards them. Alleged conduct including inappropriate touching and comments and sending inappropriate text messages.
- Despite W's denials, Tribunal found all allegations were made out. Where the evidence of the patients and W differed, Tribunal preferred that of the patients noting the similarities in their evidence.

Question of protective **orders** and costs adjourned for phase 2.

[HCCC v Roopra \(No 1\) \[2012\] NSWNMT 5](#)

- Findings of **unsatisfactory professional conduct** and **professional misconduct** under *Health Practitioner Regulation National Law Act 2009* against a dentist.
- R had been imprisoned following convictions for 9 counts of aggravated indecent assault including against a victim under the age of 16 and a victim under authority. His victims were 3 young women (including a 15-year-old) employed by R at his dental practice.
- R targeted the victims by recruiting them through an employment agency and asked them to sign "*employment contracts*" in which they promised to provide "*personal services*" including massage and purported to provide consent. At Tribunal, R admitted he never intended to employ the women and that the sole purpose was to assault them.
- R admitted the conduct constituted professional misconduct however **denied he was not suitable person** to hold registration.
- Tribunal was satisfied R was not a suitable person to hold registration at the time he committed the offences but **reserved its determinations** regarding R's suitability to hold registration as at the date of its orders as well as other orders and costs.

- Although R purported to be remorseful, Tribunal was doubtful of this as R:
 - had chosen to deny the allegations when called before Board after his arrest;
 - continued to display general lack of candour;
 - had not apologised to the victims; and
 - continued to focus on the consequences of his actions for himself rather than for his victims.

Tribunal also doubtful as to R's explanations for his conduct being pressure due to work commitments and share market losses however he provided no evidence to support this. According to the Tribunal *"if these matters fall within the normal range of the vicissitudes of daily life it would be difficult for the Tribunal to place much weight on these factors explaining the extraordinary conduct of the respondent"*.

[HCCC v Sunda \[2013\] NSWDT 1](#)

- Findings of **unsatisfactory professional conduct** and **professional misconduct** under **Health Practitioner Regulation National Law 2009** against a dentist for engaging in inappropriate personal/sexual relationship.
- S engaged in personal/sexual relationship with patient for 3 weeks in 2007 before breaking the relationship off. Then in 2011, when patient attended for treatment in 2011, S attempted to initiate sexual contact with the patient in a forceful manner and tried to force to her to perform oral sex.
- Patient had significant mental health issues and had attempted suicide numerous times. S denied knowledge of this but this was not accepted by Tribunal. It was unlikely S had no knowledge given the length of time he had treated the patient for and the fact they had a sexual relationship.
- Prior to hearing, S examined by Board approved psychiatrist who found S may have been suffering from depression.
- S was **suspended for 18 months**, with a number of **conditions** placed on his registration including psychiatric treatment and education. Factors considered included:
 - S failed to comply with chaperone conditions placed on registration following complaint by failing to keep records;
 - S failed to comply with a Notice to Produce patient's records by giving incomplete records;
 - S did not seek counselling despite recommendation from Board's psychiatrist;
 - S had previously been found guilty of unsatisfactory professional conduct; and
 - S did not offer to give evidence, he was called by Tribunal.

S was also ordered to pay **costs**.

SOUTH AUSTRALIA

[Nursing and Midwifery Board of Australia v Mundy \[2012\] SAHPT 5](#)

- Finding of **professional misconduct** against a nurse under **Health Practitioner Regulation National Law (South Australia) Act 2010** for criminal convictions.
- In 2009 and 2010, M was convicted of drug trafficking offences for methylamphetamine and cannabis as well as possession of diazepam for which she received an 18 month good behaviour bond. M admitted she had been using amphetamine for 12 months prior to offences. Trial judge noted M had not made a profit, no longer used drugs and was unlikely to offend again.
- M had previously been subject to a finding of unprofessional conduct and had conditions imposed on her registration after she collapsed on a shift following self-injection with a prescription drug in 1998.
- Tribunal noted there was no evidence that M's personal life ever impinged on the care of her patients. Rather, the evidence showed she was an asset to her patients. Despite this, there was a need to indicate disapproval of this kind of behaviour.

Tribunal ordered M be **suspended for 3 months** and imposed **conditions** on M's registration including prohibition on the consumption of non-prescription medication and random urine testing. M also required to obtain Board's approval to any employment.

[Nursing and Midwifery Board of Australia v Natziuk \[2012\] SAHPT 6](#)

- Finding of **professional misconduct** under *Health Practitioner Regulation National Law (South Australia) 2010* against N, a psychiatric nurse who picked up a schizophrenic patient from under his arms and dragged him a short distance against his will from his room into the dining room.
- N admitted the conduct constituted **professional misconduct**. Tribunal noted conduct was potentially embarrassing to the patient and failed to respect dignity and preserve trust between nurse and patient.
- Tribunal found conduct was of a low level of seriousness and a "**strong reprimand**" was sufficient as:
 - N had already been disciplined by his employer for conduct and had been temporarily stood down;
 - conduct was isolated; and
 - N had apologised.
- Tribunal also noted N was already subject to conditions on his registration including treatment and supervision due to his **multiple sclerosis**. N was not working at the time of the hearing due to these conditions.

N ordered to pay Board's **costs**.

NORTHERN TERRITORY

[Nursing and Midwifery Board of Australia v Halliday \[2013\] NTHPRT 1](#)

- Findings of **unprofessional conduct** and **professional misconduct** under the *Health Practitioner Regulation (National Uniform Legislation) Act*.
- The Tribunal made a finding of **professional misconduct** for assaulting a patient. Whilst attending the patient's bedside, Nurse H:
 - yelled at the patient and pushed the patient onto the bed;
 - placed her hands around the patient's neck and scapula area and pushed the patient into the back of the bed;
 - yelled at the patient to "shut up"; and
 - picked up the remote control for the bed and gave it to the patient, saying words to the effect of "we're not your slaves, you can do it yourself".
- Tribunal made a finding of **unprofessional conduct** in respect of H's failure to report a new nursing position for 16 days after commencing the position and her failure to provide adequate details of the position after a request from the Board. This was in breach of conditions imposed by Immediate Action Committee following the assault. Tribunal considered H was unwilling or unable to understand the full import of the conditions.
- In her submissions, H stressed that had immediately self-reported the incident and that it was an isolated event in 30 years. Tribunal accepted H was "*appalled by her own behaviour*" but was not convinced she had sufficient insight into why she did it and strategies to prevent recurrence.

Nurse H had her registration **suspended for 3 months** and **conditions** imposed on her registration including requirements that she be supervised (to be reviewed after 12 months), report the name of each employer and nominated supervisor to the Board, and have her nominated supervisor provide reports to the Board every 3 months.

[Mathew v Nursing and Midwifery Board of Australia \[2013\] NTHPRT 2](#)

- Appeal to the Tribunal under the **Health Practitioner Regulation (National Uniform Legislation) Act** against Board's decision to refuse M's application for registration because she was **not qualified for registration**.

M had a long history of experience as a **nurse in India and Kuwait** and was working full time as a nurse in Kuwait at the time of the hearing. She claimed that someone known to her had obtained registration in Australia with similar qualifications via a bridging program.

- Tribunal found M did not have an "approved qualification" under National Law, an equivalent qualification or one based on similar competencies, nor had she undertaken an examination or assessment as required by the Board. It found that M's international experience could not make up for her **lack of necessary qualification under National Law**.
- The Tribunal also determined that it did not have jurisdiction to refer M to a bridging program because it only had Board's powers under the National Law allowing it to register or refuse to register.

The Tribunal **confirmed the decision of the Board** and **dismissed the appeal**.

QUEENSLAND

[Pharmacy Board of Australia v Beattie \[2012\] QCAT 550](#)

- Finding of **unprofessional conduct** against **pharmacist** under **Health Practitioner Regulation National Law Act 2009** for failure to adequately maintain records of dispensing products containing pseudoephedrine.
- B kept records on a laptop without backing the laptop up. The laptop crashed, leaving a shortfall in B's records.
- Tribunal formed the view that B was aware of her professional obligations and had attempted to meet them however did not know she needed to backup data on the laptop. B's failure to keep records was not a deliberate flouting of records but the result of limited IT skills. As such, it did not amount to professional misconduct.

The Tribunal **cautioned** B and ordered that **each party bear their own costs**.

WESTERN AUSTRALIA

[Medical Board of Australia v Costley \[2013\] WASAT 2](#)

- A GP admitted findings of sexual misconduct, improper conduct and conduct falling short of the standard expected of a medical practitioner under the Medical Practitioners' Act 2008.
- The Tribunal was asked to determine the appropriate penalty and concluded that the circumstances surrounding the findings of sexual misconduct and improper conduct were such that the appropriate penalty was cancellation of the GP's registration.
- Fines of \$1,000 were also imposed for each of the findings of conduct falling short of the standard expected of a medical practitioner. These findings related to the issuing of a medical certificate to a patient when the doctor knew that the Patient was not unfit for work and writing a prescription for the Patient without having examined her.

The Practitioner was also ordered to pay the Board's costs of the Application in the sum of \$64,763.

[George v Nursing and Midwifery Board of Australia \[2013\] WASAT 16](#)

- Nurse G applied to the Tribunal for review of the Board's decision to refuse her application for general registration (graduated or trained overseas) as a registered nurse and registered midwife.
- As Nurse G resides in Queensland, pursuant to s199(2)(d) of the National Law the appropriate responsible tribunal for an appellable decision is the tribunal for the jurisdiction in which the practitioner lives.

The Nurse's application was therefore dismissed by the Western Australian State Administrative Tribunal for lack of jurisdiction. However, as Nurse G had been informed by AHPRA that she should lodge her application in the WA Tribunal, it was ordered that the Board pay Nurse G her out of pocket expenses in the sum of \$2,823.96. 2

Medical Board of Australia v Whiteside [2013] WASAT 18

- It was alleged that Dr W lacked the medical knowledge and skill to practise safely and competently as a general practitioner under the Medical Practitioners Act 2008.
- The allegations followed a Professional Services Review of the doctor's practice under the Health Insurance Act 1973 (Cth) which resulted in a number of complaints to the Board. There was also a complaint from a patient that the doctor had inappropriately prescribed thyroid hormone supplementation.

The application was dismissed. The Tribunal found that whilst some of the errors and omissions complained of could have given rise to an allegation that the Practitioner acted carelessly or acted incompetently within the meaning of s 76(1) of the *Medical Practitioners Act*, the Board did not allege that such a disciplinary matter existed. Instead, the allegation made was that a competency matter existed and this was not made out.

R v Medical Board of Australia [2013] WASAT 28

- Dr R sought review of the Board's decision to suspend his registration.
- Immediate action was taken against a GP requiring him to have a chaperone present when seeing female patients.
- Subsequently the Board received other complaints about the GP and was informed by the police that criminal charges had been laid against him. Further immediate action was then taken suspending the GP's registration.

The Practitioner's application was dismissed. The Tribunal took into account the information before the Board at the time of taking immediate action. It also considered a number of other complaints which had been made against the Practitioner after the suspension but raised some concerns about them. It concluded that there was sufficient evidence to support a reasonable belief that the practitioner posed a serious risk to persons and it was necessary to suspend his registration to protect public health and safety.

TASMANIA

Dr Nadira Pardo v AHPRA and the Psychology Board of Australia

- Jurisdiction of the Federal Court of Australia – Judicial review of Board decisions.
- The question of whether a decision made by a Board can be subject to judicial review in the Federal Court of Australia has been considered in two cases since the commencement of the National Law. In both cases the Federal Court has held that it does not have the jurisdiction to review decisions made by Boards that were created following the adoption of the National Law by various State and Territory parliaments.
- The implication flowing from both decisions is that if judicial review of a Board decision is sought then the appropriate venue will be a State or Territory Court, i.e. a Supreme Court.
- Both decisions highlight the fact that despite AHPRA being a single body it is governed by State and Territory legislation.
- The first decision was *Broadbent v Medical Board of Queensland* [2011] FCA 980. It was recently followed by the Federal Court sitting in Hobart. In *Dr Nadira Pardo v AHPRA and the Psychology Board of Australia* [2013] FCA 91 the Court reaffirmed the Broadbent decision by finding that because no Commonwealth laws or Commonwealth employees were decision

makers of the 'proposed' decision that there was no scope under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to invoke the jurisdiction of the Federal Court.

Below are links to both decisions:

Broadbent

<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2011/2011fca0980>

Dr Pardo

<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2013/2013fca0091>

Several of the case summaries above have been generously provided by [Russell Kennedy's Health Law Team](#) and the team at [Panetta McGrath](#).

DISCLAIMER

The information contained in this update is intended as general commentary and should not be regarded as legal advice. National Office Legal Services would be grateful for any feedback.

General Counsel