



Disciplinary Proceedings before VCAT

Presented by:

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Foley's List

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High stakes

- Reputation and commercial viability at risk
- Family members can show a keen interest
- Health, mental but also physical, can be engaged
 - Support can be needed by practitioners & complainants

Quasi-criminal Proceedings

- Brought by Boards (supported by AHPRA, and by LSC)
- Proof on the *Briginshaw* balance of probabilities, taking into account the seriousness of the allegations and the potential consequences for the practitioner
- Technically, the *Evidence Act 2008* does not apply
 - Issues with tendency, coincidence, hearsay, severance of allegations
- Two stages: findings and determinations

Initiating Documents Vital

- They formulate the Applicant's allegations
- Further and better particulars generally provided but can be sought
- Essential for Respondent to be able to understand unambiguously what is alleged

Early identification of issues

- Assist practitioner to confront realities: “ostrich behavior” is counter-productive
- Gauge seriousness of allegations
- Assess strength of evidence
- Evaluate whether negotiations (e.g. pre-charge or at compulsory conference) is advisable
- Compromise is often possible
- Commission expert evidence
- Be pragmatic
- Assemble attestations from peers (not clients) if plea of guilty is likely

Regulated health practitioners

- Doctors
- Psychologists
- Pharmacists
- Chiropractors
- Physiotherapists
- Podiatrists
- Chinese medicine
- Aboriginal & Torres Strait Islander health practitioners
- Dentists
- Nurses/midwives
- Paramedics
- Osteopaths
- Occupational therapist
- Optometrists
- Medical radiation

Relevant architecture of health regulations

- National Boards
- State /Regional Boards
- AHPRA

- VCAT
 - 1st instance
 - Appellate (eg application for a stay after a decision to take immediate action (suspension or imposition of conditions) or appeal against IAC decision)

Lawyers: Legal
Profession
National Law,
s296

- *unsatisfactory professional conduct* includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Lawyers: Legal Profession National Law, s297

"professional misconduct" includes—

- (a) unsatisfactory professional conduct of a lawyer, where the [conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence](#); and
- (b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the [lawyer is not a fit and proper person to engage in legal practice](#).

Lawyers: determinations: s302

If the tribunal finds the lawyer guilty of unsatisfactory professional conduct or professional misconduct, can make

- (a) an order that the lawyer **do or refrain** from doing something in connection with the practice of law;
- (b) an order that the lawyer cease to accept instructions as a public notary in relation to notarial services;
- (c) an order that the **lawyer's practice be managed** for a specified period in a specified way or subject to specified conditions;
- (d) an order that the lawyer's practice be subject to **periodic inspection** by a specified person for a specified period;
- (e) an order that the lawyer **seek advice** in relation to the management of the lawyer's practice from a specified person;

Lawyers:
determinations:
s302

(f) an order recommending that the name of the lawyer be removed from a roll kept by a Supreme Court, a register of lawyers kept under jurisdictional legislation or the Australian Legal Profession Register;

(g) an order directing that a specified condition be imposed on the Australian practising certificate or Australian registration certificate of the lawyer;

(h) an order directing that the lawyer's Australian practising certificate or Australian registration certificate be suspended for a specified period or cancelled;

Lawyers: determinations: s302

- (i) an order directing that an Australian practising certificate or Australian registration certificate not be granted to the lawyer before the end of a specified period;
- (j) an order that the lawyer not apply for an Australian practising certificate or Australian registration certificate before the end of a specified period;
- (k) a [compensation order](#) against the lawyer in accordance with Part 5.5;
- (l) an order that the lawyer pay a [fine of a specified amount not exceeding \\$100 000](#) if the lawyer is found guilty of professional misconduct.

Victorian Legal
Services
Commissioner v
Szwider [2019]
VCAT 562
(Judge Jenkins)

(a) The primary aim of an order is to protect the public and to protect the reputation of the profession itself;

(b) Sentencing principles apply to achieve such aim, particularly the objectives of specific and general deterrence; as well as denunciation of the conduct;

(c) The available sanctions are, by their nature punitive; and the objectives of specific and general deterrence, depend upon the sanctions having punitive effect;

(d) In relation to the concept of general deterrence;

(e) In relation to specific deterrence, regard is had to the extent to which a practitioner displays insight into their wrongdoing, such as to demonstrate that what was done was wrong and must not reoccur. Continued entitlement to practise is dependent upon such insight.

Victorian Legal
Services
Commissioner v
Szwider [2019]
VCAT 562
(Judge Jenkins)

- (f) When the Tribunal formulates a sanction, it must take into account all relevant matters, including its financial impact, for any adverse financial impact is self-evidently penal. However, the overriding concern is with public protection. It follows as a necessary corollary that it is not an objective of an order, to seek to maximise or maintain the practitioner's capacity to earn a living and pay his/her debts. Otherwise all legal practitioners who find themselves in impecunious circumstances, could, on that basis alone, seek to resist an order to suspend or cancel their practising certificate; and
- (g) A guiding principle whether to suspend, is whether the person is a fit and proper person to practise

Legal Services
Board v McGrath
[2010] 29 VR
325 at 329-340

- Warren CJ quoted with approval: the concept of a professional person being a fit and proper person to practise his profession:...
- what is meant by that expression is that an applicant must show not only that he is possessed of a requisite knowledge of the duties and responsibilities devolving upon him as the holder of the particular licence under the Act, but also that he is possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public, without further inquiry, as a person to be entrusted with the sort of work which the licence entails.

Stirling v LSC
[2013] VSCA
372 at [62]

- VCAT should apply the general common law rule that ensures that a court or tribunal stipulates a discrete penalty for each charged conduct.

Health Practitioners: National Law 2009, s5

"unprofessional conduct" , of a registered health practitioner, means professional [conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner by the public or the practitioner's professional peers](#), and includes—

(a) a contravention by the practitioner of this Law, whether or not the practitioner has been prosecuted for, or convicted of, an offence in relation to the contravention; and

(b) a contravention by the practitioner of— (i) a condition to which the practitioner's registration was subject; or (ii) an undertaking given by the practitioner to the National Board that registers the practitioner; and

Health Practitioners: National Law 2009, s5

(c) the [conviction of the practitioner](#) for an offence under another Act, the nature of which may affect the practitioner's suitability to continue to practise the profession; and

(d) providing a person with health services of a kind that are [excessive, unnecessary or otherwise not reasonably required](#) for the person's well-being; and

(e) influencing, or attempting to influence, the conduct of another registered health practitioner in a way that may compromise patient care; and

(f) [accepting a benefit as inducement, consideration or reward](#) for referring another person to a health service provider or recommending another person use or consult with a health service provider; and

Health Practitioners: National Law 2009, s5

(g) offering or giving a person a benefit, consideration or reward in return for the person referring another person to the practitioner or recommending to another person that the person use a health service provided by the practitioner; and

(h) referring a person to, or recommending that a person use or consult, another health service provider, health service or health product if the practitioner has a pecuniary interest in giving that referral or recommendation, unless the practitioner discloses the nature of that interest to the person before or at the time of giving the referral or recommendation.

Health Practitioners: National Law 2009, s5

"professional misconduct" , of a registered health practitioner, includes—

- (a) unprofessional conduct by the practitioner that amounts to conduct that is **substantially below the standard reasonably expected of a registered health practitioner** of an equivalent level of training or experience [**note need for expert evidence**]; and

Health Practitioners: National Law 2009, s5

(b) more than one instance of unprofessional conduct that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and

(c) conduct of the practitioner, whether occurring in connection with the practice of the health practitioner's profession or not, that is inconsistent with the practitioner being a fit and proper person to hold registration in the profession.

Health Practitioners: National Law 2009, s5

"unsatisfactory professional performance" , of a registered health practitioner, means the knowledge, skill or judgment possessed, or care exercised by, the practitioner in the practice of the health profession in which the practitioner is registered is below the standard reasonably expected of a health practitioner of an equivalent level of training or experience.

Health Practitioners: National Law 2009, s196(1): Findings

VCAT may decide—

- (a) the practitioner has **no case to answer and no further action** is to be taken in relation to the matter;
- (b) one or more of the following—
 - (i) the practitioner has behaved in a way that constitutes **unsatisfactory professional performance**;
 - (ii) the practitioner has behaved in a way that constitutes **unprofessional conduct**;
 - (iii) the practitioner has behaved in a way that constitutes professional misconduct;
 - (iv) the practitioner has an **impairment**;
 - (v) the practitioner's registration was improperly obtained

Health Practitioners: National Law 2009, s196(2): Determinations

- (a) caution or reprimand the practitioner;
- (b) impose a condition on the practitioner's registration, including, eg
 - (i) a condition requiring the practitioner to complete specified further education or training, or to undergo counselling, within a specified period;
 - (ii) a condition requiring the practitioner to undertake a specified period of supervised practice;
 - (iii) a condition requiring the practitioner to do, or refrain from doing, something in connection with the practitioner's practice;
 - (iv) a condition requiring the practitioner to manage the practitioner's practice in a specified way;

Health Practitioners: National Law 2009, s196(2): Determinations

(v) a condition requiring the practitioner to report to a specified person at specified times about the practitioner's practice;

(vi) a condition requiring the practitioner not to employ, engage or recommend a specified person, or class of persons,

(c) require the practitioner to pay a **fine of not more than \$30,000** to the National Board that registers the practitioner;

(d) **suspend** the practitioner's registration for a specified period;

(e) **cancel** the practitioner's registration.

Health
Practitioners:
National Law
2009, s196:
Determinations

(3) If the responsible tribunal decides to impose a condition on the practitioner's registration, the tribunal must also decide [a review period for the condition](#).

(4) If the tribunal decides to cancel a person's registration under this Law or the person does not hold registration under this Law, the tribunal may also decide to—

- (a) [disqualify the person](#) from applying for registration as a registered health practitioner for a specified period; **or**
- (b) **prohibit the person**, either permanently or for a stated period, from— (i) providing any health service or a specified health service; or (ii) using any title or a specified title.

Craig v Medical
Board of South
Australia [2001]
SASC 169 at
[41]

The purpose of disciplinary proceedings is to **protect the public, not to punish the practitioner** in the sense in which punishment is administered pursuant to the criminal law. A disciplinary tribunal protects the public by making orders which will **prevent persons who are unfit to practise from practising, or by making orders which will secure the maintenance of the proper professional standards.** A disciplinary tribunal will also consider the **protection of the public, and of the relevant profession,** by making orders which will assure the public that appropriate standards are being maintained within the relevant profession.

Ha v Pharmacy
Board of Victoria
[2002] VSC 322
at [100]-[101]

- Does the public need to be protected from him practising ...? What steps need to be taken to ensure that he does not transgress again?
- Members of the public dealing with pharmacists must do so confident that the pharmacist is an honest, reliable, careful and responsible person. The ultimate issue for the decision-maker on penalty is the risk of repetition of the misconduct.

Honey v Medical
Practitioners
Board of Victoria
[2007] VCAT
526 at
[14], [16]

It is of prime importance in assessing the appropriate sanction that we bear in mind that the purpose of the determination is not to punish...

Our aim must be to protect the public, and we achieve that aim by imposing sanctions aimed at [regulating professional performance of the particular individual under consideration and also by way of general deterrence to the profession as a whole.](#)

Medical Board
v Yeo
[2019] VCAT
192 at [26]

- The *principle of parsimony* is also applicable in disciplinary matters in that *any sanction imposed should be of the minimum force necessary to achieve a degree of protection of the public* which the Tribunal believes necessary.

Honey v Medical
Practitioners
Board of Victoria
[2007] VCAT
526 at
[23]

The Tribunal considers a range of factors in making orders including:

- *whether there is a need for specific deterrence* including:
 - a *lack of insight* into what occurred;
 - a *lack of contrition or remorse* about what occurred;
 - a *history of offending* conduct as opposed to a one-off departure from otherwise high standards of conduct;

Honey v Medical
Practitioners
Board of Victoria
[2007] VCAT
526 at [23]

Matters indicating either that a particular sanction is required to deter the practitioner from re-offending or, conversely, that *rehabilitation* has taken place.

- whether there is a *need for general deterrence*;
- of *character and contribution* to the community;
- any *delay* from the time the investigation started to the end of the Tribunal hearing;
- evidence of character and contribution to the community
- Other potentially mitigating factors such as medical or *psychological evidence*, personal or family circumstances.

After VCAT Hearing

- Psychological decompensation if adverse outcome
- Compliance with conditions is monitored
- If can cancellation and preclusion period, there will need to be application to Board for re-registration
 - Plan needs to be developed to optimise prospects of success

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