

# HEALTH PRACTITIONER TRIBUNAL CASE SUMMARIES

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HPCS 3

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

## *NEW SOUTH WALES*

### [HCCC v Santos \[2012\] NSWNMT 8](#)

- **Findings against Nurse S of unsatisfactory professional conduct and professional misconduct (under National Law) on the basis of competence issues and medication errors.**
- **Between** 2009 and 2010, Nurse S was assessed 5 times by her employer. During those assessments various failings were identified in relation to her administration of medication, communication skills, making and recording adequate observations and response to emergency situations. The Tribunal was also satisfied that there had been repeated near miss medication errors by Nurse S throughout her employment as well as actual medication errors on some occasions.

**Registration cancelled** and Nurse S **disqualified from seeking review of the cancellation** for one year. **Costs** awarded against S.

### [HCCC v Kelly Randall \[2012\] NSWNMT 9](#)

- **Findings of unsatisfactory professional conduct and professional misconduct against unendorsed enrolled nurse (under National Law) for handling medications without authorisation.**
- Enrolled Nurse R was in possession of drug safe access cards without authorisation. She used the opened the drug safe and handled Schedule 4 and 8 drugs without authorisation.
- R did not appear. In her written submission R denied having unauthorised access to the drug safe. The evidence which included witness statements, video footage and records of card use were inconsistent with her denial. The Tribunal formed an unfavourable view of R's credibility - the evidence indicated that her judgment was markedly lacking and that she was aware of the limits on the scope of her authority, but chose to act outside those limits.

**Registration cancelled** and prohibited from seeking review of cancellation for **3 years**. **Costs** against R.

### [HCCC v Pearsall \[2012\] NSWNMT 10](#)

- **Findings of unsatisfactory professional conduct and professional misconduct (National Law).**
- Male patient complained that Nurse P rubbed his legs and arms, offered to perform head and shoulder massage and touched his genitals under false pretences that he was performing a test on doctor's orders. All allegations were denied.
- P was acquitted of an assault charge because the Magistrate did not disbelieve either P or the patient, and had to extend the benefit of the doubt to the nurse.
- Tribunal found "several problems" with P's version of events and accepted the patient's evidence. Tribunal also noted evidence from Nurse P's colleagues, who had seen him touching patients on their arms and legs "many times". Nurse P's credibility was undermined by his denials that he was a "touchy feely person" and denials that had spoken about his family to the patient when this patient knew about his family situation.

**Registration cancelled with 5 year disqualification and prohibition order. Costs awarded to HCCC.**

### [HCCC v Thompson \(No 1\) NSWNMT 13](#)

- **Review jurisdiction:** unsuccessful appeal by HCCC against Professional Standards Committee's dismissal of complaint.
- Initial complaint made under *Nurses and Midwives Act 1991*. On appeal, complaint heard under **National Law**.
- A patient died after an emergency caesarean due to haemorrhaging. HCCC alleged that Nurse T had engaged in **unsatisfactory professional conduct** as she had failed to: recognise the possibility of haemorrhaging or the significance of the blood already lost; contact the surgeon, anaesthetist, or medical emergency team; and make legible notes in Patient A's medical records.

Tribunal held there was **insufficient evidence** to prove majority of alleged conduct. Where conduct was proven, the Tribunal found that it **did not amount to unsatisfactory professional conduct**.

### [HCCC v Thompson \(No 2\) \[2012\] NSWNMT 15](#)

- **Costs hearing** following hearing No 1 (see above) following HCCC's unsuccessful appeal.
- T sought costs for the initial PSC hearing which was heard pursuant to the previous act (*Nurses and Midwives Act 1991*) which had no entitlement to costs. National Law did not operate retrospectively to create a new right to award costs in proceedings conducted under previous legislation.

T argued sought indemnity costs order on basis of **Calderbank letter**. Tribunal considered this was inappropriate due to protective function of proceedings and unnecessary in this case. Specifically, the Tribunal did not accept HCCC's submissions in relation to the necessity of witnesses called by T. It considered it appropriate that HCCC pay for the costs of their attendance to hear the evidence of the other witnesses and to respond to it in the course of their evidence. **HCCC ordered to pay costs on ordinary basis.**

### [HCCC v Belkadi \(No 2\) NSWNMT 14](#)

- **Finding that Nurse B was not suitable to hold registration.** Previous findings of **unsatisfactory professional conduct** and **professional misconduct** in 'phase 1' against Nurse B ([HCCC v Belkadi \(No 1\) NSWNMT 5](#)), for inappropriately accessing the records of two elderly patients, visiting them at their homes and soliciting money from them by lying about her circumstances. At date of hearing five years later, B had only partially repaid the patients.
- B **failed to disclose criminal convictions** (stealing, larceny and shoplifting) on registration application.
- B sought **suppression order** on basis she had a 17 year old child with mental health issues. Tribunal did not grant order as B failed to provide evidence of mental health issues and child was actually 18.
- B displayed limited insight into her conduct. Her remorse was related to her situation rather than victims.
- Tribunal found B **not a suitable person to hold registration**. Found B lacked insight, professional and personal integrity (noting B's lack of candour with her referees and her family) and also noted B's lack of candour on applications for registration including in 2012.

**Registration cancelled, 3 year disqualification period. Prohibition order.** B ordered to pay **costs**.

#### [HCCC v Stewart \[2012\] NSWNMT 12](#)

- **Findings against Nurse S of unsatisfactory professional conduct and cumulatively, professional misconduct (under National Law) for failure to comply with conditions on registration** (requiring nurse to remain sober, undergo CDT testing, attending weekly AA/Smart recovery meetings and receive psychiatric treatment) and for attending work intoxicated.
- Tribunal **dismissed a complaint of unsatisfactory professional conduct** on the basis of the nurse's failure to notify the Board of criminal convictions was **dismissed**. Tribunal also dismissed complaint that the nurse was otherwise **not a suitable person to hold registration**.
- Nurse found to have **impairment** (alcoholism and/or depression). Tribunal also made findings on basis of **criminal offences** including drink driving, assault, driving while disqualified and destroying or damaging property which occurred between 1993 and 2010.

Tribunal imposed **6 conditions** on the nurse's registration, namely treatment, reporting on treatment, CDT testing, reporting of CDT results, informing employer(s) and prohibition of agency work. **Costs** awarded to HCCC.

#### [HCCC v Karja \[2012\] NSWNMT 11](#)

- **Findings of unsatisfactory professional conduct and professional misconduct (National Law).** Nurse K had inappropriate personal and sexual relationship with patient in a correctional facility.
- K had history of depression related to traumatic events as a child (including sexual assault) and death of her husband.
- Tribunal noted K had tried to notify her supervisor of her feelings for the patient however they had done nothing to assist.

K was **reprimanded, suspended for 6 months** and **conditions imposed** including: restrictions preventing K from working in a correctional facility requiring her to receive psychological counselling, supervision and education.

### [HCCC v Hasil \(No 2\) \[2012\] NSWMT 21](#)

- **Previous findings of unsatisfactory professional conduct** for Dr H's inadequate record-keeping (under *Medical Practice Act 1992*) and finding of **impairment arising from a brain injury**, which was likely to detrimentally affect his capacity to practise medicine (see [Health Care Complaints Commission v Hasil \[2012\] NSWMT 1](#)).
- H's medical registration was suspended in 2008 and name removed from register in 2009 due to his failure to pay the annual renewal fee.
- HCCC tendered a number of medical reports and submitted that H undergo further rehabilitation. No evidence tendered by H.
- Tribunal noted that if H was still registered as a medical practitioner, they would have cancelled his registration.
- H was **reprimanded and disqualified**. Tribunal ordered that H not be re-registered without a **neuropsychological assessment** confirming that the nature of his impairment is such that he can resume practise as a medical practitioner under appropriate conditions.

H ordered to pay **70 per cent of the costs** of HCCC, apportioned to reflect the result of the proceedings.

### [HCCC v Whyte \(No 3\) \[2012\] NSW PST 5](#)

- **Previous findings of unsatisfactory professional conduct and professional misconduct against psychologist for inappropriate relationship with patient** ([HCCC v Whyte \(No 1\) \[2012\] NSW PST 2](#)).
- **Registration cancelled. Prohibition order. No review of cancellation for 18 months. Costs against W**
- To enable W to terminate therapeutic relationships, Tribunal ordered that a **condition** be placed on W's registration allowing him to see each of his current patients up to two times before cancellation took effect.

Reasons for decision set out in HCCC v Whyte (No 4) [2012] NSW PST 6. (below)

### [HCCC v Whyte \(No 4\) \[2012\] NSW PST 6](#)

- **Reasons for decision** for orders made in [HCCC v Whyte \(No 3\) \[2012\] NSW PST 5](#) (see above).
- At 'phase 2' of the hearing in February 2012 ([HCCC v Whyte \(No.2\) \[2012\] NSW PST 4](#)) the matter was adjourned and Tribunal made interim orders imposing conditions on W's registration including supervision, treatment and disclosure of the findings to clients.
- At Directions Hearing in June 2012, concerns were raised about W's compliance with orders and Tribunal indicated to W that it would be likely to cancel his registration if he failed to comply.
- W **failed to comply with interim orders** by the time of final hearing specifically:
- Only commenced supervision with an approved person in July 2012 (despite Tribunal indicating in February that the proposed supervisor was not suitable) and was now only receiving 1 hour per week of supervision instead of 2 as required by orders.
- Terminated therapy with a psychologist under mental health plan after only 4/6 initial sessions and failed to tell his GP of this.
- W told clients that findings were available on internet and at front desk instead of providing them with a copy. Also waited to "an appropriate time" to tell clients rather

than telling them straight away which Tribunal held was inconsistent with requirement to obtain informed consent.

Tribunal was “deeply concerned” by W’s “careless” attitude to compliance with conditions and determined that cancellation was the only appropriate order. Given W’s failure to comply with the interim orders it could not be satisfied that W could comply with any final orders in a more diligent fashion. Also accepted HCCC’s submissions that W **lacked candour and frankness** in giving evidence.

### [Barratt v Medical Board of Australia \[2012\] NSWMT 22](#)

- **Review Jurisdiction: Dr A sought review of Board’s decision refuse his application for general registration.** The Board had determined he was not a suitable person to hold general registration on the basis of:
  - his repeated failure to comply with conditions on his previous registration;
  - his lack of insight into his responsibility for his inappropriate behaviour over many years; and
  - concerns relating to his clinical skills/competence and his failure to satisfy the Board’s Recency of Practice Registration Standard requirement.
- Tribunal dismissed Dr B’s application. Tribunal held Dr B was **not a fit and proper person to be registered** on the basis that Dr B was not competent to practice medicine, his deficiencies as a practitioner could not be adequately addressed by conditions on his registration and Dr B had consistently breached previous conditions on his registration.
- Findings were based on conduct as far back as 1974 when Dr B was first registered, which included:
  - convictions for a number of offences relating to Dr B’s addiction to pethidine;
  - continuous dependence on drugs and alcohol and rationalisations to justify his addictions;
  - unreliable appearances as a witness in multiple disciplinary hearings and inquiries;
  - findings of **unsatisfactory professional conduct** in [In Re Geoffrey Ian Barratt and the Medical Practitioners Act 1992 \[2004\] NSWNT 7](#) (the Tribunal questioned whether this finding should actually have been for professional misconduct);
  - unacceptable communications with female colleagues;
  - poor clinical judgment and performance in respect of multiple patients, including having an relationship with a patient, inadequate assessments, improper discharges, failure to follow guidelines and failure to consult with senior doctors when necessary; and
  - multiple opinions questioning Dr B’s insight into interpersonal relations and mental state.

Dr B ordered to pay the Board’s **costs**.

### *VICTORIA*

### [Medical Board of Victoria v Myers \[2012\] VCAT 1470](#)

- **Findings of unprofessional conduct under (Medical Practice Act 1994) and (HPRA Act 2005).**

- Dr M was retained by OP's lawyers to assess her capacity to challenge an involuntary treatment order. He visited the patient 18 times both at the facility and at her home.
- VCAT found Dr M's failure to obtain informed consent to fees amounted to **unprofessional conduct of a serious nature**. Dr M had said his fees could cost 'up to' \$17,000. The Tribunal emphasised the importance of obtaining and documenting informed consent with a vulnerable patient such as OP, who had no control over the amount of times that Dr M would visit her.
- VCAT dismissed Dr M's argument that the costs disclosure obligation does not apply to a doctor acting in a medico-legal capacity. VCAT also dismissed the argument that it was up to the lawyer to disclose costs that Dr M had billed OP directly and had not discussed fees with the lawyer.
- Tribunal also found Dr M engaged in **unprofessional conduct not of a serious nature** in that he failed to obtain informed consent for change in role from medico-legal role to that of treating doctor. M denied acting as treating doctor but VCAT found he acted in this role for a short period when he examined OP, took her pulse and then advocated for different/additional treatment to hospital staff.
- A finding of **unprofessional conduct not of a serious nature** was made for failure to keep appropriate notes for the period he was acting as a treating doctor.
- No finding that the number of attendances on and billing of OP was inappropriate or excessive because Board's expert could not definitively say that the number of visits was unreasonable.
- Finding of **unprofessional conduct** under HPRA Act for failing to provide information to investigators.
- Dr M was **reprimanded, cautioned and ordered to undergo counselling**. Tribunal took into account previous disciplinary proceedings against Dr M involving breach of professional boundaries but did not take into account disciplinary proceedings for charge of indecent assault because it was of "completely different character".

**Evidentiary issue:** as OP had died, evidence as to her understanding of fees and conversations she had had with Dr M were given by those who she had spoken to at the time.

#### [MLNO v Medical Board of Australia \[2012\] VCAT 1613](#)

- **Review Jurisdiction: Tribunal set aside Immediate Action Committee's decision (under National Law) to impose health and employment conditions on anaesthetist's registration (MLNO) due to two suicide attempts while working in the UK and possible discrepancies in his recording and/or disposing of Fentanyl.**
- VCAT **noted** that the conditions imposed on MLNO's registration amounted to a suspension, as they precluded the administration of Schedule 8 drugs, rendering the practice of anaesthesia almost impossible.

The Tribunal **set aside the decision of the Board**. There was **insufficient evidence** to support a reasonable belief that MLNO's conduct, performance or health posed a serious risk to persons. As a result, there was no basis to **take immediate action under s 156 of the National Law**.

#### [Chinese Medicine Board of Australia v Lim \[2012\] VCAT 1614](#)

- **Findings of professional misconduct and unprofessional conduct under HPRA Act 2005.**

- Chinese Medical Practitioner L treated FF over 12 consultations for a potentially serious bowel condition. L admitted **professional misconduct** for failing to provide clinically appropriate treatment, failing to refer FF to a medical practitioner or hospital when it became evident FF required such investigation or treatment, failing to issue L receipts, failing to keep proper records, improperly labelling and dispensing herbs to FF, and providing herbs without proper prescription information.
- L further admitted **unprofessional conduct** for issuing receipts for a herbal medicine consultation when electrotherapy treatment was provided and failing to disclose a previous complaint when completing his application for registration as an Acupuncturist.

L **reprimanded, registration suspended for 6 months, fined \$2000** and ordered to complete **9 supervision sessions**. Conditions imposed included: issuing particularised receipts for each Chinese medicine service provided, not employing any students, requiring all staff to wear name badges for identification and providing full and proper details of any Chinese herbal medicine prescriptions.

#### [Chinese Medicine Board of Australia v Yang \[2012\] VCAT 1615](#)

- **Findings of unprofessional conduct under (HPRA Act 2005) relating to the facts in [Chinese Medicine Board of Australia v Lim \[2012\] VCAT 1614](#).**
- Chinese Medical Practitioner Y treated FF at his 13th and final consultation at the clinic. Y admitted **unprofessional conduct** by failing to refer FF to a medical practitioner or hospital for further investigation or treatment of his condition after the potentially serious condition had failed to improve following the first 12 consultations. Y also admitted **unprofessional conduct** by keeping deficient patient records and failing to properly label the herbs dispensed to FF.

The Tribunal **cautioned Y** and **ordered that she undertake ten mentoring sessions**, focusing on proper records maintenance, patient communication, consent and compliance with codes of conduct.

#### [Medical Board of Australia v Christian \[2012\] VCAT 1647](#)

- **Findings of unprofessional conduct of a serious nature (Medical Practice Act 1994) and unprofessional conduct and professional misconduct (under HPRA Act 2005).**
- Between 2000 and 2009, Dr C prescribed Schedule 8 drugs to various patients without a permit. Dr C also failed to notify DHS of his patient's drug dependency, failed to maintain adequate medical records, and provided inappropriate treatment and management of drug dependent patients and prescriptions during this period. Dr C said he was not aware of permit requirements before 2005.

Dr C was **reprimanded, registration cancelled** and **disqualified from re-applying for 2 years**. Dr C required to undergo **health assessment** to determine if psychologically suitable for re-registration.

#### *SOUTH AUSTRALIA*

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

- **South Australian Health Practitioners Tribunal (the Tribunal) found that the incident constituted professional misconduct but of a lower level of seriousness. Conduct was an isolated incident in a lengthy period of service.**

- Mental health nurse dragged patient into dining room. Conduct an assault that was contrary to ward policy and the code of conduct for Australian nurses. Nurse contrite, accepted inappropriateness and seriousness of conduct.
- The Tribunal found a suspension was not warranted, rather a strong reprimand would be sufficient to make the public and the profession aware that such conduct would not be tolerated.

Orders made: **Reprimand** in strong terms outlined, **acknowledgment and endorsement of undertakings** made by respondent annexed to his registration until review and respondent to pay Board's costs.

#### WESTERN AUSTRALIA

##### MEDICAL BOARD OF AUSTRALIA and McCARTHY [2012] WASAT 210

- **Finding in favour of a medical practitioner who had prepared a medical report at the request of a patient's former employer for use in workers' compensation proceedings between it and the patient. The Board had alleged that the medical practitioner was guilty of gross carelessness (under the *Medical Act 1894 (WA)*) by making three incorrect statements in the report.**
- The Tribunal assessed each of the allegedly incorrect statements in their context, reviewed the relevant evidence in relation to each statement and concluded that the allegations against the Practitioner were not established.

Application dismissed. Practitioner's application for costs will be heard in January 2013.

##### MEDICAL BOARD OF AUSTRALIA and WOOLLARD [2012] WASAT 209

- **Finding that medical practitioner acted carelessly, but not incompetently (under *Medical Practitioners Act 2008*) in the conduct of an angioplasty.**
- In August 2006 the Practitioner performed a coronary angioplasty on Patient S. During the procedure the Practitioner inserted a balloon catheter into the right coronary artery and inflated it to a pressure above its rated burst pressure. The balloon catheter burst, dissecting the artery. The Tribunal found that the over inflation of the balloon was unsafe, particularly in a heavily calcified lesion. It also held that the Practitioner was careless in failing to withdraw the balloon and replace it with a non-compliant balloon with a higher rated burst pressure. However the Tribunal declined to find that the conduct was incompetent because at the relevant time, the Practitioner was in the final stages of training to perform angioplasties, and performed the angioplasty in question under the supervision of an accredited interventional cardiologist.

The Practitioner has appealed the Tribunal's decision. Orders with respect to penalty and costs not yet made.

#### QUEENSLAND

##### Pharmacy Board of Australia v Chung [2012] QCAT 483

- **Finding of unsatisfactory professional conduct (under *Health Practitioners (Professional Standards) Act 1999*) for dispensing drugs without appropriate prescription and failing to record sales of pseudoephedrine (PSE).**
- C accepted he had engaged in **unsatisfactory professional conduct** and submitted that ignorance and time pressures prevented him from complying with the

regulations. He also submitted that he no longer stocked PSE and made changes to the pharmacy practice to prevent future breaches.

C **reprimanded** with the details recorded on the register for 12 months. **Conditions imposed on his registration** including CPD, accreditation and mentoring requirements as well as requirement not to apply for reinstatement of endorsement to deal with PSE for 12 months. **Costs against C.**

#### [Persley v Medical Board of Australia \[2012\] QCAT 479](#)

- Application to **remove conditions on registration** imposed by Tribunal in 2009 following finding that Dr P had engaged in an inappropriate personal relationship with a former patient.
- Medical Council had already removed conditions requiring Dr P to undertake counselling and receive treatment from GP in February 2012 at P's request. The remaining conditions prevented Dr P from undertaking individual psychotherapy with female patients and required him to authorise the exchange of information between the Medical Council of New South Wales and Medicare.
- Dr P's application was supported by a reference from his employer and a report from his psychiatrist.
- The Medical Board and the Medical Council did not oppose the removal of the conditions.

The Tribunal was satisfied Dr P had gained insight and understanding and that it was no longer necessary to have a condition restricting him from providing psychotherapy to females. Ordered that **all conditions on Dr P's registration be removed**. **Costs against P.**

#### [Psychology Board of Australia v Duangpatra \[2012\] QCAT 514](#)

- **Finding of unsatisfactory professional conduct against a registered psychologist under *Health Practitioner (Professional Standards) Act 1999* for engaging in an inappropriate relationship with a former patient she treated while working at correctional facility.** D spoke with the patient on telephone over 400 times in a three month period. Discussions were of an intimate nature – eg they discussed having a child together.
- Tribunal satisfied that D had developed some insight into her conduct but it was not fully developed.
- **D reprimanded and suspended for 6 months** with that suspension being suspended after 3 months for a period of 18 months subject to certain conditions (including counselling and professional development for boundary violation issues and completion of a supervision plan). The time that the D had already spent under supervised practice was taken into account.

**Costs** awarded against D. D's **application for a non-publication order was dismissed.**

#### [Pharmacy Board of Australia v The Registrant \[2012\] QCAT 515](#)

- Disciplinary proceedings against Pharmacist R for dispensing PSE while not complying with the industry quality standard, stocking excessive quantities of PSE, facilitating the inappropriate dispensing of PSE and failing to adequately record PSE sales. Following the referral, R suffered severe health issues and surrendered his registration.

R admitted to **professional misconduct** under the National Law Act but QCAT was not satisfied that the conduct was of a *substantially* lesser standard required to establish professional misconduct. R gave an **undertaking not to apply for registration** as a health practitioner in any jurisdiction in Australia. **Costs** against R. Publication of any information that might identify R, R's brother or the location of the former pharmacy was prohibited.

#### [Nursing & Midwifery Board of Australia v Farley \[2012\] QCAT 447](#)

- Hearing to **determine whether further action should be taken** against a nurse whose registration had been suspended in 2011 with other conditions imposed on basis of inappropriate personal relationship with an elderly patient who made "substantial loans" to the nurse.
- At the original hearing, Tribunal had expressed concern about F's "remarkable lack of insight". At this hearing, Tribunal was satisfied F's insight had improved, as F had completed ethical program with a professional ethics instructor and 15 CBT sessions with a psychologist who reported F had developed better insight and appropriate decision-making strategies.

Tribunal accepted joint submissions of parties that it should **take no further action**.

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

#### *DISCLAIMER*

The information contained in this update is intended as general commentary and should not be regarded as legal advice.

#### **General Counsel**