SUPREME COURT OF QUEENSLAND

CITATION:	*Chibanda v Chief Executive, Queensland Health & Anor* [2020] QCA 144
PARTIES:	**JOHN CHIBANDA** (applicant) **v** **CHIEF EXECUTIVE, QUEENSLAND HEALTH** (first respondent) **MEDICAL BOARD OF AUSTRALIA** (second respondent)
FILE NO/S:	Appeal No 9021 of 2018 SC No 12141 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 128 (Applegarth J)
DELIVERED ON:	30 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Sofronoff P and Boddice and Davis JJ
ORDERS:	**1. Grant the application for an extension of time to appeal.** **2. Refuse the application to adduce further evidence.** **3. Dismiss the appeal with costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – TIME FOR APPLICATION – where the applicant applied for a statutory order of review of decisions made by the respondents which resulted in the termination of the applicant's employment with Queensland Health and the end of his conditional registration as a medical practitioner – where the application was made, at best, five years out of time – where the trial judge dismissed the application because the applicant had not provided an adequate justification for the grant of an extension of time in the circumstances – where the applicant seeks to appeal out of time – where the applicant applies to adduce further evidence on appeal – whether the new evidence overcomes the delay and the availability of other avenues of review – whether the trial judge erred in determining it was in the interests of justice for the judicial

review application to be dismissed

Administrative Decisions (Judicial Review) Act 1977 (Qld), s 3
Crime and Corruption Act 2001 (Qld)
Crime and Misconduct Act 2001 (Qld), s 15, s 33, s 34, s 35, s 48, s 49, s 219F, s 219G, s 219BA
Health Practitioners (Disciplinary Proceedings) Act 1999 (Qld)
Health Practitioners (Professional Standards) Act 1999 (Qld), s 51, s 115, s 116, s 118
Health Practitioner Regulation National Law Act 2009 (Qld)
Health Quality and Complaints Commission Act 2006 (Qld)
Judicial Review Act 1991 (Qld), s 4, s 9, s 13, s 20, s 26, s 32, s 48
Medical Practitioners Registration Act 2001 (Qld), s 132, s 133, s 134, s 135, s 140
Public Service Act 2008 (Qld), s 189, s 191

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10, applied
Attorney-General (NT) v Minister for Aboriginal Affairs (1986) 67 ALR 282; [1986] FCA 269, cited
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33, cited
Edelsten v Health Insurance Commission (1990) 27 FCR 56; [1990] FCA 449, cited
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, applied
Kelson v Forward (1995) 60 FCR 39; [1995] FCA 1584, cited
Margarula v Minister for the Environment (1999) 92 FCR 35; [1999] FCA 730, cited
Pancontinental Mining Ltd v Burns (1994) 52 FCR 454; [1994] FCA 1294, cited
Vega Vega v Hoyle & Ors [2015] QSC 111, cited
Walters v Drummond & Ors [2019] QSC 97, cited

SOLICITORS: The applicant appeared on his own behalf
Crown Law for the first respondent
Minter Ellison for the second respondent

[1] **SOFRONOFF P:** I agree with Davis J.

[2] **BODDICE J:** I agree with Davis J.

[3] **DAVIS J:** The applicant seeks an extension of time within which to appeal against orders made by Applegarth J dismissing his application for a statutory order of review[1] of decisions made by the respondents. Those decisions resulted in the termination of the applicant's employment with Queensland Health and the end of his conditional registration as a medical practitioner. He also applies to adduce new evidence on the appeal.

History

---

1 *Judicial Review Act* 1991 (Qld), Part 3.

[4] The applicant is a graduate in medicine from the University of Zimbabwe and was registered in that country to practise as a doctor. He came to Australia and was employed in the Northern Territory working at a hospital in Katherine.

[5] In 2007, the applicant was engaged as a Senior Medical Officer by Queensland Health to fill a position at the Emerald Hospital. He was registered by the Medical Board of Queensland[2] for the period 17 September 2008 to 16 September 2009 to work at the Emerald Hospital. That was a "special purpose registration" given under s 135 of the now repealed *Medical Practitioners Registration Act* 2001 (the *Registration Act*).

[6] On 21 September 2009, Dr Philip Montgomery, the Executive Director of Medical Services for the Central Queensland District of Queensland Health, wrote to the applicant.[3] That letter dealt with several issues:

1. The applicant's clinical privileges for obstetrics and gynaecology had previously been suspended pending the applicant undertaking further training. Dr Montgomery inquired as to the progress of that training.

2. Issues had arisen concerning the professional supervision of the applicant and Dr Montgomery gave directions to the applicant concerning those issues.

3. Seven complaints about the applicant's clinical practice had been received and Dr Montgomery outlined those to the applicant and invited a response.[4]

[7] On 25 September 2009, the applicant responded to Dr Montgomery's letter.[5] Dr Montgomery corresponded again with the applicant by letter of 1 October 2009 making various comments about the applicant's explanation concerning the complaints. Dr Montgomery emphasised the need for the applicant to complete further training and deal with the supervision requirements.[6]

[8] On 4 November 2009, the applicant was suspended from duty on full remuneration pursuant to ss 189 to 191 of the *Public Service Act* 2008. The grounds said to justify the suspension were allegations of "official misconduct" and the decision maker's finding that she "reasonably believe[d] that due to the nature of the allegations against [the applicant] that [the applicant] may be liable to disciplinary action".[7] The decision to suspend the applicant is not one the applicant seeks to judicially review, but the fact that "official misconduct" was alleged is significant, as later explained.

[9] On 7 January 2010, the Medical Board of Queensland wrote to the applicant advising him that investigations were under way in relation to the competency issues raised by Dr Montgomery and a criminal conviction suffered by the applicant

---

2 Registrations and regulation of medical practitioners is now effected through a national scheme: the Health Practitioner National Law enacted in Queensland by the *Health Practitioner Regulation National Law Act* 2009 (Qld).

3 Appeal Record Book (ARB), p 76 (Exhibit R1-1 to the Affidavit of J Chibanda, sworn 14 May 2018).

4 ARB, p 78 (Exhibit R1-1 to the Affidavit of J Chibanda, sworn 14 May 2018).

5 ARB, p 82 (Exhibit R1-2 to the Affidavit of J Chibanda, sworn 14 May 2018).

6 ARB, p 86 (Exhibit R1-3 to the Affidavit of J Chibanda, sworn 14 May 2018).

7 ARB, p 90 (Exhibit R1-5 to the Affidavit of J Chibanda, sworn 14 May 2018); *Public Service Act* 2008 (Qld), s 189(1).

in Zimbabwe.[8] On 17 February 2010, the Medical Board of Queensland refused the applicant's application for renewal of his special purpose registration (the renewal refusal decision).[9]

[10] The applicant seeks judicial review of the renewal refusal decision. The applicant seeks relief, not against the Medical Board of Queensland, but against the second respondent, the Medical Board of Australia who, upon the introduction of the National Law, assumed the position previously occupied by the Medical Board of Queensland. No objection to that approach was taken by the second respondent.

[11] Attached to the notification of 17 February 2010 was a document headed "Information Notice: Refusal to Renew as a Special Purpose Registrant".[10] That document:

(a) noted that the applicant was not eligible for general, specialist or special purpose registration under s 138 of the *Registration Act*;

(b) pointed to various factors leading to the conclusion that:

> "In these circumstances, the Board cannot be satisfied that you have made reasonable progress towards being qualified for General, Specialist or Special Purpose Section 138 Registration and that you are fit to practise the profession as a Senior Medical Officer at Emerald Hospital and has decided to refuse your application for renewal of Special Purpose Registration."[11]

(c) contained:

> "**REVIEW RIGHTS AND PROCESS**
>
> Pursuant to Part 7 of the *Medical Practitioners Registration Act 2001*, you may apply for a review of this decision to the Queensland Civil and Administrative Tribunal (QCAT). Chapter 2, Part 1, Division 3 of the *Queensland Civil and Administrative Tribunal Act 2009* contains provisions about a review of this decision to QCAT.
>
> An Application for Review must be in a form substantially complying with the QCAT rules; state the reasons for the application; and be filed in the registry within 28 days after you have been given this notice. You can access forms and further information regarding QCAT at www.qcat.qld.gov.au."[12]

[12] As the applicant then could not lawfully practise medicine, his employment with Queensland Health was terminated. The applicant does not seek judicial review of the decision terminating his employment.

---

8 ARB, p 109 (Exhibit R2-4 to the Affidavit of J Chibanda, sworn 14 May 2018).
9 ARB, p 189 (Exhibit AES2-1 to the Affidavit of AE Smith, sworn 24 May 2018).
10 ARB, p 191 (Exhibit AES2-1 to the Affidavit of AE Smith, sworn 24 May 2018).
11 ARB, p 191 (Exhibit AES2-1 to the Affidavit of AE Smith, sworn 24 May 2018).
12 ARB, p 191 (Exhibit AES2-1 to the Affidavit of AE Smith, sworn 24 May 2018).

[13] A report was later prepared by the Ethical Standards Unit within Queensland Health. That report is not in evidence, although parts of it are exhibited to an affidavit filed on behalf of the applicant.[13]

[14] The report prompted a memorandum from within Queensland Health dated 20 January 2011. The memorandum records:

> "The Ethical Standards Unit investigation and report on the above matter are now complete. The report is currently being reviewed by the Crime & Misconduct Commission (CMC)[14] and the Health Quality and Complaints Commission (HQCC).[15]
>
> As advised in a letter from the CMC dated 11 November 2010:
>
> > *While we have not completed a detailed review of the investigation report, having regard to that report and the advice given to the CMC at the abovementioned briefing (20/10/10), I confirm the CMC:*
> >
> > - *Is treating the above report as an interim report*
> > - *Considers the recommendations identified in Part D of the investigation report are appropriate for consideration by a QHealth decision maker of possible administrative processes against the nominated officers.*
> >
> > *Accordingly, please continue dealing with the matter. We look forward to receiving your further report advising the action proposed by the decision maker, if any,* ***before further dealing with the matter****. (emphasis added).*
>
> Accordingly, the CMC requires Queensland Health to advise of the decision maker's intentions to deal with this matter, before undertaking any administrative action and/or performance management with the nominated officers."

And:

> "**Background**
>
> This report relates to allegations of suspected Official Misconduct against Dr John Chibanda and potentially other officers at CQ HSD.
>
> Allegations against Dr Chibanda arose from concerns about his clinical competence. Ultimately, it became apparent that he may have practiced whilst uncredentialed and in breach of his conditional registration.
>
> In light of these circumstances, the authorised Terms of Reference for this investigation incorporated a risk analysis of identified patients attended to by Dr Chibanda and a systemic review of clinical governance and medical workforce issues."[16]

---

13 ARB, pp 125-131 (Exhibit R1-9 to the Affidavit of J Chibanda, sworn 17 May 2018).
14 *Crime and Misconduct Act* 2001 (Qld).
15 *Health Quality and Complaints Commission Act* 2006 (Qld) (now repealed).
16 ARB, p 92 (Exhibit R1-6 to the Affidavit of J Chibanda, sworn 14 May 2018).

[15] The memorandum bears the signature of Michael Reid, Director General of Queensland Health, as approving the report. The applicant seeks to judicially review what he says is the decision of the first respondent approving the report (the report approval decision).

[16] On 6 March 2012, a letter[17] was sent to the applicant by the Australian Health Practitioners Regulation Agency (AHPRA)[18] advising that:

> "**Board's decision**
>
> Under the delegated authority given by the Board, the Queensland Board of the Medical Board of Australia (the State Board) decided to take no further action on this matter. This decision was made at the Board's meeting on 6 December 2011. The Board's decision was based on its *Investigation Report* which found that on the evidence available:
>
> - There was sufficient evidence on which the Board could form a reasonable belief that your conduct amounts to unsatisfactory professional conduct;
> - However, having regard to the objects of the Act and in accordance with section 118 of the Act, the Board should take no further action about the matter and close the complaint as:
>   - You are not currently registered;
>   - Should you apply for re-registration you must comply with the following:
>   - Successfully pass the Australian Medical Council Multiple Choice Questionnaire examination; and
>   - Show evidence of your competency by undergoing a PESCI conducted by the ACRRM pursuant to section 46(1)(d) of the MPRA."

[17] The applicant seeks to judicially review what he asserts is a decision to find that "there was sufficient evidence on which the Board could form a reasonable belief that your conduct amounts to unsatisfactory professional conduct" (the finding of misconduct). Unlike the renewal refusal decision, which was a finding of the Medical Board of Queensland, the finding of misconduct was made by the Medical Board of Australia under the National Law. "The Queensland Board" referred to in the letter is a State Board within the Medical Board of Australia. It is not the Medical Board of Queensland.

[18] The application for judicial review was filed on 16 November 2017.

The application for judicial review and the dismissal of the application

---

17 ARB, p 112 (Exhibit R2-5 to the Affidavit of J Chibanda, sworn 14 May 2018).

18 AHPRA is the successor to the Queensland regulators of medical practitioners under the National Law.

[19] The effect of the various decisions made by the respondents is that the applicant ceased to be qualified to lawfully practise medicine and his employment with Queensland Health was terminated.

[20] The application for judicial review was made under Part 3 of the *Judicial Review Act* 1991 (the *JR Act*). Section 20(1) provides:

> "**20 Application for review of decision**
>
> (1) A person who is aggrieved by a decision to which this Act applies may apply to the court for a statutory order of review in relation to the decision."

[21] The applicant is clearly a "person aggrieved" by any reviewable decision made by the respondents which resulted in his deregistration and dismissal. A decision which is reviewable under the *JR Act* is one which is:

> "(a) a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion);"[19]

[22] The applicant represented himself both at first instance and on appeal. His application for judicial review did not clearly identify the decisions which he sought to review. When particulars were sought by the respondents, three decisions were identified as those which the applicant challenged. They are:

(a) The renewal refusal decision made on 17 February 2010. That is a decision by the Medical Board of Queensland and, for practical purposes, a decision of the second respondent.

(b) The report approval decision made on 20 January 2011, a decision of the first respondent.

(c) The finding of misconduct notified by the letter of 6 March 2012, a decision of the second respondent.[20]

[23] By s 26 of the *JR Act* an application must be filed within 28 days of notification of the decision, although when the decision is not accompanied by a statement of reasons, the period runs from the time of provision of the reasons.[21] The last in time of the three determinations was the finding of misconduct which was notified to the applicant by the letter of 6 March 2012. It may have been, as Applegarth J observed, that the applicant did not in fact see the finding of misconduct until 27 November 2012.[22] Even so, the application was, at best, almost five years out of time.

[24] Section 48 of the *JR Act* permits a respondent to apply for summary dismissal of an application for judicial review upon various grounds, including where there is "no reasonable basis for the application … disclosed".[23]

---

19 *Judicial Review Act* 1991 (Qld), s 4.
20 The decision was made on 6 December 2011.
21 *Judicial Review Act* 1991 (Qld), ss 26 and 32.
22 *Chibanda v Chief Executive, Queensland Health & Anor* [2018] QSC 128 at [16].
23 Section 48(1)(b).

[25] The two respondents sought dismissal of the applicant's application for judicial review because it was filed years out of time and because the proceeding did not disclose a reasonable basis to conclude that the decisions were amenable to judicial review. The applicant cross-applied for an extension of time within which to make the application for review.

[26] In support of his application for an extension of time, the applicant filed three affidavits all sworn by him.[24] In these affidavits, the applicant told of his dealings with the respondents and disputed the finding of misconduct. He also offered reasons why the renewal refusal was unjustified. While the applicant asserted that his dealings with the respondents were difficult, and by inference time consuming, there was no coherent explanation for the delay in filing the application for judicial review.

[27] Applegarth J identified the three decisions which the applicant sought to review. In relation to all three, his Honour found that there was no adequate explanation for the delay in filing the application for judicial review and that justified the dismissal of the application.[25]

[28] As to the report approval decision and the finding of misconduct, his Honour found neither to be reviewable decisions.[26] As to the renewal refusal decision, his Honour found that there was an alternative avenue to seek judicial review which was by way of appeal to the Queensland Civil and Administrative Tribunal (QCAT) which had been embarked upon and abandoned by the applicant, without adequate explanation. His Honour held that it was therefore inappropriate to grant the applicant an extension of time to pursue judicial review.[27]

The appeal

[29] The applicant has filed an application to extend time within which to appeal and an application to adduce further evidence on appeal. The applicant has requested that the applications be determined on the papers without oral hearing. The application to extend time was filed some 46 days late. Neither respondent opposes the application for an extension of time to appeal and both respondents are content to have the matter determined without oral hearing. Both respondents oppose the application to adduce further evidence and both sought the dismissal of the appeal with costs.

[30] The applicant's notice of appeal and the affidavits sought to be adduced as new evidence on the appeal raise many and varied complaints about the judgment of Applegarth J and the conduct of the respondents. As the application for judicial review and the appeal face fundamental difficulties, it is unnecessary to analyse the grounds of appeal.

[31] As already observed, his Honour found that both the report approval decision and the finding of misconduct were not amenable to judicial review under the *JR Act*. If his Honour was right in so finding, then there was no jurisdiction to give the relief sought by the applicant in relation to those two decisions. Nothing in the new evidence which is sought to be adduced would justify interference with his

---

24 16 November 2017, 22 March 2018 and 21 May 2018.
25 *Chibanda v Chief Executive, Queensland Health & Anor* [2018] QSC 128 at [25] and [30].
26 At [27] and [32].
27 At [31].

Honour's dismissal of the application for judicial review as it related to those two decisions.

[32] In *Griffith University v Tang*[28] it was held that a "decision of an administrative character made … under an enactment"[29] is one which bears two characteristics:

(a) it must be a decision that is "expressly or impliedly required or authorised by the enactment"; and

(b) the decision "must itself confer, alter or otherwise affect legal rights or obligations".[30]

[33] Sometimes the making of a decision will involve various preliminary investigations and determinations. These intermediate decisions will often not be subject to judicial review. As Mason CJ explained in *Australian Broadcasting Tribunal v Bond*:[31]

> "The policy arguments do not, in my opinion, call for an answer different from that dictated by the textual and contextual considerations. That answer is that a reviewable 'decision' is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment."[32]

[34] Section 6 of the *JR Act* recognises that the making of a report may constitute the making of a decision. That section provides:

> "**6 Making of report or recommendation is making of a decision**
>
> If provision is made by an enactment for the making of a report or recommendation before a decision is made, the making of the report or recommendation is itself taken, for the purposes of this Act, to be the making of a decision."

[35] Whether a report is itself a reviewable decision depends upon the proper construction of the relevant statute. Where a statute provides for the making of a report, the report is arguably a "decision made … under an enactment"[33] and is therefore reviewable independently of any administrative decision made consequent upon the report.[34]

---

28 (2005) 221 CLR 99.
29 *Judicial Review Act* 1991 (Qld), s 4.
30 *Griffith University v Tang* (2005) 221 CLR 99 at 130-131 at [89].
31 (1990) 170 CLR 321.
32 At 337.
33 *Judicial Review Act* 1991 (Qld), ss 4 and 9.
34 Compare *Pancontinental Mining Ltd v Burns* (1994) 52 FCR 454; *Edelsten v Health Insurance Commission* (1990) 27 FCR 56; and see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580-581.

Report approval decision

[36] It is clear from the memorandum of 20 January 2011 (the report approval decision) that the report is one prepared by the Ethical Standards Unit within Queensland Health and forwarded to the Crime and Misconduct Commission (the CMC). The CMC was a body established under the *Crime and Misconduct Act* 2001 (the *CMC Act*). The *CMC Act* has been substantially amended and is now the *Crime and Corruption Act* 2001. The CMC is no longer in existence and its successor is the Crime and Corruption Commission.

[37] The *CMC Act* cast upon the CMC functions concerning "misconduct".[35] "Misconduct" included "official misconduct" which was defined as conduct including that which, if proved, was "a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment".[36]

[38] Where a complaint was received about "official misconduct", the CMC could refer the complaint back to the relevant "unit of public administration" for investigation.[37] Here, that was Queensland Health. The CMC may then monitor the investigation[38] and the investigation may lead to disciplinary or criminal action.[39]

[39] By s 48 of the *CMC Act*:

> "**48 Commission's monitoring role for official misconduct**
>
> (1) The commission may, having regard to the principles stated in section 34—[40]
>
> (a) issue advisory guidelines for the conduct of investigations by public officials into official misconduct; or
>
> (b) review or audit the way a public official has dealt with official misconduct, in relation to either a particular complaint or a class of complaint; or
>
> (c) require a public official—
>
> (i) to report to the commission about an investigation into official misconduct in the way and at the times the commission directs; or
>
> (ii) to undertake the further investigation into the official misconduct that the commission directs; or

---

35 Section 33.
36 Section 15.
37 Section 35.
38 Section 48.
39 Section 49.
40 Section 34 guides the CMC on how it should exercise its misconduct investigating role.

(d) assume responsibility for and complete an investigation by a public official into official misconduct.

(2) The public official must—

(a) give the commission reasonable help to undertake a review or audit or to assume responsibility for an investigation; and

(b) comply with a requirement made under subsection (1)(c).

(3) If the commission assumes responsibility for an investigation, the public official must stop his or her investigation or any other action that may impede the investigation if directed to do so by the commission.

(4) In this section—

complaint, about official misconduct, includes information or matter involving official misconduct." (emphasis added)

[40] By s 49(2) of the *CMC Act*, the Commission may report on the investigation to various bodies including the Chief Executive Officer of the relevant unit of public administration. Section 49 of the *CMC Act* provides:

"**49 Reports about complaints dealt with by the commission**

(1) This section applies if the commission investigates (either by itself or in cooperation with a public official), or assumes responsibility for the investigation of, a complaint about, or information or matter involving, misconduct and decides that prosecution proceedings or disciplinary action should be considered.

(2) The commission may report on the investigation to any of the following as appropriate—

(a) the director of public prosecutions, or other appropriate prosecuting authority, for the purposes of any prosecution proceedings the director or other authority considers warranted;

(b) the Chief Justice, if the report relates to conduct of a judge of, or other person holding judicial office in, the Supreme Court;

(c) the Chief Judge of the District Court, if the report relates to conduct of a District Court judge;

(d) the President of the Childrens Court, if the report relates to conduct of a person holding judicial office in the Childrens Court;

(e) the Chief Magistrate, if the report relates to conduct of a magistrate;

(f) the chief executive officer of a relevant unit of public administration, for the purpose of taking disciplinary action, if the report does not relate to the conduct of a judge, magistrate or other holder of judicial office.

(3) A report made under subsection (2) must contain, or be accompanied by, all relevant information known to the commission that—

(a) supports a charge that may be brought against any person as a result of the report; or

(b) supports a defence that may be available to any person liable to be charged as a result of the report; or

(c) supports the start of a proceeding under section 219F or 219G[41] against any person as a result of the report; or

(d) supports a defence that may be available to any person subject to a proceeding under section 219F or 219G as a result of the report.

(4) If the director of public prosecutions requires the commission to make further investigation or supply further information relevant to a prosecution, whether started or not, the commission must take all reasonable steps to further investigate the matter or provide the further information."

[41] The relevant report here is not a report by the CMC to Queensland Health, but by Queensland Health to the CMC. As explained later under the heading "Finding of misconduct", a report is only a reviewable decision if it is a legal precondition to the subsequent decision made upon the report. The subsequent decision will itself only be a reviewable decision if it bears the features identified in *Griffith University v Tang*.[42] A report provided to the CMC under s 48 does no more than form part of the material which may lead the CMC to make a report under s 49(2) which, in turn, does not affect rights. Neither the report, nor the Director General's approval of the report are a decision under an enactment.

[42] Applegarth J was correct, in my view, to hold that the report approval was not a reviewable decision under the *JR Act*.

Finding of misconduct

[43] The finding of misconduct concerns the *Health Practitioners (Professional Standards) Act* 1999 (the *Professional Standards Act*) whose title was changed to the *Health Practitioners (Disciplinary Proceedings) Act* 1999 before its repeal in July 2014.

---

41 Sections 219F and 219G concern proceedings relating to official misconduct and "reviewable decisions"; see s 219BA.

42 (2005) 221 CLR 99 at 130-131 at [89].

[44] The *Professional Standards Act* provided a scheme for the investigation of complaints against health practitioners. The Act formed part of a scheme of legislation which also included the *Health Quality and Complaints Commission Act* 2006 which established the Health Quality and Complaints Commission (HQC Commission).

[45] When a complaint about a medical practitioner was received, the relevant medical board could investigate the complaint or refer it to the HQC Commission for investigation.[43] By s 115, the Board was obliged to prepare a report about the investigation and by s 116 to provide a copy to the HQC Commission. This is what has occurred here: see the reference to the Board's "Investigation Report".[44] A decision must then be made under s 118. Sections 115, 116 and 118 provide:

> "**115 Board to prepare report on completion of investigation**
>
> (1) This section applies if—
>
> (a) a board is, under section 114, given a preliminary report about an investigation; or
>
> (b) an investigation committee established by a board consists of all the members of the board and the committee has completed its investigation.
>
> (2) The board must prepare a report about the investigation as soon as practicable after receiving the preliminary report or completing the investigation.
>
> (3) In preparing the report, the board must have regard to the actions the board must take under section 118.
>
> (4) The report must include—
>
> (a) the board's findings about the investigation including, if the investigation was the result of a complaint, the board's findings about the complaint; and
>
> (b) the action proposed to be taken by the board about the complaint or other matter the subject of the investigation.
>
> (5) For subsection (2), the board may adopt a report mentioned in subsection (1)(a), with or without changes, as its report.
>
> **116 Board to keep commissioner informed about investigation**
>
> (1) This section applies if a board establishes an investigation committee, or directs an investigator, to investigate a complaint or other matter about a registrant.

---

43 Section 51.

44 ARB, p 112 (Exhibit R2-5 to the Affidavit of J Chibanda, sworn 14 May 2018).

(2) While the investigation is being conducted, the board must give to the commissioner the reasonable reports asked for by the commissioner about the investigation.

(3) As soon as practicable after the board prepares its report about the investigation under section 115(2), it must give the commissioner a report about the investigation.

(4) The report must include—

(a) the board's findings about the investigation, including, if the investigation was the result of a complaint, the board's findings about the complaint; and

(b) the action proposed to be taken by the board about the complaint or other matter the subject of the investigation.

(5) The commissioner may give the board comments about a report given to the commissioner under subsection (2) or (3) within—

(a) 14 days after receiving the report; or

(b) a longer period agreed to by the board.

(6) After giving the commissioner a report under subsection (3), the board must not take any action under section 118, about the complaint or other matter until 1 of the following happens—

(a) the board receives the commissioner's comments about the report and considers the comments;

(b) the commissioner advises the board that the commissioner does not intend to give the board comments about the report;

(c) the period mentioned in subsection (5) for the commissioner to give comments about the report to the board ends.

(7) In this section—

"**comments**", of the commissioner, include recommendations and other information.

…

118 Decision on investigation

(1) As soon as practicable after an event mentioned in section 116(6) happens, the board must—

(a) if the investigation was the result of a decision by the board under section 59(2) and the board reasonably believes further action is necessary—

refer the disciplinary matter under section 126 for hearing by the tribunal; or

(b) if the investigation was the result of a decision by the board under section 59(2) and the board reasonably believes no further action is necessary—end the suspension or remove the conditions and take no further action; or

(c) otherwise—decide to do 1 of the following—

(i) refer the disciplinary matter under section 126 for hearing by the tribunal;

(ii) subject to a decision by the registrant under section 120(3)—refer the disciplinary matter under section 126 for hearing by a panel;

(iii) subject to a decision by the registrant under section 120(3)—deal with the disciplinary matter by taking disciplinary proceedings itself, or establishing a disciplinary committee to conduct disciplinary proceedings, under the disciplinary proceedings part;

(iv) enter into an undertaking with the registrant, with the registrant's agreement, about the registrant's professional conduct or practice;

(v) deal with the disciplinary matter under the impairment part;

(vi) take another action approved by the Minister that will achieve the objects of this Act;

(vii) decide to take no further action about the disciplinary matter.

(2) In deciding to take an action under subsection (1), the board must have regard to the objects of the Act mentioned in section 6 and, in particular, section 6(a).

(3) If the board reasonably believes the subject matter of the investigation may provide a ground for suspending or cancelling the registrant's registration, the board must decide under subsection (1)(c)(i) to refer the matter to the tribunal.

(4) However, the board need not act under subsection (3) if it reasonably believes the matter will not be substantiated.

(5) Also, regardless of what the board decides under subsection (1), it may also decide to do either or both of the following—

(a) start proceedings to prosecute the registrant for an offence;

(b) refer the matter to another entity that has the function or power under an Act of the State, the Commonwealth or another State to deal with the matter.

(6) If the board decides to enter into an undertaking with the registrant under subsection (1)(c)(iv), it must also decide whether details of the undertaking must be recorded in the board's register for the period for which the undertaking is in force.

(7) The board must decide to record the details of the undertaking in its register unless it reasonably believes it is not in the interests of users of the registrant's services or the public to know the details.

(8) A decision by the board to take no further action about the matter under subsection (1)(b) or (c)(vii) does not prevent the board taking the matter into consideration at a later time as part of a pattern of conduct or practice by the registrant that may result in disciplinary action."

[46] The decision here was made under s 118(1)(c)(vii), namely to "decide to take no further action about the disciplinary matter". The applicant does not challenge that decision. It is a decision in his favour. He challenges the finding of misconduct which is a finding made "along the way"[45] to that decision.

[47] The real question is whether the finding of misconduct is reviewable as part of a "report" which is a "decision" as defined in s 6 of the *JR Act*.

[48] Section 6 is in the same terms as s 3(3) of the *Administrative Decisions (Judicial Review) Act* 1977 (the *ADJR Act*). Section 3(3) of the *ADJR Act* has been the subject of much judicial consideration.

[49] For a report to be a "decision", the report must be required by the statute. See, for example, *Margarula v Minister for Environment*.[46] By s 115 of the *Professional Standards Act*, a report "must" be prepared.[47]

[50] A report will only be a "decision" if the report is a legal precondition to the subsequent decision.[48] By s 118(1) of the *Professional Standards Act*, the power to make decisions occurs only after the report has been prepared, submitted to the HQC Commission and the Commission has responded to it.

---

45 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337.

46 (1999) 92 FCR 35.

47 Section 115(2).

48 See, for example, *Attorney-General (NT) v Minister for Aboriginal Affairs* (1986) 67 ALR 282 at 287.

[51] Not every statutorily prescribed precondition to the making of a decision is a reviewable decision itself.[49] A report will not be a decision if it "has, of itself, no legal effect and carries no legal consequences".[50] One consideration is whether the findings of fact in a report are binding upon the decision maker. That was found to be the case in both *Vega Vega v Hoyle & Ors*[51] and *Walters v Drummond & Ors*,[52] both being reports prepared under the provisions of the *Hospital and Health Boards Act* 2011.

[52] Often when a statute provides for the making of a report, the report writer is a different entity to the decision maker, the latter being bound or influenced by the former. That is not the case under the *Professional Standards Act*. Both the report and the final decision under s 18 are made by the Board. The report has no final effect once it is produced. By s 116(6), the HQC Commission makes comment which may include "recommendations and other information"[53] that means that the report may be reviewed or altered. Under s 118, the Board makes no final determination affecting the rights of the practitioner the subject of the report. It determines what further action (disciplinary or criminal) which may be taken.

[53] Such a finding of misconduct may affect the reputation of the applicant and may give him standing to seek declaratory relief.[54] However, Applegarth J was right to hold that the finding of misconduct was not a reviewable decision under Part 3 of the *JR Act*.[55]

Renewal refusal decision

[54] The renewal refusal was a determination made by the second respondent under the *Registration Act*. That Act governed the registration of medical practitioners before the introduction of the National Law.

[55] Part 3 of the *Registration Act* concerned the registration of medical practitioners. Registration could be achieved for general practice or specialist practice. Division 10 of Part 3 concerned "special purpose registration". Section 131 provided that a person may obtain a special purpose registration if the person was not qualified for general registration. Various sections then defined the circumstances in which special purpose registration may be obtained. These included for post graduate study or training,[56] supervised training by a person preparing to sit examinations of the Australian Medical Council,[57] and for medical teaching or research.[58]

[56] The applicant achieved special purpose registration under s 135. The purpose of that section is defined in s 135(1). Section 135(1) refers to s 135(4) and the two subsections are as follows:

---

49 *Edelsten v Health Insurance Commission* (1990) 27 FCR 56 at 68 and *Kelson v Forward* (1995) 60 FCR 39 at 61.

50 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580; *Griffith University v Tang* (2005) 221 CLR 99 at 128, [79]-[80] and 130, [89].

51 [2015] QSC 111.

52 [2019] QSC 97.

53 Section 116(7).

54 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

55 *Chibanda v Chief Executive, Queensland Health & Anor* [2018] QSC 128 at [32].

56 Section 132.

57 Section 133.

58 Section 134.

"**135 Practice in area of need**

(1) The purpose of registration under this section is to enable a person to practise the profession in an area the Minister has decided, under subsection (4), is an area of need for a medical service.

…

(4) The Minister may decide there is an area of need for a medical service (an ***area of need decision***) if the Minister considers there are insufficient medical practitioners practising in the State, or a part of the State, to provide the service at a level that meets the needs of people living in the State or the part of the State."

[57] Section 135 allows conditions to be imposed on a special purpose registration and the registration is to be limited in time.[59]

[58] Subdivision 3 of Division 10 of Part 2 of the *Registration Act* concerned the renewal of special purpose registrations. A decision to renew or not to renew is one made by force of the *Registration Act* and affects the applicant's right to practise medicine. A refusal to renew a special purpose registration is a "decision under an enactment"[60] and reviewable.[61]

[59] Part 7 of the *Registration Act* provides a right of review by QCAT of decisions including a refusal of the Board to renew a special purpose registration.

[60] Section 13 of the *JR Act* provides as follows:

"**13 When application for statutory order of review must be dismissed**

Despite section 10,[62] but without limiting section 48,[63] if—

(a) an application under section 20[64] to 22 or 43 is made to the court in relation to a reviewable matter; and

(b) provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by another court or a tribunal, authority or person;

the court must dismiss the application if it is satisfied, having regard to the interests of justice, that it should do so."

[61] On the material before him, Applegarth J was right to conclude that the failure to pursue the statutorily provided avenue of appeal to QCAT defeated the applicant's application for judicial review.[65]

Application to adduce fresh evidence

---

59 Sections 135(6) and 140.
60 *Judicial Review Act* 1991 (Qld), s 4.
61 Subject to the *Judicial Review Act* 1991 (Qld), s 13.
62 Which provides that rights conferred by the *Judicial Review Act* 1991 (Qld) are in addition to other rights.
63 Summary dismissal of application for judicial review.
64 Here the application for judicial review was made under s 20.
65 *Chibanda v Chief Executive, Queensland Health & Anor* [2018] QSC 128 at [13].

[62] By the evidence which the applicant wishes to have admitted on appeal, the applicant seeks to explain the delay in bringing the application for judicial review and seeks to explain why the QCAT proceedings were abandoned. His submission must be that it was not in "the interests of justice"[66] to dismiss the application even though there was an alternative avenue of review.

[63] The applicant's proposed new evidence makes a series of allegations and assertions attempting to explain the delay in filing the application for judicial review. These include:

(a) the applicant had marital difficulties;

(b) he sought relief in both the QCAT and the Queensland Industrial Relations Commission as a result of his dismissal;

(c) the respondents delayed in releasing relevant documents to him; and

(d) the applicant spent time making his own inquiries into the misconduct allegations.

[64] If the new evidence is admitted, none of it overcomes critical matters:

(a) The refusal to renew the applicant's special purpose registration was made on 17 February 2010, over seven and a half years before the application for judicial review was filed.

(b) An avenue of appeal to QCAT was statutorily provided, therefore enlivening s 13 of the *JR Act*.

(c) An application to QCAT was filed on 25 February 2010.[67]

(d) The QCAT application was subsequently withdrawn on 21 June 2010.

[65] There is nothing in the evidence which satisfactorily explains the seven year delay and nothing which would suggest that it is not in the interests of justice for the judicial review application to be dismissed pursuant to s 13 of the *JR Act*. For those reasons, I would refuse the application to adduce fresh evidence.

Conclusion

[66] No error by Applegarth J has been identified. I would grant the application for an extension of time to appeal, refuse the application to adduce further evidence and dismiss the appeal with costs.

---

66 *Judicial Review Act* 1991 (Qld), s 13.

67 ARB, p 193 (Exhibit AES2-2 to the Affidavit of AE Smith, sworn 24 May 2018).