SUPREME COURT OF QUEENSLAND

CITATION:	*Walters v Hanson & Ors* [2020] QSC 216
PARTIES:	**DARREN LESTER WALTERS** (applicant) **v** **JACKIE HANSON, HEALTH SERVICE ACTING CHIEF EXECUTIVE, METRO NORTH HOSPITAL AND HEALTH SERVICE** (first respondent) and **MICHELE GARDNER, EXECUTIVE DIRECTOR, THE PRINCE CHARLES HOSPITAL, METRO NORTH HOSPITAL AND HEALTH SERVICE** (second respondent) and **METRO NORTH HOSPITAL AND HEALTH SERVICE** (third respondent)
FILE NO:	BS10396/19
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2020
JUDGE:	Ryan J
ORDERS:	**1. That the decision of the first and third respondents to suspend the applicant from duty under section 137 of the *Public Service Act* 2008, notified by notice dated 28 August 2019, be quashed, with effect from 28 August 2019.** 2. **That the decision of the second and third respondents to suspend the applicant's scope of clinical practice in the Metro North Hospital and Health Service be quashed, with effect from 3 September 2019.** **3. Unless the parties wish to make submissions to the contrary within seven days, the respondents are to pay the applicant's costs on the standard basis.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – FAILURE TO OBSERVE STATUTORY PROCEDURE – where the applicant, the Director of Cardiology at the Prince Charles Hospital, was suspended from duty under the *Public Service Act* 2008 over conduct which is alleged to have contravened the *Public Interest Disclosure Act* 2010 – where section 137(2) of the *Public Service Act* 2008 requires the notice of suspension to state "when the suspension starts and ends" – where the letter notifying the applicant of his suspension states that his suspension will remain in place until an investigation can be undertaken and the outcome has been considered, unless otherwise determined – where the applicant seeks judicial review of the decision on the basis that it was made without observing procedures required by law in that it failed to specify an end date – whether the phrases "when the suspension starts and ends" and "period of suspension" require the notice to state the period by reference to dates or in terms of its duration – whether the notice achieved substantial compliance with the requirement of section 137(2)(a)

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the applicant, the Director of Cardiology at the Prince Charles Hospital, was suspended from duty under the *Public Service Act* 2008 over conduct which is alleged to have contravened the *Public Interest Disclosure Act* 2010 – where the chief executive made a decision to suspend the applicant's scope of practice on the basis that his employment had been suspended – where the decision was purportedly made under the credentialing procedure for practitioners in Metro North Hospital and Health Service – whether the credentialing procedure is an enactment within the meaning of the *Judicial Review Act* 1991, specifically, within the definition in s 7(3) of the *Statutory Instruments Act* 1992 – whether the two limbs in Part 4, section (or clause) 5 of the Credentialing Procedure are to be read cumulatively or alternatively – whether the suspension of the applicant from "duty" as per the letter of 28 August 2019 was a suspension of his "employment" – whether relief should be declined as a matter of discretion

Hospital and Health Boards Act 2011 (Qld), s 47
Integrity Reform (Miscellaneous Amendments) Act 2010 (Qld), s 125
Judicial Review Act 1991 (Qld), s 20
Public Interest Disclosure Act 2010 (Qld), s 40, s 65
Public Service Act 2008 (Qld), s 3, s 25, s 99, s 137, s 187, s 188, s 189, s 190, s 191, s 192
Statutory Instruments Act 1992 (Qld), s 6, s 7

Attorney-General (Qld) v Van Dessel [2007] 2 Qd R 1; [2006] QCA 285, applied
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, cited
Avenia v Railway & Transport Health Fund Ltd (2017) 272 IR 151; [2017] FCA 859, distinguished
Boyy v Executive Director of Specialist Operations of Queensland Corrective Services [2019] QSC 283, considered
Griffith University v Tang (2005) 221 CLR 99, cited
R v A2; R v Magennis; R v Vaziri (2019) 373 ALR 214; [2019] HCA 35, cited
Walters v Drummond & Ors [2019] QSC 290, cited
Zink v Townsville Hospital and Health Service [2019] QIRC 181, disapproved

COUNSEL: J E Murdoch QC & S T Farrell for the applicant
A Wheatley QC & A Psaltis for the respondents

SOLICITORS: Franklin Athanasellis Cullen for the applicant
Clayton Utz for the respondents

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Overview

[1] The applicant, Darren Walters, is a Professor of Medicine and a Fellow of the Royal Australian College of Physicians. He is the Director of Cardiology at the Prince Charles Hospital ("PCH") which forms part of the Metro North Hospital and Health Service ("MNHHS" or the "Health Service"). He has been in the Director's role for approximately 14 years.

[2] He has been employed by the Queensland Government, through the Health Service or its predecessors, as a medical practitioner since 1992 (apart from periods during which he worked overseas on awarded fellowships).

[3] He is currently suspended from duty (under two separate suspensions). His scope of clinical practice ("SoCP") has been suspended also.

[4] He applies, under the *Judicial Review Act* 1991 (Qld) ("*JRA*"), for a review of one of his suspensions from duty and the suspension of his SoCP.

[5] The first, second and third respondents were represented collectively at the hearing.

[6] For the reasons which follow, Dr Walters has been successful in this application and I will set aside the suspensions.

Relevant legislation

[7] The applicant was suspended from duty under the *Public Service Act* 2008 (Qld) ("*PSA*"). This application concerns his suspension over his conduct in March 2019 which is alleged to have contravened the *Public Interest Disclosure Act* 2010 (Qld) ("*PIDA*").

[8] Relevant sections of the *PSA* and *PIDA* follow.

The *Public Service Act* 2008 (Qld)

137 Suspension other than as disciplinary action

(1) The chief executive of a department may, by notice, suspend a public service officer from duty if the chief executive reasonably believes the proper and efficient management of the department might be prejudiced if the officer is not suspended.

(2) The notice must state –

(a) when the suspension starts and ends; and

(b) the remuneration to which the officer is entitled for the period of the suspension under subsection (5); and

(c) the effect that alternative employment may, under subsections (6) and (7), have on the entitlement.

(3) However, before suspending the officer, the chief executive must consider all alternative duties that may be available for the officer to perform.

(4) The period of the suspension can not be more than the period that the chief executive reasonably believes is necessary to avoid the prejudice.

(5) During the period of the suspension the officer is entitled to normal remuneration, less any amount earned by the officer from alternative employment that the officer engages in during the period.

(6) For subsection (5), alternative employment does not include employment if –

(a) the employee was engaged in the employment at the time of the suspension; and

(b) the officer's engaging in the employment was not in contravention of –

(i) this Act; or

(ii) a standard of conduct applying to the officer under an approved code of conduct under the *Public Sector Ethics Act 1994*; or

(c) a standard of conduct, if any, applying to the officer under an approved standard of practice under the *Public Sector Ethics Act 1994*.

(7) The deduction under subsection (5) must not be more than the amount of the officer's normal remuneration during the period of the suspension.

(8) The continuity of the officer's service as a public service officer is taken not to have been broken only because of the suspension.

(9) The chief executive may cancel the suspension at any time.

(10) This section does not limit or otherwise affect section 189.

187 Grounds for discipline

(1) A public service employee's chief executive may discipline the employee if the chief executive is reasonably satisfied the employee has –

(a) performed the employee's duties carelessly, incompetently or inefficiently; or

(b) been guilty of misconduct; or

(c) been absent from duty without approved leave and without reasonable excuse; or

(d) contravened, without reasonable excuse, a direction given to the employee as a public service employee by a responsible person; or

(e) used, without reasonable excuse, a substance to an extent that has adversely affected the competent performance of the employee's duties; or

(ea) contravened, without reasonable excuse, a requirement of the chief executive under section 179A(1) in relation to the employee's appointment, secondment or employment by, in response to the requirement –

(i) failing to disclose a serious disciplinary action; or

(ii) giving false or misleading information; or

(f) contravened, without reasonable excuse –

(i) a provision of this Act; or

(ii) a standard of conduct applying to the employee under an approved code of conduct under the *Public Sector Ethics Act 1994*; or

(iii) a standard of conduct, if any, applying to the employee under an approved standard of practice under the *Public Sector Ethics Act 1994*.

(2) A disciplinary ground arises when the act or omission constituting the ground is done or made.

(3) Also, a chief executive may discipline, on the same grounds mentioned in subsection (1) –

(a) a public service employee under section 187A; or

(b) a former public service employee under section 188A.

(4) In this section –

misconduct means –

(a) inappropriate or improper conduct in an official capacity; or

(b) inappropriate or improper conduct in a private capacity that reflects seriously and adversely on the public service.

Example of misconduct –

victimising another public service employee in the course of the other employee's employment in the public service

responsible person, for a direction, means a person with authority to give the direction, whether the authority derives from this Act or otherwise.

188 Disciplinary action that may be taken against a public service employee

(1) In disciplining a public service employee, the employee's chief executive may take the action, or order the action be taken, (***disciplinary action***) that the chief executive considers reasonable in the circumstances.

Examples of disciplinary action –

- termination of employment
- reduction of classification level and a consequential change of duties
- transfer or redeployment to other public service employment
- forfeiture or deferment of a remuneration increment or increase
- reduction of remuneration level
- imposition of a monetary penalty
- if a penalty is imposed, a direction that the amount of the penalty be deducted from the employee's periodic remuneration payments
- a reprimand

(2) If the disciplinary action is taken following an agreement under section 187A(4) between the previous chief executive and the current chief executive mentioned in the section, the chief executives must agree on the disciplinary action.

(3) However, a monetary penalty can not be more than the total of 2 of the employee's periodic remuneration payments.

(4) Also, an amount directed to be deducted from any particular periodic remuneration payment of the employee –

(a) must not be more than half of the amount payable to or for the employee in relation to the payment; and

(b) must not reduce the amount of salary payable to the employee in relation to the period to less than –

(i) if the employee has a dependant – the guaranteed minimum wage for each week of the period; or

(ii) otherwise – two-thirds of the guaranteed minimum wage for each week of the period.

(5) In acting under subsection (1), the chief executive must comply with this Act and any relevant directive of the commission chief executive.

(6) An order under subsection (1) is binding on anyone affected by it.

189 Suspension of public service employee liable to discipline

(1) The chief executive may suspend a public service employee from duty if the chief executive reasonably believes the employee is liable to discipline under a disciplinary law.

(2) However, before suspending the employee, the chief executive must consider all alternative duties that may be available for the employee to perform.

(3) The chief executive may cancel the suspension at any time.

190 Procedure for disciplinary action

(1) In disciplining a public service employee or former public service employee or suspending a public service employee, a chief executive must comply with this Act, any relevant directive of the commission chief executive, and the principles of natural justice.

(2) However, natural justice is not required if the suspension is on normal remuneration.

191 Effect of suspension from duty

(1) This section applies to a public service employee suspended from duty under this chapter unless the employee's chief executive decides otherwise.

(2) During the period of the suspension the employee is entitled to normal remuneration, less any amount earned

by the employee from alternative employment that the employee engages in during the period.

(3) For subsection (2), alternative employment does not include employment if –

(a) the employee was engaged in the employment at the time of the suspension; and

(b) the employee's engaging in the employment was not in contravention of –

(i) this Act; or

(ii) a standard of conduct applying to the employee under an approved code of conduct under the *Public Sector Ethics Act 1994*; or

(c) a standard of conduct, if any, applying to the employee under an approved standard of practice under the *Public Sector Ethics Act 1994*.

(4) The deduction under subsection (2) must not be more than the amount of the employee's normal remuneration during the period of the suspension.

(5) The continuity of a public service employee's service as a public service officer is taken not to have been broken only because of a suspension under this chapter.

(6) The continuity of a general or temporary employee's employment as a general or temporary employee is taken not to have been broken only because of a suspension under this chapter.

192 Additional procedures for suspension or termination

(1) If a chief executive decides to suspend or terminate the employment of a public service employee, the chief executive must give the employee notice of the suspension or termination.

(2) The notice must state –

(a) for a suspension –

(i) when the suspension starts and ends; and

(ii) the remuneration to which the employee is entitled for the period of the suspension, under a decision mentioned in section 191(1) or, if no decision has been made under section 191(1), under section 191(2); and

(iii) the effect that alternative employment may, under section 191, have on the entitlement; or

(b) for a termination – the day when it takes effect.

The *Public Interest Disclosure Act* 2010 (Qld)

40 Reprisal and grounds for reprisal

(1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that –

(a) the other person or someone else has made, or intends to make, a public interest disclosure; or

(b) the other person or someone else is, has been, or intends to be, involved in a proceeding under the Act against any person.

(2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.

(3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.

(4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.

(5) For the contravention mentioned in subsection (3) to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.

65 Preservation of confidentiality

(1) If a person gains confidential information because of the person's involvement in this Act's administration, the person must not make a record of the information, or intentionally or recklessly disclose the information to anyone, other than under subsection (3).

Maximum penalty—84 penalty units.

(2) A person gains information because of the person's involvement in this Act's administration if the person gains the information because of being involved, or an opportunity given by being involved, in the administration.

Example –

If a person gains information because the person is a public officer who receives a public interest disclosure for a proper authority, the person gains the information because of the person's involvement in this Act's administration.

(3) A person may make a record of confidential information or disclose it to someone else –

(a) for this Act; or

(b) to discharge a function under another Act including, for example, to investigate something disclosed by a public interest disclosure; or

(c) for a proceeding in a court or tribunal; or

(d) if the person to whom the confidential information relates consents in writing to the making of the record or disclosure of the information; or

(e) if –

(i) the person can not reasonably obtain the consent of the person to whom the confidential information relates; and

(ii) making the record or disclosing the information is unlikely to harm the interests of the person to whom the confidential information relates and is reasonable in all the circumstances; or

(f) if the person reasonably believes that making the record or disclosing the information is necessary to provide for the safety or welfare of a person; or

(g) if authorised under a regulation or another Act.

(4) This section does not affect an obligation a person may have under the principles of natural justice to disclose information to a person whose rights would otherwise be detrimentally affected.

(5) Subsection (4) applies to information disclosing, or likely to disclose, the identity of a person who makes a public interest disclosure only if it is –

(a) essential to do so under the principles of natural justice; and

(b) unlikely a reprisal will be taken against the person because of the disclosure.

(6) To remove any doubt, it is declared that if there is an inconsistency between this section and section 10(1), this section prevails.

(7) In this section –

confidential information –

(a) includes –

(i) information about the identity, occupation, residential or work address or whereabouts of a person –

(A) who makes a public interest disclosure; or

(B) against whom a public interest disclosure has been made; and

(ii) information disclosed by a public interest disclosure; and

(iii) information about an individual's personal affairs; and

(iv) information that, if disclosed, may cause detriment to a person; and

(b) does not include information publicly disclosed in a public interest disclosure made to a court, tribunal or other entity that may receive evidence under oath, unless further disclosure of the information is prohibited by law.

law, for a public interest disclosure made to a committee of the Legislative Assembly, includes a standing rule, order or motion of the Legislative Assembly.

The chronology of suspensions and other relevant events

[9] The applicant has been suspended on several occasions, the first of which has already been the subject of litigation in his favour.

[10] The applicant was suspended from duty on 4 April 2018, under section 137 of the *PSA*, pending an investigation into an outreach program which he oversaw.

[11] On 24 September 2018, after the investigation ended, he was advised that he was suspended from duty under section 189(1) of the *PSA* on the basis that the chief executive of the Health Service reasonably believed that he was liable to discipline on the strength of the outcome of the investigation (the "first September 2018 suspension").

[12] Three days later, on 27 September 2018, the applicant was suspended again, under section 137 of the *PSA*, pending an investigation into his alleged bullying treatment of three Health Service staff members, who had made complaints about him (the "second September 2018 suspension").

[13] On 21 December 2018, the applicant applied for judicial review of the first September 2018 suspension decision, and other related decisions, in proceeding BS14221/18.

[14] On 11 March 2019, the respondents to proceeding BS14221/18 (that is, the then chief executive of the Health Service, the Health Service and the investigators) applied for its summary dismissal.

[15] On 13 March 2019, the applicant wrote to members of the Health Service's board. In his letters, he raised concerns about his treatment and the investigation. He named the staff members who had accused him of bullying, and aired his suspicions about the timing of their complaints which led to the second September 2018 suspension.

[16] The application for summary dismissal was heard by Applegarth J, who dismissed it on 12 April 2019.

[17] On 11 and 12 June 2019, her Honour Justice Brown heard proceeding BS14221/18, reserving her decision.

[18] On 28 August 2019, the applicant was suspended again, under section 137(1) of the *PSA*, on the basis that there were concerns about his breaching the *PIDA* by way of his taking "reprisal" – as that concept is understood under the *PIDA*.

[19] His reprisal action was said to have involved his writing to eight of the members of the Health Service's board on 13 March 2019, identifying by name those who complained about him and making "denigrating comments" about them. The 28 August 2019 decision to suspend the applicant is one of the decisions the subject of the present application.

[20] On 2 September 2019, the applicant was informed that his letters to the members of the board would be sent to the Crime and Corruption Commission.

[21] On 3 September 2019, the Executive Director of the PCH notified the applicant that his SoCP was suspended. The decision to suspend the applicant's SoCP is also the subject of the present application.

[22] On 26 November 2019, the applicant was successful in BS14221/18. Among other orders, Brown J set aside the first September 2018 suspension: see *Walters v Drummond & Ors* [2019] QSC 290.

The content of the decisions under review

The decision of 28 August 2019

[23] The first respondent, Ms Jackie Hanson, the Acting Chief Executive, MNHHS, conveyed the 28 August 2019 decision to suspend the applicant from duty by letter. The relevant part of that letter states (my emphasis):

> Section 137(1) of the *Public Service Act 2008* (the Act) provides that the Chief Executive may suspend a public service employee **from duty** if the Chief Executive **reasonably believes the proper and efficient management of the department might be prejudiced if the officer is not suspended**.
>
> I reasonably believe that the proper and efficient management of MNHHS may be prejudiced if you are not suspended for the following reasons:
>
> - you are the Director of Cardiology at TPCH;
> - two of the Complainants are employees who work within the TPCH's Cardiology department;
> - the serious nature of the concerns, including that they relate to breaches of directions previously provided to you, the PID Act and reprisal action relating to Complaints made by the Complainants …;

- MNHHS' obligations to the Complainants under the PID Act to provide protection from reprisal action.

Accordingly, pursuant to section 137(1) of the Act, **I have decided to suspend you from duty, effective immediately**. In accordance with section 137(2) and (5) of the Act, during the period of the suspension you are entitled to normal remuneration, less any amount you earn from alternative employment that you engage in during the period. Your normal remuneration comprises …

Before making a decision to suspend you I considered all alternative duties that may be available for you to perform. I do not consider that alternative duties are available for you to perform …

You are therefore directed not to present yourself in the vicinity of TPCH or any other facility within the MNHHS other than to seek necessary medical treatment or to visit family or friends receiving medical treatment, without prior permission from Ms Bench or myself.

The decision to suspend you from duty under section 137 of the Act is not a predetermination of any outcome and it is very important that you comply with these directions.

Your suspension will remain in place until an investigation can be undertaken into the concerns and the outcome of those investigations has been considered, unless otherwise determined.

You are reminded that the Code of Conduct clearly sets out the obligations that apply to you as a MNHHS employee. You are also reminded that the provisions of the Code of Conduct, as well as MNHHS' and Queensland Health's policies, continue to apply during your suspension.

…

Availability

During the period of your suspension you are required to remain ready, willing and able to attend work if required.

…

The decision of 3 September 2019

[24] Ms Michele Gardner, the Executive Director of the PCH (the second respondent), advised the applicant of the decision to suspend his SoCP by letter, on 3 September 2019. The letter said (my emphasis) –

> I write to advise that **on the basis that your employment with Metro North Hospital and Health Service (MNHHS) is currently suspended**, your Scope of Clinical Practice in MNHHS is also suspended, effective immediately, **in line with Metro North HHS Credentialing Procedure** [Credentialing and Defining Scope of Clinical Practice for Medical Practitioners and Dentists in Metro North Hospital and Health Service (PROC087)]**.**

> **In the event that your suspension of employment is lifted**, you may apply for a renewal of your Scope of Clinical Practice in accordance with Credentialing Procedure.
>
> If you disagree with this decision, you have twenty business days in which to request an appeal as per Part 5, Section 4 of Credentialing Procedure.

The Application for a Statutory Order of Review

[25] The applicant applies for a statutory order of review under the *JRA*.

[26] The application and operation of the *JRA* are well established.

[27] The applicant seeks a review of –

(a) The decision of the first and/or third respondents of 28 August 2019 to suspend the applicant from duty pursuant to section 137(1) of the *PSA*; and

(b) The decision of the second and/or third respondents of 3 September 2019 to suspend the applicant's scope of clinical practice in the Metro North Hospital and Health Service.

[28] The decisions are hereafter referred to as the Suspension Decision and the Credentialing Decision respectively.

[29] It is not suggested that the applicant is not aggrieved by the decisions.

The Suspension Decision

[30] The grounds of the application in respect of the Suspension Decision provide an overview of the applicant's position. He contends relevantly as follows (my emphasis):

> 1 At all material times:
>
> (a) The Applicant was and is:
>
> (i) A public officer employed in the Prince Charles Hospital (**PCH**);
>
> (ii) The Director of Cardiology at the PCH.
>
> (b) The First Respondent was and is the Acting Health Service Chief Executive of the Third Respondent;
>
> (c) The Third Respondent was and is a health service established under the *Hospital and Health Boards Act 2011*.
>
> 2 The said decision was:
>
> (a) Purportedly made under an enactment, *viz.* s.137 of the *Public Service Act 2008* (***PSA***)
>
> (b) Notified to the Applicant by letter of 28 August 2019 signed by the First Respondent.

3 The said letter of notification, *inter alia*:

(a) Advised that the suspension is to remain in place **until** an investigation is undertaken into other allegations set forth in the said correspondence;

(b) **Specified no end date for the suspension**;

(c) Stated that the provisions of the Code of Conduct and the policies of both Queensland Health and MNHHS continue to apply to the Applicant during his suspension;

(d) Stated that during the period of suspension the Applicant is required to remain ready, willing and able to attend work if required;

(e) Stated that if the Applicant wishes to access leave during the suspension he should contact the Second Respondent.

4 The said decision:

(a) Was made without observing procedures required by law (s.20(2)(b) *Judicial Review Act 1991* (***JRA***) in that **s. 137(2)(a) required that notice of the suspension state when the suspension starts and ends**.

(b) Was not authorised under s.137 of the *PSA* (s.20(2)(d) *JRA*) in that by reason of s.137(2)(a) any suspension under the said section **may not be indefinite**.

(c) Was made without justification (s.20(2)(h) *JRA*) in that there was no evidence or other material from which the First Respondent could reasonably be satisfied that MNHHS might be prejudiced if the Applicant was not suspended.

(d) Involved an error of [law] (s.20(2)(f) *JRA*) in that by reason of s.137(2)(a) any suspension under the said section may not be indefinite.

The Credentialing Decision

[31] Similarly, the grounds of the application in respect of the Credentialing Decision provide an overview of the applicant's position. He contends relevantly as follows (my emphasis):

6 The said decision was:

(a) Made under an enactment, *viz*. the *Hospital and Health Boards Act 2011* (**HHBA**);

(b) Notified to the Applicant by letter of 3 September 2019 signed by the Second Respondent.

7 The said notification advised that "on the basis that your employment with Metro North Hospital and Health Service … is currently suspended, your Scope of Clinical Practice in MNHHS

is also suspended, effective immediately in line with Metro North HHS Credentialing Procedure".

8 The making of the said decision was subject to a mandatory procedure published by the Third Respondent pursuant to s.19(2)(f) of the HHBA and Health Service Directive QH-HSD-034: 2014, entitled *Credentialing and Defining Scope of Clinical Practice for Medical Practitioners and Dentists in Metro North Hospital and Health Service* (**the decision procedure**).

9 Clause 5 of the decision procedure provided, inter alia:

> "*When the following circumstances occur, the practitioner's [scope of clinical practice] is immediately suspended and does not require discussion, investigation or specific action on the part of the decision maker:*
>
> - *a practitioner's registration is suspended by AHPRA*
> - *a practitioner's employment with the public health facility is suspended."*

10 **On its proper construction Clause 5 is *only* engaged in circumstances where both:**

(a) The practitioner's registration is suspended by AHPRA; *and*

(b) The practitioner's employment with the public health facility is suspended.

11 **The Applicant's registration has at no time been suspended by AHPRA**.

12 The Applicant's **employment** with MNHHS has not been suspended as:

(a) The Suspension Decision purports to suspend the Applicant from his **duties only**, not his employment.

(b) The terms of the said suspension expressly direct that:

(i) The provisions of the Code of Conduct and the policies of both Queensland Health and MNHHS continue to apply to the Applicant during his suspension;

(ii) During the period of suspension the Applicant must remain ready, willing and able to attend work if required;

(iii) If the Applicant wished to access leave during the suspension he should contact the Second Respondent.

13 The terms and effect of the Credentialing Decision are incompatible with the Suspension Decision insofar that the Credentialing Decision renders the direction imposed on the Applicant by the Suspension Decision that he remain ready, willing and able to work as directed impossible.

14 None of the allegations said to support the decision of the First Respondent to suspend the Applicant from duty under s.137 of the *PSA* relate in any way to the Applicant's clinical or professional competence as a cardiologist and clinician.

15 In the premises, the Credentialing Decision:

(a) By reason of the matters in paragraph 10, 11, 12 and 13 hereof:

(i) Was made without observing the procedures required under the decision procedure (s.20(2)(b) *JRA*) in that the decision maker suspended the Applicant under Clause 5 and did not apply the procedures specified for review of credentialing where there was no immediate risk to patient safety;

(ii) Was made without jurisdiction (s.20(2)(c) *JRA*);

(iii) Was not authorised by the enactment under [which] it was purported to be made (s.20(2)(d) *JRA*);

(iv) Was an improper exercise of power (s.20(2)(e) *JRA*) in that:

(A) The decision maker failed to take a relevant consideration into account *viz* that:

(1) The Applicant's registration had not been suspended by AHPRA; and/or

(2) The Applicant's employment had not been suspended.

(B) The decision involved an exercise of the power for a purpose other than the purpose for which the power was conferred, *viz* the ensuring of patient safety through the certification of medical practitioners' clinical competence;

(C) The decision involved an exercise of a power so unreasonable that no reasonable person could so exercise it.

(v) Involved an error of law (s.20(2)(f) *JRA*) in that the Second Respondent misinformed herself concerning the proper construction and operation of Clause 5 of the decision procedure;

(vi) Was made without evidence or other material to justify the decision (s.20(2)(h) *JRA*) in that there was no evidence that:

(A) The Applicant's registration had been suspended by AHPRA; and/or

(B) The Applicant's employment had been suspended.

(b) By reason of the matters in paragraph 14 hereof was:

(i) An improper exercise of power (s.20(2)(e) *JRA*) in that the Second Respondent:

(A) Took an irrelevant consideration into account, *viz* the Suspension Decision under s.137 *PSA*;

(B) Failed to take a relevant consideration into account, *viz* the lack of any allegation regarding the Applicant's clinical competence or relevant to patient safety;

(C) Exercised the power in accordance with a rule or policy without regard to the merits of the particular case;

(D) Exercised the power in a manner so unreasonable that no reasonable person could so exercise the power.

(ii) Made without evidence or other material to justify the making of the decision in that there was no evidence that the Applicant:

(A) Posed a risk to patient safety;

(B) Was other than clinically skilled and competent.

Orders sought

[32] The Applicant seeks orders, quashing –

- the Suspension Decision, effective from 28 August 2019; and
- the Credentialing Decision, effective from 3 September 2019.

Issues

[33] The written submissions of the parties in this matter were lengthy and the material was voluminous.[1]

[34] Helpfully, the applicant reduced the key issues to the following list of five –

1. A question of law – the proper construction of section 137 of the *Public Service Act*.

2. Questions of law – is the Credentialing Procedure an enactment within the meaning of the *Judicial Review Act*, specifically, is it within the definition in section 7(3) of the *Statutory Instruments Act* 1992?

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1 The parties resolved evidential issues between themselves on the day of the hearing.

3. A question of law – are there two limbs in Part 4, section (or clause) 5 of the Credentialing Procedure to be read in the alternative?

4. A mixed question of fact and law – was the suspension of the applicant from "duty" as per the letter of 28 August 2019 a suspension of his "employment"?

5. Discretion – whether relief should be declined as a matter of discretion?

[35] In writing, the applicant identified the *critical* issues as follows –

- Whether the failure to identify an express end date establishes the grounds identified in the application such that an order quashing or setting aside that decision should be made; and

- Whether the fact that the applicant's registration with AHPRA was not suspended at the time of the Credentialing Decision invalidates that decision, such that it should be quashed or set aside.[2]

[36] The applicant submitted that, if I were to determine the first of those two critical issues in his favour, then the Credentialing Decision ought to be quashed – regardless of the outcome of the second issue, because neither prerequisite to the Credentialing Decision would be satisfied.

The Suspension Decision: Key question 1 – The proper construction of section 137 of the *PSA*

Applicant's submissions

[37] The applicant submitted that the Suspension Decision is invalid because it is open-ended, contrary to the express requirements of section 137 of the *PSA*.

[38] By section 137(1), the suspension was effected by the provision of the notice. And the content of the notice was mandated by section 137(2).

[39] It may be recalled that the applicant was informed that his suspension would "remain in place until an investigation can be undertaken … and the outcome of those investigations [*sic*] has been considered, unless otherwise determined". The applicant submitted that expressing the duration of the suspension in that way provided him with "no tangible or material understanding of how long the suspension might remain in place".

[40] In oral submissions, the applicant said that section 137 of the *PSA* does not operate in a vacuum. The approach to its interpretation is not controversial. I am required to look at the text in dispute, and the context in which that text appears in the statute, whilst having regard to the purpose of the legislative provision. The applicant submitted that the legislative provisions are intended to balance rights and obligations.

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2 The applicant observed that his registration has not subsequently been set aside – stating that this is "unsurprising, given that the allegations said to support the suspension of duties under s 137 *PSA* do not involve any issue of patient safety".

[41] He took me to section 3 of the *PSA*, "**Main purposes of Act and their achievement**". One of the *PSA*'s purposes (as per section 3(1)(d)) is to –

> provide for the rights and obligations of public service employees.

[42] He took me to section 25 of the *PSA*, "**The management and employment principles**", and drew my attention to subsection (2)(b)(i), which states that "[p]ublic service employment is to be directed towards promoting…equitable and flexible working environments in which all public service employees are…treated fairly and reasonably".

[43] He submitted that section 137 gave his employer "a powerful right at a low threshold". The "powerful right" is the right to suspend an employee from the employee's duties other than as disciplinary action; and the "low threshold" is no more than a "reasonable belief" that the proper and efficient management of the department "might" be prejudiced if the officer were not suspended.[3]

[44] He submitted that, in my consideration of section 137, I should bear in mind the requirement in subsection (2)(b)(i) to afford employees equity.

[45] The applicant referred to the 2010 amendment of section 137 (see below) as a footnote to his written argument that the requirement to provide an end date was to ensure some degree of fairness to a suspended employee. He submitted that, without an end date, the decision maker could drag out an investigation (and an employee's suspension because of it) interminably.

[46] The applicant observed that the notice requirements in section 137(2) were inserted by section 125 of the *Integrity Reform (Miscellaneous Amendments) Act* 2010 (Qld). The Explanatory Note accompanying the relevant bill states –

> Clause 125 amends section 137 to provide that if a chief executive suspends a public service officer from duty, the chief executive must give the officer a notice stating when the suspension starts and ends, the remuneration the officer is entitled to for the period of the suspension and the effect that alternative employment will have on the entitlement.

[47] I note that the amendment to section 137 by the *Integrity Reform (Miscellaneous Amendments) Act* 2010 (Qld), did not change the circumstances in which a chief executive may suspend a public service officer. Nor did it make any changes to the matters which were to be considered by the chief executive in the context of deciding on the suspension (such as the need for the chief executive to consider all alternative duties or for the period of suspension to be no more than the period the chief executive reasonably believed was necessary to avoid the relevant prejudice).

[48] The applicant submitted that there is a "critical contextual message" in section 137(4) about that which is contemplated by subsection (2)(a). The message is to be found in the requirement that "the period of the suspension can not be more than the period that the chief executive reasonably believes is necessary to avoid the prejudice". He submitted that subsection (4) takes away from the chief executive

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[3] Suspension for disciplinary reasons is provided elsewhere in s 189 of the *PSA*.

any notion of "carte blanche" discretion; and that a consideration of whether a period of suspension is more than necessary to avoid prejudice cannot be undertaken unless the period of suspension is nominated with certainty. In other words, the period of suspension has to be defined by way of a starting and a finishing date (or, I assume, by way of a defined period, for example, of weeks or months) because there can be no evaluation of the reasonableness of the period or length of a suspension if no period or length is identified.

[49] Further, in the present case, the period of suspension was not confined to the period of the investigation. Nor was it confined to the period encompassing the "consideration" of the results of the investigation. Its duration was qualified by the phrase "unless otherwise determined". Thus the decision maker (unlawfully) reserved to herself the power to extend the period of suspension indefinitely at her election.

[50] On the basis that the interpretation of section 137(2) contended for by the applicant is correct, he then relied on the following grounds of the *JRA* to have the Suspension Decision set aside –

- Section 20(2)(b): Procedures that were required by law to be observed in relation to the making of the decision were not observed – Section 137(1) requires the notice to state *when* the period of suspension is to end and the notice to the applicant did not do so.
- Section 20(2)(d): The decision was not authorised by the enactment under which it was purportedly made – An open-ended suspension is beyond statutory power.
- Section 20(2)(f): The decision involved an error of law – The decision maker failed to appreciate the need to specify an end date.
- Section 20(2)(h): There was no evidence or other material to justify the making of the decision – The power to suspend under section 137 only arises if the Chief Executive "reasonably believes the proper and efficient management of the department might be prejudiced if the officer is not suspended".

[51] Section 20(2)(h) is governed by section 24 of the *JRA*. A section 20(2)(h) ground will not be made out unless an applicant establishes that, by law, the decision can only be made if a particular matter is established; and there is *no* evidence upon which the relevant decision maker *could* be reasonably satisfied of the matter.

[52] The applicant reminded me that he had already been suspended pending an investigation into his alleged bullying of others. The present suspension is based on his sending letters to members of the Health Service's board, in breach of the *PIDA*. Thus, the issue was whether his sending those letters might prejudice the proper and efficient management of the department. He argued that there is no evidence to support a reasonable belief that – *months after* the letters had been sent – the fact that the letters had been sent would cause any ongoing prejudice to the proper and efficient management of the department which might (months later) be ameliorated by the applicant's suspension.

[53] The applicant submitted that his suspension appears punitive in character and not for the purposes contemplated by section 137.

Respondents' submissions

The respondents' written submissions

[54] In essence, the respondents' written submissions are to this effect: if the legislation required the specification of start and end dates in the notice, then it would say so. The way in which the period has been expressed is appropriate. Requiring the chief executive to define the period by reference to dates is impractical.

[55] The respondents submitted –

a) The words "unless otherwise determined" (used in the notice) give express recognition to the statutory effect of section 137(9) (which provides that the chief executive may cancel the suspension at any time) and do not render the suspension "truly open-ended" as contended by the applicant;

b) The applicant's construction requires reading words such as "the date" into section 137(2)(a) (so that it reads "*the date* when the suspension starts and ends"). Having regard to (a) the ordinary meaning of the words used; (b) the context of the *PSA* as a whole; (c) judicial consideration of similar phrases in legislation; and (d) the "practicality" of the operation of the provision, it is sufficient to state "when the suspension starts and ends" by reference to "matters, including an event, or a period able to be understood by a reader of the notice". (I assume that the reference to "judicial consideration of similar phrases in legislation" is a reference to one decision of the Queensland Industrial Relations Commission which is discussed below. I was not taken to any other case in which a similar phrase had been considered nor was one included in the respondents' "Bundle of Authorities".);

c) When something starts and ends is a flexible concept. In accordance with its ordinary meaning, the stipulation of a particular day is unnecessary. By starting the requirement with "when" and by omitting any reference to a day or dates, the section enables the period to be expressed by reference to an event, an act or the outcome of a process. (The respondents used as examples of the expression of a workable period, "the football game will start <u>when</u> the rains stops" and "the cricket game will end <u>when</u> the light is insufficient to enable safe play to continue".);

d) The language of section 137 is to be contrasted with the language used in section 192, which concerns notice of a suspension or termination for disciplinary purposes. Section 192(2) states –[4]

> (2) The notice must state –
>
> (a) for a suspension –
>
> (i) when the suspension starts and ends; and

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4 Although this section is set out above, I have repeated it here for convenience.

(ii) the remuneration to which the employee is entitled …; and

(iii) the effect that alternative employment may, under section 191, have on the entitlement; or

(b) for a termination – the day when it takes effect.

The legislation distinguishes between a requirement that a day be nominated, as in the case of a termination for a disciplinary purpose, and when it is not, as is the case when the requirement is expressed as a requirement to state when the suspension "starts and ends";

e) Section 137 is not concerned with *certain* matters (the threshold is expressed in terms of a chief executive *believing* that the proper and efficient management of a department *might* be prejudiced). Thus it anticipates uncertainty about whether there is prejudice and how long it might last – which is consistent with a construction permitting the expression of the period by reference to events;

f) It would be "contrary to the purpose of section 137… to mandate a requirement of precise and specific end date for the suspension, where the investigation and/or state of affairs may not have an identifiable 'end date' at the time of this kind of suspension decision being made". It is "consistent with public service principles, the purpose of the Public Service Act **and the PID Act,** for an employee…to be suspended by reference to the duration of an investigation and/or the continuation of a particular state of affairs. Otherwise, an important protection and **flexibility function** in the Public Service Act would be compromised" (my emphasis). This is because, for example, when an independent investigation is required, the MNHHS cannot be precise or specific about the end of the suspension, other than to link it to the underlying investigation and consideration of that investigation. The same could be said of an investigation conducted by the Crime and Misconduct Commission, or of a suspension on the basis of conflict of interest;

g) It is unreasonable to expect a chief executive to nominate, by reference to dates, the period of suspension which the chief executive believes is not more than necessary to avoid the relevant prejudice;

h) The Explanatory Note to section 137, as originally enacted, describes the section as "being intended to apply expressly to situations where it may not be possible to set a fixed, particular day or date and to give the chief executive discretion and control over the suspension". The relevant Explanatory Note states (emphasis by the respondents) –

> Clause 137 deals with suspension in circumstances other than disciplinary action. This clause provides flexibility for a chief executive to suspend an officer from duty for non-disciplinary reasons, for example, where an employee discloses a conflict of interest in relation to their employment activities, and cannot be allocated elsewhere within the department without prejudicing the efficient management of the department.

i) The applicant's construction would lead to impracticalities and administrative burdens; and

j) The respondents' construction was the construction adopted in *Zink v Townsville Hospital and Health Service* [2019] QIRC 181 (at [328] and [330]) – a decision of the Queensland Industrial Relations Commission (*Zink*).

[56] I will interrupt this summary of the respondents' submissions to consider *Zink*.

[57] Zink was a lawyer with the Townsville Hospital and Health Service (the "THHS"). She was suspended from duty under section 137 of the *PSA*, pending an investigation into complaints made by other THHS staff about her. After the conclusion of the investigation, she was suspended under section 189 of the *PSA* and invited to "show cause" why she should not be liable to discipline.

[58] She lodged a formal grievance over the show cause decision. She was dissatisfied with THHS's response to her grievance and, on 27 February 2019, she filed a Notice of Industrial Dispute with the Queensland Industrial Relations Commission. She sought (among other orders) an order setting aside the decisions to suspend her from duty.

[59] She argued (among other arguments) that the notice of her suspension was "flawed as it was contrary to law or policy" including because it did not state the date upon which her suspension would end. Rather, she was notified that "unless otherwise advised, [her suspension would] end once THHS has determined what further action is appropriate, including any management or disciplinary action". She argued that the *PSA* requires that any suspension be for a "fixed and identifiable 'period' of time and the delegate must be able to ascertain that 'period' of time at the outset" in order to comply with section 137(4) of the *PSA*.

[60] THHS submitted that the notice sufficiently complied with the relevant statutory requirement.

[61] The parties' arguments in *Zink* about the need to specify a date went essentially no further than this.

[62] Commissioner Thompson held that the notice was sufficient.

[63] Commissioner Thompson explained his task at paragraph [310]. He said (my emphasis) –

> The task for the Commission is to determine whether certain aspects of a disciplinary process engaged in by the respondent were **fair and reasonable** in circumstances where Zink, as the subject officer, had specifically challenged the actions of the respondent …

[64] Of the notice issue, he said –

> [328] The notice of suspension stated in clear terms that the suspension would end once "THHS had determined what further action was appropriate, including any management or disciplinary decision". There were in my view obvious difficulties in identifying an end date when there was to be

> an external investigation undertaken which the respondent could not manage to the point of guaranteeing when such investigation would be completed and in any event the PS Act at s 137(2)(a) does not require a numerical date to be included in the notice of suspension. Effectively, what occurred was that once the final Investigation Report was received by the respondent on 9 January 2019, the delegate determined that a show cause notice be issued and the suspension under s 137 of the PS Act was ended and a new suspension under s 189 of the PS Act was initiated.
>
> [329] In the course of the s 137 suspension, Zink received the remuneration for which she had an entitlement, with no evidence advanced that she was "out of pocket" or disadvantaged financially due to the suspension.
>
> [330] Putting aside the argument from the respondent that there was no utility in interfering with the s 137 suspension, I am satisfied that in all the circumstances, the Chief Executive in suspending the employment of Zink on 17 May 2018 had done so in a manner that was compliant with s 137 of the PS Act and ought not be disturbed.

[65] Returning to the submissions of the respondents, in respect of each of the *JRA* grounds upon which the applicant relied, they argued –

- in response to the section 20(2)(b) ground: Even if mandatory compliance with section 137(2) is required, substantial compliance is sufficient (relying on, *inter alia*, *Module2 Pty Ltd v Brisbane City Council* (2006) 153 LGERA 120; [2006] QCA 226) and there has been substantial compliance. There is no mandatory requirement that the notice specify a *date* for the beginning and end of the suspension;

- in response to the section 20(2)(d) ground: The suspension decision is clearly authorised by the enactment (relying on the following from Toohey and Gaudron JJ at 378 in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321: "The expression 'not authorized' … when considered in the context of the exercise of administrative powers conferred by an enactment, signifies a decision that is expressly or impliedly forbidden".). There has been compliance with the requirements of section 137(2);

- in response to the section 20(2)(f) ground: Either there is no error of law, because the notice does not have to specify the precise days or dates upon which the suspension began and was to end; or, *even if the applicant's construction was correct*, the decision maker has not erred *in law* in misinterpreting the meaning of the ordinary words used in the section, although she may have erred *in fact* (relying on, *inter alia*, *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287: "The ordinary meaning of a word or its non-legal technical meaning is a question of fact".);

- in response to the section 20(2)(h) ground: The applicant advanced the "no evidence" ground of review as per section 24 of the *JRA* which requires the

applicant to show that there is no evidence *at all* to support a finding of fact. It is not enough to rely upon an *insufficiency* of evidence (relying on *Australian Postal Corporation v D'Rozario* (2014) 222 FCR 303 at [118]). Moreover, the ground has no application to findings of opinion or belief (relying on, *inter alia*, *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [581] – [582], which distinguished between findings of fact and opinions and conclusions in the nature of value judgments). The pre-condition in this case required the Chief Executive to "reasonably believe" that the proper and efficient management of the department might be prejudiced if the applicant were not suspended. This required the Chief Executive to undertake a value judgment. There is evidence that the Chief Executive genuinely held the relevant opinion. There is no scope for the application of the "no evidence" ground.

[66] Further, the respondents submitted that the suspension the subject of this application is not punitive even though the applicant had already been suspended for other reasons. The suspension was a "necessary consequence" of the proper application of the *PSA* which requires a further suspension during the "different circumstances of material prejudice as compared to the Behavioural Suspension".

The respondents' oral submissions

[67] The respondents informed me that they would not press an argument that granting relief in the case of the Suspension Decision would be futile.

[68] As to the need to specify a start and end date for the suspension – Queen's Counsel for the respondents repeated the argument made in the written submissions (drawing on the Explanatory Note) that the section allows for "flexibility".

[69] I indicated to Queen's Counsel (in effect) that it seemed to me that the flexibility contemplated by the Explanatory Note is flexibility to suspend other than in the context of potential disciplinary action, rather than flexibility when it comes to the start and end dates of suspension. In response, she submitted that the reference to flexibility is a reference to matters warranting suspension which might not be identifiable by dates, such as a conflict of interest.

[70] As to the applicant's "no evidence" ground, the respondents submitted that the ground is not concerned with notions of *insufficiency* of evidence. If there is evidence sufficient for an inference to be drawn, that would "combat or thwart" any no evidence argument. Section 137 requires a value judgment. The letter containing the decision to suspend the applicant set out the basis for the decision that there was a reasonable belief that the proper and efficient management of the department might be prejudiced – namely, the applicant's role in the Health Service, the complainants' roles, the Chief Executive's concerns and the Health Service's obligations under the *PIDA*. There is therefore no basis upon which the applicant can succeed on the "no evidence" ground.

[71] The respondents acknowledged that I am not bound by *Zink*.

[72] I was taken to *Avenia v Railway & Transport Health Fund Ltd* (2017) 272 IR 151; [2017] FCA 859 (*Avenia*) – one of the applicant's authorities. The respondent

relied upon Lee J's statements at paragraphs [172], [173] and [174] and submitted that I ought to interpret section 137(2) similarly. I will consider that case now.

[73] Dr Avenia was a dentist. He was employed by the Railway and Transport Health Fund under a contract of employment. His employment was not governed by the *PSA* or equivalent legislation.

[74] Other employees made complaints about him. His employer, through its Chief Operating Officer, Ms Tregeagle, instigated a process which culminated in his employer sending him a suspension letter and then a show cause notice.

[75] The suspension letter informed Dr Avenia that he was suspended from duties while matters were being investigated, with "immediate effect". It informed him that the suspension was not disciplinary, and would be kept under review. He was told that it would be "as brief as reasonably practicable until completion of the investigation".

[76] One issue for the trial judge was whether the direction to Dr Avenia not to attend work (that is, his suspension) was a "reasonable direction". The employment contract contained no express power to suspend on full pay or otherwise pending an investigation. Arguments about the reasonableness and lawfulness of the direction to suspend occurred in the context of arguments about what terms ought to be implied, as a matter of fact, about the employer's right to suspend Dr Avenia's employment.

[77] Lee J considered the right to suspend at common law, noting that suspension was not a "neutral act". His Honour said at 191, paragraph [155] (citations omitted) –

> … as Sedley LJ observed (with Dyson LJ and Sir Peter Gibson agreeing) in *Mezely v South West London and St George's Mental Health NHS Trust* … suspension, at least in respect of the "employment of a qualified professional in a function which is as much a vocation as a job", is not a "neutral act preserving the employment relationship" and:
>
> > [s]uspension changes the status quo from work to no work, and it inevitably casts a shadow over the employee's competence. Of course this does not mean that it cannot be done, but it is not a neutral act.

[78] In *Avenia*, both parties accepted that suspension on full pay for the limited purpose of conducting a disciplinary investigation would be permitted by the employment contract and would be lawful in some circumstances. The questions to be answered were, "what were those circumstances?" and "did they, in fact, exist"? As the case was argued, the answer to those questions depended upon whether suspension was *reasonably necessary* for the purposes of a disciplinary investigation. It was in that context that his Honour made the remarks upon which the respondents rely.

[79] The respondents did not explain the basis upon which I might use the way in which an employment contract had been interpreted in my interpretation of the requirements of section 137(2) of the *PSA*. Nevertheless, I note that Lee J held (at [170]) that Dr Avenia's employer had a right to suspend him on full pay temporarily

where it formed the view, *bona fide*, that the direction to suspend was in furtherance of –

- its duties to enquire into or investigate allegations of inappropriate behaviour which could constitute a risk to the safety, health and welfare of staff; and/or
- the fulfilment of its duty to provide a safe place of work for its staff.

[80] In other words, Lee J found that the suspension was a reasonable direction with which Dr Avenia was required to comply under the "reasonable direction provision" of the contract.

[81] As noted above, the respondents relied upon paragraphs [172], [173] and [174] of Lee J's decision. To understand those paragraphs, one also needs to read [171]. Lee J said –

> [171] In *Downe* [a decision about the authority to suspend on full pay under a contract of employment],[5] Rothman J opined more generally that a direction to suspend would be reasonable where the employer had, *bona fide*, formed the view, during the course of an investigation, that the continued performance of duty was inconsistent with its interests. It is not necessary for me to express a view on whether the right to suspend pending investigation would *always* be reasonable in *all* such cases. What is clear is that the right to direct that available work not be performed would exist in the circumstances I have identified at [170].
>
> [172] Having considered in this subsection [of his Honour's reasons] how the *right* to suspend arises under the Employment Contract, I will turn to the *lawfulness* of the suspension in section I (Issue Two) below.
>
> [173] However, before leaving *Downe* and the above consideration as to the existence and scope of a right to suspend "during the course of … an investigation", at the risk of dwelling on semantics, a further question arises: what is meant by the term "investigation" in the relevant context? The subsequent decision of Rothman J in *Waddell v mathematics.com.au Pty Ltd* [2013] NSWSC 142 sheds some further light on what his Honour meant. *Waddell* concerned an employee who sued his employer for breach of contract, where, among other things, the employer had directed the employee not to attend the workplace in circumstances where the parties were in dispute over, primarily, the deletion of files from a company laptop. Rothman J made the following relevant comments (at [106]):
>
> > It is necessary, albeit not central to the determination of those matters, to deal with the reasonableness of the direction not to attend work. In other proceedings, I have dealt at length with the capacity

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5 *Downe v Sydney West Area Health Service (No 2)* (2008) 71 NSWLR 633; [2008] NSWSC 159.

> of an employer to "suspend" or direct not to work or not to attend work for a limited period: see [*Downe*]. An employer is entitled, for a limited period *pending an investigation or the determination of issues*, to require an employee not to attend for work. In the circumstances pertaining to this employment, such a direction was reasonable.
>
> (Emphasis added [by Lee J])
>
> [174] The circumstances of *Waddell* and the use of the disjunctive in the quote above suggests that Rothman J in *Downe* did not intend to limit the application of the principle there enunciated to circumstances where some sort of formal "disciplinary investigation" of a particular type had been commenced, but extends to circumstances where the employer is seeking reasonably to determine issues or find facts relevant to allegations of suspicions of employee misconduct.

[82] Queen's Counsel referred to the phrase emphasised above ("pending an investigation or the determination of issues") and submitted that "we would say that [there should be] a similar interpretation in relation to [section] 137(2)(a) here in terms of when the suspension starts and ends".

[83] I note that there is, in the quote, a reference to suspension for a "limited period". In my view, the interpretation of that phrase ("limited period") would be more relevant to the question for me in the present case – but its interpretation was not an issue for Lee J. I did not find this aspect of *Avenia* of assistance in the interpretation of section 137 of the *PSA*.

[84] Queen's Counsel submitted that a chief executive's power to cancel the suspension at any time under section 137(9) "points towards the ability to fix that end date by the event or circumstance because it remains that it can be cancelled".

[85] She further submitted that the word "period" does not convey a requirement that it be expressed by reference to dates. Rather the expression "period of suspension" "sit[s] comfortably with the end of the suspension being that event or circumstance".

Applicant's submissions in reply

[86] The applicant submitted that the written submissions of the respondents suffered from a "fundamental flaw" in that they argued that all that is required is for the notice to advise the employee *how* the suspension would come to an end. The legislation does not say that. The context for the section and the need to achieve the purpose of balancing the rights of the employer against the rights of the employee, support the requirement that, for the notice to be valid, it needs to include a statement as to when the suspension starts and when it ends.

[87] Even if I disagreed with the applicant's primary argument, the respondents' argument was still flawed. The expression of the duration of the suspension is so "open ended" that, *even if* it were enough to express the end of a suspension by

reference to an event, it qualified the nominated events (the investigation and its consideration) with the phrase "unless otherwise determined".

[88] As to the respondents' argument that the phrase "unless otherwise determined" is a reflection of section 137(9) of the *PSA*, the applicant submitted that section 137(9) is a statutory provision which does not need to be included in a letter of suspension. Further, the right to *cancel* a suspension is something fundamentally different from the reservation contained in the phrase "unless otherwise determined". Queen's Counsel for the applicant submitted, "If they meant cancelled, they would have said cancelled, but they didn't". He continued:

> Not only is there that broad catch-all at the end, but the preceding events – namely, the outcome of those investigations and the "has been considered" – are quite non-specific in that they don't say which investigations, and nor do they say who was to undertake the consideration.…[Thus] even if compliance with the Act could be achieved by stipulating an event by which the end date is the period of suspension could be calculated, there had not been compliance with that in this case.

[89] In terms of the balance between the rights of the employer and the rights of the employee, the applicant submitted that while it is true that under subsection (2)(b), the employee's remuneration is to continue, remuneration is not the whole of the loss that an employee suffers via a suspension. In addition to depriving an employee of the opportunity to associate with his or her colleagues, to practise his or her profession and to undertake his or her normal duties, it subjects the employee to the odium of being suspended. One could readily understand why the legislature curbed this draconian right to suspend an employee before there was even disciplinary action on foot. In that context, the argument that the notification had to state with specificity when the suspension starts and ends is strong and compelling.

[90] The respondents' argument that the chief executive might not know, at the time of imposing the suspension, how long it would take to conduct an investigation or consider the matter, was a weak one. Not only is the chief executive able to unilaterally set timeframes, the chief executive is also in a position to dictate how the investigation is to be undertaken and to know who is to consider the results of the investigation when they are to hand. If, at the end of a nominated period of suspension, there is a need for further investigation, the chief executive could impose a further suspension. Although, in doing so, the chief executive would have to turn his or her mind to the question of prejudice.

[91] The obligation under section 137(3), which requires the chief executive, before suspending the officer, to consider alternative duties, provides a further contextual argument against the notion that it is proper for the notice to simply specify an event without tying that event to a specific end date.

[92] With respect to *Zink*, the applicant submitted that the decision does not bind me and it has little value as a precedent. Further, the conclusions reached in *Zink* about the requirements of section 137(2) were made in the context of the employee's success in the application regardless.

The Suspension Decision: discussion and conclusion

[93] I am dealing primarily with the interpretation of a statute and the related phases "when the suspension starts and ends" and "period of suspension". To ascertain their meaning, I am to start with the words of the provision itself, but my task does not end there. I am to consider the context for the provision in its widest sense. I am to consider what may be drawn from the context for, and the purpose of, the provision. When the literal meaning of words in a statute does not conform to the evident purpose or policy of a particular provision, then it is entirely appropriate for courts to depart from the literal meaning.[6] A construction which promotes the purpose of the statute is to be preferred.

[94] Neither party took me to the dictionary definition of "when" or "period".

[95] Apart from *Zink*, neither party took me to any authority on the meaning of the word "period" in any other legislation. However, the meaning of "period" has been considered by the Queensland Court of Appeal, in *Attorney-General (Qld) v Van Dessel* [2007] 2 Qd R 1; [2006] QCA 285 (*Van Dessel*). Indeed, *Van Dessel* is one of a limited number of authorities listed against the word "period" in *Australian Legal Words and Phrases 1900 – 2017*, Lexis Nexis, 2017. And *Van Dessel* is the only authority referred to under the word "period" in the Fifth Edition of *Words and Phrases Legally Defined*, published by Lexis Nexis UK in 2018.[7]

[96] The Court of Appeal in *Van Dessel* held that, where the legislation in question required the court to state the "period" during which an order would have effect, the stated period had to be expressed in a *finite* way.

[97] I found the case of assistance because of the Court of Appeal's reference to dictionary definitions of the word "period" and because of the Court's approach more broadly – recognising of course that the decision did not involve the *PSA*.

[98] I invited further written submissions from the parties about the case.

[99] *Van Dessel* involved the construction of the *Dangerous Prisoners (Sexual Offenders*) *Act* 2003 (Qld) (the "*DPSOA*"). Under the *DPSOA*, upon the application of the Attorney-General, certain requirements having been met, the Supreme Court may order that a prisoner be detained in custody for "an indefinite term for control, care or treatment" or that a prisoner be released from custody, subject to appropriate conditions. The orders are known as continuing detention orders and supervision orders respectively.

[100] Relevantly, under section 15(b) of the *DPSOA* (as it stood at the time) a supervision order had effect, in accordance with its terms "for **the period stated** in the order" (my emphasis).

[101] The primary judge in *Van Dessel* imposed a supervision order "until further order of the Court".

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6 *R v A2; R v Magennis; R v Vaziri* (2019) 373 ALR 214; [2019] HCA 35.

7 With due respect to the author of that text, in my view, his summary of *Van Dessel* is inaccurate.

[102] Van Dessel successfully appealed against the primary judge's order, arguing that the primary judge was obliged to fix a *finite* period within which he would be subject to the conditions of the supervision order. The original order was set aside and replaced with one which stated the "period" of the order as a period of 20 years.

[103] Jerrard JA was "reluctantly persuaded" of the need for the primary judge to describe the relevant period in finite terms.

[104] His Honour was of the view that the expression "for the period stated in the order" was *capable* of applying to an indefinite or a definite period. His Honour said (footnotes omitted) –

> [15] … The expression "for the period stated in the order" is equally capable of applying to an indefinite or definite period. The *Collins English Dictionary*, Third Edition (Australian Edition), includes the following explanations of "period":
>
> "1. a portion of time of indefinite length.
>
> 2. a portion of time specified in some way;"
>
> and other meanings that are not relevant. The *New Shorter Oxford English Dictionary* provides for "period" the relevant meanings of :
>
> "A course or extent of time", and "The time during which anything runs its course; time of duration".
>
> The *Macquarie Dictionary Federation Edition* provides the meanings:
>
> "an indefinite portion of time, or of history, life etc., characterised by certain features or conditions";
>
> and
>
> "any specified division or portion of time".
>
> [16] I agree with Mr Logan [counsel for the Attorney-General] that none of these dictionary derived meanings for the word "period" carry with them any inherently finite quality …
>
> [17] I agree with the statement of Mackenzie J … that, as a matter of construction, the period of operation of the order is not a "condition" and therefore cannot be amended under s 19. Mr Logan conceded that point. He nevertheless argued that an opportunity for termination for good cause of an order having indefinite effect is provided for, by the limitation that the supervision order have effect "until further order". I agree that an order so expressed gives jurisdiction to the Supreme Court to hear at a later time an application, not simply to amend the conditions of an order, but to discharge it; indeed, that jurisdiction would exist in this Court in any event, if, for example, a supervised prisoner fell into an irreversible coma, or suffered incapacitating injury or illness making the supervision unnecessary. An order of the type here made is

appropriate where the available evidence … does not admit of any confidence in the making of a supervision order of finite duration.

[18] The alternative view is that when faced with evidence such as that presented here, namely that for the indefinite future a respondent prisoner presented an unacceptable risk of committing a serious sexual offence if unsupervised in the general community, the Supreme Court either has to set a finite period that did not specifically correlate with any evidence, or tailor the length of the order to a predictive judgment of the likely years remaining in the prisoner's life, or else consider the alternative of indefinite detention. A correlation between the period stated in the order and the serious risk described in the evidence would comply with the statutory object of providing adequate protection to the community.

[19] Despite my agreement with those various arguments advanced by Mr Logan, it is the fact that the oral argument on the appeal established a good deal of uncertainty or ambiguity in s 15(b). Mr Moynihan [counsel for the appellant] stressed that the object of the Act is to provide "adequate" and not absolute protection, and he argued that that fact supported a construction of "period" as a finite rather than indefinite term …

[20] Mr Moynihan ultimately persuaded me that the evident ambiguity should be resolved in favour of his construction, namely that "the period stated in the order" had to be for a finite period because of the provisions in s. 24 of the Act. Section 23 provides that div 6 (i.e. ss 23 and 24) applies if, after being released from custody under a supervision order or interim supervision order, a released prisoner is sentenced to a term or period of imprisonment for any offence, other than an offence of a sexual nature.

Section 24 reads:

"**24 Period in custody not counted**

(1) The released prisoner's supervision order or interim supervision order is suspended for any period the released prisoner is detained in custody on remand or serving the term of imprisonment.

(2) The period for which the released prisoner's supervision order or interim supervision order has effect as stated in the order is extended by any period the released prisoner is detained in custody."

[21] The inescapable conclusion is that the expression "the period" in s.24(2) describes a finite period, whether describing the (finite) period for which the supervision order has effect as

> stated in the order, or whether describing the (finite) period during which the released prisoner is detained in custody. The drafting excludes the possibility that the latter period of further custody could itself be an indefinite term, such as a life sentence, actually served. A period of supervision could not be extended by a life sentence actually served in custody. A sentence of six months' actual custody could not extend a period of supervision of indefinite length. The drafting assumptions exclude either indefinite periods of supervision, or periods of actual imprisonment ending only [upon] the prisoner's death or expressed to be indefinite.
>
> [22] … [The construction of "period" in 15(b), as meaning a finite period] does not frustrate the object of the Act, of securing adequate protection of the community, providing a cautious approach is taken in setting a finite period. That construction is therefore consistent with the requirements for construing legislation described in *Project Blue Sky* ... where the joint judgment of McHugh, Gummow, Kirby, and Hayne JJ. reads:
>
> > "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'". [Footnotes omitted]

[105] Holmes JA (as the Chief Justice then was) was, in my respectful view, not at all reluctant in reaching the conclusion that the relevant period had to be expressed in finite terms. Her Honour said (my emphasis) –

> [26] Dictionary definitions of the noun "period" do not, in my view, resolve the construction question, because s.15(b) of the [*DPSOA*] contemplates a "period" with a further qualification: that it is capable of being "stated". **I do not think one can "state" a period other than by identifying its duration.** There is, also, what I consider to be the telling point made by Mr Moynihan …: that if the legislature had wished to enable imposition of supervision orders for indefinite periods, it could readily have done so by saying as much …

[106] Her Honour also noted that there was no review mechanism available for supervision orders (as there was for continuing detention orders); nor was there provision for their rescission if they were no longer needed. In her Honour's view, the absence of *review* suggested that when a supervision order was made, a court must attempt to establish the duration for which it was likely to be needed.

[107] In concluding that the period stated had to be a finite period, Mackenzie J was particularly influenced by the fact that there was no review mechanism for supervision orders. His Honour said –

> [44] … It is unusual, if it was intended to permit a continuing supervision order to have an indefinite operation, that the

> legislature did not say so. That itself is not determinative either. However the existence of a review mechanism for detention orders and the absence of a review mechanism in respect of supervision orders in my view points to the conclusion that, despite or perhaps because of the imprecision of predictability of future offending, the court is required to do the best it can to fix a finite period, which must be stated in the order.

[108] In responding to my request for submissions about this case, the applicant argued, essentially, that the case supported his contentions. He submitted that, "[i]n context, having to 'state' when the suspension starts and ends is how the statute provides for ascertainment of 'the period' relevant for s.137(3), (4) and (5)". The applicant submitted that the expression "when the period starts and ends" is analogous to the phrase considered in *Van Dessel*.

[109] The respondents submitted, essentially, that *Van Dessel* was of neither relevance nor assistance. I was to be cautious before applying the meaning of a word or phrase, adopted for the purposes of one statute, to another statute which operates in a completely different context. Also the *PSA* does not require the *fixing* of a period. The respondents did not submit that the phrase "when the suspension starts and ends" permits a period of indefinite suspension. Rather, their submission was that they were not required to specify an end *date* in the notice of suspension – it is sufficient to express "when" the suspension ends by reference to an event, even though the date upon which that event might occur is unidentifiable at the time of the giving of the notice.

[110] Suspension from duty is a serious matter with serious consequences. It is not a neutral act (*Avenia*).

[111] The suspension in the present case was expressed to end by reference to "an" investigation being undertaken – without naming the investigator – and consideration of the outcome of "those investigations" (plural) – I assume by the chief executive, although that is not clear – "unless otherwise determined".

[112] Thus, the applicant was notified that, *unless otherwise determined*, his suspension would end after there had been undefined period of "consideration" of the outcome of an investigation of undefined duration. The period of the suspension was expressed in a temporally indeterminate way (in that its duration was uncertain).

[113] As will emerge, in my view, the notice failed to comply (or substantially comply) with the requirements of section 137(2), either because –

- it failed to state the end date (or the duration in weeks or months) of the suspension; or
- even if the end of the suspension could be validly stated by reference to an event, the timing of which was unascertainable by the employee, in the present case, the end date was so qualified by the phrase "unless otherwise determined" as to not be validly "stated".

[114] I am not persuaded by the respondents' argument (that there could validly be "flexibility" built into the notification of a suspension's beginning and end) which drew on the workability of periods stated in that way in everyday life (for example, games commencing "when the rain stops" or finishing "when the light is insufficient"). The consequences of the uncertainty surrounding events of that kind is nothing like the consequences of the uncertainty of the duration of suspension from duty.

[115] I do not consider the fact that section 137 is concerned with "uncertain" prejudice (that is, prejudice that *might* occur) of assistance in interpreting the requirements of a valid notice. It does not follow logically from the fact that the section is triggered by uncertain prejudice that a notice of suspension can validly state in an uncertain or temporally indeterminate way when the suspension starts and ends.

[116] In my view, the reference to flexibility in the Explanatory Note to section 137 as originally enacted is a reference to flexibility in the *circumstances* in which an employee may be suspended from duty – that is, including for reasons unrelated to discipline. And the Explanatory Note does not assist in the interpretation of the requirements of a valid section 137(2) notice.

[117] *Zink* is not binding upon me. And, as noted, the arguments about the requirements of a valid notice in that case were relatively brief.

[118] I have considered the way in which section 192 expresses the requirements of a notice of suspension versus a notice of termination. I do not consider the fact that a notice of termination is required to state "the day" when it takes effect to be *determinative* in the respondents' favour, but I consider this argument to be their most persuasive argument.

[119] I was not assisted in my interpretation of section 137(2) by the need for the chief executive to determine the "period" of suspension by reference to the period the chief executive reasonably believes is necessary to avoid the prejudice (as per section 137(4)). I acknowledge that that determination can be made by reference to an event. It is not a determination which can *only* be made by reference to a period with a fixed end date.

[120] I acknowledge that employment may be suspended pending an investigation under section 137 and that a chief executive might not know how long any investigation will take. But in my view, that is not reason enough to conclude that the period of suspension can be validly expressed in an uncertain or temporally indeterminate way.

[121] I note that the *PSA* contains no provision for the extension of a period of suspension. However, there is nothing in the *PSA* which prevents the chief executive from imposing, in effect, rolling suspensions if they are otherwise warranted – subject to the need for fairness and reasonableness (as per section 25(2)(b)) (and the potential for referral to the Industrial Relations Commission, as occurred in *Zink*).

[122] I have considered other sections of the *PSA* in which the word "period" appears.

[123] Without listing them exhaustively, I note that –

- section 38 contains a reference to the period "within which" the Public Service Commission must report on a referral – implying a period of finite duration;
- the use of the word "period" in the context of acting appointments (in section 94) implies the identification of a period by reference to dates or duration; and
- the phrase "longer period" in section 126, which deals with appointments on probation, suggests that the period of probation must be expressed with certainty.

But overall, I do not find much assistance in the interpretation of section 137(2) in the way in which the word "period" is used elsewhere in the *PSA*.

[124] In my view, the purposes of the *PIDA* are irrelevant to the interpretation of section 137(2) (contrary to the respondents' submission), but the purposes of the *PSA* itself are plainly relevant to the interpretation of section 137(2).

[125] In my view, bearing in mind that suspension is not a neutral act, the management and employment principles of section 25 (especially in subsections (2)(a) and (b)), and section 99, which requires a chief executive to observe those principles when discharging their responsibilities, favour an interpretation of section 137(2) which requires the chief executive to estimate and state the duration of the suspension with certainty. In my view, the fact that section 137(9) allows the chief executive to cancel the suspension at any time accommodates an overestimate in the nomination of the duration of the suspension. I find the applicant's argument, that it is neither fair nor reasonable to subject an employee to suspension (for a non-disciplinary purpose) without notifying the employee of the duration of their suspension, an attractive one.

[126] Taking into account all of the matters referred to above, my primary view is that the section requires "the period of the suspension" – that is "when the suspension starts and ends" – to be "stated" by reference to dates or in terms of its duration.

[127] I find support for my view in the decision of *Van Dessel*. I acknowledge that the purposes of the legislation in that case are vastly different from the purposes of the *PSA*, and the context for the decision in that case was vastly different from the present context. However, I consider the Chief Justice's position – that her Honour did not think one could "state" a period other than by identifying its duration – to be a position of more general application.

[128] I recognise that the respondents are not suggesting that section 137 allows for an indefinite suspension (on their construction). However, in my view, the notice of suspension was inadequate because of the temporally indeterminate way in which it expressed *when* the suspension was to end.

[129] Even if I am wrong, and a notice may validly state when a suspension may start and end by reference to events, I consider that the inclusion in the notice of the phrase "unless otherwise determined" rendered the notice non-compliant with section 137(2) because it did not "state" "when" the suspension is to end in any ascertainable way. The inclusion of the phrase "unless otherwise determined"

meant that the applicant could not rely upon the investigation, or the consideration of its outcome, as the touchstone for the determination of the end of the suspension. I do not accept that the phrase "unless otherwise determined" was intended merely to pick up on the power contained in section 137(9) for the chief executive to cancel the suspension at any time. Had the phrase been so intended, I would have expected the notice to have referred to the section (*cf* its reference to subsections (1), (2) and (5) of section 137). At the least, I would have expected the phrase to have used the word cancelled – echoing the language of section 137(9).

[130] Thus, in my view, the notice to the applicant is non-compliant with section 137(2) of the *PSA*.

[131] I find that the applicant has established the ground contained in section 20(2)(b) of the *JRA*. Further, in my view, the notice did not achieve *substantial* compliance with the requirement of section 137(2)(a). In my view, sufficient certainty is not achieved by notifying an employee that their suspension will end upon the happening of an event which will occur at an unidentifiable date in the future. It may be that, in a different case, an employee may be notified with sufficient certainty of "when" their suspension is to start and end by reference to events if, for example, the employee is able to control the timing of those events – but that is not this case.

[132] Having concluded that the ground in section 20(2)(b) has been established, I do not need to consider the other grounds upon which the applicant relied.

The Credentialing Decision

[133] Three issues arise in the context of my consideration of the Credentialing Decision: first, whether it is a decision *under an enactment*; secondly, whether the "limbs" of section 5 of part 4 are to be read in the alternative; and thirdly, whether the applicant's suspension from duty was suspension from his "employment".

Key question 2: A decision under an enactment?

[134] The *JRA* applies to decisions of an administrative character made "under an enactment" (section 4 *JRA*). A decision "under" an enactment is one required by, or authorised by, an enactment (see *Griffith University v Tang* (2005) 221 CLR 99 and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321). An "enactment" means an Act or statutory instrument (section 3 *JRA*). "Statutory Instruments" are defined in section 7, read with section 6, of the *Statutory Instruments Act* 1992 (Qld) (*SIA*), which state –

> **6 Meaning of *instrument***
>
> An ***instrument*** is any document.
>
> **7 Meaning of *statutory instrument***
>
> (1) A ***statutory instrument*** is an instrument that satisfies subsections (2) and (3).
>
> (2) The instrument must be made under –
>
> (a) an Act; or

(b) another statutory instrument; or

(c) power conferred by an Act or statutory instrument and also under power conferred otherwise by law.

…

(3) The instrument must be of 1 of the following types –

- a regulation
- an order in council
- a rule
- a local law
- a by-law
- an ordinance
- a subordinate local law
- a statute
- a proclamation
- a notification of a public nature
- a standard of a public nature
- a guideline of a public nature
- another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity.

(4) …

[135] The respondents relied upon the decision in *Boyy v Executive Director of Specialist Operations of Queensland Corrective Services* [2019] QSC 283 (*Boyy*) in support of their contention that the decision to suspend the applicant's SoCP is not a decision to which the *JRA* applies because it is not a decision under an enactment. To give context to the parties' arguments, I will summarise that decision now.

[136] In *Boyy*, Bowskill J considered whether a decision to place on a prisoner's file an "enhanced security offender" flag was a decision made under an enactment. The source of the power to flag the file was identified as a "sentence management – assessment and planning" document. The document was made under section 265 of the *Corrective Services Act* 2006 (Qld), as part of the administrative procedures required to be made under that section.

[137] The question for her Honour was whether the document was a statutory instrument (rendering the decision to flag a decision made "under an enactment"). Her Honour concluded that it was not, because it was not a guideline *of a public nature*. Her Honour said, after setting out section 7 of the *SIA* (my emphasis) –

[30] … the respondent submits [the document] is not a "guideline of a public nature", merely a documentation of procedures; nor does it fall within the last bullet point [of section 7 of the *SIA*].

[31] The applicant submits the "sentencing management – assessment and planning" document is a guideline of a public nature, emphasising that it is expressly said, on the first page, to be available to the public. That reflects the requirement, under s 265(3), for the chief executive to publish administrative procedures on the department's website, unless publication might pose a risk to the security or good order of a corrective services facility (s 265(4)).

[32] There is no definition of "guideline" in the *Statutory Instruments Act*. The ordinary meaning of the word, as informed by the Macquarie Dictionary (online), is "a statement which offers advice on the implementation of a policy" or "general instructions". As noted above, the "sentencing management – assessment and planning" document is described as a "Custodial Operations Practice Directive". The document does contain general instructions in relation to its overall objective, which is "to ensure relevant information is gathered, analysed and interpreted using preliminary assessments of risk and need to inform the management of prisoners and to plan the prisoner's progression throughout their sentence…". In relation to warning flag indicators in particular, the "relevant manager" is instructed to activate or deactivate "any relevant warning flag indicators", at appropriate points throughout a prisoner's sentence, and is referred to criteria for warning flag indicators. In that sense, the document can be described as a "guideline" in the ordinary sense of the word.

[33] But is it a guideline of a public nature made under an enactment, relevantly, s 265 of the *Corrective Services Act*?

[34] In *The Proprietors – Rosebank GTP 3033 v Locke & Anor* [2016] QCA 192 at [133] McMurdo JA drew a distinction between a document which has a public function or purpose; and a document which only applies to a limited class or category of persons, but which is available to the public …

[35] The limitation "of a public nature" was added to s 7(3) following the decision of the Court of Appeal in *Blizzard v O'Sullivan* [1994] 1 Qd R 112, which concerned a contract of employment between the Commissioner of Police and an executive officer of the Queensland Police Service. At the time the case was decided, s 7(1) defined a statutory instrument as an instrument made under an Act (or under a

statutory instrument), including various examples (such as a guideline). In that case, Thomas J said it would be "a startling conclusion" if "every document brought into existence by any statutory authority with the power to bring documents into existence is to be deemed a statutory instrument" (at 121 – 122). His Honour accepted, as an implicit limitation in the s 7 definition of "statutory instrument", that the requisite character of an instrument, to be a statutory instrument, may be described as legislative, public or having an effect through unilateral exercise of power (at 121). That implicit limitation became explicit, with the amendment to the definition in s 7 by the addition of the qualifier "of a public nature" in relation to, inter alia, guidelines; and with the addition of reference to "another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity".

[36] As already noted, by force of s 265(4) of the *Corrective Services Act*, the chief executive need not publish an administrative procedure, if the publication might pose a risk to the security or good order of a corrective services facility. It is apparent that some parts of the "sentence management – assessment and planning" [document] have been redacted which, for present purposes, I accept has been done in reliance on s 265(4).

[37] Although the matter is not free from doubt, I do not consider that the mere fact that the document (or at least some parts of it) is available to the public makes it a guideline of a public nature [made under an Act] for the purposes of the definition of "statutory instrument". The document sets out administrative procedures relating to the assessment of risk posed by, and planning for the management of, prisoners serving a custodial sentence. Whilst it may be made available, at least in part, to the public for information purposes, **the document has no public function, purpose or operation**.

[38] …

[39] It is important to construe the definition in s 7 of the *Statutory Instruments Act* as a whole, including by reference to the types of instrument contemplated in s 7(3). Looked at in isolation and narrowly, the "sentence management – assessment and planning" [document] may be described as a "guideline" in the ordinary sense of the word, because it contains a set of instructions reflecting the administrative procedures which have been made. But it is not, in my view, in the context of s 7 as a whole, aptly described as an instrument [document] made under, relevantly, s 265 [of] the *Corrective Services Act*, of a type

referred to in s 7(3), relevantly, a guideline of a public nature.

[40] It is clearly not "another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity". The document is a record of administrative procedures; no rights or liabilities are unilaterally affected by the document itself.

[41] For those reasons, in my view, the "sentence management – assessment and planning" document is not a statutory instrument within the meaning of s 7 of the *Statutory Instruments Act*.

Applicant's submissions

[138] The Credentialing Procedure is based on a relevant Queensland Health best practice guideline. That directive was published in pursuance of section 47 of the *Hospital and Health Boards Act* 2011 (Qld) ("*HHBA*"), which permits the chief executive to develop and issue health service directives –

(a) for certain listed purposes, including (as per section 47(1)(c)) "setting standards and policies for the safe and high quality delivery of health services"; and

(b) which might be about "standards and policies for the healthcare rights of users of public sector health services" and "standards and policies for improving the quality of health services" (section 47(2)(a) and (b) *HHBA*).

[139] Also, one of the third respondent Health Service's functions (in addition to its main function of delivering health services) is "to comply with the health service directives" which apply to it (section 19(2)(c) *HHBA*).

[140] The applicant submitted that the references to "health services" and "health care" in section 47 of the *HHBA* must "sensibly" be read as referring to health services and care provided to the *public* under the *public* health care system.

[141] The guideline considered by Bowskill J in *Boyy* was of a different character to the Credentialing Procedure. It was, in essence, a record of administrative procedures. Decisions made under the Credentialing Procedure directly affect the nature of health service and care provided to Queenslanders. Its fundamental purpose is the regulation of the providers of service and care. And a practitioner's right to practise is "clearly and fundamentally affected by any decision made under the procedure".

[142] The applicant referred also to evidence from Dr Elizabeth Rushbrook to the effect that decision-making under the Credentialing Procedure is of public character. It is intended to support patient safety. And a register of all credentialed persons is available on the Queensland Health Intranet and available to all MNHHS and Queensland Health employees.

[143] The Credentialing Procedure has a "clear and direct" relationship with the public through its regulation of public health services and care. There was no mutual or negotiated quality to the creation of the procedure. The applicant had "no say, input

or veto into its terms". *McLean v Gilliver* [1995] 1 Qd R 637 and *Blizzard v O'Sullivan* [1994] 1 Qd R 112, by contrast, involved private documents.

[144] Further, the Credentialing Procedure sets out prescriptive processes for the awarding, renewal, suspension and termination of credentials and scopes of clinical practice and associate appeal mechanisms. It refers to itself as a procedure, rather than a guideline. It employs the language and characteristics of a rule. The Macquarie Dictionary defines a rule as including "*noun* **1.** a principle or regulation governing conduct, action, procedure, arrangement, etc". An ordinance is defined to include, "*noun* **1.** an authoritative rule of law; a decree or command".

[145] Once the Credentialing Procedure is characterised as a rule, (or perhaps an ordinance) for the purposes of section 7(3) of the *SIA*, there is no requirement that it be of a public nature.

[146] The applicant summarised his argument thus –

> In the premises:
>
> (a) the Directive was issued by Queensland Health under section 47 *HHBA*, and is a statutory instrument;
>
> (b) the Credentialing Procedure was created by the MNHHS pursuant to the Directive and in discharge of its function under section 19(2)(c) of the *HHBA*;
>
> (c) the Credentialing Procedure is a "rule" or "guideline of a public nature" for the purposes of section 7(3) of the *SIA*;
>
> (d) If the former, it is therefore a statutory instrument;
>
> (e) If the latter, it has a public nature and is therefore a statutory instrument.

Respondent's submissions

[147] The respondents submitted that, while the Credentialing Procedure can be obtained by the "public" on request, and "on some level" affects a number of people, it is essentially a private or domestic document which regulates "a particular aspect of the clinical functions of MNHHS". It applies "only between MNHHS and those who are credentialed to undertake clinical practice within it". Thus, it is not of a public nature and not an enactment and the application to set it aside ought to fail for that reason.

[148] The respondents submitted that I ought to reach the same decision about the Credentialing Procedure as was reached about the relevant document in *McLean v Gilliver.*

[149] The decision in *McLean v Gilliver* concerned an application for judicial review of a decision to reject McLean's nomination for election to the office of president of the (student) union of the James Cook University. The union was established under the *James Cook University of North Queensland Act* 1970 (the *JCUA*). The *JCUA* provided that the union should have a constitution but did not prescribe how the union's powers were to be exercised thereunder. The union's decision to reject

McLean's nomination (made by its acting electoral officer) was on the basis that, contrary to its constitution and regulations, she was not enrolled as a student at the university. One of the primary questions for the Court was whether the decision to reject McLean's nomination was a decision under an enactment. The power to reject the application was implied by a certain regulation. Lee J held that the decision was not one to which the *JRA* applied essentially because it was not a decision made under a statutory instrument. The regulations were not (to use the language of Thomas J in *Blizzard v O'Sullivan*) of a character which might be described as "legislative, public or having effect through unilateral exercise of power". The Court had no jurisdiction to review the decision. Lee J said, at page 646:

> … I am of the opinion that the Union's constitution bears none of the characteristics described by Thomas J. Despite the large number of people which it affects, the constitution is essentially a private or domestic, as opposed to a public document. In addition … it is created by the Union itself, subject to the power of veto of the Council, and cannot be said to have been made under or in pursuance of some superior regulatory enactment. It is not therefore a statutory instrument, and it is certainly not made "under" an Act …

Conclusion

[150] In my view, the Credentialing Procedure has the flavour or nature of a public, rather than private, document. Indeed, that is the thrust of Dr Rushbrook's evidence and is apparent from the document itself.

[151] The opening paragraphs of the Credentialing Procedure indicate that its contents are mandatory.

[152] It is said that:

> The participation and use of this procedure by Metro North Hospital and Health Service will contribute to the improvement of patient safety and health outcomes for Queenslanders.

[153] Its public nature is reflected in the reference to "Queenslanders".

[154] Further reflections of its public nature are found in its references to Queensland generally. The Credentialing Procedure explains that it is "an adaption and amendment of the Office of the Principal Medical Officer['s] "*Guide to Credentialing and defining scope of clinical practice for medical practitioners and dentists in Queensland – a best practice guide 2014*" (the "OPMO Guide"). Indeed, the Credentialing Procedure provides a link to the OPMO Guide.

[155] The Credentialing Procedure explains that the OPMO Guide itself was "the result of extensive consultation with representatives from a wide range of organisations and professional groups throughout Queensland". It explains that it "has been developed from the work of previous standards and policies published by Queensland Health and the valuable work of the Australian Commission on Safety and Quality in Health Care for the National Standard for Credentialing and Defining the Scope of Clinical Practice of Medical Practitioners, 2004."

[156] In my view, the public nature of the document is reflected particularly in its introduction containing an explanation that its implementation "fundamentally supports patient safety and improved health outcomes by all Hospital and Health Services (HHSs), Department of Health (DoH) divisions, and eligible medical practitioners and dentists working in Public Health facilities".

[157] The introduction also explains that the process of verifying credentials and defining SoCP within Queensland Health aims to protect patients, medical practitioners and dentists, and hospital and healthcare public health facilities. In other words it applies to the public broadly.

[158] Its public flavour is reflected in its stated purpose and scope (including in its non-exhaustive inclusions list). It is reflected in its principles – particularly (but not only) in the principles of "patient safety" and "equity" – and in its provision for "mutual recognition" of credentials across HHSs and DOH divisions and the potential for the granting of a state-wide SoCP in appropriate cases.

[159] I conclude therefore that the Credentialing Procedure is a standard or guideline of a public nature. It is not confined in its operation to a section of the public in the same way as are the administrative procedures of a correctional centre or the constitution of a tertiary institution. It is probably also a rule.

[160] It was not suggested by the respondents that the Credentialing Procedure does not comply with section 7(2) of the *Statutory Instruments Act* 1992. It is thus a relevant "enactment" for the purpose of the *JRA*.

Key question 3: Alternative or cumulative limbs?

Applicant's submissions

[161] The applicant concentrated on this aspect of his argument. He submitted that the Credentialing Decision is invalid because, on its proper construction, section 5 of part 4 of the Credentialing Procedure authorised immediate suspension of a practitioner's SoCP only where *both* the practitioner's registration with AHPRA *and* his or her employment were suspended.

[162] The relevant section of the Credentialing Procedure was amended after the Credentialing Decision, to insert "or" between the two limbs, but my focus must be on what it authorised at the time at which the Credentialing Decision was made.

[163] In support of his construction of section 5, the applicant relied upon –

- the use of the plural –
  - the section applied "When the following circumstances occur" (and not "when one or more of the following circumstances apply…"); and
  - the decision maker was to advise the practitioner of the suspension "[w]ithin 48 hours of becoming aware of the circumstances …" ;
- that, under section 137 of the *PSA*, a suspended employee is to remain ready, willing and able to attend work if required. This is inconsistent with the immediate suspension of the applicant's SoCP;

- that the Credentialing Procedure, and the Directive under which it was made, are heavily focused on clinical competence and patient safety (referring to Part 1, Section 1; and Part 1 Section 3). This focus is also reflected in the mandatory steps required after immediate suspension, including taking the necessary action to ensure patient safety; and investigating and documenting patient harm and taking "appropriate action". It makes no sense to require the taking of those mandatory steps in the case of suspension from employment for reasons unrelated to clinical competence. Those steps do make sense in the case of the suspension of a practitioner's registration by AHPRA. An AHPRA suspension occurs after "notifiable conduct" as defined in section 140 of the *Health Practitioner Regulation National Law (Queensland)*. As defined, notifiable conduct involves risks of harm to a patient or the public;

- Section 6 of Part 4 lists (non-exhaustively) circumstances which "may" trigger the *deliberate* procedure for the "termination, suspension or reduction" of SoCP. One of those circumstances is "a practitioner's employment is terminated". It would be an "absurd outcome that, in the absence of a suspension of registration by AHPRA, a mere suspension of employment leads [to] the by-passing of the credentialing committee and immediate suspension of SoCP under s.5, but termination of employment would not engage the deliberative process under s.7".

[164] The applicant submitted that, if the first and third respondents wish to review the Applicant's SoCP in the light of his section 137 suspension, the appropriate course is to follow the procedure set out in Part 4, Section 9.

Respondents' submissions

[165] The respondents submitted that, when the context for the Credentialing Procedure is understood, there is "ample justification" for the disjunctive reading of the two circumstances listed in section 5. The Credentialing Procedure is a procedure "which gives effect to patient safety within the important context of providing general information to staff about the eligibility of particular medical practitioners (and dentists) (whether as a result of clinical or employment issues) to be able to undertake particular procedures".

[166] The use of the word "circumstances" does not require the bullet points to be read conjunctively, nor is the absence of "or" between the bullet points determinative.

[167] If the requirements of section 5 are to be read conjunctively "such that an employee's employment had to first be suspended before suspension of their scope of clinical practice could arise … these clinicians could <u>never</u> have their scope of clinical practice suspended under this section, even where AHPRA had suspended their registration. Such a consequence … would be antithetical to patient safety".

[168] A conjunctive construction would lead to "impractical and unintended consequences". AHPRA does not act *immediately* upon being told that a practitioner's employment has been suspended. Thus on the conjunctive construction, the section could not achieve the immediate suspension of an employee's SoCP which could have significant consequences for patient safety.

[169] The section has now been amended to insert "or" between the bullet points. It is likely that the amendment was made to remove doubts about the intended operation of the section.

[170] Immediate suspension is not only directed to situations involving patient safety or clinical competence – notwithstanding the obligations listed in the second set of bullet points in the section.

[171] APHRA does not only suspend registrations in situations of clinical competence. Thus the reference to suspension by AHPRA does not imply that section 5 is directed only to matters of patient safety or public risk.

[172] The inconsistency between the respondents suspending the applicant's SoCP and at the same time requiring him, under his suspension, to be "ready, willing and able" to work, is irrelevant to the interpretation of the section. And in any case, such a requirement does not "in fact require the applicant to perform clinical work, or indeed any work at all". Rather, such a requirement reminds the suspended employee that their failure to be ready, willing and able to work, or to attend work, could amount to a repudiation of their employment contract.

[173] Just because other provisions of the Credentialing Procedure (see sections 6 – 9) allow for the suspension of an employee's SoCP when there is no risk to patient safety does not mean that section 5 is directed only to suspension where there is a risk to patient safety. Suspension of employment does not engage the review procedure under section 6 – 9. Thus, on the applicant's construction, suspension of employment for reasons other than those which lead to AHPRA suspension would never permit suspension of a SoCP.

[174] There are good reasons why the Credentialing Procedure does not apply the same immediacy to termination of employment – employment may be terminated for reasons which are unrelated to misconduct, or the need to ensure the proper and efficient management of the department; for example, by resignation or redundancy.

Discussion and conclusion

[175] The relevant section must be considered in context.

[176] As discussed above, the introduction to the Credentialing Procedure explains that the procedure was developed as a "best practice risk management strategy". Its implementation supported patient safety and improved health outcomes. It aimed to protect (*inter alia*) patients, by ensuring medical (and dental) services and treatments were provided by competent, qualified and skilled practitioners suitably equipped to deliver safe and quality care.[8]

[177] Section 2, of Part 1 "Overview" relevantly states:

> **2. Scope**
>
> This procedure…acknowledges that no practitioner may hold a SoCP unless they hold current registration with the Australian Health Practitioner Regulation Agency (AHPRA). Practitioners who

[8] All errors contained in the quotes from the Credentialing Procedure are as per the original document.

practise in Queensland public healthcare facilities … must be credentialed …

[178] Part 4, which includes section 5, relevantly states (my emphasis by way of underlining):

> **Part 4 Termination, suspension or reduction of scope of clinical practice**
>
> **1. Purpose**
>
> This part identifies where Metro North HHS may terminate, suspend or reduce a practitioner['s] SoCP …
>
> …
>
> **3. General requirements**
>
> Suspension in part, or in full of the right to practice within a public health facility, particularly in response to concerns about competence and/or performance of a practitioner, has the potential to cause extreme detriment to the practitioner's clinical practice and/or reputation.
>
> At all times and stages during the process, there is a paramount duty to ensure patient safety, while at the same time adopting the principles of natural justice and procedural fairness when considering any concerns about the practitioner's standard of care.
>
> …
>
> **4 Immediate termination of scope of clinical practice**
>
> A practitioner's SoCP is immediately terminated and does not require discussion, investigation or specific action on the part of the decision maker when a practitioner's AHPRA registration is cancelled or modified in a way that precludes them from practising.
>
> Within 48 hours of becoming aware of the circumstances, the decision maker must advise the practitioner in writing of the termination of SoCP and the reasons for the termination of SoCP.
>
> The relevant Metro North HHS facility E/DMS [Executive Director Medical Services]… will:
>
> - take the necessary action to ensure patient safety
> - investigate and document, any patient harm and take appropriate action
> - table the matter at the next committee meeting.
>
> An affected practitioner may make a fresh application for SoCP to the committee once the circumstances that precipitated the immediate termination are no longer in effect. …
>
> **5. Immediate suspension of scope of clinical practice**

When the following circumstances occur, the practitioner's SoCP is immediately suspended and does not require discussion, investigation or specific action on the part of the decision maker.

- a practitioner's registration is suspended by AHPRA
- a practitioner's employment with the public health facility is suspended

Within 48 hours of becoming aware of the circumstances, the decision maker must advise the practitioner in writing, of the suspension of SoCP and the reasons for the suspension of SoCP.

The relevant Metro North HHS facility E/DMS ... will:

- take the necessary action to ensure patient safety
- investigate and document, any patient harm and take appropriate action
- table the matter at the next committee meeting.

An affected practitioner may make a renewal application for SoCP to the committee once the circumstances that precipitated the immediate suspension are no longer in effect. …

6. Other triggers for assessment for termination, suspension or reduction of scope of clinical practice

The following circumstances may trigger the assessment for termination, suspension or reduction of SoCP (this list is not exhaustive):

- a practitioner has conditions, suspension or undertakings imposed by AHPRA which affect the practitioner's SoCP

  …

- a practitioner's employment is terminated

  …

7. Assessing termination, suspension or reduction of scope of clinical practice

…

In all cases, the relevant Metro North HHS facility E/DMS … or delegate is to immediately seek further advice and document the advice received. The purpose of seeking advice is to consider the available information and then determine if there is a need to urgently limit the practitioner['s] SoCP in the interests of patient safety.

…

Following consultation, if it is the preliminary view of the relevant Metro North HHS facility E/DMS … or delegate that the trigger may

represent an immediate risk of patient harm, the process outlined in managing the immediate risk of patient harm is followed … Where … the risk of patient harm is not immediate and can await review by the committee, the approach outlined in Section 9 of this Part is followed.

…

8. Managing scope of clinical practice where there is an immediate risk of patient harm

… [A]t short notice and in emergency situations the EDMS or Delegate can immediately reduce or suspend a practitioner's SoCP if there is a reasonable belief that the practitioner presents a risk to the safety of patients …

The action taken should be the least onerous (with regard to the practitioner's SoCP) action necessary for protection of patients. For example, where a practitioner has conditions or undertakings imposed on their medical/dental registration that are incompatible with the existing SoCP, the reduction or suspension of SoCP is to the extent necessary to ensure compliance with those conditions or undertakings and to ensure patients receive safe and acceptable standards of care.

8.1 Steps to be taken if there is an immediate risk of patient harm

The following steps are to be taken when there is an immediate risk of patient harm:

1. An interim decision is made by the relevant … E/DMS … or delegate to immediately reduce or suspend a practitioner's SoCP. The reasons for the decision are to be clearly documented.

2. … [The decision maker will be advised of the E/DMS' decision.]

3. The decision maker will advise the practitioner verbally and in writing of the decision to immediately suspend or reduce their SoCP and the reasons for the decision within two business days of that decision being made, and that a review by the committee will follow.

4. Within two business days of the SoCP being suspended or reduced, the decision maker will request the committee to undertake a formal review … of the practitioner's SoCP. Reasons for the review must be clearly stated in the documentation.

5. The relevant Metro North HHS facility E/DMS … or delegate will advise the practitioner's line manager and other staff relevant to the provision of the affected service of the suspension or reduction of SoCP.

6. The relevant Metro North HHS facility E/DMS … or delegate should note that the *Health Practitioner Regulation National Law Act 2009* requires health practitioners to make a report to the health ombudsman if they form a reasonable belief that another health

practitioner has engaged in notifiable conduct or has an impairment …

9. Managing when there is no immediate risk of patient harm

If there is no immediate risk to patient safety, or other factors which may result in requiring a review, then the following steps apply.

Refer to Part 4, Section 5 [*sic*] for a list of circumstances which may trigger the termination, suspension or reduction of SoCP.[9]

9.1 Steps to be taken when there is no immediate risk of patient harm

1. The relevant Metro North HHS facility E/DMS … or delegate will formally advise the decision maker of the need to undertake a formal review of SoCP.

2. The decision maker will request the committee to undertake a formal review … of the practitioner's SoCP. Reasons for the review must be clearly stated in the documentation.

3. The relevant Metro North HHS facility E/DMS … or delegate should note that the Health Practitioner Regulation National Law Act 2009 requires health practitioners to make a report to the health ombudsman if they form a reasonable belief that another health practitioner has engaged in notifiable conduct or has an impairment …

[179] SoCP is defined as follows:

> Defining the SoCP … follows on from credentialing and involves delineating the extent of an individual practitioner's clinical practice within a particular public health facility. This definition is based on the individual's credentials, competence, performance and professional suitability, and the needs, capability and capacity of the public health facility to support the practitioners SoCP.
>
> The SoCP is specific to the individual in that public healthcare facility and necessarily relates to the resources, equipment and staff available at the public health facility. A practitioner's SoCP at various public health facilities and services may vary and needs to be defined specific to each health service as defined by the CSCF [the "Clinical Service Capability Framework"].[10] Granting a SoCP to additional practitioners should not threaten the ability of existing staff to have the practice volume necessary to maintain clinical competence.

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9 This is an obvious error. The relevant section is section 6 not 5.

10 The CSCF for public and licensed private health facilities provides a standard set of capability requirements for acute public health facility services provided by Queensland Health.
Determination of clinical service capability is a process separate from credentialing that determines the minimum service, workforce and support service requirements and specific risk considerations that ensure clinical services are provided safely and are appropriately supported.

[180] In my view, section 5 (pre-amendment) operated coherently within the whole of part 4 when the dot point circumstances were read conjunctively (or cumulatively) as the *two* necessary prerequisites to immediate suspension of an SoCP.

[181] That coherent operation included the drawing of a distinction between –

- AHPRA suspending a practitioner's registration (whatever the effect) (in section 5); and
- the imposition by AHPRA of "conditions, suspension or undertakings … **which affect the practitioner's SoCP**" (in section 6, my emphasis).

[182] That coherent operation recognised that some suspensions by AHPRA will not affect a practitioner's SoCP – but will warrant an *assessment* of the termination, suspension or reduction in SoCP *even if* the practitioner has not been suspended from employment (see section 6). However, if a practitioner who has had their registration suspended by AHPRA *also* has his or her employment suspended – then that will result in the immediate suspension of their SoCP. This result is plainly consistent with the need to give paramountcy to patient safety.

[183] If the dot point circumstances in section 5 were not read cumulatively, then that would lead to the inconsistent operation of sections 5 and 6.

[184] Section 5 would require the *immediate* suspension of a practitioner's SoCP when his or her registration was suspended by AHPRA. But section 6 would require the *assessment* for termination, suspension or reduction of SoCP when his or her registration was (*inter alia*) suspended as to "affect [his or her] SoCP". If anything, it ought to be the other way around.

[185] The list of matters which trigger an assessment of a practitioner's SoCP for termination, suspension or reduction is – importantly – not exhaustive.

[186] Thus, the suspension of a practitioner's employment, in the absence of action by AHPRA, may trigger such an assessment (under section 6). And under the section 7 assessment procedure, the relevant E/DMS is to *immediately* seek advice and consider the available information to determine if there is a need to urgently limit the practitioner's SoCP in the interests of public safety. There can be then – if it is warranted – the immediate (or almost immediate) reduction or suspension of a practitioner's SoCP upon the suspension of their employment. That deals with the respondents' argument that the conjunctive reading of the dot point circumstances could have significant consequences for patient safety. (I am ignoring for the moment the ambiguity of the notion of the suspension *of employment*, rather than suspension *from duty*.)

[187] I recognise that the Credentialing Procedure is not a legislative document and I ought not to scrutinise it as if it were – but contrasting the opening phrases of section 5 and section 6 supports the conjunctive reading of the dot point circumstances in section 5. Section 6, which lists circumstances to be read disjunctively, begins, "The following circumstances may trigger the assessment for termination, suspension or reduction of SoCP…". Section 5, in contrast, begins, "When the following circumstances occur …". In fact, in my view, the comparison

of the opening phrases supports the conjunctive interpretation more so than the use of the plural (circumstances) on its own.

[188] The statement in section 5 about the things the E/DMS must do upon the immediate suspension of a practitioner's SoCP under that section does suggest that it is concerned primarily with suspensions involving clinical competence or risks to patient safety.

[189] I consider that, as the Credentialing Procedure stood at the time at which the applicant's SoCP was suspended, both of the dot point circumstances had to exist before such a suspension. It follows that the Credentialing Procedure did not authorise the Credentialing Decision. I consider that the applicant has successfully established at least *JRA* grounds 20(2)(b), 20(2)(c), 20(2)(d) and 20(2)(e).

Key question 4: Is suspension from duty the same as suspension from employment?

[190] The applicant also argued that, even if he were wrong about the requirement to read the dot points conjunctively, his registration had not been suspended by AHPRA nor had he been suspended from his *employment*: rather, he had been suspended from *duty*.

[191] Because of the conclusion I have reached about the way in which section 5 applied, I do not need to reach a final conclusion about whether the applicant had been suspended from his *employment* or "only" from *duty*.

[192] However, I note that the respondents submitted that the applicant's submission (that there was a difference) misunderstood the nature of an employment relationship under a contract. The respondents submitted that the only way in which employment may be suspended, without terminating the contract of employment, is via the conferral upon an employer of a right to suspend an employee's obligation to perform that which he or she was required to perform under the contract. Such an obligation is unlikely to be read as requiring a temporary suspension of the whole contract or employment relationship.

[193] Thus, the respondents submitted, there is "no material distinction between the reference to suspension from duty in section 137 of the *Public Service Act* and suspension of employment in the Credentialing Procedure". Further, sections 137 and 189 of the *PSA* set out comprehensively the Health Service's powers to suspend an employee – there was therefore no other type of suspension to which the Credentialing Procedure could refer. Any looseness of language (in the use of the words *duty*/*employment*) was not fundamental.

Discussion and conclusion

[194] The *PSA* does not contemplate suspension from employment. It only contemplates suspension from duty.

[195] It differentiates between *duty* and *employment* in section 189 and section 191 (see above). Section 192 (which on one reading contains a reference to "suspension from employment") must be read in the context of the sections which precede it. I do not think that the phrase "suspend or terminate the employment" in section 192

refers to the suspension *of employment* or the termination of employment. In my view, it refers to the suspension "from duty" referred to in the preceding sections.

[196] However, in my view, section 5 is only workable if the reference to suspension from employment is taken to read suspension from duty and the looseness of language is forgiven. But as I said, because of my other conclusions, that is not something I need to decide.

Key question 5: Discretion

[197] The respondents did not press an argument that in my discretion I ought to refuse to grant the applicant relief from the Suspension Decision.

[198] However, they submitted that I ought to refuse relief from the Credentialing Decision. This is because they would simply make the decision again. Now that section 5 has been amended, even if I set aside the Suspension Decision, the applicant is subject to *another* suspension which provides a basis for the suspension of the applicant's SoCP.

[199] Also, the Credentialing Procedure provides for a full merits review of the Credentialing Decision. Whilst not a reason to refuse a remedy in itself, this is relevant to the Court's discretion to decline relief.

[200] Further the respondents submitted that, even if the applicant succeeded in persuading me that the Suspension and the Credentialing Decisions ought to be set aside, they ought to be set aside only from the date of my decision, and not from the time at which they were made, because "until that time there were reasonable bases for the decisions".

[201] The applicant submitted that the decisions ought to be set aside as from the date upon which they were made in accordance with section 30(1)(a)(ii) of the *JRA*. The applicant has suffered potential losses from that date and I ought not to impede any consequential claims. The applicant relied upon *Wirth v Mackay Hospital and Health Service & Anor* [2016] QSC 84.

[202] In the exercise of my discretion, I consider it appropriate to order that the Credentialing Decision be set aside so as not to impede any consequential claims. Also, issues with the interpretation of the Credentialing Procedure are unlikely to be considered in the context of a merits review.

[203] I also consider that each decision ought to be set aside from the date on which it was made. The decision to suspend the applicant from duty and to suspend his SoCP has had serious tangible and intangible consequences. In my view, procedures designed to ensure that (in the case of the Suspension Decision) the suspended employee is not facing a suspension of indeterminate length; and procedures designed to ensure that the immediate suspension of SoCP (in the case of the Credentialing Decision) only occurs in limited circumstances are significant features of the decision-making process. I have found non-compliance with procedures designed to achieve fairness to an employee such as the applicant (although I am not suggesting that there was, on the part of the decision makers, deliberate non-compliance). In those circumstances, I consider it appropriate to set aside each decision from the date upon which each was made.

Orders and costs

[204] My formal orders are –

1. That the decision of the first and third respondents to suspend the applicant from duty under section 137 of the *PSA*, notified by notice dated 28 August 2019, be quashed, with effect from 28 August 2019.

2. That the decision of the second and third respondents to suspend the applicant's SoCP in MNHHS be quashed, with effect from 3 September 2019.

[205] Unless the parties wish to make submissions to the contrary within seven days, the respondents are to pay the applicant's costs on the standard basis.