SUPREME COURT OF QUEENSLAND

CITATION:	*Chinese Medicine Board of Australia v Lee* [2014] QCA 149
PARTIES:	**CHINESE MEDICINE BOARD OF AUSTRALIA** (appellant) **v** **JEON LEE** (respondent)
FILE NO/S:	Appeal No 11919 of 2013 QCAT No 24 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	20 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	22 April 2014
JUDGES:	Gotterson and Morrison JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The decision of the Queensland Civil and Administrative Tribunal of 15 October 2013 be set aside.** **3. The matter be remitted to the Queensland Civil and Administrative Tribunal to be dealt with in accordance with the reasons of this Court.** **4. There be no order as to the costs of the appeal.**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the Chinese Medicine Board ("the Board") appeals the decision of the Queensland Civil and Administrative Tribunal ("QCAT") overturning the decision of the Board to refuse the respondent's application for registration as a Chinese Medicine practitioner (Acupuncture division) – where the respondent was a graduate of The Australian College of Eastern Medicine ("ACEM") – where the Board had previously granted registration to ACEM graduates – where the Board subsequently determined the ACEM course did not meet the *Health Practitioner Regulation National Law Act* 2009 (Qld) ("*National Law*") requirements – where the appellant contends that the learned primary judge erred in construction and application of ss 52, 53 and 83 of the *National Law* – where the appellant contends that the learned primary

judge erred in taking into account the Board's prior registration of ACEM graduates – whether the learned primary judge so erred

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 149(2)
Health Practitioner Regulation National Law Act 2009 (Qld), s 3, s 31(1), s 35, s 48(1), s 49(1), s 52, s 53, s 83, s 250, s 300, s 303, s 304

Krause v Medical Board of Australia [2013] VCAT 1009, considered
Lee v Chinese Medicine Board of Australia [2013] QCAT 609, related
Palatty v The Nursing and Midwifery Board of Australia [2013] WASAT 78, considered
Susan Margaret McMahon v The Nursing and Midwifery Board of Australia [2013] NSWNMT 4, considered

COUNSEL: I R Freckleton QC for the appellant
R A Ashton for the respondent

SOLICITORS: Rodgers, Barnes and Green for the appellant
Crouch & Lyndon for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[2] **MORRISON JA:** This is an appeal pursuant to s 149(2) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("**QCAT Act**"). The Chinese Medicine Board of Australia ("**the Board**") seeks to overturn the decision of the Deputy President of the Queensland Civil and Administrative Tribunal ("**QCAT**") delivered on 15 October 2013.[1] That decision reversed the decision of the Board to refuse the respondent's application for registration as a Chinese Medicine practitioner (in the division of Acupuncture). The learned primary judge granted registration to the respondent, subject to conditions requiring supervised practice for a period.

[3] The appeal concerns the construction of a number of provisions of the *Health Practitioner Regulation National Law Act* 2009 (Qld) ("***National Law***"). Those provisions relate to the registration of health practitioners under a national registration scheme for Chinese Medicine practitioners.

Background

[4] The Board is one of a number of national health practitioner boards established pursuant to s 31(1) of the *National Law*. The Board's functions include:

> "to register suitably qualified and competent persons in the health profession and, if necessary, to impose conditions on the registration of persons in the profession."[2]

[5] The profession of Chinese medicine is defined in the *National Law* as a "relevant health profession".[3] It did not have a system of national registration until 1 July 2012.[4]

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1 *Lee v Chinese Medicine Board of Australia* [2013] QCAT 609 ("**Reasons**").
2 *National Law*, s 35(1)(a).
3 *National Law*, s 250.
4 See *National Law*, s 300(2).

[6] On 22 March 2012 the respondent applied to the Board for general registration as a practitioner of Chinese medicine in the division of acupuncture. That application for registration was ultimately refused by the Board, at a meeting convened on 28 December 2012. The decision was conveyed to the respondent by letter dated 3 January 2013. For the purpose of permitting the application to be considered, between his application and the ultimate refusal by the Board, the respondent was granted limited registration.

[7] The course of the consideration of the respondent's application was complicated by the following matters. The respondent, along with a number of other people, was a graduate of an institution called The Australian College of Eastern Medicine ("**ACEM**"). The Board's attitude towards ACEM and its graduates has fluctuated over time. Prior to consideration of the respondent's application at least five graduates of ACEM, all with essentially the same qualifications as the respondent, had been successful in having their registrations accepted by the Board. In the case of four out of the five, conditions were imposed by the Board, requiring a period of supervised practice.

[8] The respondent graduated in December 2011, prior to the commencement of the national scheme for Chinese medicine. In December 2011 approval was given to a registration standard called the *Grandparenting and General Registration Eligibility Standard* ("**Grandparenting Standard**"), with effect from 1 July 2012. The Grandparenting Standard applied to s 303 of the *National Law*, providing a limited window of time in which applicants for registration could apply under an alternative pathway to that contained in s 52 of the *National Law*. Under s 303 of the *National Law*, applications under the alternative pathway were permitted if they were made before 1 July 2015 ("**the Grandparenting pathway**").

[9] The respondent and the other five graduates of ACEM all applied under the Grandparenting pathway.

[10] On 8 June 2012 the registration committee of the Board wrote to the respondent advising that his application had been submitted to the registration committee and that committee considered that the respondent's qualifications and supporting evidence indicated that he may not be eligible for registration. It expressed the view that the respondent's qualifications in acupuncture did not meet the requirements of sections 303(1)(a) or 303(1)(b) of the *National Law*, and suggested that the application be resubmitted under s 303(1)(c) of the *National Law*.[5]

[11] In response to that letter the respondent wrote to the Board advising that he could not satisfy the criteria under s 303(1)(c), because he had not practised for five years, but that his application came under s 303(1)(b). In that letter he said: [6]

> "I am newly qualified. I have liaised with many of my fellow graduates and they confirmed that they are being considered under section 303(1)(b) of the National Law. These students include Andrew Hoge, Catherine Jenkins, Matthew Earsmen, Maria Hunter, Rochelle Conforte, Matthew Sincock, Nathan Coxen, Mark Crossland, and Kelly Hook (who has recently been accepted by the Board)."

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5 Reasons [14]; AB 45-46.

6 Reasons [16]; AB 46.

[12] The sequence of events which then followed is set out at [17] to [28] of the Reasons of the learned primary judge. There was no contention that they were inaccurate in any way, and therefore it is convenient to set them out again:[7]

> "[17] He then set out a statement that he had a clinical component, which was in terms of the clinical component as it was set out in the Standard. The committee further considered Mr Lee's application on 10 July 2012. An "Acupuncture Decisions of Assessment Panels" document completed on that day records that a panel, which comprised five persons, recommended registration in the division of Acupuncture on the basis that Mr Lee was approved for registration upon satisfaction of s 303(1)(b).
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> [18] The document notes that the Committee had reviewed records (a patient case) that Mr Lee had provided, and recommended that in a letter Mr Lee be advised that the Committee had recommended that he undertake a period of supervision. That document was signed by three of the identified five panel members.
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> [19] A separate Acupuncture Decisions of Assessment Panels document prepared on 10 of July 2012, which, again, identifies the same five panel members, and which was signed by four of them, refers to further information being required, that being the applications by other persons referred to in Mr Lee's letter as set out above.
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> [20] There is, however, a minute of the meeting, concerning the decision made in respect of Mr Lee, on 10 July 2012. That minute records that the Committee, under s 301(1)(b)(b)(c)(d) of the National Law, decided that Mr Lee is qualified for general registration as a practitioner of Chinese Medicine for the division of Acupuncture, as he held a qualification, or had completed training in the profession, whether in a participating jurisdiction or elsewhere, and has completed any further study, training, or supervised practice, in the profession required by the Board, for the purpose of s 52(1)(a). The reference to s 303(1)(b)(b)(c)(d) is confusing, there is no such section. However, the matters recited in the body of the minute are referable only to s 303(1)(b).
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> [21] Notwithstanding the fact that the Committee decided that Mr Lee was qualified on 10 July 2012, that was not communicated to him.
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> [22] I have already referred to Mr Lee's letter of 14 June 2012 having raised the fact that a number of persons with qualifications the same as his own were being considered for registration under s 303(1)(b), or, in the case of one, had already been registered. In an affidavit by Mr Peter John Gigante, a member of the Committee which considered Mr Lee's application for registration, he deposes that one of

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7 AB 46-68.

those persons, Ms Hunter, was approved for registration by the Committee on 20 August 2012. He further states, at paragraph 39 of his affidavit

> The committee subsequently determined that the precedent being used at that point was not appropriate when measured by proper decision-making standards. The Committee acknowledged that this oversight, in accordance with its obligations to protect the public, needed rectification.

[23] At paragraphs 40 to 42, he says;

> The position of the Board and Committee was that any previous decisions to grant registrations to ACEM graduates were erroneous, and that it was inappropriate to continue to register ACEM graduates having regard to the objectives of the National Law to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner, are registered.
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> With respect to those graduates who had already been granted registration, the Committee determined that it was unable at law to reverse the decision to grant them registration.
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> The Board and Committee determined that in accordance with the duty to provide for protection of the public, the registration of those applicants who had already been granted registration would be made subject to conditions requiring they be supervised upon renewal of their registration. The Committee resolved to impose such conditions upon Ms Hunter's registration upon its renewal.

[24] In his oral evidence before the Tribunal, Mr Gigante has identified that Ms Hunter's registration renewal would have arisen in or about late November 2012. In fact, as part of exhibit 2 in the proceedings, there is the first page of a letter to Ms Hunter dated 31 January 2013. It informs Ms Hunter that the registration Committee of the Board further considered her application for renewal of general registration, together with her submission to practice as a Chinese medicine practitioner, at its meeting convened on 22 January 2013. It goes on to record that the Committee determined to approve her application for renewal of general registration subject to certain conditions. Those conditions now appear on her registration.

[25] The reasons record that the Board had determined that the advanced Diploma of Acupuncture and Oriental Therapies conducted at the Australian College of Eastern Medicine did not meet the requirements of the Board's Grandparenting

Standard. Specifically, it didn't meet all the requirements that appear at paragraph 2(a) in the Standard.

[26] Exhibit 6 in the proceedings is a bundle of extracts from the register of AHPRA concerning a number of those persons identified by Mr Lee in his letter to the Board of 14 June 2012. In respect of Ms Hunter, Ms Jenkins, Mr Hogue and Mr Sincock, it identifies that each of those persons is qualified under the National Law in accordance with s 303 of the transitional provisions.

[27] Each of them have conditions imposed in, materially, the same terms. I say "materially", because there is a variation in respect of Mr Hogue as to the date upon which certain matters are to be concluded. Each of those persons has registration conditions in the following terms:

(1) The registrant must provide the Registration Committee of the Chinese Medicine Board of Australia (the Committee) with the name and details of a prospective supervisor to be approved by the Committee, along with a signed Supervision Agreement between the registrant and their prospective supervisor by a particular date. In Ms Hunter's case, that was 11 February 2013, the decision having been made on 22 January 2013.

(2) The registrant must provide, within one week of receiving notification of approval of the supervisor, a supervised practice plan setting out proposed objectives, levels, type and amount of supervision proposed, and how the supervisions is to occur, for approval by the Committee.

(3) When the plan is approved and commences, the registrant is to provide a minimum of quarterly reports, and a report on application for renewal of registration.

[28] The registration details, in respect of Ms Jenkins, do not contain any conditions."

The decision to refuse the application for registration

[13] The Board's refusal of the respondent's application for registration was for the reasons announced in its letter dated 3 January 2013.[8] The relevant part of that letter stated:[9]

"The Committee found the following:

- Your qualification does not meet requirements for a Degree for the purposes of section 303(1)(a) of the National Law or an advanced diploma equivalent under section 303(1)(b) for the following reasons:

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8 AB 18.

9 AB 18-19.

- structured clinical learning designed to be progressive through the various stages of the program of learning, inclusive of a comprehensive range of clinical presentations that cover all the clinical areas;
- direct supervision by practitioners with appropriate qualifications, clinical experience, and understanding of the curriculum and teaching requirements;
- formal assessment (formative and summative, addressing all clinical skills, against clear learning outcomes); and
- clinical learning that is a minimum of 200 hours

In order for your application to be considered under section 303(1)(b) and meet the requirements of the Grandparenting and General Registration Eligibility Registration standard you would need to provide evidence of:

- 2 years of post qualification experience prior to 1 July 2012.

Your qualification does not, in the view of the Committee, show progressive clinical learning that would meet the criteria set out above and you have not been able to demonstrate 2 years of post qualification experience.

- Under the Grandparenting and General Registration Eligibility Registration Standard, in so far as it relates to applications made under section 303(1)(c) of the National Law an applicant must demonstrate practice in the profession for a five year period between 1 July 2002 and 30 June 2012, and meet the competency requirements of the National Law. The Committee found that you did not provide sufficient evidence to satisfy those requirements.

On 21 November 2012, you were sent a letter advising you of the Committee's proposal to refuse your application for general registration as a Chinese Medicine practitioner in the division of Acupuncture. That letter invited you to make a written submission with regards to that proposal by 21 December 2012.

According to AHPRA's records, a written submission was received from you by the stipulated due date. The Committee considered that submission and found that your submissions did not demonstrate sufficient clinical experience in the course of your qualifications, or two full years of post qualification experience up to 1 July 2012 for your qualification to meet the Chinese Medicine Board of Australia (**CMBA**) Grandparenting and General Registration Eligibility Registration Standard. The Committee has now determined that your application for general registration to practise as a Chinese Medicine practitioner in the division of Acupuncture is refused."

The Board's attitude to ACEM

[14] As has been seen, the Board registered a number of graduates from ACEM. There was evidence before the learned primary judge from Mr Gigante, a member of the Board's registration committee. He dealt with the position of ACEM, and the Board's attitude to it and its graduates, in greater detail than needs be set out here, but the essential elements of his evidence are as follows:

(a) ACEM has never been accredited, pursuant to s 48(1) of the *National Law*, by an accredited authority for the Chinese Medicine profession;[10]

(b) therefore graduation from the ACEM course was not an approved qualification for the purpose of s 49(1) of the *National Law*;[11]

(c) the Board had registered a number of students from ACEM, each of whom had applied under the Grandparenting provisions; the Board subsequently considered that those registrations were erroneous and the product of the use of an inappropriate precedent;[12]

(d) the Board had subsequently considered the ACEM course in detail, finding it substantially deficient in terms of the required standards;[13]

(e) the deficiencies included that the clinical training could not be shown to have been properly structured, formally assessed and directly supervised by a qualified and experienced practitioner, as required by the Grandparenting Standard;[14] there were deficiencies in training with patients, adequacy of supervision and inconsistencies in the course documentation;[15]

(f) as a consequence the Board had determined that it should no longer register ACEM graduates;

(g) the Board had determined that it was unable at law to reverse the decision to grant registration to those ACEM graduates who had been granted registration;[16]

(h) therefore the Board determined that those ACEM graduates who had been registered would, when renewals of their registration arose, be made subject to conditions requiring supervised practice;[17] and

(i) the Board had since consistently refused registration for ACEM graduates where they could not otherwise evidence their compliance with the practice requirements of s 303(1)(b) or s 303(1)(c) of the *National Law*.[18]

Relevant provisions of the *National Law*

[15] Section 3 of the *National Law* sets out the objectives and guiding principles. The object of the *National Law* is to establish a National Registration and Accreditation

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10 Affidavit of Mr P J Gigante, dated 1 October 2013 ("**Gigante's Affidavit**"), para 8; AB 29.
11 Gigante's Affidavit, para 8; AB 29.
12 Gigante's Affidavit, paras 38-44; AB 37-38.
13 Gigante's Affidavit, paras 9-24; AB 29-34~~1~~.
14 Gigante's Affidavit, para 13; AB 31.
15 Gigante's Affidavit, paras 15-24; AB 32-34.
16 Gigante's Affidavit, para 42; AB 38.
17 Gigante's Affidavit, para 42; AB 38.
18 Gigante's Affidavit, para 43; AB 38.

Scheme for the regulation of health practitioners, and students undertaking programs of study and clinical training in the health profession. The objectives include:[19]

> "(a) to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered;
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> …
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> (c) to facilitate the provision of high quality education and training of health practitioners;
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> …
>
> (e) to facilitate access to services provided by health practitioners in accordance with the public interest;
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> …"

[16] Section 3(3) provides that the guiding principles of the National Registration and Accreditation Scheme include: "the scheme is to operate in a transparent, accountable, efficient, effective and fair way …".

[17] The functions of the National Boards, which includes the Board, are set out in s 35 as follows:

> "(1) The functions of a National Board established for a health profession are as follows –
>
> (a) to register suitably qualified and competent persons in the health profession, and, if necessary, to impose conditions on the registration of persons in the profession;
>
> (b) to decide the requirements for registration or endorsement of registration in the health profession, including the arrangements for supervised practice in the profession;
>
> (c) to develop or approve standards, codes and guidelines for the health profession, …
>
> (d) to approve accredited programs of study as providing qualifications for registration or endorsement in the health profession;
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> …
>
> (j) to oversee the management of health practitioners and students registered in the health profession, including monitoring conditions, undertaking and suspensions imposed on the registration of the practitioners or students;
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> …".

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19 *National Law*, s 3(2).

[18] The central provisions in issue in this matter concern those relating to eligibility for general registration by a medical practitioner. They commence with s 52:

> "(1) An individual is eligible for general registration in a health profession if –
>
> (a) the individual is qualified for general registration in the health profession; and
>
> (b) the individual has successfully completed –
>
> (i) any period of supervised practice in the health profession required by an approved registration standard for the health profession; or
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> (ii) any examination or assessment required by an approved registration standard for the health profession to assess the individual's ability to competently and safely practise the profession; and
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> (c) the individual is a suitable person to hold general registration in the health profession; and
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> (d) the individual is not disqualified under this Law or a law of a co-regulatory jurisdiction from applying for registration, or being registered, in the health profession; and
>
> (e) the individual meets any other requirements for registration stated in an approved registration standard for the health profession.
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> (2) Without limiting subsection (1), the National Board established for the health profession may decide the individual is eligible for general registration in the profession by imposing conditions on the registration under section 83."

[19] The requirement in s 52(1)(a) that an individual be "qualified" is given meaning by s 53, which defines when an individual is qualified:

> "An individual is qualified for general registration in a health profession if –
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> (a) the individual holds an approved qualification for the health profession; or
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> (b) the individual holds a qualification the National Board established for the health profession considers to be substantially equivalent, or based on similar competencies, to an approved qualification; or
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> (c) the individual holds a qualification, not referred to in paragraph (a) or (b), relevant to the health profession and has successfully completed an examination or other assessment required by the National Board for the purpose of general registration in the health profession; or

(d) the individual –

(i) holds a qualification, not referred to in paragraph (a) or (b), that under this Law or a corresponding prior Act qualified the individual for general registration (however described) in the health profession; and

(ii) was previously registered under this Law or the corresponding prior Act on the basis of holding that qualification."

[20] The ability to impose conditions on registration arises under s 83 of the *National Law* which provides:

"(1) If a National Board decides to register a person in the health profession for which the Board is established, the registration is subject to any condition the Board considers necessary or desirable in the circumstances.

(2) If the National Board decided to register the person subject to a condition referred to in subsection (1), the Board must decide a view period for the condition."

[21] The Grandparenting registration provisions appear in s 303 of the *National Law*, which is entitled "Qualifications for general registration in relevant profession". It provides:

"(1) For the purposes of section 52(1)(a), an individual who applies for registration in a relevant health profession before 1 July 2015 is qualified for general registration in the profession if the individual –

(a) holds a qualification or has completed training in the profession, whether in a participating jurisdiction or elsewhere, that the National Board established for the profession considers is adequate for the purposes of practising the profession; or

(b) holds a qualification or has completed training in the profession, whether in a participating jurisdiction or elsewhere, and has completed any further study, training or supervised practice in the profession required by the Board for the purposes of this section; or

(c) has practised the profession at any time between 1 July 2002 and 30 June 2012 for a consecutive period of 5 years or for any periods which together amount to 5 years.

(2) This section applies despite section 53."

[22] Section 303 of the *National Law* is found in Div 15, entitled "Staged commencement for certain health professions", of Part 12, which is entitled "Transitional provisions". The operation of s 303, being part of Div 15, is affected by s 304 of the *National Law* which provides:

"**304 Relationship with other provisions of Law**

This Division applies despite any other provision of this Law but does not affect the operation of clause 30 of Schedule 7."[20]

Proceedings before the learned primary judge

[23] The learned primary judge reviewed the history of the respondent's application for registration, including the fact that other graduates of ACEM had been granted registration. His Honour also noted the evidence from Mr Gigante as to the position of the Board in relation to the decision to grant registrations to ACEM graduates. That evidence was summarised at [23] of the Reasons of the primary judge as set out in paragraph [11] above.[21]

[24] The learned primary judge had been urged to adopt the decision of the Nursing and Midwifery Tribunal in *McMahon v The Nursing and Midwifery Board of Australia*[22] which, in essence, held that s 52(2) of the *National Law* could not be used as a means to avoid compliance with the requirements for registration set out in s 52(1), including compliance with an approved standard. Having noted that decision, his Honour continued:[23]

> "[35] In my view, s 52(2) cannot be used as a means of avoiding compliance with the requirements of s 52(1). However, s 52(2) provides a means of establishing compliance with s 52(1). That is, that the Board may decide an individual is eligible for registration by imposing conditions on the registration under s 83.
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> [36] In my view, that is what the Board has done in the circumstances where it has renewed the registration of Ms Hunter and others, by imposing conditions. That is, the Board has established an eligibility based on qualification by the imposition of conditions. That is, in my view, an authorised and an appropriate use of the power under s 52(2) of the National Law. It is clear from the material that the Board did so mindful of the duty imposed by the National Law in respect of ensuring protection of the public, and directed conditions accordingly to that issue."

[25] Having noted that the Board's view that the ACEM qualification did not meet the requirements of the Grandparenting Standard,[24] his Honour held that did not disqualify the Board, or QCAT, from being satisfied of an applicant's eligibility by the imposition of conditions. His Honour found that the deficiencies in the ACEM course, which had led the Board to the conclusion that an ACEM qualification did not meet the requirements of the standard, were all known to the Board prior to its consideration of the respondent's application for registration, and prior to the Board's granting conditional renewal of the registration to the other

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20 Clause 30 of Schedule 7 is irrelevant.

21 AB 47.

22 *Susan Margaret McMahon v The Nursing and Midwifery Board of Australia* [2013] NSWNMT 4, at [24] ("***McMahon***").

23 AB 50.

24 Reasons [38]; AB 50.

ACEM graduates. His Honour expressed his conclusion as to the Board's position and the imposition of conditions in this way:[25]

> "[38] In my view, that evidences established that which had already been identified by the Board earlier in its consideration of the qualification. That is, that it was of the view that the qualification did not meet the requirements of the Grandparenting Standard. However, that does not disqualify the Board, or in this case the Tribunal, from being satisfied of an applicant's eligibility by the imposition of conditions which, as I have said, is what the Board has done in respect of the renewal of registration of Ms Hunter and others.
>
> [39] Had it been otherwise, that eligibility was not being satisfied in that way, then the only decision that the Board would have been able to make in respect of those other matters, would have been to have refused registration."

[26] On that basis the learned primary judge decided that the application for registration should be allowed on the same conditions as had been imposed by the Board in respect of the other ACEM graduates.[26]

Grounds of appeal

[27] The Board contends that the learned primary judge erred in law in three ways:

(a) failing to give proper weight and effect to the requirement in s 52(1) for applicants for general registration to be eligible by reason of satisfying the qualifications set out in s 53;

(b) concluding wrongly that ss 52(2) and 83 override the requirements of ss 52(1) and 53, thereby enabling the imposition of conditions on registration when an applicant is not eligible for general registration; and

(c) taking into account an irrelevant consideration, namely that the Board had previously registered other ACEM graduates.

The parties' contentions

[28] The Board contended that the operation of ss 52(2) and 83 was such that the discretion to impose conditions on registration could not be used to make up a deficiency in meeting the eligibility criteria. It urged that this Court should follow the reasoning of the Victorian Civil and Administrative Tribunal ("**VCAT**") in *Krause v Medical Board of Australia*[27] and the New South Wales Nursing and Midwifery Tribunal in *McMahon*.[28]

[29] Thus, it was contended, a condition could not be imposed pursuant to s 52(2) to establish or satisfy the eligibility criteria in s 52(1). If there was a deficiency in eligibility, then the Board was bound to refuse the application.

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25 AB 50-51.

26 Reasons [42] and [43]; AB 51.

27 *Krause v Medical Board of Australia* [2013] VCAT 1009, at [68] and [71] ("***Krause***").

28 [2013] NSWNMT 4, at [11].

[30] It was contended the registration of previous graduates of ACEM was irrelevant, relying on a decision of the State Administrative Tribunal of Western Australia in *Palatty v The Nursing and Midwifery Board of Australia*.[29] The Board contended that there was no form of estoppel which applied, and each application for registration had to be considered on its merits.

[31] The respondent's contentions were that the Grandparenting provisions in s 303(1) provided an alternative way in which the eligibility criteria in s 52(1) could be met. The respondent drew attention to the difference in wording between s 303(1)(a) and s 303(1)(b). The former referred to an applicant who "holds a qualification or has completed training in the profession" which, in each case, had to be such that the Board considered it to be adequate for the purposes of practising the profession. The latter, by contrast, merely referred to an applicant who "holds a qualification or has completed training in the profession" without the requirement that the qualification or training be such that the Board considers it adequate. The remaining provision of s 303(1)(b) simply required that the applicant complete any further supervised practice as required by the Board. It was contended that was exactly what had happened with the other ACEM graduates. The Board had used its condition imposing power and that the respondent could thereby meet eligibility requirements by satisfying s 303(1)(b).

[32] The respondent also contended that the Board's registration and imposition of conditions in respect of the other ACEM graduates was not irrelevant, as it provided evidence that conditions could be imposed which were efficacious and effective to achieve the objectives of the legislation and thus satisfy any compliance gap.

Correct construction of s 303(1) of the *National Law*

[33] Section 52(1) of the *National Law* deals with eligibility for general registration. It includes five different components which go to eligibility. They are that the individual: is qualified;[30] has successfully completed requirements under an approved registration standard, relating to supervised practice or an examination or assessment;[31] the individual is a suitable person;[32] is not disqualified under some statutory provision;[33] and meets any other requirements in an approved registration standard.[34]

[34] There is no suggestion that any of the requirements of sub-ss (1)(b) to (e) are relevant to the present case. Therefore, the only part of s 52(1) with which this Court is concerned is that in sub-s (a). It provides, relevantly, that "An individual is eligible for general registration in a health profession if … the individual is qualified for general registration in the health profession".

[35] In determining whether someone is qualified, two pathways are available. The first is that set out s 53. It is not presently relevant, as the respondent applied for registration under the second pathway, namely that in s 303: see paragraph [20] above.

[36] It is common ground that sub-ss (1)(a) and (c) are not applicable to the respondent. Such qualification or training as he has achieved through ACEM is certainly not considered by the Board to be adequate for the purpose of practising the profession, nor is it the case that the respondent has practised for a consecutive period of five years.

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29 *Palatty v The Nursing and Midwifery Board of Australia* [2013] WASAT 78, at [24].
30 Subsection (a).
31 Subsection (b).
32 Subsection (c).
33 Subsection (d).
34 Subsection (e).

[37] Section 303(1)(b) postulates two alternative options for demonstrating qualifications. The first is where the applicant for registration "holds a qualification … in the profession", and the second is where an applicant for registration "has completed training in the profession". The use of the word "or" clearly makes the first two limbs disjunctive.

[38] Each of those limbs is then qualified by the requirement that the applicant for registration "has completed any further study, training or supervised practice in the profession required by the Board for the purposes of this section". It is plain that those things that might be required by the Board are also disjunctive, in that it can be further study **or** training **or** supervised practice.

[39] The next significant aspect to note is that the wording in sub-s (1)(b) is different from that in sub-s (1)(a). In sub-s (1)(a) the qualification or the training referred to must, in each case, be considered by the Board to be adequate for the purpose of practising the profession. No such requirement exists in relation to subsection (1)(b). Therefore, the plain words of sub-s (1)(b) comprehend a qualification which, of itself, is one that is not considered by the Board to be adequate for the purpose of practising the profession. The same applies to the second limb, namely the "training in the profession". This does not run counter to the objects of the *National Law*, as sub-s (1)(b) combines that with the Board's requirement to complete further study or training or supervised practice.

[40] That s 303(1) provides a completely alternative method of establishing that an applicant is qualified for general registration, is apparent from sub-s 303(2). It provides that s 303 "applies despite section 53". When one has regard to s 53 the qualification referred to in that section is one that has been approved by the Board, or which the Board considers to be substantially equivalent to an approved qualification, or where the Board has imposed an examination or assessment, or where it was a previously registered qualification. None of those things apply to s 303(1)(b).

[41] Section 303(1) does not, in my view, conflict with s 83 of the *National Law* which gives power to a Board to impose conditions. Section 303(1) is directed towards providing an alternative form of qualifying for the purposes of s 52(1)(a). It has no further ambit of operation than to provide the alternative qualification avenue, limited to those who apply before 1 July 2015.

[42] Thus, the ability of the Board to require further study, training or supervised practice under s 303(1)(b) can be seen to be complementary to its power to impose conditions on registration under s 83.

[43] Further, s 303(1) does not constrain the operation of s 52(2) of the *National Law*. It provides:

> "(2) Without limiting subsection (1), the National Board established for the health profession may decide the individual is eligible for general registration in the profession by imposing conditions on the registration under section 83."

[44] Because s 303(1) provides an alternative method of establishing that an applicant is qualified for the purposes of s 52(1)(a), in this case s 52(2) should be read as though the opening phrase read "Without limiting subsection 303(1) and section 52(1)(b)-(e) …".

[45] The use of the word "by" in s 52(2) is important. It signifies that it is the imposition of the conditions themselves which establishes eligibility. Put another way, it is the conditions which cause eligibility. Were it intended to be otherwise, the section could have said something like "may decide the individual is eligible for general registration in the profession and in doing so may impose conditions …".

[46] Further, it is plain from the opening phrase in s 52(2), namely "Without limiting subsection (1)", that s 52(2) applies to all parts of s 52(1). Thus, it applies to subsection 52(1)(a). It also applies to s 303(1) which operates for the purposes of s 52(1)(a).

[47] The Board accepted that s 52(2) applied to all parts of s 52(1), but contended it could only be exercised in extraordinary circumstances. The way it was put was that "the conditions might top up a situation which is otherwise deficient by reference to section 52(1)",[35] but that:

> "it would only be in extraordinary circumstances where a qualification has been done in the modern era that the remediation of a section 52(2) condition could attend to deficits in qualification".[36]

[48] I do not accept that submission. That approach would add more than a gloss to the plain words of ss 52(1) and 52(2). On its face s 52(2) applies to s 52(1)(a), and by extension to s 303(1). Therefore conditions may be imposed which go to the question of an applicant being qualified. There is no wording which would suggest that the power to do so is limited to any particular set of circumstances, much less extraordinary circumstances.

[49] The use of the word "may" in s 52(2) clearly gives a Board a discretion which it can exercise to decide if someone is eligible by the imposition of conditions. However, that discretion is not unconstrained. It would have to be exercised by reference to relevant, and not to irrelevant, considerations, and within the framework of the *National Law* and its objects. However, until the Grandparenting provisions of s 303(1) expire, the discretion to impose conditions in s 52(2) has at least two areas of operation, namely:

(a) where an applicant seeks to demonstrate that they are qualified under ss 52(1) and 53, the Board's consideration is whether to impose conditions that relate to a qualification that comes within s 53; put shortly, that relates to qualifications that are approved by a Board, or where the Board recognises in one way or another that the qualifications are substantially equivalent to an approved qualification;

(b) for those applicants who seek to demonstrate qualification under s 303(1), the discretion relates to the imposition of conditions in respect of a qualification falling outside those that the Board considers are adequate for the purposes of practising the profession, or in relation to training in the profession which falls outside what the Board otherwise considers adequate.

[50] In each case the operation of s 52(2) is such that it is the very imposition of conditions which makes the applicant eligible. In that sense the word "by" in s 52(2) could be equated with the phrase "per force of".

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35 Transcript 1-15.

36 Transcript 1-43.

Applicability of *Krause v Medical Board of Australia*

[51] The Board urged that this Court should adopt the reasoning in *Krause*[37] in relation to the constraints upon the condition making power under ss 52(2) and 83. In *Krause* the Medical Board determined to refuse the grant of general registration to Dr Krause. The history of Dr Krause's qualification in Germany in 1993, and a subsequent period of time working with a limited registration in Australia, makes the facts of that case vastly different from that of the respondent. However, the case was governed by the *National Law*. Dr Krause's contention was that on the proper interpretation of the *National Law* the Board was authorised to grant general registration in circumstances where prerequisite qualifications had not been satisfied, but where the applicant is otherwise deemed competent to practice in a limited or restricted area and a conditional registration could give effect to such restrictions.[38] In essence Dr Krause wished to achieve general registration, but continue to work in a limited capacity as she had done for many years. She accepted that she did not qualify for general registration, and was therefore ineligible, but she sought general registration subject to the condition that she act only as a surgical assistant.

[52] In the course of its analysis VCAT considered the operation of ss 52(2) and 83. It said:

> "In the Tribunal's view, consistent with the submissions made on behalf of the Board, sub-s 52(1) and s 83 do not either expressly or by implication abrogate the necessity for an applicant to have complied with the eligibility criteria otherwise prescribed by s 52 and in turn s 53. The imposition of conditions is predicated upon an individual otherwise satisfying the eligibility criteria for registration. The circumstances in which the Board may nevertheless consider imposing conditions upon registration will be typically:
>
> (a) where the professional performance of a registered practitioner has been found deficient in some respect, resulting in sanctions such as a fine, suspension or cancellation of registration;
>
> (b) where the registered practitioner may have suffered a physical impairment, which would render the right to unconditional general medical practise inappropriate or impracticable; or
>
> (c) where the registered practitioner seeks to restrict their practice and their exposure to professional indemnity insurance accordingly.
>
> …
>
> The Tribunal endorses the submission of the Board's counsel to the effect that registration by way of conditions, notwithstanding that the applicant does not satisfy the basic requirements of general registration, would subvert the registration system. Indeed such a 'sub-category' of registration would enable serious deficiencies in satisfaction of criteria for general registration to be remedied by the imposition of conditions, which purport to obviate those deficiencies by restricting

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37 [2013] VCAT 1009.

38 *Krause* at [48].

> the registrant's right to practise medicine. In the Tribunal's view, such an outcome would, as concluded by the Board's counsel, be 'anomalous, confusing and problematic and would undermine the system of registration as it is structured'.
>
> In the Tribunal's view, the regime for registration of health practitioners prescribed under Part 7 of the National Law, does not provide for any residual discretion in the Board, or in turn the Tribunal, to impose conditions upon registration, in lieu of an applicant meeting eligibility criteria. The preamble to sub-s 52(1), 'Without limiting subsection (1) …' makes this purpose and intent clear enough. The circumstances which may give rise to appropriate conditions attaching to registration, of the kind outlined above, do not relate to a deficiency in prescribed eligibility."[39]

[53] There are a number of reasons why I do not accept the reasoning in *Krause*. First, no attention was paid to the significance of the word "by" in s 52(2), where it provides that a Board "may decide the individual **is** eligible for general registration in the profession **by** imposing conditions …".[40] As discussed above, the use of the word "by" makes it clear that the eligibility is achieved per force of the imposition of conditions. Thus, in my view it is incorrect to say that the imposition of conditions was predicated upon an individual "otherwise satisfying the eligibility criteria for registration". Secondly, the enumerated circumstances in which conditions might be applied do not appear anywhere in the text of the legislation. True it is that those circumstances "do not relate to a deficiency in prescribed eligibility", but for that very reason cannot circumscribe the general discretion given under s 52(2) to impose conditions. Thirdly, s 52(2) expressly confers a discretion on the Board to achieve eligibility for registration by the imposition of conditions. I do not believe, with respect, that approach would subvert the registration system, when the *National Law* makes it part of the registration system.

[54] Counsel for the Board also urged adoption of what was said in respect of s 52(2) and the imposition of conditions, in *McMahon*.[41] As in *Krause*, the facts of *McMahon* are well removed from the respondent's case. However, the essential nature of the application was that McMahon had a considerable history working as a general nurse, but commencing some 30 years prior to her application. She had practised for some years, following which her registration lapsed, but she was again registered for five years leading to 2001, after which her registration again lapsed. She accepted that her qualifications did not meet the relevant standard, nor did the recency of her practice but she proposed that she be granted registration on conditions. The Nursing and Midwifery Tribunal accepted the Board's submission that conditions may be imposed in addition to the general registration requirements set out in s 52(1), including compliance with a standard, and could not be used as a "back door" means of satisfying the registration requirements, thereby avoiding the necessity for compliance with the standard. As to that the Tribunal said:

> "The Tribunal accepts as correct Mr Stafford's interpretation of s 52(2). That is, we agree conditions cannot be used as a means to avoid compliance with the requirements for registration set out in s 52(1), including compliance with an approved standard.

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39 *Krause* at [68], [70] and [71].

40 Emphasis added.

41 [2013] NSWNMT 4, at [111] and [112].

> While a standard is not a legislative instrument, its authority is recognised under the National Law. Further, the importance of a standard, once approved by the Ministerial Council, is that in various situations compliance with a standard, such as the Standard or the English Language Standard, by a nurse is *mandatory* to retain or achieve registration. The legislation contains no discretion that enables a Board, (or a Tribunal), in particular circumstance, not to apply a standard once approved."[42]

[55] I agree, with respect, that s 52(2) cannot be used as a means of avoiding compliance with the requirements of s 52(1). However, s 52(2) provides a means by which compliance with s 52(1) can be achieved. That is, eligibility can be achieved per force of the imposition of conditions. Because s 52(2) applies to each part of s 52(1) it can apply to s 52(1)(e), dealing with whether an individual meets the requirements for registration stated in a standard. To the extent that *McMahon* suggests the contrary, I respectfully disagree.

Did the Board and the learned primary judge correctly address s 303(1)?

[56] The Board's refusal of registration was notified in the letter set out at paragraph [12] above. It is evident from the terms of the letter that the Board did not address both alternative limbs of s 303(1)(b). Rather, the decision turned only on the first limb, namely whether the applicant "holds a qualification … in the profession". In doing so the Board misapplied s 303(1)(b).

[57] The Board's decision referred to the Grandparenting and General Registration Eligibility Registration standard and advised the respondent that in order to meet those standards he would have to provide evidence of two years of post qualification experience prior to 1 July 2012.[43] Section 2 of the standard deals with applicants making an application under s 303(1)(b). Thereafter the standard only deals with the first limb, namely where an applicant holds a qualification, and does not deal with the second limb at all. Section 2 refers to "qualification and any further study, training or supervised practice …" and "such qualification/s and/or further training or supervised practice must include …". Insofar as it refers to study, training or supervised practice, the phrase is preceded by the word "further". That must naturally mean further to the qualification. That makes it plain that the standard addresses only the first limb of s 303(1)(b).

[58] When the respondent challenged the decision in QCAT, he swore an affidavit making it apparent that his application was under s 303(1)(b).[44] He said that his application was "under the clinical study route", and then deposed to having satisfied such requirements by:

> (a) completion of a minimum of 240 clinical hours under the direct supervision of Mr Ebejar[45] along with the Qualification;[46]
>
> (b) completion of 500 clinical hours as at 22 November 2012 under the direct supervision of Mr Sung Jin Kim,[47] attainment of which was

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42 *McMahon* at [111] and [112].

43 AB 18.

44 Affidavit of Mr Lee, dated 16 September 2013, para 5(b); AB 24.

45 Mr Ebejar is the principal of ACEM.

46 This was defined in paragraph 1 of the affidavit to refer to his Advanced Diploma of Acupuncture and Oriental Therapies awarded to him on his graduation from ACEM.

47 Chinese medicine practitioner number: CMR0001732834.

> communicated to the Board by letter dated 12 December 2012 before the refusal.

[59] The Board adduced evidence before the learned primary judge, from Mr Gigante. In his affidavit he looked at the question of whether the clinical training met the components set out in s 2 of the Grandparenting Standard. He found it deficient, by reference to the various headings of that standard which required the clinical component to be structured, directly supervised and formally assessed. However, that was a reference to that part of the clinical training conducted at ACEM. Further, because the Grandparenting Standard only deals with the first limb of s 303(1)(b), Mr Gigante did not address the question of whether the respondent "has completed training in the profession" for the purposes of the second limb of that section.

[60] Mr Gigante then addressed the question of inconsistencies in the ACEM course documentation leading to the conclusion that "ACEM has failed to demonstrate satisfactory academic quality and integrity", and therefore:

> "I am unable to be satisfied that the applicant's ACEM qualification has a clinical component which complies with the requirements in the Grandparenting Standard for applications made under s.303(1)(b)."[48]

Once again it is apparent that the question addressed was the first limb of s 303(1)(b), not the second limb.

[61] Mr Gigante then addressed the respondent's evidence of the number of hours of clinical study undertaken either with ACEM or with Mr Kim. Having made various criticisms of the lack of supporting evidence in respect of the clinical practice,[49] Mr Gigante turned his attention to the 500 hours of clinical practice performed with Mr Kim. In respect of that Mr Gigante said:[50]

> "The applicant states at paragraph 9(b) of his affidavit that he communicated to the Board/AHPRA his completion of 500 hours of clinical practice with Mr Sung Jin Kim by way of a letter dated 12 December 2012. I have reviewed the applicant's registration application, including the submissions made by the applicant (all of which are contained in the BOD). I cannot locate a letter dated 12 December 2012 or any reference to the applicant's completion of 500 clinical hours under the supervision of Mr Sung Jin Kim. Therefore, I do not consider the Committee would have had this information before it when it made the decision to refuse the applicant's registration application."

[62] It is apparent that the respondent submitted declarations by Mr Ebejar and Mr Kim, separately from his own affidavit. Mr Gigante referred to those declarations stating that he could not determine from the information if the respondent "has actually completed any period of supervised practice and in any case, the documents do not provide any evidence of the matters outlined in paragraph 30 herein."[51] The reference to paragraph 30 was to part of Mr Gigante's affidavit where he said he could not be

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48 Gigante's Affidavit, para 24; AB 34.

49 Specifically, dealing with where the practice occurred, the nature of it, the assessment of it, whether the respondent diagnosed or treated patients, and whether he was involved in recording details of the treatment or merely observed it.

50 Gigante's Affidavit, para 33; AB 36.

51 Gigante's Affidavit, para 47; AB 38.

satisfied that the supervised practice was structured, supervised or formally assessed "as required by the Grandparenting Standard".[52] Once again, that comment only addressed the first limb of s 303(1)(b).

[63] It is apparent that his Honour only considered the matter in the context of the first limb of s 303(1)(b). So much is apparent from the terms of [38] and [39] of his Honour's reasons,[53] set out above in paragraph [24] above.

[64] The learned primary judge decision to overturn the Board's refusal of the respondent's registration, followed this course of analysis:

(a) s 52(2) cannot be used as a means of avoiding compliance with the requirements of s 52(1), but it does provide a means of establishing compliance with s 52(1); that is, the Board may decide an individual is eligible, by imposing conditions under s 83;

(b) because the Board had renewed the registration of the other ACEM graduates by imposing conditions on them, the Board "has established an eligibility based on qualification by the imposition of conditions";[54]

(c) the evidence of Mr Gigante merely established that which the Board had identified earlier, namely that "the qualification did not meet the requirements of the Grandparenting Standard"; however, that did not disqualify the Board[55] from being satisfied as to eligibility by the imposition of conditions;

(d) had it been the case that eligibility was not being satisfied in that fashion, the only decision the Board could have then made was to refuse the registration.

[65] With respect to the learned primary judge, however attractive it is to say that the Board, by registering and renewing the registration of the other ACEM graduates, should be taken as having established that such conditions for such graduates were sufficient for eligibility, I do not think that is the correct course to follow. As counsel for the Board submitted, this is not a case where some form of estoppel follows. More importantly, the evidence from the Board was that it had made an error in registering the other graduates of ACEM, and found itself in the position where it did not consider that it could lawfully reverse the decision to grant registration or renew registration. No challenge was made to the factual basis for that decision, nor any attack on its genuineness. In my view it would be contrary to the objects of the *National Law* to effectively compel the Board to repeat its alleged error.

[66] Therefore I respectfully consider that the learned primary judge fell into error in two ways, namely:

(a) he did not address the fact that the respondent's application for registration invoked the second limb of s 303(1)(b), as well as the first limb; and

(b) just because the Board had, by error, used its condition making power under s 83 to achieve eligibility for previous graduates of ACEM, it should not be taken to be bound to do so again.

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52 Gigante's Affidavit, para 30; AB 36.

53 AB 50.

54 Reasons [36]; AB 50.

55 Or QCAT standing in its place, on appeal.

Conclusion

[67] For the reasons expressed above I consider that error has been demonstrated in the way in which the matter was approached by the learned primary judge. That stems from the fact that the Board itself failed to consider the second limb of s 303(1)(b) when it assessed the respondent's application for registration, and those matters were not addressed before QCAT. The consequence of that failure is that the respondent's evidence of his having undergone 500 hours of practical training has not been properly considered. If the matter is remitted to QCAT, that provides an opportunity for all matters to be properly assessed, given that an appeal from the Board to QCAT is a fresh hearing on the merits.

[68] In the event the appeal has succeeded, but not on a ground advanced by the appellant. The errors in the proceedings in QCAT were caused by the Board's failure to properly address the second limb of s 303(1)(b), and consequently the failure to address that question in QCAT. Therefore, it seems appropriate that there be no order as to the costs of the appeal.

[69] I would make the following orders:

1. The appeal be allowed.

2. The decision of the Queensland Civil and Administrative Tribunal of 15 October 2013 be set aside.

3. The matter be remitted to the Queensland Civil and Administrative Tribunal to be dealt with in accordance with the reasons of this Court.

4. There be no order as to the costs of the appeal.

[70] **BODDICE J:** I have read the reasons for judgment of Morrison JA. I agree with those reasons, and the proposed orders.