QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Nowlan v Medical Board of Australia (No 2)* [2020] QCAT 38
PARTIES:	**CHRISTOPHER NOWLAN** (applicant) **v** **MEDICAL BOARD OF AUSTRALIA** (respondent)
APPLICATION NO/S:	OCR066-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	18 February 2020 Addendum added 28 February 2020
HEARING DATE:	On the Papers
HEARD AT:	Brisbane
DECISION OF:	Judge Allen QC, Deputy President
ORDERS:	1. **Pursuant to s 62(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the Tribunal directs that, in conducting the hearing of proceeding OCR066-19, the Tribunal will be constituted by a judicial member without the assistance of assessors.** 2. **Pursuant to s 61(1)(c) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the Tribunal waives compliance with the procedural requirements applicable to the applicant's applications received 17 January 2020.** 3. **The applicant's application for a costs order against the respondent, received 17 January 2020, is refused.** 4. **The applicant's application that the respondent's disclosure be verified by affidavit, received 17 January 2020, is refused.**
CATCHWORDS:	PROFESSION AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – LICENSES AND REGISTRATION – APPEALS AND APPLICATIONS FOR ORDER DIRECTING REGISTRATION – where applicant appeals against a

decision of the Medical Board of Australia to refuse the applicant's application for provisional registration as a medical practitioner

HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – where applicant appeals against a decision of the Medical Board of Australia to refuse the applicant's application for provisional registration as a medical practitioner – where such proceeding is a "disciplinary proceeding" as defined by the *Health Ombudsman Act 2013* (Qld) and the tribunal must be constituted by a judicial member – whether the proceeding is a "disciplinary proceeding relating to a registered health practitioner" within the meaning of that term as used in s 126 of the *Health Ombudsman Act* 2013 (Qld) so that the tribunal must be assisted by assessors

Health Ombudsman Act 2013 (Qld), s 94, s 97, s 126, schedule 1
Health Practitioner Regulation National Law Act 2009 (Qld), s 6, s 9
Health Practitioner Regulation National Law (Queensland), s 5, s 53, s 62, s 82, s 89, s 90, s 199, s 201, s 229, s 244
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 60, s 61, s 62, s 100, s 102

Gupta v Medical Board of Australia [2015] QCAT 142
Nursing and Midwifery Board of Australia v Linquist [2019] NSWSC 978
Ting v Medical Board of Australia; Ting v Queensland Health [2019] QCAT 192

REPRESENTATION:	
Applicant:	Self-represented
Respondent:	Clayton Utz
APPEARANCES:	This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

[1] The applicant has applied to review the decision of the Medical Board of Australia ("the Board") to refuse the applicant's application for provisional registration as a medical practitioner. This decision is as to whether the Tribunal, when hearing the applicant's application to review, must, pursuant to s 126 of the *Health Ombudsman Act 2013* (Qld) ("*HO Act*"), be assisted by assessors. For the reasons which follow, it

is the decision of the Tribunal that s 126 of the *HO Act* does not apply to the applicant's application to review. The Tribunal need not be, and will not be, assisted by assessors in conducting the hearing of the application to review.

The decision of the Board

[2] The registration of health practitioners is governed by the provisions of the *Health Practitioner Regulation National Law* ("National Law"). Section 53 of the National Law prescribes the requirements for qualification for general registration in a health profession. Section 62 of the National Law prescribes the requirements for eligibility for provisional registration in a health profession. Those requirements include qualification for general registration in the profession.

[3] In deciding to refuse the applicant's application for provisional registration, the Board acted pursuant to s 82(1)(c)(i)(A) of the National Law. Section 82(1)(c)(i)(A) of the National Law required the Board to decide to refuse to grant the applicant registration in the health profession if the applicant is ineligible for registration in the profession under a relevant section of the National Law because the applicant is not qualified for registration. The Board determined that the applicant did not meet the requirements prescribed by s 53 of the National Law for qualification for general registration in the health profession and, consequently, did not meet the requirements prescribed by s 62 of the National Law for eligibility for provisional registration in a health profession. The Board thus determined that the applicant is ineligible for provisional registration as a medical practitioner under s 62 of the National Law because the applicant is not qualified for general registration pursuant to s 53 of the National Law.

The application to review

[4] The applicant has exercised his right to appeal against the decision of the Board. Such right of appeal is provided by s 199 of the National Law which relevantly provides:

> (1) A person who is the subject of any of the following decisions (an **appellable decision**) may appeal against the decision to the appropriate responsible tribunal for the appellable decision –
>
> (a) a decision by a National Board to refuse to register the person…

[5] Pursuant to s 6 of the *Health Practitioner Regulation National Law Act 2009* (Qld), QCAT is declared to be the responsible tribunal for the purposes of the National Law. Pursuant to s 9 of the *Health Practitioner Regulation National Law Act* 2009 (Qld), a reference in the National Law to an appeal against a decision is to be read as a reference to a review of the decision as provided under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("*QCAT Act*").

Constitution of the Tribunal for the proceeding

[6] Pursuant to s 94(2)(b) of the *HO Act*, QCAT is given jurisdiction to review an appellable decision under s 199 of the National Law. The applicant's application to review is accordingly a "disciplinary proceeding" as defined in schedule 1 of the *HO*

Act. Accordingly, pursuant to s 97 of the *HO Act*, for the application to review, QCAT must be constituted by one judicial member[1].

Does s 126 of the *HO Act* apply so as to require the Tribunal to be assisted by assessors in conduction a hearing of the applicant's application to review?

[7] The provisions of part 10, division 5 of the *HO Act* provide for the establishment of, and appointment of individuals to, a public panel of assessors and professional panels of assessors for specified health professions including "a medical practitioners panel of assessors".

[8] The provisions of part 10, division 6 of the *HO Act* provide for the assistance of QCAT by assessors. Section 126(1) of the *HO Act* provides as follows:

> (1) In conducting a hearing of a disciplinary proceeding relating to a registered health practitioner, the tribunal must be assisted by—
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> (a) 1 assessor chosen by the principal registrar from the public panel of assessors; and
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> (b) 2 assessors chosen by the principal registrar from—
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> (i) the professional panel of assessors for the practitioner's profession; or
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> (ii) if the practitioner is registered in more than 1 profession—the panel of assessors for the profession to which the disciplinary proceeding relates.

[9] Whilst it seemed reasonably clear to me that the application to review, whilst clearly a "disciplinary proceeding", could not be described as "relating to a registered health practitioner", the parties were invited to file written submissions as to such matter. The respondent filed written submissions contending that s 126 of the *HO Act* did not apply to the applicant's application to review, for reasons which are largely reflected in the Tribunal's reasons for decision. On the other hand, the applicant filed written submissions contending that s 126 of the *HO Act* did apply such that the tribunal must be assisted by assessors in conducting a hearing of his application to review. Although he did not specify so, presumably the applicant contends that the Tribunal should be assisted by one assessor from the public panel of assessors and two persons from the medical practitioners panel of assessors. These reasons will deal with the applicant's arguments and why they are not accepted.

[10] Before turning to the applicant's arguments, some other relevant statutory provisions should be noted.

[11] The term, "registered health practitioner", is defined in schedule 1 of the *HO Act* to mean "a registered health practitioner or student under the National Law".

[12] The term, "registered health practitioner", is relevantly defined in s 5 of the National Law to mean "an individual who … is registered under this Law to practise a health profession, other than as a student".

[13] The term, "student", is defined in s 5 of the National Law to mean "a person whose name is entered in a student register as being currently registered under this Law." The term, "student register", is defined in s 5 of the National Law to mean "aregister

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1 The term, "judicial member", is defined in schedule 3 of the *QCAT Act*.

kept under section 229 by the National Board established for the profession." Section 229 of the National Law provides for each National Board to keep a student register that includes the name of all the persons currently registered as students by the Board. Section 89 of the National Law provides for the registration of students and s 90 of the National Law provides that the period of registration for a student starts when the student is registered under s 89 and expires at the end of the day on which the student completes, or otherwise ceases to be enrolled in, an approved program of study.

[14] The applicant firstly relies upon a passage from the reasons for decision of Judge Horneman-Wren SC in the matter of *Gupta v Medial Board of Australia* [2015] QCAT 142. In that matter a registered medical practitioner applied to the Tribunal for a review of a decision of the Board to place conditions on his registration. The Board sought leave to be legally represented in the proceeding. The Tribunal determined that leave was not required as the parties were entitled as of right to be legally represented pursuant to s 43(2)(b)(ii) of the *QCAT Act* which provided that a party may be represented if "the proceeding relates to taking disciplinary action, or reviewing a decision about taking disciplinary action, against a person". Judge Horneman-Wren SC stated as follows:

> [28] The *Health Ombudsman Act* defines a "disciplinary proceeding" to mean a proceeding for which QCAT has jurisdiction under s 94(1) or (2) of that Act.
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> [29] Section 94(1) confers jurisdiction upon QCAT: to review decisions of the Health Ombudsman to take immediate registration action in relation to a practitioner; to review decisions of the Health Ombudsmen to issue an interim prohibition order to a practitioner; to hear matters referred to QCAT by the director of proceedings on behalf of the Health Ombudsmen under s 103 of the *Health Ombudsman* Act; and to hear applications under s 110 of the *Health Ombudsman* Act to change or remove a condition imposed upon a practitioners registration my QCAT.
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> [30] Section 94(2) reflects the jurisdiction conferred upon QCAT under the National Law to hear matters referred to QCAT by a National Board under s 193B of the National Law, and to review appellable decisions under s 199 of the National Law.
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> [31] Thus all those matters, and most particularly for present purposes the review of all appellable decisions under s 199 of the National Law, are now defined to be disciplinary proceedings for the purposes of the *Health Ombudsman* Act.
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> [32] Section 97 of the *Health Ombudsman* Act requires QCAT to be constituted by 1 Judicial Member for a disciplinary proceeding.
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> [33] Section 126 of the *Health Ombudsman* Act requires QCAT in conducting a hearing of a disciplinary proceeding relating to a registered health practitioner to be assisted by assessors chosen from the public and professional panels of assessors established under that Act.
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> [34] Therefore, the Tribunal must now be constituted by a Judicial Member and be assisted by assessors when hearing reviews of

> appellable decisions identified in s 199 of the National Law because those matters are all now defined to be disciplinary proceedings.
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> [35] Another consequence of those matters all now being disciplinary proceedings is that, as the Explanatory Memorandum to the QCAT Bill makes clear, they are also matters of the type contemplated by s 43(2)(b)(ii) as being ones in which a party would be entitled to representation as of right.
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> [36] For these reasons, the Tribunal's leave is not required in order for a party to be represented by someone in proceedings concerning the review of an appellable decision identified in s 199 of the National Law.

[15] The applicant relies upon the Tribunal's reasons at [34] with the following additional emphasis:

> [34] Therefore, the Tribunal must now be constituted by a Judicial Member <u>and be assisted by assessors</u> when hearing reviews of appellable decisions identified in s 199 of the National Law because those matters are <u>all</u> now defined to be disciplinary proceedings.

[16] Whilst it is true that the quoted words, on their face, support the applicant's contention, I do not accept such contention. His Honour Judge Horneman-Wren SC was concerned with the issue of whether parties to a disciplinary proceeding, within the meaning of that term as defined in the *HO Act*, required leave to be legally represented or were entitled to such representation as of right. The *ratio* of the decision is properly confined to that issue. I am not departing from that *ratio* nor declining to follow the decision of his Honour in declining to accept the applicant's contention. The applicant relies upon *obiter dicta* and seeks to extend it beyond its proper application to the circumstances of the case before his Honour to quite different circumstances. Gupta undoubtedly involved "a registered health practitioner" within the meaning of that term as used in s 126 of the *HO Act*. His Honour was not required to give any consideration to the issue of whether the applicant was a registered health practitioner. His Honour's comments cannot be reasonably understood as contemplating the matter in issue in this decision which is whether the applicant is a "registered health practitioner" within the meaning of that term as defined in schedule 1 and used in s 126 of the *HO Act*.

[17] The terms of s 126(1)(b) of the *HO Act* require the professional assessors to be chosen from a professional panel of assessors "for the practitioner's profession" or "if the practitioner is registered in more than 1 profession – the panel of assessors for the profession to which the disciplinary proceeding relates." The applicant is not a member of, or registered in, any of the health professions for which professional panels have been established. Section 126 of the *HO Act* cannot, by its terms, apply to the applicant's application to review the Board's decision to refuse to register him in the health profession.

[18] The applicant is not a "registered health practitioner" as defined in schedule 1 of the *HO Act*. It is clear that the applicant is not "a registered health practitioner… under the National Law". It is the refusal to register him that he complains of.

[19] The applicant contends that he is a "student under the National Law" and thus a "registered health practitioner" as defined in the schedule 1 of the *HO Act*. That

contention cannot be accepted. The definition of "student" under the National Law has been referred to earlier. An evidentiary certificate pursuant to s 244 of the National Law under the hand of the chief executive officer of the Australian Health Practitioner Regulation Agency ("AHPRA") dated 10 January 2020 establishes that the applicant was registered as a student from 27 February 2012 until 18 October 2018. He is not currently registered as a student. He was not a "student under the National Law" when the decision the subject of review was made on 15 January 2019 or when his application to review the decision was filed on 28 February 2019.

[20] Whilst the majority of applications to review an appellable decision under s 199 of the National Law will be disciplinary proceedings relating to a registered health practitioner and subject to the requirements of s 126 of the *HO Act*, not all will be. The applicant's application to review is an instance of one which is not. That there may be appellable decisions pursuant to s 199 of the National Law which relate to neither a registered health practitioner nor student under the National Law is contemplated by the terms of s 199(2) of the National Law. The terms of s 199(2) of the National Law draw a distinction between decisions in relation to a "registered health practitioner or student" and "a decision in relation to another person". The decision in relation to the applicant falls into the latter category.

[21] Finally, the applicant submits that if the Tribunal "were of two minds on the issue, the safer path would be to accept the assistance of assessors as to do otherwise would risk having the decision set aside for want of jurisdiction as occurred in *Linquist*[2]". *Linquist* is a matter where the New South Wales Supreme Court set aside a decision of the New South Wales Civil and Administrative Tribunal for want of jurisdiction where the member made a decision without the legislatively mandated assistance of assessors. The applicant submits that if this Tribunal were to be found to be in error by making a decision without the assistance of assessors, then the decision would be set aside as in *Linquist*. The applicant submits that, on the other hand, if the decision was made by the Tribunal assisted by assessors and it were subsequently held that such assistance was not required, it is unlikely that the decision would be set aside simply because the Tribunal was assisted. The applicant submits that the Tribunal should therefore accept the assistance of assessors as a matter of caution. I do not accept the applicant's contentions. Firstly, I am not of "two minds" as to the matter. Secondly, to conduct the proceedings with the assistance of assessors where such is not mandated would also be doing so where such is not permitted. To conduct the hearing with the assistance of assessors would constitute a fundamental irregularity in the conduct of the hearing.[3]

[22] Proceeding OCR066-19 is not "a disciplinary proceeding relating to a registered health practitioner" within the meaning of that term as used in s 126(1) of the HO Act and the Tribunal directs that, in conducting the hearing of the proceeding, the Tribunal will be constituted by a judicial member without the assistance of assessors.

Further applications by the applicant

[23] By a document received by the Tribunal on 17 January 2020 the applicant purported to make applications described as "Applicant's Application for a Costs Order against the Respondent" and "Applicant's Application that Respondent's Disclosure be

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2 *Nursing and Midwifery Board of Australia v Linquist* [2019] NSWSC 978.

3 *Ting v Medical Board of Australia; Ting v Queensland Health* [2019] QCAT 192 at [10].

Verified by Affidavit". Such applications were not made in the applicable form and filed as required by the relevant provisions of the *QCAT Act* and *Queensland Civil and Administrative Tribunal Rules 2009*. Nevertheless, so as avoid further time and expense, the Tribunal will waive compliance with the procedural requirements under the *QCAT Act* and the rules applicable to the applications and proceed to hear and determine them.

Applicant's application for a costs order against the respondent

[24] Section 201 of the National Law provides that the Tribunal may make any order about costs it considers appropriate for the proceedings. The applicant erroneously refers to the costs provisions of s 100 and s 102 of the *QCAT Act*.[4] The applicant's application for costs is predicated on a misapprehension that the Tribunal would determine the question regarding the application of s 126 of the *HO Act* as contended for by him on the basis that he was a student under the National Law and thus "a registered medical practitioner" within the meaning of that term used in s 126 of the *HO Act* at relevant times. Based on such misapprehension, the applicant goes on to make submissions critical of the conduct of the respondent in the timing of its provision of the evidentiary certificate referred to earlier in these reasons. Given the decision of the Tribunal on the primary question, the circumstances do not justify any order for costs regarding such part of the proceedings. The question of costs of the proceedings is one which may be revisited following the determination of the application to review.

Application that disclosure be verified by affidavit

[25] This application appears to be motivated by the applicant's concern as to what he views as late disclosure of the evidentiary certificate referred to earlier in these reasons. The applicant submits that the circumstances of the late disclosure of the evidentiary certificate would be such as to lead the Tribunal to require the chief executive officer of the AHPRA to make an affidavit of discovery in certain terms. I am not satisfied that the circumstances require such and the application is refused.

Addendum

[26] This addendum is by way of correction of the reasons in the first two sentences of paragraph [24] of these reasons.

[27] The applicant was not in error in referring to the costs provisions of s 100 and s 102 of the *QCAT Act.* It was the Tribunal that was in error in failing to advert to the fact that s 201 of the National Law is inapplicable to these proceedings and that ss 100 and 102 of the *QCAT Act* do indeed apply.

[28] An application of ss 100 and 102 of the *QCAT Act* would not have led to the Tribunal making any different order on the application for costs.

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[4] See addendum.