DISTRICT COURT OF QUEENSLAND

CITATION:	*Malaguti v Orchard* [2020] QDC 242
PARTIES:	**MANUELA MALAGUTI** (appellant) **v** **ALFRED JAMIE ORCHARD** (respondent)
FILE NO:	320/19
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Southport District Court
DELIVERED ON:	25 September 2020
DELIVERED AT:	Southport
HEARING DATE:	3 August 2020
JUDGE:	Kent QC, DCJ
ORDER:	**The appeal is dismissed.** **I will hear the parties as to costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – HEALTH PRACTITIONERS REGULATION NATIONAL LAW – GENERALLY – where the appellant is a naturopath and self-titled 'Senior Consultant of Integrative and Functional Medicine - Oncology – where the appellant was convicted of two sets of four charges pursuant to ss 116(1(b)(i) and 118(1)(b)(ii) of the *Health Practitioner Regulation National Law* (Qld) respectively – where those charges concerned content published on the appellant's business website, business Facebook page, LinkedIn page and personal Facebook page – where the appellant appealed the decision of the learned Magistrate pursuant to s 222 of the *Justices Act 1886* (Qld) – whether the content indicated or could reasonably be understood to indicate that the appellant was a health practitioner, namely in the medical profession, and that she was authorised or qualified to practice in a recognised speciality, namely medical oncology.
CASES:	*Allesch v Maunz* (2003) 214 CLR 180-1. *Certain Lloyds Underwriters Subscribing to Contract No. IH00AAQS v Cross* [2012] 248 CLR 378. *Commissioner of Police v Al Shakarji* [2013] QCA 319. *Commissioner of Police v Broederlow* [2020] QCA 161. *Crowther v Sala* [2008] 1 Qd R 127.

	Fox v Percy (2003) 214 CLR 118. *Hann v Director of Public Prosecutions (Cth)* (2004) 144 A Crim R 534 *Lee v Lee* (2019) 266 CLR 129. *McDonald v Queensland Police Service* [2018] 2 Qd R 612. *Penev v The County Court of Victoria* [2013] VSC 143. *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] 194 CLR 355. *R v Lagos* [2003] QCA 121. *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679. *Rowe v Kemper* [2009] 1 Qd R 247. *Teelow v Commissioner of Police* [2009] 2 Qd R 489. *White v Commissioner of Police* [2014] QCA 121.
LEGISLATION:	*Acts Interpretation Act* 1901 (Cth), s 15AA. *Acts Interpretation Act* 1954 (Qld), s 14A. *Health Practitioner Regulation National Law* (Qld), ss 5, 116 and 118. *Justices Act 1886* (Qld), s 222.
COUNSEL:	G Diehm QC for the Appellant L Crowley QC with MJ Jackson for the Respondent
SOLICITORS:	Mills Oakley for the Appellant Kingston Fox for the Respondent

Introduction

[1] The appellant challenges her convictions in the Magistrates Court at Southport of eight offences against the *Health Practitioner Regulation National Law* (Queensland) (the "*National Law"*) pursuant to s 222 of the *Justices Act* 1886. My reasoning, set out below, is organised under headings as follows

- The relevant background
- The nature of the appeal
- A summary of the evidence
- The Magistrate's findings and reasoning process
- For each of the grounds in turn, the appellant's submissions, the respondent's response, and my consideration and conclusion relating thereto
- My final conclusion

Background

[2] There were four charges under s 116(1)(b)(i) of the *National Law* concerning the appellant using a title, name, initial, symbol, word or description (the content) on her business website (Charge 1); business Facebook page (Charge 2); LinkedIn page (Charge 3) and personal Facebook page (Charge 4). The prosecution case was that the appellant was "carrying on a business" and having regard to the circumstances in which she used the content, it indicated or could be reasonably understood to indicate that she was a *health practitioner, namely in the medical profession*, contrary to the subsection (perhaps summarised as the "health practitioner" offences).

[3] The final four charges were under s 118(1)(b)(ii) of the *National Law;* the same conduct with differing characterisation[1]. They concerned the same content on the appellant's business website (Charge 5); business Facebook page (Charge 6); LinkedIn page (Charge 7) and personal Facebook page (Charge 8). The prosecution case concerning these charges was that in the relevant circumstances she had used the content, she indicated or it could be reasonably understood to indicate that she was *authorised or qualified to practice in a recognised speciality, namely medical oncology,* contrary to the second relevant subsection (perhaps summarised as the "recognised specialty" offence). Thus there are two sets of four charges, brought under separate but similar provisions of the *National Law,* concerning the content. The respondent provided a helpful table summarising the various descriptions used by the appellant, where they are found in the evidence and their relation to the charges and particulars. A copy is Annexure "A" to these reasons.

[4] The charges, which are annexed to the Notice of Appeal, in each case provide relevant particulars. These set out details of the *National Law* and how it operates; the fact that the appellant has never had a relevant registration; her use of her ABN and trading name; and, in each case, the relevant factual particulars for the charge, that is, the details of the relevant published content used by the appellant and that it could be reasonably understood, in each case, to indicate the relevant meaning. I will refer to the elements of the offences later in the judgment.

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1 The elements of the offences being different, I do not understand there to be any argument advanced by the appellant as to potential duplicity

[5] The appellant has various qualifications but is broadly described as a naturopath. Although a number of grounds of appeal are pursued, broadly the appellant's argument at trial and on appeal is that the content made it clear to an ordinary person that this was her occupation or qualification, rather than anything within the two subsections charged; or perhaps, more precisely, that the prosecution could not establish its case to the contrary beyond reasonable doubt.

Nature of the appeal

[6] An appeal under s 222 is by way of rehearing. It is well established that, on an appeal under s 222 by way of rehearing, the District Court is required to conduct a real review of the trial, and the Magistrate's reasons, and make its own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view (*Fox v Percy* (2003) 214 CLR 118, 127-8 [27]; *Rowe v Kemper* [2009] 1 Qd R 247, 253 [3]; *White v Commissioner of Police* [2014] QCA 121, [6]). Nevertheless, in order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error (*Allesch v Maunz* (2003) 214 CLR 180-1 at [23]; *Teelow v Commissioner of Police* [2009] 2 Qd R 489, 493 [4]; *Commissioner of Police v Al Shakarji* [2013] QCA 319, [7], [65]; *White v Commissioner of Police* at [8]).[2]

[7] The respondent submits that in *Robinson Helicopter Co Inc v McDermott*[3] the High Court held that an Appellate Court should not interfere with a Judge's findings of fact unless they are demonstrated to be wrong by incontrovertible facts or uncontested testimony or are glaringly improbable or contrary to compelling inferences. Respect and weight should be given to the trial Judge's analysis.[4] The appellant engages this somewhat, referring to *Lee v Lee*[5] although the passage referenced also preaches restraint in relation to findings of secondary facts based on impressions about witnesses and other inferences from primary facts.

[8] No doubt in this case I am in as good a position as the Magistrate where many of the facts are not contested; however I do not consider (consistent with the authorities referenced in [5] above) that I should not give the Magistrate's conclusions a degree

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2 *McDonald v Queensland Police Service* [2018] 2 Qd R 612 at 627, [47] per Bowskill J
3 (2016) 90 ALJR 679 at [43].
4 Supra at [56].
5 (2019) 266 CLR 129 at 148, [55]

of respect, while reaching my own conclusions on the review; and I am not otherwise in a position, nor am I required to be (in my view), to resolve any possible tension between *McDermott* and *Lee*.

[9] In this case, the relevant factual substratum, namely the appellant's association with the content and that she did not have the relevant qualifications, are not in issue. Rather, the central question, in my view (although there are other grounds, dealt with below), is the correctness or otherwise of the Magistrate's conclusions on the essentially semantic (i.e. relating to the meaning of words or phrases) question of what, in context, the content indicated or could reasonably be understood to indicate to a reader, or in some cases, a viewer. Those findings in my view are essentially factual findings, or possibly a mixed question of fact and law (in the sense that the meaning may be informed by, or interpreted against the backdrop of, the legislative framework).

[10] I will address all of the grounds of appeal in order, although the most overarching, and possibly the most important, are grounds 6 and 7, dealt with together below. These grounds occupied much of the oral argument.

The evidence

Preliminary Correspondence

[11] The prosecution was, in effect, brought on behalf of the Australian Health Practitioner Regulation Agency ("AHPRA"). AHPRA wrote to the appellant on 7 November 2017 raising concerns about her activities with reference to enclosed material including advertising from a number of sources which indicated or could reasonably be understood to indicate that the appellant was an "oncologist"[6]. Reference was made to a number of websites including a Facebook account. The correspondence indicated concern that the appellant's activities may be contravening provisions of the *National Law* relating to claims to be registered as a health practitioner or a specialist health practitioner as well as advertising. Reference was made to s 116(1)(b) and 118(1)(b) of the *National Law* and concerns that the material could be reasonably understood to indicate that the appellant was a registered health

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6 This and other preliminary correspondence is the subject of a ground of appeal as to its admission, but it is set out here as part of the factual matrix

practitioner and that she should not use the title "oncologist". She was warned of possible consequences of contravention of the *National Law* and given an opportunity to respond.

[12] It is common ground that the appellant has never been registered as a health practitioner or a specialist health practitioner with the Medical Board of Australia.[7]

[13] The appellant responded to APHRA's letter on 13 November 2017. Her letter is on the letterhead of "Cassia Wellness Clinic". She asserted that she has been a registered health professional for 20 years with "ATMS" (possibly a reference to the Australian Traditional Medicine Society, a group not affiliated with or regulated by AHPRA). The letter asserts she has never claimed to be a specialist practitioner, but rather to be a "specialist consultant of integrated oncology". She acknowledged potential confusion and that she had rectified the wording on a number of websites.[8]

[14] APHRA wrote back on 28 November 2017 expressing its continued concerns in relation to the appellant's self-description as an "integrated medicine practitioner" and her services as "clinical integrated oncology".[9]

[15] The response on 1 December 2017, was that the appellant had deactivated her Facebook page and website to be reviewed for "wordings in accordance to AHPRA directives". There is then evidence that the defendant communicated with the practice manager of the Cassia Wellness Clinic on 21 December 2017 referring to an intensive course she had done on "integrative oncology" offered to "NDs" (possibly a reference to a naturopath) in Australia by an American ND, and saying that the phrase integrative oncology is widely used in the relevant commercial advertising. She expressed the belief that she was allowed to use these terms.[10] She later reasserted this entitlement in correspondence of 23 December 2017, attaching an article from the journal of National Cancer Institute, USA.[11] Further correspondence ensued, seemingly with each side entrenched in their contrasting positions.

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7 See list of admissions, Document 1 in the bundle of exhibits (for clarity, I will refer to the "Bundle of Exhibits" which was before the Magistrate and is in a plastic binder. There is a court file document, No. 4, entitled "Exhibit Bundle", which contains similar material in a different order. The exhibit numbers referred to are the ones in the binder).

8 Exhibit 4 in the bundle of exhibits.

9 Exhibit 5.

10 Exhibit 7.

11 Exhibit 8.

[16] The correspondence formed a background to the charges, the charged period being later in time than the correspondence[12], and the correspondence being said by the respondent to pre-warn the applicant at least that there was reasonable concern as to her descriptions being misleading; and, importantly, that this concern was held by the regulating authority. An adjunct to this argument is that if AHPRA found the content misleading, so could a reasonable member of the public. The respondent also submits that the correspondence shows the appellant's management and control of the various sites, such as to establish her use of the content; and it is said to include admissions – statements against interest – in the letters of 13 November and 1 December. There are also some parts of the correspondence from the appellant expressing her contentions as to the relevant behaviour – see e.g. the statements in [13] above.

The content and its relation to the charges

[17] The relevant various screenshots relied on are pages 81 to 101 of the exhibit bundle, Exhibit 12. For the first four charges (the "health practitioner" offences), the relevant breach was alleged to be of s 116(1)(b)(i), that a person who is not a registered health practitioner must not knowingly or recklessly take or use a title, name, initial, symbol, word or description that, having regard to the circumstances in which it is taken or used, indicates or could be reasonably understood to indicate … the person is *authorised or qualified to practise in a health profession*. For the second group of four charges (the "specialty" offences), s118(1)(b)(ii), the conduct is to similar effect, with reference to the same content, but the reasonable understanding indicated is that she was *authorised or qualified to practise in a recognised specialty (medical oncology)*. There was no contest that the appellant used the content on the various sites; rather the dispute is as to the meaning, or "reasonable understanding".

[18] In my review of the trial and the Magistrate's reasons, I will record the Magistrate's findings and reasons and where appropriate add some of my own observations on the evidence. The charges are conveniently grouped together in pairs which refer to the same content.

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[12] Broadly between May and July/August 2018, apart from charges 4 and 8 which encompass August 2017 to July 2018

The Magistrate's Findings and Reasons

Charges 1 and 5 – the website

[19] The extracts from Exhibit 12, the website printouts, noted by the Magistrate include the following from page 83 under the heading "what I offer":

> "My approach to cancer treatment focuses on holistic evidence based therapies to correct metabolic dysfunction at the cellular level. This process, in turn, has been shown that it may inhibit cancer development, progression and metastasis."

There is also reference to blocking the activity of the collagen digesting enzyme.

[20] At page 84 of Exhibit 12, as the Magistrate noted, it is said:

> "Manuela looks at the mechanisms of initiation and development of cancer including infection, immune dysfunction, information, oxidative stress, impaired detoxification, hormonal imbalances and environmental factors. All of these affect gene expression, cell growth messenger, angiogenesis and apoptosis which is the death of a cell."

On the same page there is reference to "individualised medical blueprint investigation based on advanced diagnostics such as genetic tumour profiling collected in real time, targeted immunotherapy, next generation sequencing, metastatic analysis, and oncologenamics biologics testing".

[21] On page 85 there is reference to a personalised holistic cancer care program based on specific assessment and treatments:

- Medical blueprint with individualised diagnostics
- Genetic tumour profiling collected in real time
- Targeted immunotherapy as well as a number of other matters.

At page 86 there is reference to her appointment as an external expert by the European Centre for Disease Prevention and Control in Sweden, which is an honorary position aimed to "provide independent *scientific* opinions, expert advice, data and information" and "to maintain *scientific* excellence at all times through the best expertise available" (emphasis added).

[22] At 101, the appellant says:

> "At the end of your comprehensive two hours initial consultation, you will receive a detailed practitioner's report, a script, a referral if necessary and a health insurance claim. Please note that supplements/medications can be dispatched to your private address if required by express mail/FedEx/DHL. Additional assessments, nutritional supplements, herbal medicines, homeopathic remedies or other protocols are at an extra cost to the consultation."

All of the above is contained in screenshots from the appellant's website, www.manuelaboyle.com.au. The pages also refer to "holistic cancer support" and "sophisticated technology with the latest scientific evidence" (at page 82).

Charges 2 and 6 – the business Facebook Page

[23] Next, as found by the Magistrate, the appellant's business Facebook page contained a number of statements wherein the defendant advertises herself as Manuela Boyle, clinical and integrative oncology. This includes the statement that:

> "Integrative oncology is simply a healthier way to stand up to cancer. It blends conventional and alternative evidence based medical proven methods."

Charges 3 and 7 - LinkedIn

[24] These charges concern the appellant's LinkedIn pages and are found in Exhibit 13 of the bundle of exhibits. The relevant statements include the following as a description of the appellant:

> "Manuela Boyle, researcher and clinician of functional medicine and integrative oncology/media personality/author/international speaker".

[25] Under the general heading of "Experience" and the sub heading of an apparent title of "Senior Consultant of Integrative and Functional medicine – Oncology", the description continues:

> "Intravenous therapies, whole of body hyperthermia, local hyperthermia, hyperbaric oxygen therapy, botanicals, nutrigenomics, dietary, chemo sensitivity tests, tumour gene tests, circulating tumour cells."

[26] The "Experience" heading also includes the sub-heading "Consultant Clinician of Integrative and Functional medicine – Oncology".

[27] There are also further descriptors, as listed in the particulars, which on the respondent's case convey the indication of the appellant being a health practitioner or medical oncologist.

Counts 4 and 8 – the personal Facebook Page

[28] These charges relate to the appellant's personal Facebook pages and are found in Exhibit 15. As found by the Magistrate, the exhibit refers to the appellant being an integrative oncologist, in an entry of 13 October 2017; "cancer is a multifaceted and complex chronic disease that requires an integrative medicine approach", on the 15 October 2017; she is self-described as "an extremely busy integrative oncologist with back to back patients", on 29 October 2017; and on 1 December 2017 there is a post displaying a diagram comparing different aspects of "Conventional Medicine" as opposed to "Functional Medicine". The appellant's comment in relation to this is as follows:

> "A mutually empowering patient/practitioner relationship is highly regarded in the functional medicine model (my model of health care). Does it matter?"

[29] The appellant relies on the last mentioned post in part, arguing that the very nature of the displayed diagram – *i.e.* that it presents the two types of medicine as a dichotomy (two mutually exclusive groups) - is suggestive of the idea that the appellant is practising something other than conventional medicine.

[30] Again, there are other relevant descriptors used, as listed in the particulars.

The Magistrate's Analysis

[31] Prefacing her commentary of the above evidence (although not in precisely the same terms as I have recorded) the Magistrate described her approach to the question of whether the relevant "indications" in each case were being given. Her Honour accepted the appellant's counsel's invitation to analyse the matter on the basis that what the ordinary reader would understand from the descriptions was central, and that such a person would know that various people with a variety of qualifications call themselves "Doctor"; that medical doctors' qualifications in Australia are typically MBBS (Bachelor of Medicine and Bachelor of Surgery: the Latin terms are

Medicinae Baccalaureus, Baccalaureus Chirurgiae); and that there are alternative health practitioners, including naturopaths, using diets and herbs.[13]

[32] In submissions at the trial, reference was also made to *Penev v The County Court of Victoria*[14], relevantly at [61]:

> *"Furthermore, in order to find charges proven under s 80(1), it was necessary for the County Court to consider whether members of the public would or could reasonably understand Ms Penev's advertising of laser acupuncture to indicate she was a practitioner in the health profession regulated by the CM Board or amount to holding herself out to be registered under the HPR Act. That was not a question that could be answered simply by construing the statute. It required attention to the circumstances in which the advertising took place, including such matters as the context and content of the offending advertisements and whether, indeed, 'laser acupuncture' was something that was usually provided by registered practitioners of Chinese medicine."*

And at [62]:

> "*The County Court made no findings about what Ms Penev's use of the words 'laser acupuncture' indicated (or might be reasonably understood to indicate) in the circumstances in which those words were used. The Reasons contain no analysis of the content of the advertising, the context in which the advertisements were published, the nature of the treatment itself or the context in which it was provided. The only part of the advertisements referred to in the Reasons is the description of 'laser acupuncture' as 'acupuncture without needles'. This seems to comprise the 'factual' basis upon which the court concluded that laser acupuncture was a sub-set or form of acupuncture. However, it was no more than an expression of opinion by Ms Penev. It was not something upon which the court could rely to relieve itself of the task of making findings based on admissible evidence in respect of the elements of the offences charged."*

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13 Page 4 of the Decision
14 [2013] VSC 143

[33] In my view, applying the above reasoning, in analysing the reasonable understanding of members of the public, it is important to attend to the circumstances of the advertising, the context and content thereof, and, transposing the above analysis, whether "oncology" is something usually provided by registered practitioners (*i.e.* those registered under the *National Law*), particularly where the setting, as it generally seems to be in this case, is a discussion of the treatment of cancer.

[34] Having set out her references to the evidence, her Honour said:

> "A consideration of all of these advertisements demonstrates the defendant is generally described as a holistic medicine practitioner which only vaguely associates her with the provision of an unidentified – sorry undefined alternative health care program which, taking into account all of the other words in the articles, I think, is a weak and poor attempt."[15]

[35] While it is not completely clear to me, I think the Magistrate was conveying that the appellant was making a poor attempt to define her program and, accordingly, distinguish her activities from those of a registered health practitioner.

[36] Her Honour went on to observe that although there are many references (in the advertisements) to, broadly, therapies of the naturopathic type, such as diet, herbal extracts, nutrients and botanicals etc., her Honour concluded that such was not the predominant part of the advertisements and was secondary to the other references which, having regard to the circumstances in which they are used, indicate or could reasonably be understood to indicate that she is a registered health practitioner. [16]

[37] Her Honour concluded that the advertisements and statements were carefully crafted and in effect were highly suggestive of the idea that the appellant is a registered health practitioner. The claims were subliminal, rather than overt; however the Magistrate found it clear that the description of the services offered sound and looked like they are delivered by a registered health practitioner,[17] while acknowledging that testimonials do not identify her as a medical practitioner, and there are references to alternative health practitioner.[18]

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15 At page 7 of the Decision
16 Decision p7 ll20-21
17 *Ibid* ll23-30
18 *Ibid* ll32-38

YouTube Video

[38] Part of the evidence is a recording of a YouTube video[19] which overall plainly, as her Honour found, demonstrates a view against traditional western medicine. It includes, in the section involving the appellant, a reference to a patient who contrasts the appellant's treatment with "Western treatment".[20] The lengthy presentation (1 hour 25 minutes, all of which I have viewed) includes a large number of interviews by the main presenter with a large number of practitioners of alternative medicine, and disciplines such as chiropractic (which is required in Australia to be registered by AHPRA and, at least in the United States and Canada, seems to be described by the qualification "D.C."); but also including some people who are conventional medical practitioners.

[39] It is at times very critical of the western medicine model, and some of the language is very inflammatory and at times, with respect, in my view, borders on the absurd (e.g. commentary inferring the Therapeutic Goods Administration corruptly assists the medical profession to the detriment of the public, by requiring some preparations to be supplied on prescription). The few minutes relating to the appellant, commencing at about 1 hour 10 minutes into the video, are somewhat more moderate, at least in content; however some of it nevertheless supports the prosecution case. For example, she is introduced as "Doctor Manuela Boyle" and the screen includes her qualifications as "Ph.D. N.D." and the description "**Integrative Medical Practitioner**, Author & International Lecturer" (emphasis added).

[40] The appellant mentions having "worked with" cancer patients in Milan, London, Singapore and Australia. She asserts that "conventional treatment" is "one size fits all" which is inappropriate. She refers to botanical agents, nutritional supplements, designing a treatment for the particular patient, and the fact that she and her team have the ability to use an amazing machine involving "hypothermia" (or perhaps "hyperthermia"). She also refers to intravenous vitamin E, glucothyamine, and dendritic vaccine. She says that her treatment is evidence based, including human clinical trials and is very successful. There is also an endorsement from a Mr Beaty who benefited from her treatment, which seems to have been complementary to his

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19 This is referred to in the particulars for charges 1 and 5

20 Decision p8 ll1-9

conventional cancer treatment, and he feels he recovered more quickly and easily from his treatment because of the appellant's help, compared to other similar patients without that help.

[41] This is part of the evidence which puts the circumstances and content of the advertising into context, which as outlined above is a necessary part of the reasoning process.

[42] The Magistrate noted that the use of the term "integrative oncologist" is different from "medical oncologist". Her Honour continued:

> "Professor Barton gave evidence for the prosecution. He has had 35 years of treating cancer with radiation. He said 'oncologist' is a recognised medical specialist, a medical practitioner who holds qualifications from a recognised medical college. There are four recognised types of oncologists and that integrative oncology was definitely not a sub-speciality."[21]

[43] Her Honour noted that the methods apparently employed by the appellant are alternative to treatments prescribed by a medical practitioner and/or specialist. Nevertheless her Honour's finding was that a consumer without extensive knowledge in the area of medical oncology would be encouraged by the advertisements, including the context and content, to expect that they would be dealing with a registered health practitioner.[22]

[44] The Magistrate also found that although the appellant was offering therapies that are complementary (which I understand, in context, to be a reference to something which completes or makes perfect another thing) to medical models of care, she did not indicate in clear terms that she is not a health practitioner, and there was a strong inference that she is offering the alternate therapies whilst being a registered health practitioner, where there is no mention of her discipline.[23]

[45] Her Honour found that the references to the appellant being a functional medical practitioner and references to "integrative oncology" and "integrative medicine" may reasonably be understood by an ordinary reader that the defendant is a medical

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21 Decision p8 ll11-16
22 *Ibid* ll22-26
23 Decision p9 ll13-17

practitioner or oncologist, where the discipline or specialty of the appellant was not identified.[24]

[46] Her Honour found that having regard to the content and context (consistently with *Penev*) it would have been a simple thing for the appellant to clearly indicate that she was not authorised or qualified to practise in a health profession or in a recognised specialty, as described in the legislation, however the language used in the circumstances in which it was used contributed to the understanding of a reasonable person that the appellant was an oncologist and a registered health practitioner.[25] The Magistrate referred in this context to the correspondence from AHPRA raising the relevant concerns.[26]

[47] In my view these observations by the Magistrate are well made; the appellant could have simply and clearly described herself as a naturopath, and chose not to despite the expressed concerns of AHPRA.

[48] The Magistrate referred to the correspondence and the appellant's reference to the article entitled "A Comprehensive Definition for Integrative Oncology". Her Honour noted that the article clarifies that integrative oncology is the term being adopted to embrace complementary and alternative medicine but integrated with conventional treatment. Her Honour considered that where the advertisements were ambiguous, caution should be taken to properly nominate the practitioner discipline so as to communicate that she was not a registered health practitioner pursuant to the *National Law.*[27]

[49] Thus her Honour found that the appellant, by reinstating her advertisements, demonstrated recklessness in continuing to advertise as she had previously done. It was noted that the appellant did not outright claim to be a registered health practitioner. Various abbreviations for qualifications follow her name in the publications and are academic qualifications other than a medical degree[28]. However,

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24 *Ibid* ll26-30
25 *Ibid* ll32-39
26 Decision p 9 l41 – p10 l25
27 Decision p10 ll26-40
28 The appellant's counsel submitted that the material showed she has a Bachelor of Arts and a Master of Public Health from the University of Queensland, she is a Ph. D. scholar at the University of New England School of Health and Medicine, she has a qualification in communication and media studies and a Bachelor of Health Science in complementary medicine: Appeal Hearing, T1-41

as her Honour noted, the repetitive use of the words "oncology"' and "clinical integrative oncology" as well as a number of other terms were definitely suggestive of the appellant being a health professional, and the ordinary reasonable reader would think her to be a registered health practitioner.[29]

[50] Thus the Magistrate found the appellant guilty of each of the charges.

The appellant's submissions

Ground 1 – recognised specialty

[51] The first challenge is to Charges 5 to 8 globally pursuant to s 118, requiring as they do the identification of a "recognised specialty". The point is that a table was produced which is the list of specialties, fields of specialty practice and related specialist titles approved by the Australian Health Workforce Ministerial Council on 31 March 2010 with effect from 1 July 2010. It sets out the three separate headings in a table, and is, relevantly, found at page 31 of Exhibit 2 of the bundle of exhibits. Relevantly, the specialty applicable is that of "physician". The fields of specialty practice associated with the speciality of physician include medical oncology, and the specialist title attached thereto is "specialist medical oncologist".

[52] What the appellant submits on this topic is that "recognised speciality" is a term defined in s 5 of the *National Law* to mean "a specialty in the health profession that has been approved by the Ministerial Council under s 13.2". Section 13.2 of the *National Law* provides that if a health profession is a profession for which specialist recognition operates, the Ministerial Council may approve a list of specialties for the profession and one or more specialist titles for each speciality in the list. Clearly enough, this is what happened, as the list indicates.

[53] The appellant's point in this regard is that there is not a separate recognised specialty of "medical oncology"; rather, the relevant speciality is that of physician, and "medical oncology" is a field of speciality practice. This, so it is argued, is fatal to counts 5 to 8 because the Magistrate erroneously found that there was a recognised specialty of "medical oncology".[30]

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29 Decision p10 l41 – p11 l31
30 Decision p3 l16

Response

[54] The respondent submits that he was required to prove a "recognised specialty" for the purpose of these charges and did so. The list of specialties must be read in conjunction with the related fields of specialty practice approved by the Ministerial Council, and "medical oncology" is a field of specialty practice of the related recognised specialty, namely physician. It is therefore a recognised specialty approved under s 13.2 of the *National Law*. The respondent refers to principles of statutory construction including the following observation from *Project Blue Sky Inc v Australian Broadcasting Authority*:[31]

> "Ordinarily… the legal meaning… will correspond with the grammatical meaning of the provisions. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

[55] In this context, the respondent refers to the *National Law* and in particular s 3A headed "Paramount guiding principle". It provides:

> "The main principle for administering this Act is that the health and safety of the public are paramount."

[56] Section 5 provides definitions. "Health practitioner" means an individual who practises a health profession. "Health profession" means the following professions which are set out and includes a recognised specialty in any of the following professions. One of the professions listed is (e) medical. "Medical practitioner" means a person who is registered under this law in the medical profession.

[57] The respondent's submission continues that the aim of statutory interpretation is to determine and give effect to the intention of the Parliament as disclosed by the language used in the statute.[32] Thus in light of the purpose and language of the *National Law*, it was not intended, in the context of the paramount principle of the health and safety of the public, that a person could hold themselves out, for example, as a "cardiologist" and not be found to have been holding themselves out in a recognised specialty. "Cardiology" is in the same category as medical oncology, as

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31 [1998] 194 CLR 355.

32 *Certain Lloyds Underwriters Subscribing to Contract No. IH00AAQS v Cross* [2012] 248 CLR 378 per French CJ and Hayne J at 389 [25] and Kiefel J (as her Honour then was) at 411 [88].

a field of specialty practice related to the specialty of "physician". As I understand the submission, it leads to the proposition that to hold oneself out as a medical oncologist is, in the context of the approved list of specialties, to hold oneself out as a specialist physician with a field of specialty practice described as medical oncology.

[58] In the context of that analysis, it is relevant to bear in mind that the charges under s 118, relating to claims by persons as to specialist registration, charge the appellant with using a description that, in the circumstances indicates or could be reasonably understood to be the case, the person is authorised or qualified to practise in a recognised specialty. Here, if the appellant is found to have used a description that in the circumstances indicates or could reasonably be understood to indicate that she was a medical oncologist, this would be a field of specialty practice and thus a field of the specialty of physician and in that way the elements of the legislation are satisfied. Thus the Magistrate was correct to find at T3, l 16 of the transcript of her decision that "medical oncology has been established as a specialty".

Consideration

[59] In my view, the respondent's submissions on this point should be accepted. Particularly considering the overriding principle for administration of the Act, that the health and safety of the public are paramount, when one approaches the task of statutory construction in accordance with recognised principles (including the purpose of the Act, or the "mischief" the statute is intended to remedy, namely the protection of the health and safety of the public, by avoiding practice of aspects of medicine, intended to be regulated by the *National Law*, by unregistered practitioners[33]), the conclusion contended for by the respondent must be correct. It would, in my conclusion, be somewhat anomalous if, to use the analogy parallel to that advanced by the respondent, one could describe oneself as a "medical oncologist" and because the descriptor "physician" was not included, the person could not be found to have used a description capable of indicating that they were authorised or qualified to practise in a recognised specialty, notwithstanding the way in which the terms interrelate in the table.

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[33] See *Commissioner of Police v Broederlow* [2020] QCA 161 at [15]-[17] and the cases there referred to; also *Acts Interpretation Act* 1901 (Cth), s 15AA; *Acts Interpretation Act* 1954 (Qld), s 14A(1)

Ground 2 – objection to admission of the preliminary correspondence

[60] The second ground advanced was that the preliminary correspondence referred to above should not have been admitted into evidence.

[61] The appellant argues that the evidence was irrelevant to the charges and it should have been excluded or alternatively regarded as providing no evidence tending to prove the guilt of the appellant. It is submitted that AHPRA wrote to the appellant about the content of various digital publications, several of which were not the subject of charges and making allegations of wrongdoing under a variety of provisions, several of which the appellant was not charged with. Further, it is submitted that the correspondence related to publications at a different date and was very generally expressed such as to raise doubt as to its relevance to the publications with which the appellant was charged. It is said that the Magistrate did not acknowledge these weaknesses in the evidence.

Ground 3 – the trademark evidence

[62] Similar objection was taken to the admission of the trademark evidence. This is document 18 in the bundle of Exhibits, which is a screenshot of the Australian Trademark database search for the "Inspired Cancer Care Program" dated 6 August 2018.

[63] The appellant submits that it appears the Magistrate placed some reliance upon the "trademark" and to the extent her Honour did say this, it was misplaced because the fact of the trademark had no relevance to the charges.

Response

[64] The respondent treated these two grounds together. He points out the purpose of the correspondence which was firstly to establish "management and control" of the various sites because the respondent was required to prove that the appellant had "used" the content. Secondly, the correspondence included statements against interest made by the appellant to AHPRA and/or admissions by conduct. The respondent refers to the appellant's correspondence of 13 November 2017:

> "I have never claimed to be a specialist practitioner but to be a "specialist consultant of integrative oncology". I understand that some of the terminology may have caused confusion and I have rectified the

> wording. As requested, all changes have been made according to your guidelines to the following: …"

What follows is reference to three websites and the associated Facebook pages. Further, the respondent refers to the appellant's correspondence of 1 December 2017:

> "I am responding to the claims in the above correspondence. Please note:
>
> (1) I deactivated my Facebook page on 29 November 2017. The deactivation will take seven days to become effective.
>
> (2) My website was shut down on 29 November 2017 to be reviewed for wordings in accordance to AHPRA directives."
>
> Kindly accept my apologies for any confusion that I may have unwittingly caused".

[65] However, the respondent points out that the applicant later reinstated her website and advised AHPRA she was doing so. The respondent's submission is that the objection was not really pressed at the trial quoting the appellant's counsel from the transcript:

> "So your Honour would admit their tender when that part of the evidence comes, but of course, what weight is to attach to them…is another matter."[34]

[66] The respondent points out that he had to prove at least that the appellant was reckless. Thus it is important that the exchange of correspondence was prior to any of the respective charge periods and thus plainly relevant to proving that the appellant was aware of the substantial risk and it was unjustifiable to take that risk.[35] It is further submitted that this is how the magistrate made use of the correspondence. Her Honour referred to the relevant passages and found that:

> "The (appellant) by reinstating her advertisements establishes, beyond a reasonable doubt, that she recklessly was prepared to continue to advertise as she had previously done, which offends the law."[36]

Thus the respondent submits that on a proper understanding of the evidence there can be no challenge to its admissibility. It was plainly relevant and probative and the magistrate cannot be said to have given it undue weight.

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34 Transcript Day 1 – T1-14, ll 17 – 18.
35 The respondent refers to *Hann v Director of Public Prosecutions (Cth)* (2004) 144 A Crim R 534.
36 Decision page 9, l 26 – 32.

[67] In relation to the trademark evidence, this was led because the company, ICCP Health Pty Ltd, of which the appellant was the sole director, applied for the trademark. The Inspired Cancer Care Program was referred to on the appellant's website.

[68] Thus it, like the correspondence, proved the appellant's "use" of the website and specific words and descriptions that the appellant used on it. The trademark related to that element but also because it was, in effect, linked to the page on the appellant's website which provided some of the "assessments and treatments" offered by the appellant. The appellant advertised "a personalised holistic cancer care program based on specific assessments and treatments".[37] Thus it is submitted the evidence had the capacity to assist in the evaluation of the evidence and what it meant to a reasonable person; and therefore was properly admitted for a legitimate purpose.

[69] Thus it is submitted by the respondent that the Magistrate legitimately admitted the evidence of the trademark and properly referred to the words used at pages 84 and 85 of the Exhibit bundle, which according to Her Honour "speak of the signs and cure of cancer in language which is largely medical". Her Honour observed that there was scant reference to natural therapies. This is submitted to be an accurate analysis and a proper use of the evidence which was admissible and having sufficient probative value in relation to the facts in issue. Thus the Magistrate did not place any undue weight thereon.

Consideration

[70] In my conclusion, the respondent's arguments as to Grounds 2 and 3 should be accepted. The evidence of the preliminary correspondence was legitimate and probative for the purposes for which it was led, and was indeed evidence of significant weight when considering the degree of recklessness with which the appellant reinstated her websites. Similarly, the trademark evidence was caught up in the appellant's use of the website and the specific words and descriptions therein.

[71] Considering the purpose of the introduction of the two bodies of evidence under discussion, both were admissible and available to be used in the reasoning process in the way submitted by the respondent, and as seems to have been conducted by the

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37 Tab 12 of the bundle of exhibits, page 85.

Magistrate. In my conclusion these grounds of appeal do not disclose any appealable error.

Ground 4 – possible misdirection

[72] This ground is that Her Honour misdirected herself as to the relevant test for the purposes of charges 1 to 4 inclusive in that the relative offence was to cause an understanding that the defendant was a "registered health practitioner" or a "health professional" or a "health practitioner" when the relevant test was whether the title, name, initial, symbol, words or descriptions used indicated, having regard to the relevant circumstances, that the defendant was a health practitioner, in the medical health profession.

[73] What the appellant submits is that the reasons use these three descriptive terms somewhat interchangeably without reference to the statutory definition of the offence and the narrowness of the particulars of the charge.

[74] The submission acknowledges that although the various digital publications may convey a meaning that the appellant is a person who provides health services, and in that sense a health practitioner, the true question was narrower, and this escaped the Magistrate's attention in the reasoning. This is advanced as another basis on which it can be said the Magistrate fell into error.

Response

[75] The respondent acknowledges that at different points Her Honour did use these different terms, however Her Honour understood and appreciated what was required for the respondent to succeed in proof of the four offences under s 116(1)(b)(i) of the *National Law.*

[76] The respondent points out that the Magistrate correctly referred to the statutory wording at the commencement of her decision.[38] Secondly, Her Honour was aware of the distinction between s 116(1)(b)(i) and 118(1)(b)(ii) under the *National Law.*

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[38] Decision, p 2, ll 10-35.

[77] The respondent also submits that the Magistrate referred to the complaints.[39] The complaints were amended by consent both verbally and in writing[40] The respondent further submits that the Magistrate explicitly referred to the particulars being outlined on the complaint. The reference here is to page 3 of the decision, lines 18-22, however that passage refers to admissions being made with respect to the charges.

[78] The submission is that despite at times using the various terms interchangeably throughout the course of her decision, nevertheless the learned Magistrate correctly directed herself as to the offence provisions and particulars of the charge. Any looseness of language did not affect her analysis. Thus it is argued that there is no basis to conclude that the Magistrate misdirected herself simply because of these interchangeable terms.

[79] It is further argued that the particulars of charges 1 to 4 were clear to the Magistrate because her Honour was aware of the requirement of a finding that the appellant could be reasonably understood to be a "health practitioner" in the "medical health profession". Reference is made to a passage at page 5 of the transcript of the decision, dealing with passages from Exhibit 12:

> "There are many examples of names, initials, symbols, words and description which are suggestive of services offered by the defendant being offered as a health practitioner. I will refer to certain – to some of them. When Ms Boyle Malaguti offered or advertised cancer treatment programs as an intuitive (*sic* - integrative) oncologist in circumstances where it would be understood to indicate that she was a practitioner registered by the Medical Board to carry out cancer treatment or its use amounts to an indication to be registered or holding out that she was registered under the *Health Practitioners Act*."[41]

Thus it is argued that the Magistrate was aware of the requirement to find that the appellant could be reasonably understood to be a "health practitioner" in the "medical health profession".

[80] As to the business Facebook page, Her Honour said:

> "The defendant here attempts to be offering therapies that are complementary to medical models of care. However, at no point does she indicate in clear terms that she is not a health practitioner in the

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39 Reference is made to the decision p 3, l 18, which is a reference to admissions made with respect to charges 1 to 8.

40 Transcript T1-3, l 1 to T1-4, l 42.

41 Decision p 5, ll 15-22.

> medical health profession. I think this is a strong inference that she is offering the alternate therapies whilst being a registered health practitioner as there is no mention of her discipline."[42]

This is indicative, so the submission goes, of the Magistrate considering the correct question.

[81] The submission also refers to the following passage:

> "These references to the defendant being a functional medical practitioner and references to 'integrative oncology' and 'integrative medicine' to the ordinary reader, may mean or reasonably be understood by them to mean that the defendant is a medical practitioner or oncologist because of the discipline or speciality of the defendant is not identified."[43]

This is submitted to be a clear indication of the Magistrate distinguishing between the separate offence provisions, referring separately to a medical practitioner or oncologist.

[82] Further the respondent argues that the appellant's submission is redundant where the references challenged by the appellant were not part of the Magistrate's decisive findings, rather being part of a narrative. The respondent submits that the references do not invalidate the Magistrate's findings because she was aware, and satisfied herself of, the correct legal tests and essential ingredients of the offences.

[83] It is correct that, as the respondent submits, the relevant parts of the sections were referred to at page 2 of the Magistrate's decision. Then on page 11, line 26 to 31 the conclusive finding is made as follows:

> "I find that, beyond a reasonable doubt, the defendant's use of title, name and initials, symbol, words and description, having regard to the circumstances which they are taken or used, indicates or could reasonably be understood to indicate that the defendant is a health practitioner and/or specialist. I, therefore, find the defendant guilty of charges 1 to 8 as charged."

In this context, as I understand the respondent's submission, the finding was of an indication or something which could reasonably be understood to indicate that the defendant was a health practitioner (s 116(1)(b)(i)); and that she indicated or could

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42 Decision p 9, ll 26-30.
43 Decision p 9, ll 26-30.

reasonably be understood to indicate that she was authorised or qualified to practice in a recognised specialty (s 118(1)(b)(ii)).

Consideration

[84] In my conclusion the respondent's submission should again be upheld. Whilst it is correct that the narrative by the Magistrate in her reasons did use different terms interchangeably at times, it is also correct that her Honour set out the separate legislative provisions at the beginning of her decision and the vital finding should be read as having considered, and been satisfied of, the relevant elements of the separate charges.

Ground 5 – not all "circumstances" put into evidence

[85] The fifth ground of appeal was that the Magistrate erred in the failure of AHPRA to put into evidence of all the information published by the defendant on each of the platforms referred to in the charges, and in particular all of the information available to the reader from the particular digital sources the subjects of Charges 2, 4, 5, 6, 7 and 8, meant it had failed to prove the said charges beyond reasonable doubt as "the circumstances" required by ss 116 and 118 to be had regard to had not been proved.

[86] What this refers to is that the AHPRA investigator had not downloaded each of the pages accessible on the Facebook accounts and LinkedIn account that were the accounts the subjects of Charges 2 and 6, 3 and 7 and 4 and 8 respectively.

[87] In case of the business Facebook account concerning Charges 2 and 6, only the "home" and "about" pages had been opened, thus photos, videos, events, posts and other material had not been opened by the investigator or at least copied and put into evidence.

[88] As to the LinkedIn account, tabs such as "see contact info", "see all articles" and "see all activity" had not been accessed.

[89] The same applied as to the tabs "skills and endorsement" and "show more", "interests" and "see all".

[90] As to Charges 4 and 8, concerning the personal Facebook page, sub-paragraph 6 (e) of the particulars referred to the appellant having posted an article "Is Integrative Health the Future of Medicine?" uplifted from the New York – Presbyterian (an

apparent reference to the New York-Presbyterian Hospital, which I understand to be a non-profit academic medical centre in New York). The article was not put into evidence.

[91] The same submission is made as to an article posted on 3 December 2017 and 10 December 2017 as well as 11 October 2017.

[92] What is submitted is that the charges required a consideration of what a reasonable reader of the words would understand in the circumstances. The failure to put in to evidence these other materials meant that the charges could not be made out because the relevant circumstances had not been proven. It is said that this submission was made to the Magistrate, but her Honour only dealt with it concerning the LinkedIn account. This is argued to be an unsatisfactory response by the Magistrate, and that there was a failure to deal with the submission in relation to the two Facebook accounts. Thus the submission is that the prosecution failed to make out those six charges because of the failure to prove all of the relevant circumstances.

Response

[93] The respondent essentially argues that the content referred to in the prosecution case was reasonably available to the ordinary reader and would convey the meanings relied upon in the circumstances. It is argued that the appellant's proposition requires the ordinary reader to, in effect, read everything that appears or could appear on the appellant's Facebook and LinkedIn pages; that is, it assumes that all pages would be opened and all links would be referred to, by the ordinary reader. This is, so it is submitted, an incorrect approach (in the sense of being simply unrealistic) and is not reflective of what an ordinary reader is likely to see when they visit or look at the appellant's various platforms.

[94] It is pointed out that at trial, the appellant cross-examined the witnesses Judd and Du Plessis about the possibility of accessing different parts of the platforms. The Magistrate considered the argument, and her Honour's response was referred to in her decision. Her Honour said:

> "The relevant pages for LinkedIn are pages 102 to 104. They are screen shots of pages but it is clear on those pages that there are links to more pages. It says, 'see all articles, see other activity, see all' and 'learn more' and they are links to further information. Mr Du Plessis

> agreed that those pages could have been accessed but they were not. If they were, Mr Diehm says, the consumer would have further articles and greater explanations to read. That proposition is very easy to accept but does the reasonable person test depend on the volume or quantity of the words or does it depend on the ordinary use and meaning of the words, phrases and descriptions, how many of them there are."[44]

[95] Thus, the respondent argues, the Magistrate directed herself that the criminal liability of the appellant turned on a consideration of the words which were actually used by the appellant on the various sites and not necessarily what might have appeared on other pages or resources that were not in evidence.

[96] The respondent refers to the statutory test, which was for the prosecution to prove that having regard to the circumstances in which (the content) was used, it indicates or *could reasonably be understood* to indicate that the respondent is authorised or qualified to practice in the health profession and authorised or qualified to practice in a recognized specialty. It is thus argued that the requirement is disjunctive in that the respondent could prove either:

(a) The content indicated; or

(b) The content could be reasonably understood to indicate;

the required meaning.

In the circumstances of the present case, the respondent at the very least proved the content obtained by APHRA could be reasonably understood to indicate the appellant was (a) a health practitioner in the medical profession and (b) authorised or qualified to practice in a recognised speciality, namely medical oncology.

[97] It is submitted that although context is important, what was proven in evidence established the content used by the appellant *and* what an ordinary reader was likely to see when they looked at the various platforms; it would be unrealistic to assume the ordinary reader would access every available word on every possible page. Thus, there is, in effect, no deficiency in the evidence by failure to produce every link which could have possibly been accessed and, indeed, no further material is pointed to which would materially impact the Magistrate's reasoning.

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44 Decision p8 l40 – p9 l2

Consideration

[98] Again, in my conclusion, the respondent's submissions should be accepted. When the sections refer to material that indicates or could be reasonably understood to indicate a certain state of affairs, what is contemplated is the ordinary visitor to the various platforms. I do not conclude that an ordinary visitor to such platforms would normally inspect every available page or link associated with those platforms, or that such is how the test should be applied. I do not consider that the material extracted and produced in evidence is other than a fair representation of what an ordinary reader would encounter. It follows that this ground of appeal is without merit.

Grounds 6 and 7 – wrong conclusion reached

[99] These grounds are perhaps central and overarching. Ground 6 is that her Honour erred in failing to apply or properly apply the requirement, in s 116(1)(b)(i) and s 118(1)(b) of the *National Law*, of having regard to the circumstances in which the title, name, initial, symbol, words or descriptions were taken or used; and failing to consider or properly consider the context and content of what was said by the defendant as she was required to do. Ground 7 is that her Honour's finding of guilt on each of the eight charges were, on the evidence, glaringly improbable, contrary to compelling inferences and otherwise plainly wrong such that the Court should, on a reasonable rehearing of the evidence, substitute its own finding of not guilty.

[100] In essence, what these grounds refer to is the appellant's submission that the content used, in all the circumstances, not only did not convey the meaning as charged respectively, but in fact made it clear enough to a reasonable reader that the appellant was a naturopath; thus the Magistrate reached the wrong conclusion and one which was not reasonably available.

[101] The appellant points out that the Magistrate accepted the propositions listed, namely that people with a variety of relevant qualifications make use of the title of doctor; medical doctor's qualifications in Australia are typically expressed as MBBS; there are alternative health practitioners and the ordinary reader would know that they include naturopaths, who aim to provide natural therapies with the use of diets and herbs; and where the defendant's qualifications appeared they did not include a reference to a medical degree.

[102] I am not sure exactly what passage in the evidence that last submission refers to. Certainly it is clear enough in the YouTube video that the appellant is described as not only "Dr Manuela Boyle" but also an "integrative medical practitioner"; however it is correct that she never claimed an MBBS or, in that formal and specific sense, a "medical degree".

[103] The appellant also submits[45] - in the context, as I understand it, of a submission that "oncology" may have a broader meaning than the prosecution contends for - that "oncology" has a common dictionary meaning of "the study and treatment of tumours". That may be correct (although the dictionary involved was not identified on appeal[46]). Dictionary definitions may vary; for example *dictionary.com* defines oncology as follows:

1. The branch of *medical science* dealing with tumours, including the origin, development, diagnosis, and treatment of malignant neoplasms. (emphasis added)

2. The study of cancer.

That definition suggests an expertise in medical science which is not, as I understand it, something the defendant is entitled to include in her qualifications (nor, as outlined above, does she claim to be so entitled).

The Shorter Oxford English Dictionary, Sixth Edition (2007) defines "oncology" as "The branch of *medicine* that deals with tumours" (again, emphasis added).

Thus it is not clear to me that the "dictionary definition" question is as clear cut as the appellant submits. In any case, dictionary definitions, or a choice between them, are not decisive in this case; rather it is the conclusion as to what the ordinary reasonable reader would understand, in all the context, which is important.

[104] The appellant's submission continues that any naturopath who offers a patient a particular plant or herb based product to assist them to overcome the effects of any form of cancer is therefore engaged in the practice of "oncology". That may of course be true in a particular context, but as the appellant herself submits, consistently with

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45 Para 41 of the appellant's outline

46 In submissions before the Magistrate, reference was made to the Oxford dictionary – T2-22; however no document was tendered in that regard, as far as I am aware

the legislation, the particular circumstances of the usage are important in what a description might be reasonably understood to indicate; and this exercise falls to be conducted against the context of the purposes of the legislation.

[105] In any case, the appellant submits that the mere practise, in the sense contended for, of "oncology" is not an offence against the *National Law.*

[106] The appellant then submits that the word "integrative" is important and as an adjective it refers to combining two or more things to form an effective unit or system. This leads to the submission that in context the publications made by the appellant plainly point to a person advertising naturopathic services as a complement to medical care.

[107] The appellant submits that the website material includes references to the appellant working "co-operatively with oncologists, radiation oncologists, surgeons and other health care practitioners…" There are references to herbs, anti-cancer diets, liquid herbal extracts and other matters presumably intended to be more consistent with naturopathy than medical science. There are also references to peer review publications in journals clearly indicating a connection with naturopathy.

[108] Further, the website contained multiple testimonials from patients who spoke of alternative therapies provided by the appellant in distinction from therapies provided by medical practitioners. One patient, Doris, recommended the clinic "for supplementary treatment for cancer". Another spoke of her desire not to have "traditional treatments" and instead being on a search for "natural treatment" that led her to the appellant, to whom she was grateful for the (alternative) regime.

[109] Generally, it is emphasised that the content was interspersed with references to herbs, diet and other similar concepts said to be indicative of naturopathy rather than medical science.

[110] The appellant submits that the LinkedIn account referred to the appellant as a senior lecturer at the Endeavour College of Natural Medicine and there was reference to her having a Bachelor of Health Science in Complementary Medicine.

[111] To these matters no doubt the appellant would also add the commentary by Mr Beaty in the YouTube video indicating that he had undertaken both conventional treatment

and the things provided by the appellant, which seems to be in a complementary sense.

[112] The appellant argues that even if the offence provisions do present a "low bar" in the sense contended for by the respondent - that is, that all that had to be proven was an awareness of a reasonable possibility that a reader might form the wrong impression and she went ahead recklessly – nevertheless in the context of all the material referring to alternative therapies and that she was providing care *alongside* medical practitioners and oncologists, a reader could not reasonably gain the wrong impression; thus the charges must fail.

[113] In essence, the thrust of these grounds of appeal is that the Magistrate reached the wrong conclusion on the evidence and in conducting a rehearing this Court would be driven to the conclusion that the descriptions used did not *indicate or could be reasonably understood to indicate* that, relevantly, the appellant was a health practitioner or authorised or qualified to practice in a recognised speciality. The overall thrust of the submission is that the matters referred to really indicated that the appellant was a naturopath rather than a medical practitioner who needed to be registered.

Response

[114] The respondent again refers to the objects of the *National Law* set out above. He submits that the law principally is to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practice in a competent and ethical manner are registered (and this informs the statutory construction exercise, as set out above). Thus the *National Law* prohibits persons who are not registered from claiming (in effect holding out) to be a registered health practitioner (s 116) and/or specialist health practitioner (s 118).

[115] The respondent submits that he had to prove beyond reasonable doubt three elements:

(a) The appellant was not a registered health practitioner or a specialist health practitioner (this is common ground) [Element 1];

(b) She knowingly or recklessly took or used a title, name, initial, symbol, word or description (the content; again it seems common ground what the content was and that it was established that she used it) [Element 2]; that

(c) Having regard to the circumstances in which (the content) was taken or used, (the content) indicated or could reasonably understood to indicate that she was a health practitioner, namely a person who practices in the medical profession (for the first four charges) and authorised or qualified to practice in a recognised speciality, namely medical oncology (for the final four charges) [Element 3].

[116] Element 1 in each case was admitted. The other two elements together required proof of the objective act of taking or using the content together with proof of her subjective state of mind at the time. The element 2 objective acts were not in dispute. Element 3, the state of mind, could be established by recklessness, or "conscious disregard" of the risk.[47] The focus is on the appellant's state of mind, but there is an objective aspect[48] as to how her content might be considered by a reader. Thus the prosecution had to prove at least that she was aware of a reasonable possibility a reader might understand the content to indicate she was a "health practitioner" or "authorised or qualified to practise in a recognised specialty"; and she nevertheless went ahead. This is submitted to be a low threshold. The respondent's submission is that it proved these elements and the Magistrate reached the correct conclusion.

[117] I have referred to the evidence above. It was not contested that the appellant had used the content on the various sites. The appellant argues that the words conveyed to the ordinary person that she was a naturopath; the respondent contended to the contrary, and the trial was thus, in effect, a single issue trial. The respondent submits that the Magistrate was aware of this central issue. Her Honour said:

> "The question which is central to the issue is what would an ordinary reader understand the title, name, initial, symbols, words and descriptions to mean or to reasonably understand to mean?"[49]

[118] The respondent submits that the Magistrate structured her decision appropriately, grouping the relevant pairs of charges together relating to the various *fora*. I have traversed the evidence and her Honour's findings at paragraphs [19] to [50] above.

[119] The respondent submits that no error is disclosed in the approach taken to the application by the Magistrate of the relevant sections and it is submitted that the

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47 *Hann v Director of Public Prosecutions* (Cth) 920040 144 A Crim R 534 (notwithstanding that this case was not subject to the Commonwealth *Criminal Code*; also *R v Lagos* [2003] QCA 121 per MacPherson JA at [13]

48 *Crowther v Sala* [2008] 1 Qd R 127 at [46]

49 Decision, p 4 ll 6-10.

decision was a careful and balanced one to which due weight and respect should be given. Thus, the convictions were open on the evidence and should be upheld; I take this as a submission that the Magistrate was not in error in any relevant way, and in any case on the rehearing I would reach the same conclusion.

Consideration

[120] The approach to the appeal by way of rehearing is set out at paragraph [6] above. I am required to conduct a real review of the trial, and the Magistrate's reasons, and make my own determination of relevant facts in issues from the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view. Generally there must be established some legal, factual or discretionary error for an appellant to succeed, and generally the Magistrate's factual findings should be given respect and weight.

[121] I do consider that I am in as good a position as the Magistrate to conduct a real review by way of rehearing. The relevant parts of the evidence are not in any serious contest; rather it is the conclusions as to the meaning of the various comments and descriptions which is in issue.

[122] In my view, the respondent's submissions should be upheld. The narrative of the evidence, which I have set out above, is one in which I agree generally with the Magistrate's description of the evidence and her conclusions in respect thereof. I have, as set out, at times added some further aspects of the evidence from the Exhibits. In my view, the Magistrate was correct to conclude that the advertisements and statements were suggestive, to the ordinary reader, of the idea that the appellant was a registered health practitioner and specialist oncologist. The adjective "integrative" which regularly appears did not, in my conclusion, qualify the meaning in such a way as to erode the indication contended for by the prosecution. The evidence includes many descriptions of the appellant (catalogued above and listed in the particulars of the charges), however for example the YouTube video describes her as an "integrative medical practitioner" and she is both introduced and described as a doctor. There are many other such examples, set out above and in the particulars, including "Functional Medicine Practitioner-Oncology"; "integrative oncologist"; "Clinical Integrative Oncology"; and "Clinician of Functional Medicine and Integrative Oncology". These

descriptions, published on the various *fora*, justify the conclusive finding already referred to:

> "I find that, beyond a reasonable doubt, the defendant's use of title, name and initials, symbol, words and description, having regard to the circumstances which they are taken or used, indicates or could reasonably be understood to indicate that the defendant is a health practitioner and/or specialist. I, therefore, find the defendant guilty of charges 1 to 8 as charged."[50]

[123] While no doubt she would be entitled to describe herself as a "doctor" if she has a PhD, as I understand the evidence here, including some of the exhibits, she was self-described as "PhD c", which, as I understand it, may convey that she had embarked on coursework for a PhD, but had not completed, for example, her dissertation or received the actual degree[51]. Thus her use of "doctor" in any setting may be doubtful at best.

[124] Further, the context is important as required by the particular sections of the legislation; its guiding principles and objectives, and protective aspect; the principles of statutory interpretation, and the arguments I have referred to above. It is true that the context did include material which could give an impression of association with alternative, complementary or naturopathic health care; these are the matters upon which the appellant relies to argue that the offending indications were not truly given. However balanced against this is the particular nature of the terminology, outlined above, and further the context was health care, and not just general health care but serious health conditions, particularly the treatment of cancer, including many references to scientific and medical terms and commentary suggestive of formal medical qualifications. Thus the descriptions of "doctor", "integrative medical practitioner", "integrative oncologist" and the other descriptors referred to in the context were, in my conclusion, apt to mislead.

[125] Importantly, as the respondent submits, the relevant indication includes one which "could be reasonably understood" to give that indication. Following the preliminary correspondence, which I have concluded that the Magistrate was correct to find admissible, in my view it is correct for the respondent to argue that the appellant was

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50 Decision p11 ll26-31

51 The appellant's supplementary submissions describe the attribution to her of "PhD" as wrong

at least reckless to proceed in the way she did having been placed on notice of the substantial risk of the required indication being conveyed.

[126] As the respondent submits, in terms of the legislation there could be more than one differing but reasonable conclusions drawn about the content, but as long as ***a*** reasonable indication is the offending one, this is sufficient, as long as, subjectively, the appellant had the awareness of that possibility, which in all the circumstances (particularly the preliminary correspondence) in my conclusion she did. The content may not necessarily have given the required indication to every possible reader – there is no way of definitively proving this, and there is, of course a range of degrees of human scepticism and, indeed, intelligence – but that, in my view, is not the test. Rather, as set out above:

- the relevant indications could be reasonably understood from the content by an ordinary reader and/or viewer;

- the appellant was at least reckless of that risk;

- and in those circumstances the offences are established.

[127] It is not clear why the appellant could not simply describe herself as a naturopath. The Magistrate said at page 9, line 32 of the decision:

> "Having regard to the matter of context and content in all of the advertisements, I think it would be a relatively simple matter to emphasise or indicate that the practitioner in the advertisements and the trademark is in fact not a health practitioner in the medical health profession and, actually, advertise her brand. This would put it beyond any doubt to the reasonable consumer. At this point, the omission and deliberate avoidance of the specific area of expertise contributes to the understanding of a reasonable person that the defendant is an oncologist and a registered health practitioner."

I agree with these comments.

Conclusion

[128] Thus, my conclusion is that no appealable error is identified in the Magistrate's reasoning and further on a rehearing of the matter considering the evidence placed before me I reach the same conclusions as the Magistrate, referenced above. The result is that the appeal is dismissed. If necessary I will hear the parties as to costs.

AHPRA v Manuela Malaguti

Summary of titles, names, initials, symbols, words, descriptions

www.manuelaboyle.com.au [Charges 1 and 5]	**Business Facebook Manuela Boyle Clinical Integrative Oncology [Charges 2 and 6]**	**LinkedIn Profile [Charges 3 and 7]**	**Personal Facebook [Charges 4 and 8]**
Homepage – Page 81 Tender Bundle At all times drugs... are carefully analysed **Charge 1 – Particulars 7(a)** **Charge 5 – Particulars 10(a)**	***Page 105 Tender Bundle*** Manuela Boyle Clinical Integrative Oncology **Charge 2 – Particulars 6(a)** **Charge 6 – Particulars 8(a)**	***Page 102 Tender Bundle*** Researcher and Clinician of Functional Medicine and Integrative Oncology **Charge 3 – Particulars 6(a)** **Charge 7 – Particulars 8(a)**	***Page 116 Tender Bundle*** 26 May 2017 post: Today I am leaving Sri Lanka and our state of the art private oncology clinic with a heavy heart. My (brief) medical rotation in Australia is due to start... **Charge 4 – Particulars 6(c)** **Charge 8 – Particulars 7(c)**
Homepage – Page 81 Tender Bundle This process can be accomplished by carefully identifying underlying physiological dysfunctions with cutting-edge assessment tools and individualized Wholistic Medicine evidence-based cancer support **Charge 1 – Particulars 7(b)** **Charge 5 – Particulars 10(b)**	***Page 106 Tender Bundle*** About – Integrative oncology is simply a healthier way to stand up to cancer. It blends conventional and alternative evidence-based medical proven methods. **Charge 2 – Particulars 6(b)** **Charge 6 – Particulars 8(b)**	***Page 102 Tender Bundle*** Consultant Clinician of Functional and Integrative Medicine **Charge 3 – Particulars 6(b)** **Charge 7 – Particulars 8(b)**	***Page 115 Tender Bundle*** 23 August 2017 post: In the last few weeks I have received intensive training to further consolidate my clinical knowledge of integrative oncology. Now it is time to translate this excellent experience into practice for the benefit of my patients. **Charge 4 – Particulars 6(d)** **Charge 8 – Particulars 7(d)**
Homepage – Page 81 Tender Bundle Manuela Boyle ... Wholistic Medicine Practitioner **Charge 1 – Particulars 7(c)** **Charge 5 – Particulars 10(c)**	***Page 106 Tender Bundle*** Direct link to www.manuelaboyle.com.au **Charge 2 – Particulars 6(c)** **Charge 6 – Particulars 8(c)**	***Page 102 Tender Bundle*** Consultant mentor to MDs ... on best practices-patient safety and evidence based research. **Charge 3 – Particulars 6(c)** **Charge 7 – Particulars 8(c)**	***Page 114 Tender Bundle*** 3 October 2017 post: Integrative medicine has two meanings and it is indeed the future of health care". Article posted from: www.healthmatters.nyp.org titled, *Is Integrative health the Future of Medicine? -New York-Presbyterian.*

			Charge 4 – Particulars 6(e) **Charge 8 – Particulars 7(e)**
What I offer – Page 83 Tender Bundle My approach to cancer treatment focuses on wholistic evidence-based therapies to correct metabolic dysfunction at the cellular level. This process, in turn has been shown, that it may inhibit cancer development, progression and metastasis **Charge 1 – Particulars 7(d)** **Charge 5 – Particulars 10(d)**	***Pages 105-6 Tender Bundle*** Photograph of respondent lecturing. **Charge 2 – Particulars 6(b)** **Charge 6 – Particulars 8(b)**	***Page 102 Tender Bundle*** Senior Consultant of Integrative and Functional Medicine – Oncology, Cassia Wellness Clinic **Charge 3 – Particulars 6(f)** **Charge 7 – Particulars 8(f)**	***Page 113 Tender Bundle*** 10 October 2017 post: Bringing integrative oncology to the American people with the help of Dr Oz. Stay tuned! **Charge 4 – Particulars 6(f)** **Charge 8 – Particulars 7(f)**
		Page 102 Tender Bundle (Duties include): intravenous therapies, whole body hyperthermia, localised hyperthermia, hyperbaric oxygen therapy, botanicals, nutrenomics, dietary, chemosensitivity tests, tumour gene tests, circulating tumour cells **Charge 3 – Particulars 6(g)** **Charge 7 – Particulars 8(g)**	***Page 112 Tender Bundle*** 11 October 2017 post: Integrative medicine and integrative oncology are based on a system-biology concept of medicine! This is soooo good!! **Charge 4 – Particulars 6(g)** **Charge 8 – Particulars 7(g)**
What I offer – Page 83 Tender Bundle At my satellite clinics on the Gold Coast (Australia), Milano (Italy) and Dubai (UAE) and more so at our private Integrative Medical Clinic in Sri Lanka, I/we utilise utilize [sic] targeted and personalised medical care to achieve better outcomes for patients **Charge 1 – Particulars 7(e)** **Charge 5 – Particulars 10(e)**		**Page 102 Tender Bundle** Senior Consultant of Integrative and Functional Medicine – Oncology, Studio Medical Malaguti Lamarche **Charge 3 – Particulars 6(h)** **Charge 7 – Particulars 8(h)**	***Page 111 Tender Bundle*** 13 October 2017 post: Empowerment and education go a long way in preventing disease. As an integrative oncologist prevention is definitely better than cure. But do you put this concept into practice? Are you already in the path of disease? Do you need help? **Charge 4 – Particulars 6(h)** **Charge 8 – Particulars 7(h)**
Inspired Program – Page 84 Tender Bundle What is the Inspired Cancer Care Program? SEVEN PHASES on how to Stand-Up to cancer. Individualized (sic)		**Page 102 Tender Bundle** Duties include: Functional medicine. Genetic and genomic testing, OncoDNA; RGCC; dietary; rehabilitation; oncologist pain management **Charge 3 – Particulars 6(i)**	***Page 110 Tender Bundle*** 15 October 2017 post: Cancer is a multifaceted and complex chronic disease that requires an integrative medicine approach. **Charge 4 – Particulars 6(i)**

medical blue-print investigation based on advanced diagnostics such as genetic tumour profiling collected in real time; targeted immunotherapy; next generation sequencing; metastatic analysis; oncologenomics biologics testing... Immunotherapy with intravenous and injectable therapies such as antibiotics. **Charge 1 – Particulars 7(k)** **Charge 5 – Particulars 10(k)**		**Charge 7 – Particulars 8(i)** **Page 102 Tender Bundle** Consultant Clinician of Integrative and Functional Medicine – Oncology, DNA Health **Charge 3 – Particulars 6(j)** **Charge 7 – Particulars 8(j)**	**Charge 8 – Particulars 7(i)** **Page 109 Tender Bundle** **29 October 2017 post:** As an extremely busy integrative oncologist with back-to-back patients, I can certainly understand the meaning of physical and mental fatigue. Article from www.kevinmd.com titled *Doctors are dangerously tired, and health care leaders aren't taking action".* **Charge 4 – Particulars 6(j)** **Charge 8 – Particulars 7(j)**
Inspired Program – Page 84 Tender Bundle Manuela looks at the mechanisms of initiation and development of cancer including infection, immune dysfunction, inflammation, oxidative stress, impaired detoxification, hormonal imbalances and environmental factors. All of these affect gene expression, cell growth messaging, angiogenesis and apoptosis (death of the cell). 7(f) **Charge 1 – Particulars 7(f)** **Charge 5 – Particulars 10(f)**		**Page 102 Tender Bundle** Duties include: State of the art assessments of functional medicine. Dietary; cancer prevention individual plans; clinical detoxification. **Charge 3 – Particulars 6(k)** **Charge 7 – Particulars 8(k)**	***Page 108 Tender Bundle*** 1 December 2017 post: A mutually empowering patient-practitioner relationship is highly regarded in the Functional Medicine model (my model of health care) Does it Matter? Graphic attached titled: Conventional Medicine vs Functional Medicine **Charge 4 – Particulars 6(k)** **Charge 8 – Particulars 7(k)**

Assessments and Treatments – Page 85 Tender Bundle A personalised Wholistic Cancer Care Program is based on specific assessments and treatments: • Medical blue-print with individualised diagnostics • Genetic tumour profiling collected in real time • Targeted immunotherapy • Fractioned and low-dose metronomic therapy • Chelation therapy and clinical detoxification • Complex homeopathic and homo toxicology • Ozone therapy • Insulin potentiation therapy • HBOT • Complex intravenous therapies • Viral therapies • Signature nutritional program • Clinical psychotherapy • Spinal rehabilitation • Individualised pain management treatment • Clinical enzyme therapy **Charge 1 – Particulars 7(g)** **Charge 5 – Particulars 10(g)**		**Page 103 Tender Bundle** Clinician of Integrative Oncology, Studio Medica Malaguti Lamarche and Cassia Wellness Clinic. **Charge 3 – Particulars 6(l)** **Charge 7 – Particulars 8(l)**	**Page 107 Tender Bundle** **23 December 2017 post:** On reflection of my intense clinical work in 2017 (both in Australia and overseas).... Learning the language of cancer can be challenging. For many of my patients and caregivers, it's a jumbled mix of immune-this and onco-that. Many patients stumble over sound-alike terms and indecipherable phrases, unpronounceable words made worse by assumptions and conclusions often made in frustration or for fear of asking too many questions. There can't be that much difference in genetics and genomics, right? Hodgkin and non-Hodgkin diseases aren't that different, correct? And lung cancer is cancer in the lung, yes? Well, no. Nuances in cancer types, terms and titles may indicate deep differences in the diseases, diagnoses and treatments. The small-cell prefix "non" can make huge differences in a patient's care plan and prognosis. To help cut through the confusion, and in line with my PhD study, I will launch a blog on my website to help clear up some of the confusion in cancer vocabulary and help increase your cancer IQ. **Charge 4 – Particulars 6(l)** **Charge 8 – Particulars 7(l)**

Testimonials – Pages 88 - 90 Tender Bundle Testimonials **Charge 1 – Particulars 7(i)** **Charge 5 – particulars 10(i)**			
In the Media – Page 86 Tender Bundle Truth About Cancer **Charge 1 – Particulars 7(j)** **Charge 5 – Particulars 10(j)**			
Contact us – Page 101 Tender Bundle At the end of your comprehensive 2 hours initial consultation, you will receive a detailed Practitioner's Report, a script, a referral if necessary, and a health insurance claim. Please note that Supplements/Medications can be dispatched to your private address if required. **Charge 1 – Particulars 7(h)** **Charge 5 – particulars 10(h)**			