CITATION:	*Liyanage v Medical Board of Australia* [2019] NTSC 11
PARTIES:	LIYANAGE, DR WIJENEKA v MEDICAL BOARD OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	CAT 1 of 2018 (21703183)
DELIVERED:	15 February 2019
HEARING DATES:	10 July 2018
APPLICATION FOR EXTENSION OF TIME:	10 August 2018
FURTHER WRITTEN SUBMISSIONS:	16 August 2018 and 21 August 2018
JUDGMENT OF:	Blokland J

CATCHWORDS:

APPEAL – Application for leave to appeal from the Northern Territory Civil and Administrative Tribunal – Medical Practitioner – whether cancellation of medical registration for 21 months after 15 months suspension from medical practice "manifestly excessive" – whether question of law – merits of proposed appeal considered.

APPEAL – Application for leave to appeal – merits of proposed appeal – whether Tribunal failed to give weight to mitigating factors – whether penalty "out of step" with suggested comparable decisions – whether penalty imposed for matters incidental to principal allegations – consideration of the protection of the public and purposes of the *Health Practitioner Regulation National Law Act* 2009 (NT) – proposed appeal without merit – application for leave refused.

APPEAL – Application for leave to appeal – Application to dispense with compliance with the filing period of 7 days under the Supreme Court Rules – non-compliance not sufficiently explained – proposed appeal without merit – application refused.

Health Practitioner Regulation National Law (NT) ss 3(2)-(3), 5, 193(1)(a), 196(1)(b), 196(2)
Health Practitioner Regulation National Law Act 2009 (Qld)
Health Practitioner Regulation (National Uniform Legislation) Act (NT) s 4(a)-(b)
Northern Territory Civil and Administrative Tribunal Act (NT)
Supreme Court Rules (NT) r 83.23

Director-General, Department of Aging, Disability and Health Care v Lambert [2009] NSWCA 102; 74 NSWLR 523; *Green v The Queen* (1989) 95 FLR 301; *Health Care Complaints Commission v Amigo* [2012] NSWMT 13; *Health Care Complaints Commission v Do* [2014] NSWCA 307; *Health Care Complaints Commission v Ha* [2013] NSWPYT 1; *Health Care Complaints Commission v Kitto* [2010] NSWMT 2; *Health Care Complaints Commission v Schultz* [2012] NSWMT 7; *Hill v The Queen* [2012] NTCCA 7; *Hunter v Nursing and Midwifery Board of Australia* [2017] NTSC 64; *Johnson v Development Consent Authority & Anor* [2017] NTSC 90; *Liyanage v Medical Board of Australia* [2014] NTHPRT 4; *Liyanage v Medical Board of Australia* [2016] NTCAT 587; *Lee v Health Care Complaints Commission* [2012] NSWCA 80; *Lo Castro v The Queen* [2013] NTCCA 15; *Medical Board of Australia v Adams (Review and Regulation) (Corrected)* [2017] VCAT 796; *Medical Board of Australia v Dr ZOF No. 2 (Review and Regulation)* [2015] VCAT 379; *Medical Board of Australia v Forrest* [2014] NTHPRT 1; *Medical Board of Australia v Hocking; Hocking v Medical Board of Australia (Occupational Discipline)* [2015] ACAT 44; *Medical Board of Australia v Jones* [2012] QCAT 362; *Medical Board of Australia v Liyanage* [2017] NTCAT 660; *Medical Board of Australia v*

Putha [2014] QCAT 159; *Medical Board of Australia v Vucak* [2015] QCAT 367; *Medical Practitioner v Medical Board of Australia* [2011] ACTSC 191; *Naidu v Medical Board of Australia & Anor* [2016] NTSC 8; *Psychology Board of Australia v Dall* [2011] QCAT 608; *Psychology Board of Australia v Wakelin* [2014] QCAT 516; *Seriban v The Queen* [2014] NTCCA 12, referred to.

Dean Mildren, *The Appellate Jurisdiction of the Courts in Australia* (Federation Press, 2015)

REPRESENTATION:

Counsel:

Applicant:	J Tippett QC
Respondent:	G McMaster and G Driscoll

Solicitors:

Applicant:	Maleys Barristers & Solicitors
Respondent:	Australian Health Practitioner Regulation Agency

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Liyanage v Medical Board of Australia [2019] NTSC 11
No. CAT 1 of 2018 (21703183)

BETWEEN:

DR WIJENEKA LIYANAGE
Appellant

AND:

MEDICAL BOARD OF AUSTRALIA
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 15 February 2019)

Introduction

[1] This is an application for leave to appeal against a decision of the Northern Territory Civil and Administrative Tribunal ("the Tribunal") cancelling the applicant's medical registration for 21 months. The applicant had been suspended for 15 months at the time of the cancellation. The Tribunal considered a total period of 3 years was reasonable, allowing for the 15 months suspension period required during the investigation.

[2] A party may appeal to the Supreme Court against a decision of the Tribunal on a question of law, however pursuant to s 141 of the *Northern Territory Civil and Administrative Tribunal Act* ("the *NTCAT Act*") leave is required. Further, an application for leave must be filed with 7 days as provided by the *Supreme Court Rules* (NT) ("the Rules").[1] The application for leave to appeal was not filed within 7 days as required. As will be seen in the reasons that follow, notwithstanding non-compliance with the Rules, the merits of the application have been examined. After hearing an appeal, the *NTCAT Act* provides the Supreme Court must do one of the following:[2]

(a) confirm the decision of the Tribunal;
(b) vary the decision of the Tribunal;
(c) set aside the decision and:
    (i) substitute its own decision; or
    (ii) send the matter back to the Tribunal for reconsideration in accordance with any recommendations the Supreme Court considers appropriate;
(d) dismiss the appeal.

[3] The single ground of appeal is set out in the affidavit of Peter John Maley sworn on 14 February 2018 in support of the application for leave. It is alleged the Tribunal[3] erred in exercising its discretion in the circumstances of the case, on the grounds that cancelling the applicant's registration and

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1 *Supreme Court Rules* (NT), r 83.23(1)(a).

2 *NTCAT Act* (NT), s 141(3).

3 The affidavit refers throughout to the decision of the "Board". This is understood to be a typographical error, as the particulars allege errors in the Tribunal's decision, which is the subject of this appeal. All references to the "Board" in the particulars have been changed to the "Tribunal".

the imposition of the period of 21 months in addition to the 15 months suspension was a penalty that was manifestly excessive.[4] A number of specific matters that may be regarded as particulars were relied on in support of the manifestly excessive ground:[5]

1. The Tribunal failed to give due weight to mitigating factors put before it on behalf of the applicant;
2. The Tribunal's decision regarding the applicant is out of step with earlier decisions of the Tribunal, such as those relied upon by the applicant's counsel in their submissions of 25 July 2017, supporting the contention that the Tribunal fell into error in their decision regarding the applicant.
3. The decisions of *Medical Board of Australia v Adams (Review and Regulation) (Corrected)*,[6] *Medical Board of Australia v Hocking* and *Hocking v Medical Board of Australia (Occupational Discipline)*[7] and *Psychology Board of Australia v Wakelin*[8] referred to by the Tribunal in the course of imposing sanctions on the applicant did not stand to be distinguished in the manner the Tribunal sought to distinguish them; and
4. The penalty imposed was for matters incidental to the allegations as they were first formulated. In other words, the allegations relating to dishonesty were not the subject of a formal charge under the Health Practitioner Regulation National Law ("National Law") but arose incidentally to the evidence adduced in support of the specific allegations in relation to which the Tribunal had been asked to make findings and impose sanctions. Further the Tribunal failed to have proper regard to the applicant's explanations regarding the alleged "dishonesty".

[4] The respondent argues the application for leave discloses no "question of law" as required by the *NTCAT Act*, however I accept in this context of

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4 The error complained of was in the terms described by Dixon, Evatt and McTiernan JJ in *House v The King* [1936] HCA 40; 55 CLR 499 at 504-5; Applicant's further written submissions at [1].

5 Affidavit Peter John Maley, sworn 14 February 2018 at [6]-[8].

6 [2017] VCAT 796.

7 [2015] ACAT 44.

8 [2014] QCAT 516.

disciplinary penalties a ground alleging "manifest excess" may be taken as alleging an error of law in the sense of administrative law unreasonableness or error in the exercise of a discretion as mentioned above in the terms described in *House v The King*.

Background to the present proceedings

[5] It is necessary to deal in summary with part of the extensive history. The applicant was a registered medical practitioner at the Top End Medical Centre. On 14 November 2014, under s 156(1)(a) of the National Law the respondent suspended the applicant's registration immediately due to an allegation of an inappropriate sexual relationship (or "boundary violation") with a patient referred to as "Patient A".[9] The applicant challenged this decision in the Northern Territory Health Professional Review Tribunal, which concluded there was insufficient evidence to reasonably believe immediate action should have been taken against the applicant, and set aside the respondent's decision to suspend the applicant's registration.[10]

[6] On 8 July 2016, the Australian Health Practitioner Regulation Agency ("AHPRA") advised the applicant that his registration was again suspended immediately due to the incident relating to Patient A, along with three other incidents with patients referred to as "Patient B", "Patient C" and

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9 The *Health Practitioner Regulation National Law* is set out in the schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld), which applies as a law of the Northern Territory, and may be referred to as the *Health Practitioner Regulation National Law* (NT): *Health Practitioner Regulation (National Uniform Legislation) Act* (NT), sub-ss 4(a)-(b); *Liyanage v Medical Board of Australia* [2014] NTHPRT 4 at [2].

10 *Liyanage v Medical Board of Australia* [2014] NTHPRT 4 at [50].

"Patient D".[11] The applicant again challenged this suspension in the current Tribunal, which affirmed the respondent's decision to suspend his registration.

[7] The respondent then referred the applicant's conduct to the Tribunal pursuant to s 193(1)(a) of the National Law, alleging the applicant's conduct constituted professional misconduct, unprofessional conduct and unsatisfactory professional performance under s 196(1)(b).[12] After considering the evidence, the Tribunal made the following findings in relation to the four patients:[13]

> Patient A: the applicant behaved in a way that constituted professional misconduct;
>
> Patient B: the applicant behaved in a way that constituted professional misconduct and unsatisfactory professional performance;
>
> Patient C: the applicant behaved in a way that constituted professional misconduct and unsatisfactory professional performance;
>
> Patient D: the applicant behaved in a way that constituted professional misconduct.

[8] It is unnecessary to outline in detail the facts grounding the Tribunal's findings. The factual findings are not the subject of a ground of appeal. I have familiarised myself with the facts from the various proceedings below. In brief, one matter relates to a boundary violation (Patient A), in which the applicant had an inappropriate sexual relationship with a patient. Two

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11 *Liyanage v Medical Board of Australia* [2016] NTCAT 587 at [1], [6].

12 For definitions see Health Practitioner Regulation National Law (NT), s 5.

13 *Medical Board of Australia v Liyanage* [2017] NTCAT 660 at [76].

matters (Patients B and C) relate to the applicant conducting inadequate skin cancer checks together with his subsequent efforts to conceal them from AHPRA investigators and the respondent by recreating more detailed consultation notes and falsely representing them to be contemporaneous. The final matter (Patient D) relates to the applicant's efforts to conceal from investigators and the respondent a consultation which occurred with a patient he had some form of a personal relationship with, by recreating notes and asserting they were contemporaneous. An in-depth description of the facts relating to Patients A-D is available in the previous decisions of the Tribunal.[14]

[9] Under s 196(2) of the National Law, if findings of professional misconduct, unprofessional conduct or unsatisfactory professional performance (among other potential findings)[15] are made, the Tribunal may do one or more of the following: caution or reprimand the practitioner, impose conditions on the practitioner's registration, fine the practitioner, suspend the practitioner's registration for a specified period, or cancel the practitioner's registration. As mentioned, the Tribunal disqualified the applicant from applying for registration for 21 months. Allowing for the 15 months during which his registration had already been suspended, the Tribunal noted and remarked

14 *Liyanage v Medical Board of Australia* [2014] NTHPRT 4 at [13]-[28]; *Liyanage v Medical Board of Australia* [2016] NTCAT 587 at [9]-[67]; *Medical Board of Australia v Liyanage* [2017] NTCAT 660 at [10]-[75].

15 The Tribunal may also find the practitioner has an impairment, or that the practitioner's registration was improperly obtained, but these are not relevant for current purposes.

that a period of three years would be reasonable.[16] The respondent sought a reprimand, but the Tribunal deemed this unnecessary given the more serious penalty that it had already imposed.[17]

Extension of time within which to appeal

[10] As mentioned above, under r 83.23(1)(a) of the Rules, the period within which an application for leave to appeal from a Tribunal decision must be filed is 7 days from the date of the decision.[18] The application was filed 126 days, or just over four months, out of time. The applicant did not file an application to extend time, nor were any reasons provided for the delay at the hearing of the application for leave. At the conclusion of the oral hearing in this Court on 10 July 2018, orders were made to facilitate the filing of an application to extend time. A supporting affidavit and the application were subsequently filed on 9 and 10 August 2018 respectively. Further submissions addressing the application to extend time were filed on 16 and 21 August 2018. The applicant sought an order dispensing with compliance with the filing period, as was required under r 83.23(2). The respondent opposed the application to dispense with compliance and to grant leave to appeal.

[11] The applicant's affidavit states he was informed by his previous solicitors by email of the Tribunal's decision to suspend his registration on

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16 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [21].

17 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [22].

18 Read in conjunction with r 83.01 of the *Supreme Court Rules* (NT).

6 October 2017.[19] He immediately responded, instructing that he wished to appeal the decision. A copy of that email was annexed to the affidavit and read:

> Dear Paul, Myles and Bernadette
>
> The punishment is extreme.
> I did not hide anything.
> If I was a different person or Australian trained doctor, outcome would be much less.
> I think I should appeal to reduce that 21 months.
>
> Thanks

[12] The applicant further deposed to being advised by his former solicitors that his professional indemnity insurance would not cover the costs of an appeal, and that the prospects of a successful appeal were slim. The applicant was devastated emotionally and psychologically. He initially did not have sufficient funds to engage a lawyer to lodge an appeal, and needed time to obtain financial support. On 15 January 2018, he engaged his present solicitor to provide advice regarding the merits of an appeal. After obtaining relevant materials and seeking the advice of his counsel in these proceedings, an application for leave to appeal was filed on 19 February 2018.[20]

[13] On behalf of the applicant it was submitted that the delay was not extensive, and did not cause any forensic prejudice to the respondent.[21] The delay was

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19 Affidavit of Wijeneka Liyanage, sworn 8 August 2018.

20 In fact, the application for leave to appeal was lodged on 15 February 2018.

21 Applicant's further submissions, 16 August 2018 at [4].

described as "entirely understandable" in the circumstances.[22] The applicant stated a miscarriage of justice had occurred by the imposition of an inappropriate penalty, and that this should enliven the Court's discretion to extend time.[23] Reference was made to the principles discussed in *Green v The Queen*[24] relating to the extension of time.

[14] Counsel for the respondent submitted the applicant's affidavit did not materially support the application to extend time.[25] There was no information provided regarding the applicant's financial circumstances (particularly given his evidence in the Tribunal that he was employed as a practice manager at his workplace during the suspension of his registration), or why or how the relationship with his previous solicitors was terminated. It was suggested that information of this kind would have been readily ascertainable. Further, the respondent asserted the principles relevant to an extension of time application in civil matters are distinct from those in criminal matters, as issues such as prejudice are less pertinent than the merits of an appeal.

[15] While I do not agree the tests are necessarily different on the question of extension of time as between civil and criminal appeals, it is accepted the emphasis on, or weight given to, the various principles may differ in

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22 Applicant's further submissions, 16 August 2018 at [4].

23 Applicant's further submissions, 16 August 2018 at [4].

24 (1989) 95 FLR 301 at 304 per Asche CJ, cited in *Lo Castro v The Queen* [2013] NTCCA 15 at [8] and *Seriban v The Queen* [2014] NTCCA 12 at [14]-[15].

25 Respondent's further outline of submissions, 21 August 2018 at [2].

different types of proceedings depending on the circumstances. Disciplinary proceedings clearly possess potentially punitive features and the prejudice that may eventuate to a party as a result of an error is a matter to be given substantial weight. Nevertheless, I am not persuaded on the applicant's material of the reasons for the delay in filing the application for leave to appeal. The present case is readily distinguishable from *Hunter v Nursing and Midwifery Board of Australia*,[26] in which an order was also sought under r 83.23(2) of the Rules to dispense with the 7 day appeal period. In that matter the delay could readily be explained:[27]

> [T]here was understandable confusion in relation to the time period within which to file the application. The delay was not at all significant. These circumstances were well explained by the appellant's solicitor in her affidavit of 20 May 2017 and were not attributable to the conduct of the appellant. The appeal had merit and it would have been unjust not to dispense with compliance.

[16] An order was consequently made in that matter dispensing with compliance. In this case, the applicant received legal advice regarding the appeal prospects, and there is no suggestion he was not informed of the appeal period at that time. A delay of 4 months, while not in the more notable range of delays seen in this Court, is nonetheless of some significance. In my view the reasons offered for the delay outlined in the applicant's affidavit are not sufficiently supported by documentation or otherwise. As the respondent suggested, supporting material would have been reasonably straightforward to obtain. I also conclude the respondent would not be prejudiced in the

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26 [2017] NTSC 64.

27 *Hunter v Nursing and Midwifery Board of Australia* [2017] NTSC 64 at [32].

relevant sense. I have had regard to the following useful and illuminating summary of the relevant principles (footnotes omitted):[28]

> It is always necessary to explain the length of the delay and the reasons for the delay. If the delay was caused by the applicant's solicitors, consideration might also be given to the ability of the applicant to put pressure on his solicitors to comply with the rules. If the delay was caused by a mistake, consideration will be given to other factors if the delay is not lengthy. On the other hand a deliberate decision not to appeal will weigh against the grant of the application. In the case of a very lengthy delay, this may be a sufficient reason for dismissing the application, even if the appeal is arguable, particularly where the respondent would be prejudiced beyond the usual prejudice of having to deal with an appeal and the additional worry and costs associated with it. If the delay is short, the court will generally extend time if there has been no prejudice to the respondent and there appear to be sufficient merits to the appeal. Usually, where the application for an extension of time is not accompanied by an application for leave to appeal, the court will only have limited material before it on which to make an assessment as to the prospects of success of the appeal. Only in a clear case where the court is able to find that there are no merits will an application be refused on that basis. Where an application for leave to appeal is also required, it will often be the case that both applications are heard together. If an extension is given, it may be on terms as to costs. However, these are general guidelines; there are no rigid rules, and the court may extend time in any case where to do so will afford justice to the parties.

[17] The merits of an appeal and its likelihood of success are to be assessed in determining whether to dispense with compliance with filing timeframes.[29] Compliance will be dispensed with if it would be against the interests of justice to enforce strict compliance. In my view however, the application for leave to appeal is without merit and it is principally on that basis that I would refuse the application to dispense with the time limitation. Had

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28 Dean Mildren, *The Appellate Jurisdiction of the Courts in Australia* (Federation Press, 2015) at 73.

29 *Hill v The Queen* [2012] NTCCA 7 at [5]; *Johnson v Development Consent Authority & Anor* [2017] NTSC 90 at [10].

there been merit in the appeal the outcome is of sufficient substance to justify an extension, however for the reasons that follow, I have concluded that is not the case here.

Merits of the proposed appeal

[18] As above, the Notice of Appeal first alleges the Tribunal failed to give due weight to mitigating factors put on behalf of the applicant. These factors, as can be ascertained from written submissions relied upon in the Tribunal hearing,[30] were:

- The applicant recreated the patient notes and attempted to mislead investigators in the context of stressful dealings with AHPRA regarding Patient A, which included being suspended from practice, embarrassing media reports and an ongoing investigation into his conduct which was likely to eventuate in another hearing;

- He had undertaken further training in skin cancer treatment and ethics;

- He had identified deficiencies in his record-keeping and acknowledged the consequential risk to patients. He intended to allow more time for consultations to allow him to complete records

30 Outline of respondent's (the current applicant) submissions, 25 July 2017 at [38]-[44]; Outline of submissions of the practitioner, 15 September 2017, at [24]. These submissions, which were before the Tribunal, were annexed to the applicant's outline of argument on appeal in this Court, dated 27 June 2018. The current submissions stated that those previous submissions included the essential matters the applicant sought to raise on appeal.

contemporaneously, rather than relying upon his memory later in the day;

- He had been suspended for 12 months (at that stage), losing his income, during which he had assisted his colleagues so they could learn from his mistakes; and

- He was supported by his co-directors at the Top End Medical Centre, and references were tendered.

This contention will be discussed further.

[19] The second complaint relates to the disparity between the penalty imposed on the applicant and penalties imposed in comparative cases. It was argued the penalty the subject of this application is significantly greater than those in comparable matters involving boundary violations or recreating medical documents, bespeaking error. Some propositions of assistance that may be drawn from comparative penalties were advanced by the New South Wales Court of Appeal in *Lee v Health Care Complaints Commission* ("Lee"):[31]

(a) comparison with the outcomes in earlier cases may be useful if those earlier cases show some discernible range or pattern;

(b) such a range or pattern, even when discernible, cannot be regarded as a precedent indicating what is "correct";

(c) the range or pattern is, at best, a reflection of the accumulated experience and wisdom of decision-makers;

(d) the range or pattern will potentially be of value only if it is possible to gather from it an appreciation of some unifying principle;

31 [2012] NSWCA 80 at [34], per Macfarlan JA, Barrett JA and Tobias AJA.

(e) since the predominant consideration is the protection of the public, a decision can only be made by reference to the facts of the particular case and by considering what measures are needed to ensure that the future behaviour of the particular practitioner is shaped in a way that is consistent with that protection; and

(f) the Medical Tribunal, as a specialist tribunal, brings special skill and experience to the task of formulating protective orders.

[20] The penalties handed down in the cases the Court was referred to range from mere conditions imposed on a practitioner's registration, to cancelling the practitioner's registration for 18 months with conditions upon recommencing practice. These cases do not support a conclusion that the Tribunal erred when determining the applicant's sanction. Firstly, the cases do not illustrate a unifying principle, and are distinguishable from the present matter in the following ways. Most of them relate to a single patient, or either a boundary violation or recreating documents, but not both.[32] Many of the practitioners made full admissions regarding their conduct and cooperated in the investigation.[33] Other cases involve significant mitigating factors,[34] or sanctions agreed between the parties.[35] In others, the Tribunal

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32 *Health Care Complaints Commission v Kitto* [2010] NSWMT 2 ("*Kitto*"); *Health Care Complaints Commission v Schultz* [2012] NSWMT 7 ("*Schultz*"); *Medical Board of Australia v Forrest* [2014] NTHPRT 1 ("*Forrest*"); *Medical Board of Australia v Jones* [2012] QCAT 362 ("*Jones*"); *Medical Board of Australia v Vucak* [2015] QCAT 367; *Medical Practitioner v Medical Board of Australia* [2011] ACTSC 191 ("*Medical Practitioner*"); *Medical Board of Australia v Dr ZOF No. 2 (Review and Regulation)* [2015] VCAT 379; *Medical Board of Australia v Adams (Review and Regulation) (Corrected)* [2017] VCAT 796 ("*Adams*"); *Medical Board of Australia v Putha* [2014] QCAT 159 ("*Putha*"); *Psychology Board of Australia v Dall* [2011] QCAT 608; *Medical Board of Australia v Hocking and Hocking v Medical Board of Australia (Occupational Discipline)* [2015] ACAT 44 ("*Hocking*").

33 *Health Care Complaints Commission v Amigo* [2012] NSWMT 13 at [5] ("*Amigo*"); *Schultz* [2012] NSWMT 7 at [5]; *Forrest* [2014] NTHPRT 1 at [3]; *Jones* [2012] QCAT 362 at [2]; *Putha* [2014] QCAT 159 at [15].

34 *Forrest* [2014] NTHPRT 1.

35 *Psychology Board of Australia v Wakelin* [2014] QCAT 516; *Adams* [2017] VCAT 796.

found there was no threat to the wider public.[36] Two cases are not sufficiently factually analogous to be of assistance.[37] None of the cases referred to involve the overall level of seriousness of the present matter in terms of the number of incidents (which comprised various types of misconduct), number of patients affected, number of adverse findings made by the Tribunal (four findings of professional misconduct and two findings of unsatisfactory professional performance), or number of attempts to deceive authorities.

[21] Further, the Notice of Appeal lists three particular cases which the Tribunal allegedly fell into error by distinguishing from the applicant's case. I do not consider this to be correct, for the reasons that follow.

[22] *Medical Board of Australia v Adams (Review and Regulation) (Corrected)*:[38] in this case a practitioner forged the operation consent forms of 37 patients over 12 months, as he asserted his patients, many of whom were from non-English speaking backgrounds, would be unable to complete the lengthy forms. His registration was suspended for 6 months. The following considerations were relevant: there were no negative consequences to the patients, who all had satisfactory outcomes; the surgeon derived no benefit; and the parties had made a joint submission regarding agreed sanctions.

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36 *Amigo* [2012] NSWMT 13 at [52]; *Medical Practitioner* [2011] ACTSC 191 at [53].

37 *Hocking* [2015] ACAT 44 (see [20] for the facts); *Health Care Complaints Commission v Ha* [2013] NSWPYT 1 (a physiotherapist made false claims to a health fund for services provided to non-attending family members of clients).

38 [2017] VCAT 796.

[23] *Medical Board of Australia v Hocking and Hocking v Medical Board of Australia (Occupational Discipline)*:[39] a surgeon wrote a second, more detailed report three months after an operation, when there was a prospective investigation into the appropriateness of the surgical procedures he used. He was attempting to suggest the patient's symptoms were not caused by the surgery. Conditions were placed on his registration. The facts of this case were too disparate from the facts at hand. The ACT Civil and Administrative Tribunal found Dr Hocking engaged in unprofessional conduct by creating the second report, but there were also three other findings of unsatisfactory professional performance for conduct quite unrelated and not relevant for present purposes.

[24] *Psychology Board of Australia v Wakelin*:[40] a psychologist had a sexual relationship with a patient, which she initially denied. Ms Wakelin disclosed disparaging information about the patient's former partner (who was the notifier). A false affidavit purportedly made by the patient also denying the relationship was provided, thereby attempting to deceive the investigators. The psychologist later admitted to investigators the denials were untrue. Her registration was suspended for 18 months. However, the conduct related to a single patient. The denials were retracted and the deception admitted. Agreed draft orders were proposed. Ms Wakelin had voluntarily ceased practice once she admitted all matters and so was already de-registered at

39 [2015] ACAT 44.

40 [2014] QCAT 516.

the time of the decision. The Queensland Civil and Administrative Tribunal stated the sanction imposed may have been light, due to the dishonesty involved with her dealings with the investigators, and highlighted the importance of deterring practitioners from practicing deceit with the Board.

[25] The comparative cases do not disclose a unifying principle, and have too many distinguishing features to support the proposition that the penalty imposed was manifestly excessive. As was stated in *Lee*, even if the cases referred to reveal such a principle, the range of penalties cannot be regarded as a precedent indicating the "correct" approach, and rather reflects the combined experience of a specialist tribunal.[41] Thus, the particular claim that the Tribunal erred by imposing a penalty out of range, and wrongly distinguished a number of cases, has no merit and would fail if leave to appeal was granted.

[26] Lastly, the Notice of Appeal complains that the sanction imposed was for matters incidental to the allegations against the applicant, as the dishonesty allegations were not the subject of a formal charge but arose incidentally to the evidence adduced in support of the specific allegations about Patients A-D. It further alleges the Tribunal failed to have proper regard to the applicant's explanations regarding the alleged "dishonesty".[42] The dishonesty refers to the applicant holding out that the recreated notes were

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41 *Lee v Health Care Complaints Commission* [2012] NSWCA 80 at [34].

42 The quotation marks around "dishonesty" are found in the Notice of Appeal.

contemporaneous, and later asserting the recreated notes accurately reflected the consultation which took place. This particular complaint is also baseless.

[27] The Tribunal conducted the hearing in this matter in its original jurisdiction, and was bound to exercise its jurisdiction in accordance with the *NTCAT Act* and the National Law.[43] Neither of these instruments include any restriction on the Tribunal taking into consideration evidence which arises as a result of the investigation and the hearing.

[28] Further, the objectives and guiding principles of the National Medical Registration and Accreditation Scheme are set out in s 3 of the National Law, and under s 4, the Tribunal was bound to consider them. Two such objects of the legislation are to "provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered", and "to facilitate access to services provided by health practitioners in accordance with the public interest".[44] To require the Tribunal to disregard the deceptive actions, which were a deeply significant element in the applicant's response to his misconduct, would not be consistent with the purposes of the National Law. Having regard to the applicant's deceptions was directly relevant to the Tribunal's assessment of whether he was "suitably trained and qualified to practise in a competent and ethical manner".

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43 See *NTCAT Act*, s 32.

44 Health Practitioner Regulation National Law (NT), ss 3(2)(a) and (e).

[29] In its reasons, the Tribunal highlighted the applicant's multiple attempts to deceive investigators and continued deceitful conduct during the Tribunal hearing as its most significant concern. The Tribunal stated that taken alone, and without the element of deception, none of the incidents relating to Patients A-D would necessitate a period of deregistration, and the imposition of conditions including further training and mentoring would have sufficed.[45] However, the applicant's conduct must be assessed in its entirety, and any decision regarding the proper penalty must be made considering the particular facts of the matter. The dishonesty in the context of an investigation into the applicant's conduct illustrated to the Tribunal that a significant period of deregistration was required.[46] Regarding Patients B and C, the Tribunal noted the applicant recreated notes when he became aware of the investigation, attempting to demonstrate he was sufficiently thorough in the skin checks performed than he really was. The Tribunal also stated he continued to rely on those notes at the time of the hearing, urging the Tribunal to accept they were correct and accurately reflected the consultations.[47] The Tribunal refused to do so, and instead found the notes were created with the intention of misleading the investigation.[48] The Tribunal preferred the evidence of Patients B and C whose accounts differed from the information in the recreated notes and which substantiated the

45 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [14].

46 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [14].

47 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [6].

48 *Medical Board of Australia v Liyanage* [2017] NTCAT 660 at [43] and [75].

allegations of unsatisfactory professional performance.[49] Further, with regard to Patient D, the applicant's continued assertion at the Tribunal hearing that the consultation had not occurred was not credible.

[30] I cannot discern error in the approach of the Tribunal in holding that these matters bear poorly on the applicant's trustworthiness, and indicate he did not have insight into the nature of his conduct.[50] He was almost exclusively motivated by his own interests.[51] This throws into doubt whether the applicant will be likely to practice ethically in the future.[52] Further, as the respondent points out in written submissions, the applicant was initially suspended in 2014 for the boundary violation with Patient A, which he challenged successfully.[53] He was therefore on notice in relation to his conduct, and should have had even greater regard to practising ethically. The fact there were three further instances of misconduct makes the applicant's behaviour more brazen and strongly begs the question of whether he is suitably trained to practice ethically. The Tribunal was required to assess the applicant's conduct in its entirety and structure an order best suited to the protection of the public. It is unsurprising a conclusion was drawn that the applicant was a significant risk to the public if permitted to continue practice without insight into his conduct and his ethical obligations.

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49 *Medical Board of Australia v Liyanage* [2017] NTCAT 660 at [40] and [55].

50 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [6] and [7].

51 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [15].

52 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [19].

53 Respondent's further outline of submissions, 21 August 2018, [15].

[31] The assertions in the applicant's written submissions that the public did not suffer any deleterious effects due to his attempted deceptions fails to consider that the public requires medical practitioners to be honest and forthcoming in their dealings with investigatory bodies which act in their protection.[54] The maintenance of public confidence in the profession also requires practitioners to be deterred from acting unethically. As Kelly J stated in *Naidu v Medical Board of Australia & Anor*:[55]

> Protection of the public is not limited to protecting particular patients of a particular medical practitioner from the effects of that practitioner's misconduct. It includes protecting the public from similar misconduct by other medical practitioners and upholding public confidence in the medical profession by denouncing acts of professional misconduct.

[32] The Tribunal had regard to the objectives and guiding principles of the National Law outlined above.[56] Restrictions on the practice of a health professional are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality.[57] The Tribunal's powers to order sanctions under s 196(2) of the National Law are to be exercised in furtherance of public protection, not to punish the practitioner, although the deterrent effect of any penalty can be relevant in structuring a protective order.[58] While it was recognised that

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54 Applicant's further outline of submissions, 9 July 2018, at [21].

55 [2016] NTSC 8 at [30]; see also *Health Care Complaints Commission v Do* [2014] NSWCA 307 at [35].

56 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [6], [14], [20].

57 Health Practitioner Regulation National Law (NT), s 3(3)(c). The phrase "a health profession" is used in the legislation, not "a health professional" or "practitioner".

58 *Director-General, Department of Aging, Disability and Health Care v Lambert* [2009] NSWCA 102; 74 NSWLR 523 at 546, per Basten JA.

losing the applicant's services may not be in the public interest, the Tribunal found in all the circumstances, cancelling the applicant's registration was necessary to protect the public, as the applicant was not suitably trained and qualified to practice in a competent and ethical manner.[59] It was also noted the applicant and others should be deterred from deceptive dealings with the investigators and the respondent.[60]

[33] There were some mitigating factors in the applicant's case as outlined at [15] above. However, some of those factors were the direct result of his misconduct, such as being in the midst of stressful dealings with AHPRA, being suspended without income, and being the subject of embarrassing media reports. It could not be said to constitute error if little weight was given to those factors. Other factors referred to were that he had completed further skin cancer training and was at that time undertaking training in ethics. He had recognised inadequacies in his record-keeping practices, which he intended to remedy with specific steps such as allowing more time for consultations and having his notes regularly audited by AHPRA. On the other hand the applicant had also twice challenged his suspension by AHPRA (the first time successfully in 2014), and the undertakings to improve his practice and undergo training materialised at a late stage when the Tribunal was deciding in late 2016 whether to confirm the immediate

59 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [20].

60 *Medical Board of Australia v Liyanage* [2017] NTCAT 770 at [20].

suspension imposed by the respondent.[61] This suggests these undertakings are attempts to ensure a lesser penalty, rather than a product of genuinely understanding the ethical issues surrounding his conduct. Indeed there is no information before the Court to show the applicant has even completed the ethics course to date.[62] There is no dispute the applicant successfully treated many other patients prior to these findings, but that does not significantly mitigate the gravity of the applicant's conduct. The argument the Tribunal failed to give the mitigating factors appropriate weight would also fail.

[34] Clearly the Tribunal had regard to the time the applicant had already been suspended when the penalty was set. The suspension was clearly necessary during the course of the investigation which was complicated in part by the applicant's conduct throughout it.

[35] For the reasons above, there would be no substantial injustice in refusing to dispense with compliance with r 83.23(1)(a) of the Rules. Reasons of substance for the delay and supporting documentation were not provided, and after examination, I do not consider the proposed appeal has merit. Accordingly, an order dispensing with compliance will not be made.

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61 The applicant had been on notice regarding the investigation regarding Patient A from 2014, Patients B and C from 2015 and Patient D from 2016.

62 The best information the Court has is that the applicant was to complete the course in the first semester of 2018: Outline of respondent's submissions, 25 July 2017 at [40].

[36] **Orders**

1. Compliance with r 83.23(1)(a) of the *Supreme Court Rules* (NT) is not dispensed with.

2. The application for leave to appeal is refused.

3. I will hear the parties as to costs.
