Coppa v Medical Board of Australia [2014] NTSC 48

PARTIES:	COPPA, Bruce v MEDICAL BOARD OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	26 of 2014 (21413796)
DELIVERED:	17 October 2014
HEARING DATES:	6 May 2014
JUDGMENT OF:	BARR J

CATCHWORDS:

STATUTORY INTERPRETATION – *Health Practitioner Regulation National Law (NT)* – challenge to National Board's decision requiring plaintiff to undergo health assessment pursuant to s 169 – Part 8, Divisions 8 and 9 processes may take place independently of one another – health assessment of medical practitioner may occur at the same time as investigation of the medical practitioner.

ADMINISTRATIVE LAW – notion of reasonable belief under s 169 – words "or may have" indicate that reasonable belief as to a possibility is sufficient – National Board's belief as to plaintiff's impairment was a reasonable belief – *Health Practitioner Regulation National Law (NT)*.

ADMINISTRATIVE LAW – procedural fairness – defendant's decision to require health assessment did not involve making findings of fact or determination of merits of notifications – principles of natural justice

do not apply prior to formation of a "reasonable belief" – *Health Practitioner Regulation National Law (NT).*

Evidence Act 1939 (NT) s 57(1)(b)
Federal Court Rules 2011 (Cth)
Health Practitioner Regulation National Law (NT) s 3(2)(a), s 3(3), s 3A, s 5, s 6, s 23, s 25(a), pt 5, s 31(1), s 33(10), s 35(1)(g), s 35(1)(h), s 35(1)(j), pt 8, pt 8 div 3, pt 8 div 7, pt 8 div 8, pt 8 div 9, pt 8 div 8 sub-div 3, s 144(1)(d), s 148(1), s 151(1)(a), s 156, s 160, s 160(1), s 161, s162, s 166, s 167, s 167(b)(i), s 169, s 172(1), s 172(2), s 175, s 176(1)(a), s 176(3)(a), s 176(3)(b), s 177, s 178(2), s 191(1)(a), s 191(1)(b)(iii), s 191(3)(a)(ii), s 191(3)(a)(iii), sch 4 cl 7, sch 7 cl 7
Health Practitioner Regulation (National Uniform Legislation) Act (NT) 2010 s 4
Health Practitioner Regulation National Law Act 2009 (Qld)
Health Practitioner Regulation National Law (NSW) No 86a s 145B

George v Rockett (1990) 170 CLR 104 applied.

Bernadt v Medical Board of Australia [2013] WASCA 259; *Commissioner of Police v Ryan* (2007) 70 NSWLR 73; *Eckersley v Medical Board of Queensland* (1998) 2 Qd R 453; *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403; *Hocking v Medical Board of Australia* [2014] ACTSC 48; *Lindsay v New South Wales Medical Board* [2008] NSWSC 40; *Re the Medical Board of Western Australia; Ex parte P* [2001] WASC 103; *Reeve v Aqualast Pty Ltd* [2012] FCA 679; *T v Medical Board of South Australia* [1999] SASC 402; *The Medical Board of Queensland v Byrne* (1958) 100 CLR 582 referred to.

REPRESENTATION:

Counsel:

Plaintiff:	I Freckleton SC with G McMaster
Defendant:	D Mahendra

Solicitors:

Plaintiff:	MSP Legal
Defendant:	Australian Health Practitioner Regulation Agency

Judgment category classification:	B
Judgment ID Number:	Bar1413
Number of pages:	31

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Coppa v Medical Board of Australia [2014] NTSC 48
No. 26 of 2014 (21413796)

BETWEEN:

BRUCE COPPA
Plaintiff

AND:

MEDICAL BOARD OF AUSTRALIA
Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 17 October 2014)

[1] The plaintiff registered health practitioner seeks declaratory relief and an injunction to restrain the defendant from requiring him to undergo a health assessment pursuant to s 169 of the *Health Practitioner Regulation National Law (NT)*.

Legislative context

[2] The legislative context is somewhat complicated. By s 4 of the *Health Practitioner Regulation (National Uniform Legislation) Act* (NT), the 'Health Practitioner Regulation National Law', as in force from time to time, and set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld), applies as a law of the Northern Territory as if

it were part of the *Health Practitioner Regulation (National Uniform Legislation) Act* (NT). In such application, it is to be referred to as the *Health Practitioner Regulation National Law (NT)*.

[3] The responsible Northern Territory minister's second reading speech for the Health Practitioner Regulation (National Uniform Legislation) Bill 2009 explained the purpose of the proposed new law as follows:

> The purpose of this bill is to apply the Health Practitioner Regulation National Law, the national law, as a law of the Northern Territory to implement the National Registration and Accreditation scheme for the Health Professions, the national scheme, in the Northern Territory; to declare the responsible tribunal for the Northern Territory for the purposes of the national law; and to make consequential amendments to the *Health Practitioners Act*.
>
> The principal objective of the national law is to protect the public by establishing a national scheme for the regulation of health practitioners and students. Arrangements under the national scheme will help health professionals move around the country more easily; reduce red tape; provide greater safeguards for the public; and promote a more flexible, responsive and sustainable health workforce. ….
>
> The implementation of the national scheme is relying on the national law given effect by an act of the host jurisdiction, in this case, Queensland, which is then adopted and applied as law of, and by, participating jurisdictions. The national law has been designed to facilitate the full implementation of the national scheme consistent with the COAG agreement and the Australian Health Workforce Ministerial Council.

[4] In this judgment, for ease of reference, I will refer to the *Health Practitioner Regulation National Law (NT)* as "the National Law".

[5] The National Law establishes a national registration and accreditation scheme for the regulation of health practitioners. One of the objectives of the national scheme is to protect the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered.[1] The main principle for administering the National Law is now stated in terms that the health and safety of the public are paramount.[2] The "guiding principles" of the national registration and accreditation scheme include the principles that "the scheme is to operate in a transparent, accountable, efficient, effective and fair way" and that "restrictions on the practice of a health profession are to be imposed only if it is necessary to ensure that health services are provided safely and are of an appropriate quality".[3]

[6] The many health professions recognized under Part 5 of the National Law include medical, nursing and midwifery, occupational therapy, pharmacy, physiotherapy and psychology. National Boards are established for each of the recognized health professions. The defendant Medical Board of Australia is established as the National Board for the medical profession.[4] Each National Board is a body corporate. The functions of a National Board include assessment and investigation of matters referred to it by the Australian Health Practitioner Regulation Agency ("AHPRA")[5] about registered health practitioners; the establishment of panels to conduct

1 National Law, s 3(2)(a).
2 National Law, s 3A.
3 The guiding principles are set out in the National Law, s 3(3).
4 National Law, s 31(1).
5 A body corporate established by s 23 of the National Law.

hearings about health and performance and professional standards matters in relation to persons in the health profession; and the monitoring of conditions, undertakings and suspensions imposed on the registration of health practitioners.[6]

[7] The National Law requires all members of National Boards to act impartially and in the public interest in the exercise of their functions. The National Law expressly provides that a member of a National Board is to put the public interest before the interests of particular health practitioners or any entity that represents health practitioners.[7]

[8] The functions of a National Board do not include the actual receipt of complaints (or "notifications" as they are called). Rather, notifications are made to AHPRA, which undertakes preliminary assessments and investigations on behalf of the relevant National Board. The functions of AHPRA include providing administrative assistance and support to the National Boards in exercising their functions.[8] Subject to exceptions which are not presently relevant, AHPRA must as soon as practicable refer any notification it receives to the relevant National Board.[9] AHPRA must refer notifications about registered health practitioners in the medical profession to the defendant Medical Board of Australia.

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6 National Law, s 35(1)(g), (h) and (j).
7 National Law, s 33(10); Schedule 4, cl 7.
8 National Law, s 25(a).
9 National law, s 148(1).

[9] Part 8 of the National Law, headed "Health Performance and Conduct", makes provision for mandatory and voluntary notifications. Within Division 3 of Part 8, relevant to the present proceeding, s 144(1) permits voluntary notifications to be made to AHPRA about a registered health practitioner's professional conduct, competence, or suitability, or on the ground that the practitioner "has, or may have, an impairment."[10] The meaning of "impairment", in relation to a person, is that "the person has a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect – (a) for a registered health practitioner ... the person's capacity to practice the profession."[11]

Facts

[10] At all material times, the plaintiff was an employed medical practitioner working at a clinic in a remote community in Central Australia.

[11] On 30 September 2013 and on 7 October 2013, AHPRA received notifications from two persons in relation to the plaintiff. The two complainants identified themselves to AHPRA, and thus the notifications were not made anonymously. However, in the form subsequently provided to the plaintiff, the notifications were as set out below:

[10] National Law, s 144(1)(d).
[11] National Law, s 5 Definitions.

30 September 2013

Telephone in from anonymous notifier to Ms Inta Tumuls – Director Notifications, NT

Notifier wishes to remain anonymous and is notifying about Dr Bruce Coppa

- Is concerned about possible substance abuse
- Aggressive behaviour displayed, shaky and dishevelled
- It is noticed that PR gets agitated and shaky hands about 12 & 3 pm
- Disappears on regular basis
- Returns in high spirits

7 October 2013

Telephone in from anonymous notifier to Ms Inta Tumuls – Director Notifications, NT

Notifying about Dr Bruce Coppa. Notifier wishes to remain anonymous

- Notifier is suspicious of Dr Coppa drug taking
- Disappears twice a day for ¾ hr or longer and returns happier. Moods change.
- Never wears shirts with sleeves shorter than ¾ length.
- Protective of private life.

[12] The Senior Notifications Officer of AHPRA wrote to the plaintiff by letter dated 18 November 2013 providing him with a copy of the two notifications, and informing him that the defendant would assess the notification to decide

whether or not further action was required. The plaintiff was invited to provide a written response to the notification, and any information he might consider relevant, by no later than 30 December 2013.

[13] By letter dated 10 December 2013, solicitors acting for the plaintiff replied to AHPRA. The solicitors stated that the plaintiff unequivocally denied the allegation that he had a 'substance abuse' issue and was taking drugs. He also denied displaying any aggressive behaviour. The solicitors asserted that, because the notifiers had elected to remain anonymous and the allegations were "so obviously lacking in particularity", it was difficult to provide a meaningful response beyond denial of the allegations. The plaintiff admitted he was not a neat dresser and that he might on occasion appear dishevelled; further that he regularly left his workplace at lunch time and was protective of his private life. The plaintiff's solicitors submitted that the allegations were vexatious and did not warrant any further investigation by AHPRA. They requested that the defendant determine not to take any further action in relation to the notifications.

[14] The plaintiff's solicitors did not specifically refer to any statutory provision, but under s 151(1)(a) of the National Law the defendant could decide to take no further action in relation to a notification if it reasonably believed the notification was "frivolous, vexatious, misconceived or lacking in substance".

[15] The defendant did not accept the submission that it take no further action. On 13 January 2014, it resolved to investigate the plaintiff's health, pursuant to s 160(1) of the National Law.[12] The issue identified for investigation, as stated in a letter to the applicant from AHPRA dated 15 January 2014, was: "Whether the practitioner has, or may have an impairment".

[16] In addition to the decision to investigate under s 160(1) of the National Law, the defendant decided, also on 13 January 2014, to require the plaintiff to undergo a health assessment purportedly pursuant to s 169 of the National Law.[13] A "health assessment" is defined to mean "an assessment of a person to determine whether the person has an impairment and includes a medical, physical, psychiatric or psychological examination or test of the person."[14] The specific impairment identified by the defendant for assessment was substance abuse.

[17] The AHPRA letter dated 15 January 2014 informed the plaintiff of the reasons for the defendant's belief under s 169 of the National Law, and explained the decision to require the plaintiff to undergo a health assessment, as follows:

"The Board formed this view for the following reasons:

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[12] The National Law, s 160(1), provides that a National Board may investigate a registered health practitioner if it decides it is necessary or appropriate (a) because the Board has received a notification about the practitioner or (b) because the Board for any other reason believes the practitioner has or may have an impairment.

[13] The National Law, s 169, provides that a National Board may require a registered health practitioner to undergo a health assessment if the Board reasonably believes, because of a notification or for any other reason, that the practitioner has, or may have, an impairment.

[14] National Law, s 5 Definitions.

(a) Two notifications have been made about the practitioner who detailed similar allegations of impairment due to possible substance abuse.

(b) The practitioner's response to the allegations contained in the two notifications does not sufficiently address all aspects of the allegations, specifically in relation to the following:

(i) Agitation and shaky hands at different periods during the day;

(ii) Disappearing from the workplace on a regular basis without notice (not including designated lunch period);

(iii) Returning to the workplace with noticeable mood improvement.

(c) Based on the above, there is a reasonable belief that the practitioner has, or may have, an impairment and it is necessary for a health assessment to take place in the interests of public health or safety.

(d) Based on the above, it is necessary and appropriate to investigate the allegations contained within the two notifications received regarding the practitioner in the interests of public health or safety."

[18] Under s 172(1) of the National Law, a Board must give a registered health practitioner written notice if it requires him or her to undergo a health assessment. Such a notice (under s 172(2)) must state:

(a) that the registered health practitioner … is required to undergo a health assessment or performance assessment; and

(b) the nature of the assessment to be carried out; and

(c) the name and qualifications of the registered health practitioner who is to carry out the assessment; and

(d) that if the registered health practitioner … does not undergo the assessment the National Board may continue to take proceedings in relation to the practitioner … under this Part.

[19] The National Law (s 175) requires the appointed assessor to give a report of the health assessment to the National Board, which must (as soon as practicable upon receipt) give a copy of the report to the registered health practitioner (s 176(1)(a)). A person nominated by the National Board must then discuss the report with the practitioner (s 176(3)(a)and (b)).

[20] The purpose of a health assessment is to enable prompt professional evaluation of issues that relate to the registered health practitioner's physical or mental fitness to practise. That evaluation then informs Board decision-making.

[21] After receipt of a health assessment, a National Board has a number of actions available to it, including the taking of "relevant action" (defined by s 178(2)), or referral to a panel, such as a health panel established under s 181. A health panel would then conduct a hearing (not open to the public) after which the panel might decide that the practitioner has no case to answer (and hence that no further action is required);[15] or that the practitioner has an impairment.[16] If the panel decides that the practitioner has an impairment, the panel could impose conditions on the practitioner's registration, for example, a condition requiring the practitioner to undertake

[15] National Law, s 191(1)(a).
[16] National Law, s 191(1)(b)(iii).

a specified period of supervised practice, or a condition that the practitioner refrain doing something in connection with his or her practice.[17]

[22] On 20 January 2014, the Senior Notifications Officer of AHPRA informed the plaintiff's solicitors that an appointment had been made for the plaintiff to be assessed by a named medical practitioner in Alice Springs on 17 February 2014. The plaintiff's solicitors were also informed that the plaintiff had to attend on Monday 10 February to undergo comprehensive assessment including but not limited to providing urine and blood samples.

[23] On 28 January 2014 the plaintiff's solicitors wrote to AHPRA, reiterating complaints made at an earlier time, and stating:

> "It is our client's opinion that the Board has clearly failed to provide our client with the requisite particulars and/or procedural fairness by failing to identify the notifiers in the notification of 13 November 2013 [*sic*] and this precluded our client from, amongst other things, being able to assess the bona fides of the notifiers and properly respond to the notifications.
>
> Further, the allegations that you have referred to in your letter of 15 January 2013 … do not provide any reasonable basis for the Board to require our client to undergo a health assessment.
>
> Having regard to the above, it is clear that the decision of the Board to conduct an investigation and require our client to undergo a health assessment is unreasonable, lacks evident and intelligible logic based on the particulars at hand and is liable to be set aside in the event that our client seeks prerogative relief in the Supreme Court.
>
> We therefore invite the Board to review its decision, failing which we are instructed to commence prerogative relief proceedings in the Supreme Court."

[17] National Law, s 191(3)(a)(ii) and (iii).

[24] On 3 February 2014, the plaintiff's solicitors wrote to AHPRA to state that the plaintiff would not be attending the scheduled medical appointments. The solicitors asked AHPRA to confirm that the plaintiff was not required to attend such appointments until the defendant had considered and responded to the plaintiff's solicitors' letter of 28 January 2014. An officer of AHPRA replied to the plaintiff's solicitors on 7 February 2014, stating that she was unable to excuse the plaintiff from the health assessment, but that the letter of 28 January and the fact of the plaintiff's refusal to attend would be brought to the attention of the defendant.

[25] On 6 February 2014, AHPRA had received a further notification, or a follow-up notification, in relation to the plaintiff. I extract below the notification, in the form subsequently provided to the plaintiff:

> Practitioner: Bruce Coppa
>
> Notification No: 00266004 & 00266453
>
> <u>Telephone discussion with notifier on 6 February 2014</u>
>
> In the course of a telephone discussion between one of the notifiers and the investigator on 6 February 2014, further information was provided regarding the practitioner's recent behaviour at [name of remote community] clinic including:
>
> - That the practitioner is acting angrily at work and treating one of the nurses at the Clinic badly because he thinks that she has made the notification about him.
>
> - That on Monday 3 February 2014 the practitioner was observed by the notifier around mid-morning at the Clinic looking dishevelled and shaky and walking oddly, swaying and with glassy and glazed

eyes and that the notifier believed that he appeared to be ‘on something’.

- That the practitioner continues to be absent from the Clinic at various times, two or three times a day at times other than during his lunch break, which is at 12.00 pm each day.

- That the practitioner refuses to see patients at 11.55 am.

[26] On 10 February 2014 the defendant met and considered the plaintiff’s solicitors’ letter dated 28 January 2014, the evidence previously made available to the defendant at the time of the decisions made on 13 January 2014, and the further notification of 6 February 2014, referred to in [25]. The defendant confirmed its decisions of 13 January 2014 (1) that it conduct an investigation and (2) that the plaintiff should undergo a health assessment.

[27] By letter dated 12 February 2014, the Senior Notifications Officer of AHPRA informed the plaintiff’s solicitors that the defendant had confirmed its decisions made on 13 January, and provided a copy of the further notification of 6 February 2014. The letter continued:

> “In the Board’s view, Dr Coppa has been provided with sufficient particulars of the notifications and provided with adequate opportunity to respond. Please provide any further response to the additional particulars provided by 10 March 2014.
>
> The notifiers have expressed concern that Dr Coppa may retaliate or victimise them if their identities are made known to him. This may place the notifiers at risk of intimidation or harassment by Dr Coppa and/or prejudice the investigation of the notifications. For this reason, the names of the notifiers will not be provided.”

[28] In the same letter, the plaintiff's solicitors were notified of further appointments made for the plaintiff to attend a health assessment: 25 February at 2.00 pm for a comprehensive assessment with a nurse, and 3 March 2014 at 10.00 am for assessment by a named medical practitioner.[18] The address and contact telephone number for the premises at which the assessment would be carried out were provided.

[29] By letter dated 21 February 2014, the plaintiff's solicitors informed AHPRA that the plaintiff was on leave overseas, not scheduled to return to Alice Springs until 10 March, and that he would not attend the scheduled appointments. Accordingly, AHPRA re-scheduled appointments for 25 March 2014 and 31 March 2014, and, by letter dated 17 March 2014, it notified the plaintiff's solicitors of the relevant appointment dates, times, location, and name of the (same) medical practitioner.

[30] The plaintiff did not attend the appointments.

Commencement of proceedings – relief claimed

[31] The plaintiff's solicitors commenced proceedings by originating motion filed 20 March 2014. The specific relief claimed was substantially the same as that claimed in the amended originating motion filed 1 May 2014, as follows –

1. A declaration that the National Board did not satisfy the requirements of Division 8, Part 8 and/or section 169 of the *Health Practitioner Regulation National Law* (the National Law) prior to

[18] The assessing medical practitioner was named and identified as Director, Addiction Medicine, Alcohol and Other Drug Services, Central Australia (ADSCA).

its decision on 13 January 2014 to require the plaintiff to undergo a health assessment.

2. A declaration that the National Board did not satisfy the requirements of Division 8, Part 8 and/or section 169 of the National Law prior to its second decision on 10 February 2014 to require the plaintiff to undergo a health assessment.

3. An order restraining the National Board from requiring the plaintiff to undergo a health assessment pursuant to section 169 of the National Law based on the notifications the National Board received in the period between 30 September 2013 and 10 February 2014 (inclusive).

4. An order that the name and/or identify of the plaintiff not be published.[19]

[32] The plaintiff does not challenge the defendant's decision to investigate the plaintiff's health pursuant to s 160(1) of the National Law. He challenges only the defendant's decision to require him to undergo a health assessment pursuant to s 169 of the National Law.

[33] In his affidavit evidence, the plaintiff denied allegations made by the notifiers of, amongst other things "substance abuse", "drug taking" and/or being "on something". He asserted that the other matters referred to by the notifiers did not provide a reasonable basis for the defendant to believe that he had engaged in "substance abuse" or "drug taking" or that he had an impairment. The plaintiff said that he was very concerned and distressed when he learned that the defendant had made a decision to require him to undergo a health assessment and had made appointments at the Alcohol and

[19] The plaintiff also sought such further order as the Court might see fit to grant, costs and, curiously, interest.

Other Drug Services, Central Australia ("ADSCA"). He said that one reason for his concern was that his attendance at the ADSCA would become public knowledge and hence it would also become public knowledge that the defendant had had a reasonable belief that he had an impairment or had engaged in substance abuse, drug taking etc. He said that, if the health assessment were to proceed, it would severely compromise his reputation within the medical profession and negatively impact on his current employment and any future prospective employment. He also expressed concern that many of his current patients themselves attend the ADSCA regularly and he said it would significantly affect his ability to treat those patients if he had to attend the ADSCA "as a patient alongside them".

[34] The plaintiff's attempted justification for his unwillingness to undergo the required health assessment does not bear scrutiny. There is no evidence to suggest that the plaintiff's health assessment would have been conducted otherwise than discreetly. The plaintiff's claimed concern that he might be seen in the waiting room of ADSCA could have been resolved simply by the plaintiff being allowed a private waiting area, if he needed to wait for his appointments. However, the plaintiff had not mentioned that concern to the AHPRA officers who made the series of appointments referred to in [22], [28] and [29]; nor had he explored alternative possibilities with either AHPRA or the nominated medical practitioner from ADSCA. Moreover, even if he were seen in the waiting room of ADSCA by any of his remote community clinic patients (who happened to have been there on the day),

those patients would presumably have no idea why the plaintiff was there. If he were asked, the plaintiff could honestly reply that he had come to see a professional colleague. It is not as though the plaintiff would be giving a blood or urine sample in the waiting room where his patients would be watching him. Further, apart from the assertion that it would be so, the plaintiff does not explain how being seen by his patients would significantly affect his ability to treat those patients.

[35] In any event, in responding to notifications of the kind made against the plaintiff, the defendant was not required to have regard to the plaintiff's sensitivities to the exclusion of its legal obligations. The primary aim or objective of the National Law is to protect the public, and the obligation of the defendant was to put the public interest ahead of the interests of any individual medical practitioner.[20]

[36] Moreover, given the plaintiff's repeated denials of drug taking and substance abuse, and his expressed concern that if the health assessment were to proceed it would severely compromise his reputation within the medical profession and negatively impact on his current and future employment, surely the most logical thing for him to have done was to provide blood and urine samples and undergo the health assessment, and thereby show all concerned that the notifications were without substance, at least in relation to any possible impairment from substance abuse.

[20] See [7] and footnote 7 above.

[37] Notwithstanding my observations (and the doubts expressed by me) in [34] to [36], the plaintiff's case at trial did not depend on my acceptance of his evidence, which was largely irrelevant to the legal issues argued on his behalf.

[38] The three main arguments advanced on behalf of the plaintiff at trial were: (1) an argument based on statutory interpretation that the defendant could not require the plaintiff to undergo a health assessment while the investigation was ongoing; (2) an administrative law argument that the defendant's belief as to the plaintiff's having an impairment was not a reasonable belief; and (3) an administrative law argument that the defendant did not provide procedural fairness to the plaintiff before requiring the plaintiff to undergo a health assessment.

The statutory interpretation argument

[39] The plaintiff submitted that National Law does not allow the defendant to conduct a Part 8, Division 9 health assessment as part of a Part 8, Division 8 investigation. Once the defendant had elected to conduct the investigation referred to in [15] above, it did not have the power to require the plaintiff to attend a health assessment until the full process set out in Part 8, Division 8, Subdivision 3, s 160 – s 162 and s 166 – s 167 of the National Law, had taken its course. That process included the defendant receiving a report by the investigator with recommendations as to future action. The mandatory language of Part 8, Division 8 was said to be a clear indication of the legislative intention.

[40] The plaintiff also referred to the fact that an investigator does not have the power to require a health practitioner to attend a health assessment, and submitted that, where express powers conferred on an investigator do not include a power to override an individual's rights to privacy,[21] the Court should not interpret Part 8 of the National Law as enabling the defendant to require a s 169 health assessment to be conducted as part of a Division 8 investigation.

[41] The construction contended for by the plaintiff was said to find support in Section 145B of the *Health Practitioner Regulation National Law (NSW)* [which, I note, is not the law in the Northern Territory] under which the Council in that state may refer a practitioner for a health assessment. The plaintiff submitted that the "clear intention" of the National Law is that an investigation cannot occur at the same time as an assessment. Once the defendant elects to conduct and commence an investigation or an assessment it is bound to complete that task before determining what further action, if any, it will take.

The defendant's belief as to the plaintiff's impairment

[42] Further or alternatively, it was submitted that the defendant's belief that the plaintiff had or may have had an impairment was not a reasonable belief as it was based on three sets of uncorroborated and untested allegations only. A reasonable belief requires the existence of facts which are sufficient to

[21] The plaintiff's counsel referred to *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403 at 433; 85 ALR 588 at 614 – 615, per French J.

induce the belief in a reasonable person. It was submitted that there must be proven objective circumstances sufficient to justify the belief.[22]

The procedural fairness argument

[43] Further or alternatively, the defendant's belief that the plaintiff had or may have an impairment was not a reasonable belief because of the procedural circumstances in which the defendant reached its view. The plaintiff argued that the principles of natural justice apply prior to the formation of a "reasonable belief" and the making of decisions pursuant to s 169 of the National Law.

[44] It was further submitted that the defendant failed to afford procedural fairness to the plaintiff by incorrectly asserting that the plaintiff had failed to address all the allegations, by failing to provide sufficient particulars to the plaintiff to enable him to provide a detailed and meaningful response to the allegations, and by making its determination to require the plaintiff to attend a health assessment based on uncorroborated allegations prior to giving the plaintiff an opportunity to respond to the further allegations made by the notifier on 6 February 2014.

Consideration of the plaintiff's case

[45] I reject all three of the plaintiff's arguments set out and summarized in [38] to [44].

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[22] The plaintiff's counsel referred to *Bernadt v Medical Board of Australia* [2013] WASCA 259 at [173], [66]

[46] There is no warrant to imply a limitation into the National Law that the defendant may not resolve to investigate a medical practitioner and at the same time require a health assessment of that medical practitioner. This is particularly so given the specific provision that the interpretation that will best achieve the purpose or object of the National Law is to be preferred to any other interpretation.[23] There is no logical reason, in the public interest, to read into the National Law a limitation which would effectively limit the options available to a National Board by requiring that a health assessment not take place before the entire investigation process has been completed, or vice versa.[24]

[47] Both Division 8 (Investigations) and Division 9 (Health and performance assessments) are contained within Part 8 of the National Law "Health, Performance and Conduct". Division 9 enables a health (or performance) assessment upon the Board forming the requisite belief. Division 9 enables a separate process; it is not dependent upon Division 8 or any other Division within Part 8. A health (or performance) assessment under Division 9 is not required to follow upon the processes for investigating a notification under Division 8. Division 9 can stand alone, and may be utilized in conjunction with Division 8, ancillary to an investigation. The processes set out in each of Divisions 8 and 9 can take place independently of one another.

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[23] National Law s 6; Schedule 7, cl 7.

[24] I note that s 177 makes similar provision in the situation which applies after the National Board has considered an assessor's report under Division 9.

[48] With reference to the plaintiff's argument summarised in [39], counsel for the plaintiff relied on s 167(b)(i) of the National Law which provides that, after considering an investigator's report under Division 8, a National Board must do one of several things, including "take the action the Board considers necessary or appropriate under another Division."[25] Counsel submitted that the effect of s 167(b)(i) is that, once the Board has embarked on an investigation, it cannot take action "under another Division" until after it has considered the investigator's report. I disagree that s 167(b)(i) has the effect contended for. It does *not* require that "the action … under another Division" not commence until after the Board has considered the investigator's report. The reference to "the action" in s 167(b)(i) would include action under s 169 (if such action had not already been taken) to require a registered health practitioner to undergo a health assessment, but would also include other actions within Division 9, including making a decision under s 177 (after receipt of an assessor's report and discussions with the practitioner).

[49] I therefore consider that the power contained in s 167(b)(i) to "take the action the Board considers necessary or appropriate under another Division" reflects the position under the National Law that the Board has options after

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[25] There are a number of options available. National Law, s 167, reads as follows:

> After considering the investigator's report, the National Board must decide –
> (a) to take no further action in relation to the matter; or
> (b) to do either or both of the following –
> (i) take the action the Board considers necessary or appropriate under another Division;
> (ii) refer the matter to another entity, including, for example, a health complaints entity, for investigation or other action.

considering an investigator's report, including to continue processes already commenced under Division 9 and taking action following the completion of those processes. Construed in that way, s 167(b)(i) does not operate to prevent action under Division 9 being commenced before the Board has considered the investigator's report provided under Division 8, nor does s 167(b)(i) evidence an intention under the National Law that an assessment cannot occur at the same time as an investigation.[26]

[50] I consider that s 145B of the *Health Practitioner Regulation National Law (NSW)* is irrelevant to the interpretation of the National Law because the statutory scheme in New South Wales is materially different to that established under legislation applying in the Northern Territory. The position in New South Wales is a departure from the National Law. The plaintiff's argument that there should be consistency of interpretation across jurisdictions is valid, but only in so far as the comparative legislation is the same or substantially the same.

[51] The only limitation to Division 9 being utilized to require a health assessment is the Board's reasonable belief under s 169 that the registered health practitioner has or may have an impairment. In that context I turn to consider the plaintiff's submission that the defendant did not have a reasonable belief as to the plaintiff's impairment. An important matter to note is that s 169 requires that the defendant reasonably believe that the plaintiff has *or may have* an impairment. The words "or may have" clearly

[26] As argued in the Plaintiff's Outline of Submissions, 6 May 2014, par 4.9.

indicate that reasonable belief as to the possibility of an impairment is sufficient.

[52] Both counsel have referred me to the decision of the High Court in *George v Rockett,*[27] for the legal meaning of the word "belief":

> Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

[53] In *George v Rockett*, the Court described the difference between suspicion and belief, and explained that the facts which can reasonably ground a suspicion may be insufficient reasonably to ground a belief.[28] Nonetheless, the objective circumstances to ground a belief need not "establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof."[29] In that context, the Court made the statement extracted in [52] as to the meaning of, and grounds necessary for, "belief".

[54] Therefore, the matters the subject of belief do not need to be proven on the balance of probabilities. It is necessary that the Board hold a reasonable belief about the requisite matters, not about whether those matters were the fact.[30] Most decisions in respect of such matters would be made on

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[27] *George v Rockett* (1990) 170 CLR 104 at 116.4.
[28] *George v Rockett* (1990) 170 CLR 104 at 115.8.
[29] *George v Rockett* (1990) 170 CLR 104 at 116.3.
[30] *Bernadt v Medical Board of Australia* [2013] WASCA 259 at [171].

incomplete evidence which had not been tested or fully tested, leaving at least something to 'surmise or conjecture'.

[55] In *Reeve v Aqualast Pty Ltd*,[31] Yates J reviewed the authorities in relation to pre-trial discovery in civil proceedings under the *Federal Court Rules 2011*, which required a prospective applicant to hold a reasonable belief that he had a right to relief from a prospective respondent, and a reasonable belief that the prospective respondent had documents relevant to that right. His Honour concluded that, although the notion of "reasonable belief" may set the threshold at quite a low level, there must be some tangible support that takes the existence of the alleged right beyond mere belief or assertion by the applicant.[32]

[56] In my judgment, the notifications referred to in [11], even without the follow-up notification referred to in [25], amply justified a reasonable belief on the part of the defendant that the plaintiff had or may have had an "impairment" as explained in [9] above, namely substance abuse which was detrimentally affecting or likely to detrimentally affect his capacity to practise as a medical practitioner. The follow-up notification served to reinforce and confirm the reasonable belief already formed.

[57] I am satisfied that the two notifiers identified themselves at the time of notification to the AHPRA officer referred to in [11]. It is apparent from the recorded content of the two notifications, and from the follow-up

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[31] *Reeve v Aqualast Pty Ltd* [2012] FCA 679 at [61]-[65].
[32] *Reeve v Aqualast Pty Ltd* [2012] FCA 679 at [65](g).

notification, that the notifiers had closely observed the plaintiff at his place of work, over one or more days. The notifiers were quite possibly (although not necessarily) work colleagues of the plaintiff: nurses or administrative staff at the remote community clinic. The notification of 30 September 2013 was probably more concerning than the notification of 7 October 2013; the earlier notification referred to the practitioner's aggressive behaviour and the fact that he was shaking and dishevelled, becoming agitated with hand tremors at about 12 noon and 3.00 pm. However, both notifiers referred to the practitioner's absences from work on two or more occasions per day, and his elevated or comparatively elevated mood on his return. The description provided in the follow-up notification, of the plaintiff at his place of work in the mid-morning of 3 February 2014, looking dishevelled and shaky, swaying as he walked, with glassy and glazed eyes, would logically have been seen as a 'red flag' by the defendant. It was objectively alarming.

[58] The grounds for the defendant's belief that the plaintiff had or at least may have had an impairment were strong. The defendant was entitled to rely upon complaints and allegations, material that would not conventionally be considered as strictly evidentiary in nature.[33] The notifications were tangible support for the defendant's belief. The defendant's belief was reasonable. In summary, I am satisfied that the defendant reasonably believed, because of the notifications, that the plaintiff had or may have had an impairment. For this reason, I reject the plaintiff's argument that the defendant should have

[33] *Lindsay v New South Wales Medical Board* [2008] NSWSC 40 at [77](c).

conducted "some level of fact finding in order to determine whether or not the allegations had at least some substance", before requiring the plaintiff to undergo a health assessment.

[59] I next explain why I have rejected the plaintiff's arguments in relation to natural justice and procedural fairness. In my judgment, the rules of natural justice did not apply to the administrative process preliminary to the defendant Board reaching the reasonable belief necessary to require the plaintiff to undergo a health assessment pursuant to s 169 of the National Law. The defendant's decision, consequent upon that belief, to require the plaintiff to undergo a health assessment, did not involve making findings of fact or determining the merits of the notifications. The defendant's decision did not determine any question affecting the plaintiff's rights. The situation was not one where the exercise of the defendant's power had the capacity to interfere with rights, interests or legitimate expectations, as argued by the plaintiff.[34] There is nothing in the National Law which expressly or impliedly required the defendant to do more than it did.[35]

[60] In this context, the full process required under Division 9 is a relevant consideration. Importantly, before the defendant could have made any decision under s 177 of the National Law affecting the plaintiff, it would have had to (1) provide a copy of the report of the health assessor to the

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[34] In reliance on *Commissioner of Police v Ryan* (2007) 70 NSWLR 73 at [28], per Basten J.

[35] *The Medical Board of Queensland v Byrne* (1958) 100 CLR 582 at 591, per McTiernan J; *Eckersley v Medical Board of Queensland* (1998) 2 Qd R 453 at 466.40-467, per Fitzgerald P; *T v Medical Board of South Australia* [1999] SASC 402 at [45], [51]; *Re the Medical Board of Western Australia; Ex parte P* [2001] WASC 103 at [33], [38].

plaintiff, (2) nominate a person to discuss the report with the plaintiff, and (3) consider the assessor's report and the discussions held between the plaintiff and the nominated person. Division 9 thus contains its own express procedural fairness requirements.

[61] For essentially the same reason as explained in [59], I accept the submission of the defendant's counsel that the defendant's decision not to identify the notifiers to the plaintiff (for reasons of confidentiality) was not an irregularity, and certainly not a material irregularity or a failure to provide procedural fairness. Moreover there was a proper reason for the decision, evidenced by the follow-up notification, extracted at [25]. Although I probably do not need to deal with the other procedural fairness grounds argued on behalf of the plaintiff, referred to in [44], I reject the submission that the defendant incorrectly asserted that the plaintiff had failed to address all the allegations in the notifications. I refer to [17] above and to the three aspects accurately identified by the defendant, to which the plaintiff's solicitors had not responded: agitation and shaking hands, workplace disappearances outside of the designated lunch period and returning to the workplace with noticeable mood improvement.

[62] I also reject the submission that the defendant failed to provide sufficient particulars to the plaintiff to enable him to provide a "detailed and meaningful response" to the notifications. The defendant provided all the information then available to it (except for the identity of the two notifiers), and could not have given any further "particulars" at that time. In any event,

the word “particulars” suggests particulars in civil and criminal litigation, the dual purpose of which is to identify matters in issue, and confine the scope of the evidence relevant to those issues, for the purpose of a hearing or trial. There was no justification for the request for “particulars” by the plaintiff’s solicitors in the preliminary administrative process underway at the time of request.

[63] The plaintiff also argued that he had not been given an opportunity to respond to the further allegations made by the notifier on 6 February 2014. In the context that the defendant’s decision (which had already been made), was confirmed after the follow-up notification was received, there was no procedural fairness requirement for the plaintiff to be heard, or heard further by the defendant. I note in any event, to the extent it might be relevant, that the plaintiff did not seek to adduce evidence at the hearing as to what he would have submitted in relation to the follow-up notification, further to that which had already been submitted on his behalf in response to the two earlier notifications.

Application for non-publication order

[64] In conclusion, the plaintiff has failed to establish his entitlement to the relief claimed by him, set out at [31], indented paragraphs 1, 2 and 3.

[65] Counsel for the plaintiff submitted that, given the confidential nature of the action taken by the defendant under the National Law, it would be unfairly prejudicial to the plaintiff for it to become a public knowledge that the

defendant "had an inclination of its mind towards accepting the proposition that the plaintiff was abusing drugs in circumstances where that belief was not a 'reasonable belief'". However, because I have decided[36] that the defendant reasonably believed that the plaintiff had or may have had an impairment, there is nothing to sustain the plaintiff's submission.

[66] The plaintiff unsuccessfully challenged the reasonableness of the defendant's belief and the legitimacy of the processes it followed or attempted to follow in the public interest. The principle of open justice is the paramount consideration, and the plaintiff has not established by cogent evidence or legal principle that his desire for confidentiality should prevail over the principle.

[67] I do not consider it appropriate to make an order forbidding or prohibiting the publication of the plaintiff's name. I am not satisfied, as required by s 57(1)(b) *Evidence Act* (NT), that such an order would be desirable "for the furtherance of, or otherwise in the interests of, the administration of justice". Accordingly, that part of plaintiff's case must also be dismissed. It follows that I would discharge the existing interim order prohibiting publication of the plaintiff's name.

Conclusion

[68] The plaintiff's claim is dismissed.

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[36] See [58] above.

[69] I will hear the parties on the issue of costs and consequential orders.
