

# Minter Ellison Health News

15 July 2009

## Caselaw

### Commonwealth

#### ***Shaboodien v Dental Board of Western Australia***

Mr Shaboodien was registered in Victoria as an "orthodontist" pursuant to section 7 of the *Health Professions Registration Act 2005* (Vic). He applied to have his registration mutually recognised in New South Wales, which resulted in: his deemed registration as a dentist (restricted to the practice of orthodontics) in New South Wales under the *Dental Practice Act 2001* (NSW); and, his actual registration as a dentist in New South Wales, subject to conditions that Mr Shaboodien was "not registered to practice general dentistry" but was "registered to practice orthodontics".

Mr Shaboodien then applied under the *Mutual Recognition (Western Australia) Act 2001* to have his registration in Victoria (as an orthodontist) and in New South Wales (as a dentist restricted to the practice of orthodontics) mutually recognised in Western Australia. This application was rejected by the Dental Board of Western Australia. That decision was the subject of the review by the Administrative Appeals Tribunal of Australia (the Tribunal), in this case.

The Tribunal declared that pursuant to section 31(2) of the *Mutual Recognition Act 1992* (Cth) as adopted in New South Wales and in Western Australia, the activities involved in the occupation of "orthodontist" in Victoria are not substantially the same as the activities involved in the occupation of "dentist" in New South Wales and Western Australia, even with the imposition of conditions.

[Click here for decision](#)

### New South Wales

#### ***Casari v Sydney South West Area Health Service***

Mr Casari, an employee of Sydney South West Area Health Service (the Service) for almost 12 years, was summarily dismissed for serious and wilful misconduct in July 2007 after taking a photograph of a naked, two year-old patient, in the emergency department of Liverpool Hospital. At first instance, it was held that Mr Casari's dismissal was not harsh and unjust. Mr Casari sought leave to appeal that decision to the full bench of the Industrial Relations Commission of New South Wales (the Commission), which was granted.

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The full bench of the Commission held that Mr Casari had not been motivated by evil or improper intent in taking the photograph and that no harm had been done to the child. On that basis, while Mr Casari's actions had not constituted a breach of the duty of care owed by him personally or on the Service's behalf, the Commission conceded that Mr Casari's actions constituted a breach of fidelity to the Service since they exposed the Service to criticism that it failed to ensure the child's welfare was not placed at risk. Despite that, the Commission held that Mr Casari's breach of fidelity was not as severe as the Service had suggested and that without any improper motive on Mr Casari's part, his actions did not strike at the heart of his employment contract and were not so repugnant to his relationship with the Service that they constituted a proper basis for summary dismissal.

The Commission found that Mr Casari's dismissal by the Service was harsh, just and unreasonable. The Commission considered the fact that Mr Casari no longer enjoyed the trust of the Service and ordered that the Service re-employ Mr Casari subject to Mr Casari tendering his resignation from the position the day after the order was made. Mr Casari ordered the Service to pay Mr Casari's wages and entitlements from the date the Service had purported to terminate Mr Casari's employment until the day after the Commission's order was made.

[Click here for decision](#)

## Victoria

### ***Pharmacy Board of Victoria v Jadczyk (Occupational and Business Regulation)***

Mr Mark Jadczyk, a pharmacist registered in Victoria, pleaded guilty to 84 offences under the *Drugs, Poisons and Controlled Substances Act 1981* and the *Drugs, Poisons and Controlled Substances Regulations 1995*, in the Melbourne Magistrates' Court. Under s 59(2) of the *Health Professions Registration Act 2005*, the Pharmacy Board of Victoria (the Board) asked the Victorian Civil and Administrative Tribunal (the Tribunal) to consider whether the fact of Mr Jadczyk's having been found guilty of these offences meant that he had engaged in professional misconduct or unprofessional conduct.


The Tribunal found that Mr Jadczyk had abused drugs for recreational purposes and, accordingly, had abused the trust put in him by his registration as a pharmacist. In so doing, the Tribunal found Mr Jadczyk had brought the profession into disrepute. The Tribunal cancelled Mr Jadczyk's registration and disqualified him from re-applying for a period of nine months from the date of the order.

[Click here for decision](#)

## Western Australia

### ***Medical Board of Western Australia and McGushin***

The Medical Board of Western Australia (the Board) made a number of allegations that Mr Michael McGushin, a surgeon, was guilty of gross carelessness in relation to five patients between 1999 and 2007 at the Kalgoorlie Regional Hospital. Mr McGushin admitted the allegations made against him. The State Administrative Tribunal of Western Australia (the Tribunal) was called upon to determine the penalty to be applied to Mr McGushin.



Despite Mr McGushin's admission of guilt, and the proactive steps he had taken to address the problems with his surgical practice, which included significant financial losses to Mr McGushin, the Tribunal considered it appropriate to impose a fine upon Mr McGushin to signal to the community that gross carelessness by a medical practitioner is treated seriously. The Tribunal ordered Mr McGushin pay the maximum penalty of \$10,000 and that Mr McGushin's registration be made subject to the conditions the Board had proposed to the Tribunal.

[Click here for decision](#)

## Northern Territory

### ***Inquest into the death of Kenneth William Hill***

Kenny Hill was admitted to the emergency department of the Royal Darwin Hospital (the Hospital) on 13 September 2007. He had experienced chest pain and shortness of breath upon arriving home from football training that evening. Mr Hill died in the emergency department while waiting to be examined by medical staff.

The Coroner was asked to consider whether the procedures followed by the Hospital in admitting Mr Hill were reasonable, whether unnecessary delays had occurred in Mr Hill being examined and whether Mr Hill's death might have been avoided by earlier medical intervention.

The Coroner found that Mr Hill's admission to the Royal Darwin Hospital had been appropriate in the circumstances and that reasonable triage procedures had been followed, despite the fact that around 25 minutes elapsed between Mr Hill presenting at the hospital with chest pain and shortness of breath and his collapsing and dying at 7.10pm. Mr Hill died from a blood clot blocking his coronary artery and the only treatment available for that in Darwin would have taken a longer period to become effective than that which had elapsed between Mr Hill's admission and his death. Accordingly, the Coroner found that earlier medical intervention would not have prevented Mr Hill's death.

Despite that, the Coroner recommended that the Royal Darwin Hospital should make provisions for backfilling the second triage nurse position during meal breaks so that there are always two triage nurses available to admit patients at the emergency department.


[Click here for decision](#)

## New Zealand

### ***Health Practitioners Disciplinary Tribunal: Nurse E, registered nurse***

A charge was brought before the Health Practitioners Disciplinary Tribunal (the Tribunal) alleging professional misconduct on the part of Nurse E. The charge alleged that while employed as a registered nurse at a rest home, Nurse E physically abused a colleague and fellow registered nurse, Nurse D, by placing her hands around Nurse D's throat and grabbing her arm.

The Tribunal noted that the appropriate standard of proof is a civil standard; that is, proof to the satisfaction of the Tribunal on the balance of probability. However, the degree of satisfaction called for in regard to this standard varies according to the gravity of the allegations.



On the evidence before it, the Tribunal accepted that Nurse E had grabbed Nurse D's arms. However, it found that it was not proved that Nurse E had touched Nurse D's throat. As the charge did not refer to the grabbing of the arm as a separate particular, and the Tribunal considered that it would be prejudicial to Nurse E to amend the wording of the charge, the charge was found not proved.

The charge was dismissed.

[Click here for decision](#)

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## Legislation

### Commonwealth

#### ***Therapeutic Goods (Charges) Amendment Regulations 2009 (No. 2) 2009 No. 180 (Cth)***

The *Therapeutic Goods (Charges) Amendment Regulations (2009) (No. 2) 2009 No. 180 (Cth)* amend the *Therapeutic Goods (Charges) Regulations 1990 No. 395 (Cth)* to increase the annual product charges for medicines or medical devices listed or registered on the Australian Register of Therapeutic Goods by between 4.3% and 14.3%. The amending Regulations commenced on 10 July 2009.

[Click here for regulations](#)

#### ***Therapeutic Goods (Medical Devices) Amendment Regulations 2009 (No. 1) 2009 No. 181 (Cth)***

The *Therapeutic Goods (Medical Devices) Amendment Regulations 2009 (No. 1) 2009 No. 181 (Cth)* amend the *Therapeutic Goods (Medical Devices) Regulations 2002 No. 236 (Cth)*. The amending Regulations increase by 4.3% all fees payable in connection with the regulation of medical devices which are required to be included on the Australian Register of Therapeutic Goods. The amending Regulations commenced on 10 July 2009.

[Click here for regulations](#)

### South Australia

#### ***Nursing and Midwifery Practice Regulations 2009 No. 201 (SA)***

The *Nursing and Midwifery Practice Regulations 2009 No. 201 (SA)* have been made under the authority of the *Nursing and Midwifery Practice Act 2008 No. 50 (SA)*. The Regulations:

- (a) prescribe representative bodies for the purposes of the governing Act and the powers and functions that may be delegated by the Nursing and Midwifery Board, including the power to hear and determine proceedings under Part 4 of the governing Act;
  - (b) prescribe additional information that must be included in the annual report;
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(c) prescribe "mental health nursing" as an area of practice and the expression "mental health nurse" in relation to registration endorsement with recognition as a nurse practitioner;

(d) provide that an exempt provider who has provided, or is providing, nursing or midwifery care through a nurse or midwife is a prescribed person for the purposes of s. 50 (Nurse or midwife to produce certificate of registration or enrolment) of the governing Act;

(e) require the Minister to consult with the Australian Nursing Federation (SA Branch) before approving guidelines;

(f) provide that each employee responsible for the supervision of a person registered or enrolled under the governing Act has an obligation to report medical unfitness or unprofessional conduct and prescribe the information required to be included in such a report;

(g) prescribe the information that must be included where a person has claimed damages or other compensation in respect of alleged negligence by a person registered or enrolled under the governing Act;

(h) prescribe matters in relation to certificates of registration, including in relation to the issue of a duplicate if certificate is lost;

(i) authorise the Board to fix fees and charges and provide for an exemption from the requirement to pay such fees for a nurse or midwife temporarily practicing in the state of South Australia who is qualified and pays fees under the laws of another state.

The Regulations will commence on 4 August 2009.

[Click here for regulations](#)

### ***Nursing and Midwifery Practice Act 2008 No. 50 (SA)***

The remaining provisions of the *Nursing and Midwifery Practice Act 2008 No. 50 (SA)*, which repeals the *Nurses Act 1999 No. 19 (SA)*, have been proclaimed by Government Gazette No. 50, dated 9 July 2009, p. 3,144, and will commence on 4 August 2009.

[Click here for act](#)

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## News

### E-Health

#### **Ministers to refine details of e-health safeguards**

Australia's health ministers are moving to quell Big Brother fears about the planned patient identity numbers to be assigned to every Australian by mid-next year.

[Click here for story](#)



## General Health

### **Collateral Damage: Industry Focus**

The GFC continues to ravage the global economy, and although health care appears to fare better than other industries, several pre-existing issues have been exacerbated by the downturn. All health care sectors and regions are affected, and a common approach to recovery includes assessing the size and scope of the problem, determining priorities to tackle, and taking action.

[Click here for story](#)

### **General Practice in Australia, health priorities and policies 1998-2008**

A report released by the Australian Institute of Health and Welfare and the University of Sydney examines changes in the clinical activities of GPs and management of disease over the last decade in the context of policy changes, changes in the GP workforce and the ageing population. The report focuses on the management of conditions declared as national health priority areas.

[Click here for gov't media release](#)

[Click here for Minister's statement](#)

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## Hospitals

### **States lack unity on health agenda**

A split between the States over the Federal Government's health reform agenda is threatening even the most modest options for change from its key adviser. NSW has opposed a proposed Commonwealth takeover of primary health services, Victoria and Tasmania have serious concerns, but Western Australia and South Australia have given the idea their qualified support.

[Click here for story](#)

### **Court decision over break fee alleged to be payable to Healthscope by Symbion**

Details of the NSW Court of Appeal break fee decision between Healthscope Limited and Symbion Health are detailed in the attached story and judgment.

[Click here for story](#)

[Click here for judgment](#)

## Pharmaceuticals

### **EU promises crackdown on pharmaceuticals industry**

EU anti-competition authorities said they would act against pharmaceuticals groups that were suspected of delaying the launch of new medicines, adding that a lack of competition was harming patients and taxpayers.

[Click here for story](#)



## Preventative Health

### **Diabetic teenagers in early intervention drugs trial**

Teenagers with type 1 diabetes will be given blood pressure and cholesterol-lowering drugs as part of a landmark international trial to prevent the complications of the lifelong auto-immune disease.

[Click here for story](#)

### **US to spend another \$US1b on flu vaccine**

The US will spend another \$US1 billion on ingredients for a swine flu vaccine, US health and human services secretary Kathleen Sebelius said.

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### **Tobacco tax 'boosts smuggler profits'**

A proposed hike in cigarette tax will make the importation of illegal tobacco more profitable, potentially enticing new players into what is already a booming criminal market.

[Click here for story](#)

## New Zealand

### **Foreign-trained medics badly treated, says report**

The Medical Council has been hit with high-level criticism of the "unreasonable" way it treats some foreign-trained doctors.

[Click here for story](#)

### **iSOFT picks up \$6m of healthcare work**

Australia's biggest listed health information technology company iSOFT group cemented deals worth more than NZ\$6 million in New Zealand in June.

[Click here for story](#)

### **Assessment by phone possible**

As the death toll from swine flu continues to climb, doctors are considering assessing flu patients over the phone for medical certificates.

[Click here for story](#)

### **New Zealand swine flu deaths rise to six**

The swine flu death toll has officially reached six with a seventh likely, as the Health Ministry moves to make the seasonal flu vaccine free to all New Zealanders.

[Click here for story](#)

### **Doctors' 80-hour weeks 'unsafe'**

Public hospitals' heavy reliance on employing casual doctors is inducing some to work excessively long and "unsafe" hours, a state sector inquiry has heard.

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### Further Information

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