

**Form 23 – Application for leave to appeal**

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN:

WILLIAM ANICHA BAY

Applicant

and

AUSTRALIAN HEALTH PRACTITIONER REGULATION AGENCY

First Respondent

THE MEDICAL BOARD OF AUSTRALIA

Second Respondent

STATE OF QUEENSLAND

Third Respondent

10

**APPLICATION FOR LEAVE TO APPEAL**

The applicant applies for leave to appeal from the whole of the judgment of the High Court, Justices Gordon and Steward given on 7 June 2023.

**Part I:** *[The proposed grounds of appeal and the orders that will be sought]*

- 1. **Ground One** – Justices Gordon and Steward erred at law in the decision to dismiss the applicant’s Application for Removal by misidentifying jurisdictional facts (in both scope and identity) on the face of the record and thus falling into jurisdictional error.
- 2. **Ground Two** – Justices Gordon and Steward erred at law in the decision to dismiss the applicant’s Application for Removal by making errors of fact on the face of the record.
- 3. **Ground Three** - Justices Gordon and Steward erred at law in the decision to dismiss the applicant’s Application for Removal by considering and making inferences from material facts for which there was no evidence.

20

**4. Orders Sought**

- i. An order that leave to appeal the whole of the judgment of the High Court, Justices Gordon and Steward given on 7 June 2023, is granted.
- ii. An order that the whole of the judgment of Justices Gordon and Steward given on 7 June 2023 to dismiss the applicant’s Application for Removal, be set aside.
- iii. An order that the applicant’s Application for Removal under s 40 of the *Judiciary Act 1903* (Cth) for removal to the High Court of the whole of the cause now pending in the Supreme Court of Queensland, which is proceeding number 14178/22, be considered by the Court, as a whole, anew.

30

- iv. An order that the decision on 7 June 2023 that costs be awarded against the applicant for the dismissal of his s 40 Application for Removal, be set aside.

**Part II:** [A concise statement of the leave questions said to arise.]

5. **Question One:** Did Justices Gordon and Steward mistake the whole of the proceeding now pending in the Supreme Court of Queensland with another matter that is not the whole of the proceeding now pending in the Supreme Court of Queensland? If so;
6. **Question Two:** Were Justices Gordon and Steward correct at law to decide that an Application for Removal under s 40 of the *Judiciary Act 1903* could be decided on jurisdictional facts not arising under the application? In the alternative;
- 10 7. **Question Three:** Did Justices Gordon and Steward mistake the whole of the proceeding now pending in the Supreme Court of Queensland with part of the matter that is now pending in the Supreme Court of Queensland? If so;
8. **Question Four:** Were Justices Gordon and Steward correct at law to decide that the applicant's Application for Removal under s 40 of the *Judiciary Act 1903* could be decided on part of the cause only? If the answer to Question Two or Four is the negative;
9. **Questions Five:** Does this error at law produce sufficient doubt attended to the decision to dismiss the applicant's application under s 40 of the *Judiciary Act 1903*, and if so, would this error at law produce a substantial injustice if this decision was left to stand? If so;
- 20 10. **Question Six:** Does the applicant's s 40 Application for Removal have prospects of success by fulfilling the technical requirements of s 40(1) of the *Judiciary Act 1903* and demonstrating sufficient cause by disclosing a matter of importance and urgency? If so;
11. **Question Seven:** Does the applicant's s 40 Application for Removal enliven the powers under section 40(1) of the *Judiciary Act 1903* for the purpose of permitting removal into this Court of a cause raising constitutional issues ripe for decision?

**Part III:** [Argument in support of the grant of leave]

12. **Outline of Argument:** Their Honours Justices Gordon and Steward erred in finding that the applicant's proceeding<sup>1</sup> was another proceeding<sup>2</sup>, or in the alternative; their Honours erred in finding that a part of the applicant's proceeding was in fact the whole of the proceeding (despite removal of the whole of the cause being identified by the

---

<sup>1</sup> Proceeding number 14178/22 submitted in the Supreme Court of Queensland on 15 Nov 2022, see Exhibit C2 to the Court document – Bay v AHPRA & Ors 'Affidavit of William Anicha Bay 6 March 2023'.

<sup>2</sup> Bay v AHPRA & Ors [2023] Hcasl 86 at [1], "namely an application by the first and second respondents for summary dismissal of the applicant's application for judicial review of a decision by the second respondent on 17 August 2022 to take "immediate action" under s 156 of the *Health Practitioner Regulation National Law (Qld)* by suspending the applicant's registration as a health practitioner."

applicant in the introductory paragraph on the application per *High Court Rules 2004*).<sup>3</sup>

13. Regardless of whether another proceeding, or only part of the proceeding was considered, their Honours erred in the whole of their judgment by applying their legal reasoning to these mistaken facts, and/or mistaken jurisdictional facts, and/or facts without evidence.

14. This error of fact and jurisdiction has causally led to the errors in the finding that; the application for removal did “not identify any basis to justify interference with the processes of the Supreme Court of Queensland”<sup>4</sup>; “There is no identified urgency”<sup>5</sup>; and, “by granting removal, this Court would be deprived of the benefit of the reasoning of the Supreme Court of Queensland”<sup>6</sup> as their Honours made a primary jurisdictional error by  
10 misidentifying the proceeding and jurisdictional facts for which removal was requested.

15. This error of fact and jurisdiction has also causally led their Honours into error at law in finding and construing that “...the interests of the parties and the public interest”<sup>7</sup> can be properly considered when “the circumstances”<sup>7</sup> being considered are in fact, incorrect and have no evidence to support them.

16. Consequently, because there has been a primary error of jurisdictional facts and which fatally affect every decision that follows, there is sufficient doubt that the whole of the judgment, “the Court is not persuaded that it is appropriate to make the order sought.”<sup>7</sup> is correct, and thus a significant injustice would result if leave to appeal were not granted.

#### 17. **Sufficient statutory grounds for leave to appeal**

20 This application for leave to appeal has sufficient constitutional and statutory grounds supported by High Court case law to allow for its filing and for leave to appeal to be granted.

18. Section 73 (i) of the *Constitution* provides for a head of power for the Commonwealth Parliament to authorize s 34(2) of the *Judiciary Act 1903* to allow this Court to grant leave to appeal because the s 40 Application for Removal was an application in the original jurisdiction of the court under s 76 (i), and s 73 (i) of the *Constitution* allows for appellate jurisdiction over any “Justices exercising the original jurisdiction of the High Court”<sup>8</sup>.

19. The *Constitution* at s 76 (i) expressly allows an expansion of the original jurisdiction of the High Court through statute and s 40 of the *Judiciary Act 1903* is the result of the Commonwealth Parliament exercising this head of power. Thus, a decision on a s 40

---

<sup>3</sup> Court document - Bay v AHPRA & Ors ‘Application for Removal’ Page 1; *High Court Rules*, Rule 26.01.1(a)

<sup>4</sup> Bay v AHPRA & Ors [2023] HCASL 86 at [2]

<sup>5</sup> Bay v AHPRA & Ors [2023] HCASL 86 at [2]

<sup>6</sup> Bay v AHPRA & Ors [2023] HCASL 86 at [2]

<sup>7</sup> Bay v AHPRA & Ors [2023] HCASL 86 at [3]

<sup>8</sup> The *Constitution* at s 73 (i)

application is also a decision within the original jurisdiction of the High Court.

20. This was supported by *Bienstein v Bienstein*<sup>9</sup> at [28] which held that a decision to dismiss a s 40 Application for Removal is an exercise of the original jurisdiction of the High Court which allows an application for leave to appeal under s 34(2) of the *Judiciary Act 1903*.

21. At [28] in *Bienstein v Bienstein*<sup>10</sup> the High Court expressly stated, “In accordance with s 34(2) of the *Judiciary Act*, leave is required before Mrs Bienstein can pursue her proposed appeal challenging the correctness of those orders”. Section 34(2) expressly relates only to decisions made in the original jurisdiction of the High Court. Thus, it is clear that a decision to dismiss a s 40 Application for Removal is a decision in the original jurisdiction of the High Court for which leave to appeal can be requested, and as the decision to dismiss the s 40 Application for Removal in *Bienstein* was held to be an interlocutory (not final)<sup>3</sup> decision this enlivened s 34(2) of the *Judiciary Act 1903* as the correct statutory grounds for the applicant to file and have granted this leave for appeal.

10

22. This Court has confirmed that this interpretation is correct and applications for leave to appeal on s 40 applications are “not on their face outside the jurisdiction of the Court”.<sup>11</sup>

### **Ground One Reasoning**

23. The misidentified jurisdictional facts on the face of the record are the mistaken identity of proceeding 14178/22 being taken for another proceeding not being that proceeding.

24. In the alternative, the misidentified jurisdictional facts on the face of the record are the identification of part of the cause instead of the whole of the cause or proceeding.

20

25. The correct proceeding is “the whole of the cause now pending in the Supreme Court of Queensland (the Matter) which is proceeding number 14178/22 between Dr William Anicha Bay (the Applicant), and Australian Health Practitioner Regulation Agency, the Medical Board of Australia, and the State of Queensland (the Respondents)”.<sup>12</sup>

26. Justices Gordon and Steward at [1] incorrectly identified the proceeding as “...the whole of a proceeding now pending in the Supreme Court of Queensland, **namely an application by the first and second respondents for summary dismissal of the applicant’s application for judicial review...**”<sup>13</sup>.

27. The whole of the cause now pending in the Supreme Court proceeding number 14178/22 is the whole of the originating application as submitted by the applicant on 15 November

30

---

<sup>9</sup> *Bienstein v Bienstein* [2003] HCA 7; 195 ALR 225

<sup>10</sup> [2003] HCA 7; 195 ALR 225

<sup>11</sup> Justice Gageler at [23] in *Re Young* [2020] HCA 13; 94 ALJR 448

<sup>12</sup> Court document – Bay v AHPRA & Ors ‘Application for Removal’ page 2, introductory paragraph.

<sup>13</sup> *Bay v AHPRA & ORS* [2023] HCASL 86

2022.<sup>14</sup> There is no evidence to find that the whole of the cause now pending (proceeding number 14178/22) is the application by the first and second respondents for dismissal.

28. The respondent's dismissal application is an application that forms **part** of the proceeding number 14178/22. This proceeding number is not a unique identifier in the Supreme Court Registry for the respondent's application for summary dismissal. However, the proceeding number 14178/22 is a unique identifier in the Supreme Court Registry for the applicant's original application for judicial review and therefore differentiates the two applications.

29. Each of these two distinct applications raise distinct and differing questions of law. The s  
40 Application and affidavit expressly discussed the relevant questions of law being those  
10 raised by the whole of the original application, and expressly discussed the primary  
jurisdictional questions that arise under the Constitution<sup>15</sup> whereas the other did not.

30. These primary jurisdictional questions must be reliably decided before an application for summary dismissal can be considered. Thus, it is a jurisdictional error of law to consider the application on the basis of the respondent's application to dismiss, absent first hearing and deciding the primary jurisdictional questions regarding the jurisdictional and constitutional validity of the relevant laws and identity of the first and second respondents.

31. In summary, their Honours have not identified the correct jurisdictional facts (i.e., the correct proceeding) which is the criterion, "satisfaction of which enlivens the power of the decision-maker to exercise a discretion."<sup>16</sup>

## 20 **Ground Two Reasoning**

32. There have been several mistakes of material facts on the face of the record, namely:

- i. Misidentification of the correct proceeding i.e., not proceeding 14178/22.
- ii. Misidentifying part of the proceeding as the whole of the proceeding.
- iii. Misidentifying joinder in the originating application by naming the Board only.<sup>17</sup>
- iv. Misidentifying the name of the law at the basis of the application for review.<sup>18</sup>

33. The importance of these mistakes of facts is that their Honours have made resultant mistakes of law by consequence of considering these mistaken and thus irrelevant facts.

## **Ground Three Reasoning**

---

<sup>14</sup> Court document - 'Affidavit of William Anicha Bay 6 March 2023' Exhibit C2

<sup>15</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' at page 4-5 [19-21]; Court document - 'Affidavit of William Anicha Bay 6 March 2023' at [1,3].

<sup>16</sup> *Corporation of the City of Enfield v Development Assessment Commission [2000]* HCA 5;199 CLR 135 at [28]

<sup>17</sup> See *Bay v AHPRA & Ors [2023]* HCASL 86 at [1] compared to Exhibit C2 which names both respondents.

<sup>18</sup> See Court document - 'Affidavit of William Anicha Bay 6 March 2023' paragraph 3 and footnote 1 where this issue is identified and Court document - Bay v AHPRA & Ors 'Reply' at [6-8] where it is discussed further.

34. Whether a particular inference can be drawn from facts found or agreed is a matter of law<sup>19</sup> and a decision on a question of fact where there is no evidence to support the finding constitutes an error of law.<sup>20</sup>
35. The evidence to support or deny the finding of their Honours regarding which proceeding the applicant requested to be removed by the s 40 Application, is contained within the applicant's s 40 Application submissions including the affidavit and the s 40 Reply submissions. There is nothing within the wording of these documents to support a reasonable basis for an inference that the applicant seeks removal of the whole of the cause being "an application by the first and second respondents for summary dismissal".
- 10 36. The applicant's s 40 Application expressly requested removal of the true scope and identity of the whole of the cause by correctly utilising High Court Form 17 per the *High Court Rules 2004*<sup>21</sup>. Importantly, this rule and Form 17 constrain and prescribe the words that can be used to identify the proceeding for which removal is requested. Thus, there is no latitude or evidence to depart from the scope of the fact of what the applicant asked to be considered for removal. It is noted that there are a further 30 paragraphs within the s 40 Application, affidavit, and Reply<sup>22</sup> which clearly define which proceeding should be considered, i.e., "the whole of the cause which is proceeding number 14178/22".
37. Thus, "An application by the first and second respondents for summary dismissal"<sup>23</sup> is not the "whole of the cause now pending" which the applicant expressly requested to be removed,<sup>24</sup> and there is no fact or evidence to support their Honours' contrary inference.
- 20 38. Further, there is no fact or evidence to support an inference that the s 40 Application requested removal of only part of the proceeding number 14178/22. At [1] their Honours expressly recognised the request was for removal of "the whole of a proceeding".<sup>25</sup> The inference that part of the proceeding constitutes the whole of a proceeding is a jurisdictional error, as the part of the proceeding named and considered by their Honours does not raise the same questions of law as are raised by the whole of the proceeding.

---

<sup>19</sup> *Australian Broadcasting Tribunal v Bond* [1990] HCA 33 at [94,96], *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at [91]

<sup>20</sup> *Australian Broadcasting Tribunal v Bond* [1990] HCA 33 at [94,96]

<sup>21</sup> *High Court Rules 2004*, Rule 26.01.1 ss (a) "be in Form 17".

<sup>22</sup> Court document – Bay v AHPRA & Ors 'Application for Removal' at [1] page 2, [19] page 4, [20] page 5, [21] page 6, [2] page 7, [10] page 7, [18] page 9, [21] page 9, [22] page 10, [23] page 10, [27] page 11, [30] page 11, [32] page 12, and at [33] page 12; and Court document - 'Reply' at paragraphs 1-3, and at [5-7], and [9], and [16, 21] and [27-31]; and Court document - 'Affidavit' at paragraphs [1] & [3].

<sup>23</sup> *Bay v AHPRA & Ors* [2023] HCASL 86 at [1]

<sup>24</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' page 2, introductory paragraph.

<sup>25</sup> *Bay v AHPRA & Ors* [2023] HCASL 86 at [1]

39. This error affects the whole decision and is a jurisdictional error of subject matter<sup>26</sup> on the face of the record. The misidentification of the proceeding for which removal was requested, has altered the nature of the proceeding being considered, from one that raises significant public interest concerns and enlivens strong grounds supporting the original jurisdiction of the High Court, into a proceeding which raises personal interest concerns and weak grounds for removal.

40. The misidentification of the proceeding has also altered the relevant questions of law that the proceeding raises. It is the misperceived nature of the proceeding and the misperceived questions of law that have justified the decision to dismiss and this constitutes a  
10 jurisdictional error of law<sup>27</sup> on the face of the record. To avoid jurisdictional error, which is the Court's "first duty",<sup>28</sup> leave should be granted to reconsider this decision to dismiss.

#### **Sufficient doubt**

41. Sufficient doubt has attended the decision to dismiss the applicant's application with costs which provides for one of the two principles that govern the grant of leave.<sup>29</sup>

42. The consequence of Justices Gordon and Steward mistaking multiple facts and jurisdictional facts pertaining to the Application for Review has resulted in multiple errors of legal reasoning and law which have led their Honours into an error of law for the whole of the judgment. The result being sufficient doubt that the correct decision was made.

#### **Substantial injustice**

20 43. A substantial injustice would result if leave to appeal the decision to dismiss was not granted, which provides the second of the two principles that govern the grant of leave.<sup>30</sup>

44. Unlike Ms Young<sup>31</sup> in her case, the applicant has the whole of the cause now pending in the Supreme Court by way of an indefinite adjournment, and with only a few interlocutory issues being decided; the entirety of the matter is yet to go to trial. All other non-constitutional questions have been withdrawn.<sup>32</sup>

45. Thus, to return this matter back to the Supreme Court would waste court and all parties' time and money by not addressing the antecedent jurisdictional constitutional questions at the heart of this matter. As detailed in the subheadings below; it would also not allow matters of urgent public importance in the public interest to be raised and decided upon.

---

<sup>26</sup> Justice Edelman at [6,8] in *Plaintiff S164/2018 v Minister for Home Affairs* [2018] HCA 51; 92 ALJR 1039

<sup>27</sup> *Craig v South Australia* [1995] HCA 58; 184 CLR 163 at [11-12]

<sup>28</sup> Justice Edelman at [8] in *Plaintiff S164/2018 v Minister for Home Affairs* [2018] HCA 51; 92 ALJR 1039

<sup>29</sup> See *Bienstein v Bienstein* [2003] HCA 7; 195 ALR 225 at [29]

<sup>30</sup> See *Bienstein v Bienstein* [2003] HCA 7; 195 ALR 225 at [29]

<sup>31</sup> Justice Gageler at [29] in *Re Young* [2020] HCA 13; 94 ALJR 448

<sup>32</sup> Exhibit A2 to Court document - Bay v AHPRA & Ors 'Affidavit of William Anicha Bay' at [77-78] & [494].

46. Unconstitutional ‘National Laws’ would continue to proliferate, Australians would continue to have their suffrage denied, Queenslanders would be forced to raise constitutional questions in an unconstitutional tribunal, doctors would continue to be unable to speak freely to warn patients of inherent material risks, and Queensland would continue to subsume the legislative and executive power of the Commonwealth.

47. In summary, the legal foundation of the Commonwealth of Australia would be harmed by failing to have these extremely important constitutional issues examined by this Court.

### **Matter of importance and public interest**

- 10 48. In paragraphs 15 – 38 of the applicant’s Application for Removal,<sup>33</sup> and in paragraphs 6-30 of the applicant’s Reply<sup>34</sup> the applicant discloses all the reasons pertaining to the importance and public interest in this matter. Some of these important reasons are:
- a) the authority of the *Constitution* to restrain the States and Territories’ federal law-making power, and;
  - b) the rights of citizens of Queensland to have proper legal recourse to have constitutional questions heard in an appropriate Court instead of a tribunal, and;
  - c) the rights of citizens of all the several States and Territories (except Queensland) to keep their democratic right to responsible and representative Government now removed by a horizontal “application of laws” model, and;
  - d) the constitutionality of allowing State-based *Regulations* to modify Commonwealth Acts, and;
  - e) the constitutionality of legislative and executive
- 20 power vested in a single State acting in place of the Commonwealth, and; f) the validity of a disparate suite of State laws acting in place of an absent Commonwealth law yet still being called and treated as a singular and National (that is Commonwealth) Law, and; g) the ability for mislabelled and jurisdictionally questionable administrative bodies, to use the name “Australia” in their title to impersonate Commonwealth bodies to regulate health practitioners at a national (that is Commonwealth) level absent a lawful Commonwealth head of power to do so, and; h) for those entities to then use that unlawfully begotten power to abrogate the implied right to a freedom of political communication which is inherent and absolutely vital to a medical practitioner’s duty to warn being executed.
49. Furthermore, recent (and ongoing) federal senate estimates committee hearings on
- 30 AHPRA and involving the applicant makes this matter one of urgent public interest<sup>35</sup>.

---

<sup>33</sup> Court document - Bay v AHPRA & Ors ‘Application for Removal’

<sup>34</sup> Court document - Bay v AHPRA & Ors ‘Reply’

<sup>35</sup> See Court document – Bay v AHPRA & Ors ‘Application for Removal’ page 11 at [28]. The most recent mention in the Commonwealth Hansard regarding the applicant and this matter was on 1st June 2023, see: <https://tinyurl.com/drbyinHansard> at page 54.



50. The effect of the decision to deny the s 40 removal would also set a precedent in allowing QCAT to become a Chapter III court thus creating conflict with established case law such as *Burns v Corbett* [2018] HCA 15; 265 CLR 304 at [1-2].

51. Finally, this matter should be heard in the original jurisdiction of the High Court as the superior court of jurisdiction for matters such as this that involve conduct across state borders, for legislation affecting all States and Territories, between residents of different states<sup>36</sup>, and for questions as to the limits of a state's legislative power.

### **A matter of urgency**

10 52. The applicant discloses a matter of urgency in the Application for Removal warranting the granting of leave to appeal and giving good prospects for the Application to be removed.

53. As per Justice Edelman reasoning in the s 40 Application,<sup>37</sup> the three jurisdictional constitutional questions<sup>38</sup> need to be urgently addressed as this is the starting point for consideration of the whole cause<sup>39</sup>, and the Supreme Court of Queensland has, by way of indefinite adjournment<sup>40</sup> provided an opportunity for this Court to do this.

54. The s 40 Application discloses several matters of urgent importance to the Australian public, namely: a) national abrogation of voting rights<sup>41</sup>; b) the potential for ongoing nationwide medical harm due to an abrogation of the duty to warn<sup>42</sup>; c) national jurisdictional error<sup>43</sup> and misidentification of 'National Laws'<sup>44</sup>; d) the unlawful  
20 administration<sup>45</sup> of approximately 850,000 health practitioners (and their patients) under the NRAS<sup>46</sup>; e) the ability of Queenslanders to have access to the Courts for matters involving federal judicial power<sup>47</sup>; f) the State of Queensland usurping Commonwealth legislative and executive power,<sup>48</sup> and; g) an impermissible burden on a freedom of

---

<sup>36</sup> As per s 75 (iv) of the *Constitution*

<sup>37</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' page 7 at [9]

<sup>38</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' page 4-5 at [19-21]

<sup>39</sup> As put into evidence in Court document – 'Affidavit of William Anicha Bay 6 March 2023' at [8]

<sup>40</sup> See Court document – Bay v AHPRA & Ors 'Reply' at [9]

<sup>41</sup> Court document - Bay v AHPRA & Ors 'Reply' at [4], [28] and Court document – Bay v AHPRA & Ors 'Application for Removal' page 4 at [19,20], page 10 at [22(c)], and page 11, [33]

<sup>42</sup> Court document - 'Affidavit of William Anicha Bay 6 March 2023' Exhibit C2 page 262-264 at [216-219].

<sup>43</sup> Including the Supreme Court of Qld, the State of Qld, and AHPRA and the Medical Board, see: Court document - 'Reply' at [6-8], [27] & Court document – 'Affidavit of William Anicha Bay 6 March 2023' at [5a].

<sup>44</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' page 4 at [19], page 6 at [2], page 8 at [15], page 8-9 at [17], and Court document - Bay v AHPRA & Ors 'Reply' at [6-8].

<sup>45</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' page 5 at [2], and page 6 at [5]

<sup>46</sup> Court document - Bay v AHPRA & Ors 'Reply' at [3]

<sup>47</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' page 5 at [21] and page 6 at [3], and Court document – Bay v AHPRA & Ors 'Reply' [18-21]

<sup>48</sup> Court document – Bay v AHPRA & Ors 'Application for Removal' page 4 at [19,20], page 7 at [6-8], page 8 at [17], page 9 at [20], page 10 at [22 a) e) g) h)]

political communication for health practitioners and the applicant<sup>49</sup> continuing as the impugned AHPRA and the Board's 'Position Statement'<sup>50</sup> remains still in effect.

### **Good prospects of success**

55. The applicant has met all three of the technical requirements of a s 40(1) Application for Removal to be considered by this Court. The application is for a cause now pending in the Supreme Court of Queensland<sup>51</sup>, it raises a cause arising under the Constitution<sup>52</sup>, and importantly, there has been no final judgment;<sup>53</sup> thus the s 40 application is competent.

56. The application is therefore distinguishable from *Bienstein v Bienstein*<sup>54</sup> where that case did not involve a matter arising under the *Constitution*. It is argued that this lack of a constitutional matter is why the Court in that case did not want to deprive the reasoning of the lower court by ordering a removal.<sup>55</sup> Notably, that reasoning does not apply to the applicant's matter which discloses three important jurisdictional constitutional questions.

57. The applicant's matter is also very similar to *R v Hughes*<sup>56</sup> where a removal was allowed as both matters involve National Law schemes but with the distinguishment that this proceeding involves the consideration of yet unexamined horizontal adoption-of-laws model national schemes.<sup>57</sup> As such, due to this similarity and the opportunity for the Court to develop the law in this untested and pressing issue of public importance, the application has good prospects of success for being removed.

58. Having the proceeding removed now would also save costs for the parties and for all the courts involved by answering foundational jurisdictional questions that must be answered first<sup>58</sup> before any other questions of fact or law can be considered<sup>59</sup>. To remit this matter to a lower court would only lengthen the judicial process by inevitably bringing these same constitutional questions back to this Court to be reviewed, especially when this matter has

---

<sup>49</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' page 10 at [22 h]), page 10 [27], page 12 [33], and Court document - Bay v AHPRA & Ors 'Reply' at [30].

<sup>50</sup> See Court document - 'Affidavit of William Anicha Bay 6 March 2023' at Exhibit A2 at [458].

<sup>51</sup> Court document - 'Affidavit of William Anicha Bay 6 March 2023' at [1]

<sup>52</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' page 4-5 at [19-21]

<sup>53</sup> Court document - Bay v AHPRA & Ors 'Reply' at [9], "This Matter has been adjourned in its entirety..."

<sup>54</sup> *Bienstein v Bienstein* [2003] HCA 7; 195 ALR 225 at [45]

<sup>55</sup> It is illogical, an irrationality, and thus an error of law to require the reasoning of the Supreme Court of Queensland first because that reasoning can only be given after a final decision has been made by that Court. Once a final decision is made, a s 40 application cannot be made. Thus, to deny a s 40 application for want of reasoning of a lower court has the effect of making s40(1) otiose which is ultra vires the powers of the Court by way of reason of covering Clause 5 of the *Commonwealth of Australia Constitution Act 1900*.

<sup>56</sup> *R v Hughes* [2000] HCA 22; 202 CLR 535

<sup>57</sup> See Court document - Bay v AHPRA & Ors 'Reply' at [13-16] for a broader explanation.

<sup>58</sup> The object of granting a s 40 is, "to secure early resolution of constitutional questions..." Justice Gageler at [18] in *Re Young* [2020] HCA 13; 94 ALJR 448.

<sup>59</sup> As put into evidence (and not contested by the Respondents in their Responses) at Court document - Bay v AHPRA & Ors 'Affidavit of William Anicha Bay 6 March 2023'.

been adjourned to allow such a contemplation,<sup>60</sup> and as such, an order for removal would not and cannot disturb the Supreme Court's processes.

59. Finally, s 38(c) of the *Judiciary Act 1903* invites the consideration that the applicant's s 40 application may be ultimately successful by virtue of s 75(iii) of the *Constitution* in combination with s 38(c) of the Act that requires jurisdiction be conferred in this matter to this Court as the applicant claims to be a party suing on behalf of the Commonwealth.<sup>61</sup>

60. As per Chief Justice Kiefel in (*Palmer v Ayres*)<sup>62</sup> the applicant need not prove his claim to suing on behalf of the Commonwealth at this stage. All that is necessary is that a claim has been made to this effect, and further, by requesting orders 3 and 4 in the Application for Removal the applicant has invoked the exclusive jurisdiction of the High Court,<sup>63</sup> thus necessitating its removal. The Court may later remit the matter under s 44 but it cannot refuse the matter to be removed as that would constitute an error of geographic jurisdiction.<sup>64</sup> Thus, the applicant's s 40 application has excellent prospects for success.

### **Constitutional issues ripe for decision**

61. The applicant's Application for Removal discloses constitutional issues ripe for review at Part IV paragraphs 18-21,<sup>65</sup> as well as the raising of an inter se questions on the power of Queensland to exercise Commonwealth legislative power,<sup>66</sup> and invites a constitutional examination of (yet untested) horizontal adoption-of-laws models<sup>67</sup> in paragraphs [13-16] and [27-28] of the Reply.<sup>68</sup>

20 62. Furthermore, the applicant's Reply raises important issues abrogating the democratic rights of all Australian electors (except Queenslanders) to choose members and senators who vote on legislation they are subject to<sup>69</sup>; as well as an inability of these electors to

---

<sup>60</sup> As well as the indefinite adjournment, the Supreme Court acceded (by way of the Directions Hearing on 30th November 2022) that the constitutional questions are all antecedent to the Matter progressing. See Exhibit C-1 to the Court document – Bay v AHPRA & Ors 'Affidavit of William Anicha Bay 6 March 2023'.

<sup>61</sup> As was raised in the Supreme Court on 22 March 2023, and at [1], footnote 1 of the Court Document - Bay v AHPRA & Ors 'Reply'.

<sup>62</sup> *Palmer v Ayres* [2017] HCA 5; 259 CLR 478 Kiefel, Keane, Nettle and Gordon JJ. at [27], discussing what is a matter & quoting Abebe (1999) 197 CLR 510 at 528[32]; Hooper (1999) 96 FCR 1 at 15[55]. "...only a claim is necessary. A matter can exist even though a right, duty or liability has not been, and may never be, established."

<sup>63</sup> *Thurin v Krongold Constructions (Aust) Pty Ltd* [2022] VSCA 226; 407 ALR 187 at [97], "In inviting the Supreme Court to make declarations on questions which were crucial to the outcome of the trade mark applications the applicant in our opinion raised for decision matters arising under the *Trade Marks Act* and attracted the exercise of federal jurisdiction."

<sup>64</sup> Justice Edelman at [6] in *Plaintiff S164/2018 v Minister for Home Affairs* [2018] HCA 51; 92 ALJR 1039

<sup>65</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' at page 9

<sup>66</sup> Court document - Bay v AHPRA & Ors 'Application for Removal' page 4-5, at [19,20]

<sup>67</sup> With but one exception all former and current National Schemes involved the Commonwealth in a vertical co-operative federalism model. This new horizontal model omits the Commonwealth and replaces it with a singular State (i.e., State of Queensland). See Court document – Bay v AHPRA & Ors 'Reply' at [27-28]

<sup>68</sup> See Court document - Bay v AHPRA & Ors 'Reply'.

<sup>69</sup> Court document - Bay v AHPRA & Ors 'Reply' at [4]

have their respective adopted legislation overturned due to a novel ‘abdication provision’ of the *National Law*;<sup>70</sup> thus making these issues ripe for review by the Court.

63. **Conclusion:** The jurisdictional error of a mistake of proceedings has resulted in the error at law to dismiss the applicant’s s 40 Application for Removal thus creating a significant injustice if left to stand. As the applicant’s Application for Removal is competent and discloses matters of significant urgent public importance and constitutional questions ripe for review: the Court should rectify this significant injustice by granting leave to appeal.

**Part IV:** [Arguments as to costs]

64. Due to the clear and significant errors of fact on the face of the record it would be against the interests of justice to penalize the applicant by way of costs for attempting to lawfully and correctly right a significant and prima facie injustice.

**Part V:** [A list of the authorities on which the applicant relies.]

65. *Australian Broadcasting Tribunal v Bond* [1990] HCA 33 at [94,96]; *Bay v Australian Health Practitioner Regulation Agency & Ors* [2023] HCASL 86 at [1,2,3]; *Bienstein v Bienstein* [2003] HCA 7; 195 ALR 225 at [28,29,45]; *Burns v Corbett* [2018] HCA 15; 265 CLR 304 at [1-2]; *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135 at [28]; *Craig v South Australia* [1995] HCA 58; 184 CLR 163 at [11,12]; *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at [91]; *Palmer v Ayres* [2017] HCA 5; 259 CLR 478 Kiefel, Keane, Nettle and Gordon JJ. at [27]; *Plaintiff S164/2018 v Minister for Home Affairs* [2018] HCA 51; 92 ALJR 1039 at [6,8]; *R v Hughes* [2000] HCA 22; 202 CLR 535; *Re Young* [2020] HCA 13; 94 ALJR 448 at [18,23,29]; *Thurin v Krongold Constructions (Aust) Pty Ltd* [2022] VSCA 226; 407 ALR 187 at [97].

**Part VI:** [The applicable laws and statutes are set out in the Annexure.]

Dated 3 July 2023

  
Dr William A. Bay

To: The First and Second Respondents

McCullough Robertson Lawyers

The Third Respondent

GR Cooper – Crown Solicitor

30 **TAKE NOTICE:** Before taking any step in the proceedings you must, within **14 DAYS** after service of this application, enter an appearance and serve a copy on the applicant.

The applicant is self-represented.

---

<sup>70</sup> Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld), Division 4, s 246, ss 2.

## Annexure

- ***Commonwealth of Australia Constitution Act 1900, Clause 5 - Operation of the Constitution and laws***

- This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

10

- ***High Court Rules 2004 (Cth) 26.01.1***

- 26.01 Form of application for removal

26.01.1 An application for an order removing a cause or part of a cause under section 40 of the *Judiciary Act 1903* shall:

(a) be in Form 17; and

- ***The Constitution - Section 73 Appellate jurisdiction of High Court.***

- The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—
- (i.) Of any Justice or Justices exercising the original jurisdiction of the High Court:

20

- ***The Constitution - Section 75 Original jurisdiction of High Court.***

In all matters—

- (iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
- (iv.) Between States, or between residents of different States, or between a State and a resident of another State:

30

- **The Constitution - Section 76 Additional original jurisdiction.**

The Parliament may make laws conferring original jurisdiction on the High court in any matter--

- (i.) Arising under this Constitution, or involving its interpretation

- **The Judiciary Act 1903 (Cth) - Section 34 Appeals from Justices of High Court**

- (1) The High Court shall, except as provided by this Act, have jurisdiction to hear and determine appeals from all judgments whatsoever of any Justice or Justices, exercising the original jurisdiction of the High Court whether in Court or otherwise.

10

- (2) An appeal shall not be brought without the leave of the High Court from an interlocutory judgment of a Justice or Justices exercising the original jurisdiction of the High Court whether in Court or otherwise.

- **The Judiciary Act 1903 (Cth) - Section 38 Matters in which jurisdiction of High Court exclusive**

Subject to sections 39B and 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:

- (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;

20

- **The Judiciary Act 1903 (Cth) - Section 40 Removal by order of the High Court**

- (1) Any cause or part of a cause arising under the Constitution or involving its interpretation that is at any time pending in a federal court other than the High Court or in a court of a State or Territory may, at any stage of the proceedings before final judgment, be removed into the High Court under an order of the High Court, which may, upon application of a party for sufficient cause shown, be made on such terms as the Court thinks fit, and shall be made as of course upon application by or on behalf of the Attorney-General of the Commonwealth, the Attorney-General of a State, the Attorney-General of the Australian Capital Territory or the Attorney-General of the Northern Territory.

30

- (2) Where:

- (a) a cause is at any time pending in a federal court other than the High Court or in a court of a Territory; or
  - (b) there is at any time pending in a court of a State a cause involving the exercise of federal jurisdiction by that court;
  - the High Court may, upon application of a party or upon application by or on behalf of the Attorney-General of the Commonwealth, at any stage of the proceedings before final judgment, order that the cause or a part of the cause be removed into the High Court on such terms as the Court thinks fit.
- 10
- (3) Subject to the Constitution, jurisdiction to hear and determine a cause or part of a cause removed into the High Court by an order under subsection (2), to the extent that that jurisdiction is not otherwise conferred on the High Court, is conferred on the High Court by this section.
  - (4) The High Court shall not make an order under subsection (2) unless:
    - (a) all parties consent to the making of the order; or
    - (b) the Court is satisfied that it is appropriate to make the order having regard to all the circumstances, including the interests of the parties and the public interest.
  - (5) Where an order for removal is made under subsection (1) or (2), the
- 20
- proceedings in the cause and such documents, if any, relating to the cause as are filed of record in the court in which the cause was pending, or, if part only of a cause is removed, a certified copy of those proceedings and documents, shall be transmitted by the Registrar or other proper officer of that court to the Registry of the High Court
- ***The Judiciary Act 1903 (Cth) - Section 44 Remittal of matters by High Court to other courts***
    - (1) Any matter other than a matter to which subsection (2) applies that is at any
- 30
- time pending in the High Court, whether originally commenced in the High Court or not, or any part of such a matter, may, upon the application of a party or of the High Court's own motion, be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject-matter and the parties, and, subject to any directions of

the High Court, further proceedings in the matter or in that part of the matter, as the case may be, shall be as directed by the court to which it is remitted.

- (2) Where a matter referred to in paragraph 38(a), (b), (c) or (d) is at any time pending in the High Court, the High Court may, upon the application of a party or of the High Court's own motion, remit the matter, or any part of the matter, to the Federal Court of Australia or any court of a State or Territory.
- (2A) Where a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party is at any time pending in the High Court, the High Court may, upon the application of a party or of the High Court's own motion, remit the matter, or any part of the matter, to the Federal Court of Australia.
- (3) Where the High Court remits a matter, or any part of a matter, under subsection (2) or (2A) to a court:
  - (a) that court has jurisdiction in the matter, or in that part of the matter, as the case may be; and
  - (b) subject to any directions of the High Court, further proceedings in the matter, or in that part of the matter, as the case may be, shall be as directed by that court.
- (4) The High Court may remit a matter, or any part of a matter, under this section without an oral hearing.

- ***Health Practitioner Regulation National Law - Section 156 Power to take immediate action***

- (1) A National Board may take immediate action in relation to a registered health practitioner or student registered in a health profession for which the Board is established if—
- (a) the National Board reasonably believes that—
  - (i) because of the registered health practitioner's health, conduct or performance, the practitioner poses a serious risk to persons; and
  - (ii) it is necessary to take immediate action to protect public health or safety; or
- (b) the National Board reasonably believes that—
  - (i) the student poses a serious risk to persons because the student—



- (A) has been charged with an offence, or has been convicted or found guilty of an offence, that is punishable by 12 months imprisonment or more; or
  - (B) has, or may have, an impairment; or
  - (C) has, or may have, contravened a condition of the student's registration or an undertaking given by the student to a National Board; and
  - (ii) it is necessary to take immediate action to protect public health or safety; or
- 10
- (c) the registered health practitioner's registration was improperly obtained because the practitioner or someone else gave the National Board information or a document that was false or misleading in a material particular; or
  - (d) the registered health practitioner's or student's registration has been cancelled or suspended under the law of a jurisdiction, whether in Australia or elsewhere, that is not a participating jurisdiction.
  - (e) the National Board reasonably believes the action is otherwise in the public interest.
  - *Example of when action may be taken in the public interest—*
    - A registered health practitioner is charged with a serious criminal
- 20
- offence, unrelated to the practitioner's practice, for which immediate action is required to be taken to maintain public confidence in the provision of services by health practitioners.
  - (2) However, the National Board may take immediate action that consists of suspending, or imposing a condition on, the health practitioner's or student's registration only if the Board has complied with section 157 .
- ***Health Practitioner Regulation National Law - Section 160 When investigation may be conducted***
- 30
- (1) A National Board may investigate a registered health practitioner or student registered in a health profession for which the Board is established if it decides it is necessary or appropriate—
    - (a) because the Board has received a notification about the practitioner or student; or

- (b) because the Board for any other reason believes—
  - (i) the practitioner or student has or may have an impairment; or
  - (ii) for a practitioner—
  - (A) the way the practitioner practises the profession is or may be unsatisfactory; or
  - (B) the practitioner’s conduct is or may be unsatisfactory; or
  - (c) to ensure the practitioner or student—
  - (i) is complying with conditions imposed on the practitioner’s or student’s registration; or
  - (ii) an undertaking given by the practitioner or student to the Board.
- 10 ○ (2) If a National Board decides to investigate a registered health practitioner or student it must direct an appropriate investigator to conduct the investigation.

***Schedule to the Health Practitioner Regulation National Law Act 2009 (Qld), Division 4, s 246, ss 2***

- (2) A regulation disallowed under subsection (1) does not cease to have effect in the participating jurisdiction, or any other participating jurisdiction, unless the regulation is disallowed in a majority of the participating jurisdictions.