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

REPLY

Urgency and readiness for removal

1.This Matter involves jurisdictional issues involving the interpretation and application of the *Constitution* enlivening s 75(iii)[1] and s 76(i), and the Court's decision will affect the legislation of all States and Territories and all Australians concerning the National Registration and Accreditation Scheme (NRAS).

2.All questions of law in this Matter are indivisibly linked to the jurisdictional questions involving the interpretation and application of the *Constitution* and these issues constitute the grounds for the Judicial Review of this Matter and this Application for Removal. All other non-constitutional questions have been withdrawn[2]. The primary constitutional and jurisdictional questions must be determined first before any other questions are addressed to avoid jurisdictional error.

3.This Matter is of urgent importance to the public interest to ensure that the regulation of approximately 850,000 health practitioners Australia-wide is absent jurisdictional error and to ensure all health practitioners can uphold the lawful standard of the duty to warn and thereby protect the public's health and safety.

4.The NRAS is abrogating the democratic rights of all Australian electors (except Queenslanders) to choose members and senators who vote on legislation they are subject to[3]; as well as an inability of these electors to have their respective adopted legislation overturned due to the 'abdication provision' of the *National Law*[4].

The Facts of the Matter

5.The relevant facts are entirely the impugned laws and their application and thus require the interpretation of this Court. All Respondents agree that practitioners are being regulated nationally[5], the only disagreement is whether this is constitutionally valid or not. The Third Respondent does not dispute any facts[6]. Furthermore, the affidavit of the First and Second Respondents fails to uphold *High Court Rule* 26.04.5 by

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[1] Since the Applicant is seeking to defend the jurisdiction of the Commonwealth against the State of Queensland, it is arguable he is suing on behalf of the Commonwealth thus enlivening section 38 (c) of the *Judiciary Act 1903* (Cth).

[2] Exhibit A2 to the Affidavit of William Anicha Bay, accompanying the Application for Removal at [77-78] and [494].

[3] Thus distinguishing this Matter from the case of *O'Meara v McTackett* [2000] HCA 32; 225 CLR 364.

[4] *Schedule* to the *Health Practitioner Regulation National Law Act* 2009, Division 4, s 246, ss 2.

[5] At paragraph 19 of The Third Respondent's Response and paragraph 18 of the First and Second Respondents' Response.

[6] Third Respondent's Response, Part II, paragraph 3, "There are no factual issues in contention...".

not stating which facts are in dispute. Therefore, the absence of a factual dispute in this matter makes this Matter ready for adjudication in the High Court, and thus does not require its remittal to a lower court.

Jurisdictional error

6.No correctly identified law has been applied against the Applicant's conduct under the '*National Law*'[7]. Furthermore, all Respondents have demonstrated varying descriptions of the *National Law*[8] which constitutes a clear error of law. Chief Justice Bowskill shared this confusion in the adjournment hearing in the Supreme Court on 22nd March 2023 and thus the expertise of the High Court is required to resolve it.

7.This error has arisen because there is in fact no '*Health Practitioner Regulation National Law*' or '*National Law*' in any legislature of Australia[9]. Furthermore:

a) Even if the *National Law* is taken to refer to the *Health Practitioner Regulation National Law,* (as stated in the Notice of Decision document from AHPRA[10]) that is not an applicable law because that is only the text that forms part of the *Schedule* to the *Health Practitioner Regulation National Law Act* 2009.

b) The *National Law* is a disparate suite of 36 different national laws and subordinate and complementary legislation[11] where adoption Acts apply and modify text from the *Schedule,* and the *Health Practitioner Regulation National Law Regulation* (2018) *(Regulations) adopt and modify Commonwealth Acts.*

c) The *National Law* misleadingly contains no national law (i.e., by its ordinary meaning, a Commonwealth law of the Commonwealth parliament). The word 'national' plainly denotes Commonwealth jurisdiction.

8.This jurisdictional error is highlighted by the Applicant's alleged conduct occurring in multiple state jurisdictions. (i.e., Queensland and New South Wales). The Applicant cannot lawfully defend himself against administrative action under an unclear '*National Law*' when impugned conduct is occurring nationally but where he has never been informed which state-based (National) laws are being applied to his Matter[12]. Notably, under the *National Law* if a practitioner harms a patient in every State and Territory **except** their home State, their conduct will be judged by the *National Law* of a State in which no conduct occurred[13]. This is in opposition to the lawful application of extraterritorial powers of States and Territories.

Removal is appropriate

The State of Queensland has stated at [12] of their Response that, "the cause sought to be removed is one arising under the *Constitution* for the purposes of s 40 (1) of the *Judiciary Act*" which is the provision under which the Order for Removal is lawfully requested and can be granted.

9. This Matter has been adjourned in its entirety by Bowskill CJ (after her consideration of the existence of the Application for Summary Dismissal) on 22nd March 2023 to allow the High Court the opportunity of

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[7] See the part 'Misidentification of the *National Law*' below for a full explanation and Affidavit Exhibit A1, page 1, 'Decision'.
[8] See below in the part 'Misidentification of the *National Law*' for a full account of the irregularities.
[9] This claim was tested by Bowskill CJ on 22nd March 2023 and found not wanting. It was also submitted into evidence at [5a] of the Affidavit of William Anicha Bay to this Court, which was not contested by the Respondents, and is in fact, verifiable and true.
[10] See Exhibit A-1 of the Affidavit of William Anicha Bay to the Application for Removal at Page 1, 'Decision'.
[11] A search of all parliamentary counsel websites of the Commonwealth reveal that Queensland has 4 similarly worded or complementary *National Law* legislative instruments, NSW has 6, ACT has 4 (with the 4th incredibly being the *Litter Act* 2004), Victoria has 2, Tasmania has 7, S.Australia has 10, W.A. has 2, and the N.T. has 1, and importantly; the Commonwealth has none.
[12] See Exhibit A-1 of the Affidavit of William Anicha Bay to the Application for Removal at Page 1, 'Decision'.
[13] Section 193(2)(a)(ii) of the *Schedule:* "if the behaviour occurred in more than one jurisdiction, the responsible tribunal for the participating jurisdiction in which the practitioner's principal place of practice is located;…".

hearing this matter in its original jurisdiction via the s 40 Application for Removal. As such, a removal will not disturb the Supreme Court's processes. Notably, the Supreme Court acceded (by way of the Directions Hearing on 30th Nov 2022[14]) that the constitutional questions are all antecedent to the Matter progressing.

10. *Bienstein v Bienstein* is distinguishable as it had no arguable constitutional matter[15] as is *Luck v Chief Executive Officer of Centrelink*[16] for the same reason. Importantly, Exhibit A2[17] demonstrates in detail how previously considered schemes differ to this Matter.

11. *Golding & Anor v The Queen* [2015] HCATrans 199 is distinguishable because it was doubtful if the case involved a question that "arises under the Constitution or involves its interpretation" unlike this Matter.

12. *McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation*[18] is distinguishable as the constitutional arguments raised have no relevance to the Applicant's arguments.

13. The Applicant's Matter is relevant but also distinguishable to *R v Hughes* [2000] HCA 22; 202 CLR 535 due to two related but significant differences. First, *R v Hughes* involved a national scheme with a national law (*Corporations Act* 1989 (Cth)) as the host Act, while the host Act impugned here is an Act of a State.

14. Secondly, the constitutional necessity of right of revocation of an adoption- of-laws model is lost in the NRAS because of the 'abdication provision' of the *National Law*[19]. The State's ability to retain its legislative sovereignty is the reasoning in *R v Hughes* at [94] making the vertical adoption model lawful. This horizontal adoption model of the NRAS is distinguishable based on the reasoning of *Gould v Brown*[20], because this model removes the constitutional necessity to retain revocation rights of sections of the host act.

15. Furthermore, *R v Hughes* demonstrates the cogency of the Applicant's Matter warranting a s 40 removal, as the question as to the constitutional validity of national schemes involving adoption-of-laws models was removed from a District Court for a hearing not just by a single Justice but by the full bench of the High Court and following the *R v Hughes* decision a s 51(xxxvii) referral of state powers occurred.

16. This Matter of the constitutional validity of a national scheme hosted by an Act of the Queensland Parliament rather than by an Act of the Commonwealth, has never been considered by the High Court. High Court consideration of State hosted national schemes is urgently required as these schemes are being used in multiple areas of law in Australia as discussed in the First and Second Respondents' Response at [19].

17. Finally, all administrative law grounds are enlivened by the constitutional and implied freedom of political communication issues; thus, the First and Second Respondents' Response at [16] is irrelevant.

QCAT is not an appropriate jurisdiction

18. In the First and Second Respondents' Application for Summary Dismissal[21] and their attached

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[14] See Exhibit C1 to the Affidavit of William Anicha Bay accompanying the Application for Removal.
[15] As per McHugh, Kirby, & Callinan JJ at [46] of *Bienstein v Bienstein [2003] HCA 7; 219 CLR 1.*
[16] As determined at [7] & [39] of *Luck v Chief Executive Officer of Centrelink* [2015] FCAFC 75.
[17] At paragraphs [207], [209], [231], [233], [331], [346-349], [365-383], [387], [393], [426-427], [430], and [434-435].
[18] [2000] HCA 27; 203 CLR 662
[19] *Schedule* to the *Health Practitioner Regulation National Law Act* 2009, Division 4 Regulations, s 246, ss 2.
[20] *Gould v Brown* [1998] HCA 6; 193 CLR 346 Brennan CJ and Toohey J at [287], "A legislature, such as a State Parliament, may delegate legislative power so long as it does not abdicate it." And then at *Capital Duplicators Pty Ltd v Australian Capital Territory* at [265], regarding abdication; "So long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws". Thus the 'abdication provision' defeats a State's ability to retain its lawful power.
[21] Exhibit B1 to the Affidavit of William Anicha Bay accompanying the Application for Removal.

submission on 10 February 2023[22], they argue with reference to *Owens v Menzies* [2013] 2 Qd R 327 that the Queensland Civil and Administrative Tribunal (QCAT) is the appropriate jurisdiction to hear this Matter because QCAT can hear arguments involving federal jurisdiction.

19.At Response [13] and [23] the First and Second Respondents remain determined that this Matter (which is wholly based on jurisdictional questions of law regarding a national scheme involving interpretation of the *Constitution)* must be determined by QCAT via a merit review indicating this is a live issue.

20.At [22] the Third Respondent states that this Application for Removal does not raise an issue about the correctness of the decision regarding *Owen v Menzies* [2013]. This is proven untrue by the Application for Summary Dismissal and by [10], and [21-26] of the First and Second Respondents' Response to this Court and at [20] of their 17th March 2023 submission to the Supreme Court[23].

21.Indeed, the jurisdiction of QCAT is the third primary reason this case needs to be heard in the High Court as the Queensland Court of Appeal has already decided the matter, thus the Applicant has little chance of success in the Queensland Courts; even though the *Owens v Menzies* decision[24] conflicts with High Court precedents[25]; thus enlivening 76(i) of the *Constitution* and a further constitutional question of law.

Misidentification of the *National Law*

22.The First and Second Respondents have failed to correctly identify the *National Law*. Even though the correct naming of the *National Law* is explained clearly on the first page of the *Health Practitioner Regulation National Law* (Queensland), they have never identified either the *Health Practitioner Regulation National Law* (Queensland)[26] or the *Health Practitioner Regulation National Law Act* 2009 as the basis for their administrative action against the Applicant[27] which amounts to foundational jurisdictional error.

23.At [3] of the First and Second Respondents' Response they incorrectly refer to the "*Health Practitioner Regulation National Law"* which does not exist[28]. They also incorrectly identify a law at footnote 2 of their Response by referring to the "*Health Practitioner Regulation National Law* (Qld)", and further at [8(b)] where they identify the law as "the National Law (Qld)". Additionally, and erroneously, the First and Second Respondents state in their Annexure (on page 12) that the applicable law is named the "*Health Practitioner Regulation National Law Act* (Qld)". This is important, as none of these laws exist.

24.The Third Respondent (as author of the host legislation) has also been unable to properly identify the *National Law* consistently. At [5] of their Response, they have identified two non-existent laws i.e., the "*Health Practitioner Regulation National Law"* and the "*Health Practitioner National Law Regulation*

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[22] Exhibit B3 to the Affidavit of William Anicha Bay accompanying the Application for Removal at [11-19].
[23] "...matters of this kind are first considered in QCAT and that QCAT...must satisfy itself of its own jurisdiction."
[24] See *Owen v Menzies* [2013] 2 Qd R 327 at [52], "QCAT is a court of a State for the purposes of s 77(iii).... State courts can exercise delegated federal judicial power concurrently with their State judicial power.".
[25] In *Kable v Director of Public Prosecutions* (NSW) [1996] HCA 24 at [165], and *Burns v Corbett* [2018] HCA 15 at [39], "...most importantly, it is uncontroversial that NCAT is not a "court of a State" for the purposes of Ch III of the Constitution."
[26] The *Health Practitioner Regulation National Law Act* 2009 in Part 2 sections 5,6,7,7A,7B,7C, and Part 3 s 8(2) and s 9, makes clear that reference to the *Health Practitioner Regulation National Law* (Queensland) requires the use of the word "Queensland".
[27] The *Health Practitioner Regulation National Law* (Queensland) in Part 1 s 1 states that "This Law may be cited as the Health Practitioner Regulation National Law (Queensland). Also, Part 1 s 3 ss 1-3 of the *Health Practitioner Regulation National Law Act* 2009 makes clear that the *Schedule* (called the *Health Practitioner Regulation National Law*) to the *Health Practitioner Regulation National Law Act* 2009 is different from the *Health Practitioner Regulation National Law* (Queensland).
[28] As was not determined otherwise by the Chief Justice Bowskill in the Queensland Supreme Court on 23rd March 2023.

2018". Furthermore, in the Annexure to their Response they incorrectly and inconsistently identify the law they are relying on as "the *Health Practitioner Regulation National Law* (Qld)".

25. The Applicant contends that a proper understanding of the suite of laws comprising the '*National Law*' is that the "*Health Practitioner Regulation National Law*" is the title of the *Schedule* contained in Part 1 s 1 of the *Schedule* to the *Health Practitioner Regulation National Law Act* 2009 where the *Schedule* is applied as a law in the several States and Territories of Australia but with modification (called 'local application provisions')[29]. Whenever the *Schedule* is applied (whether in Qld) or in other states[30] it is adopted and amended to the local jurisdiction thus making each law (and thus the *National Law*) non-uniform.

26. Therefore, by referencing the '*Health Practitioner Regulation National Law*' as the basis for the NRAS and the s 156 and s 160 decisions under review; no actual law has been used. What has been used is text from a schedule to a Queensland Act that makes it impossible for the Applicant to determine what local provisions, laws, tribunals (and thus jurisdiction) are appliable to his (or any health practitioner's conduct).

Unconstitutional and confusing horizontal adoption-of-laws National Scheme

27.A confusing or misleading *National Law* and NRAS is a basis for constitutional invalidity as it leads all parties into jurisdictional error[31], and is thus not conducive to peace, order, or good government.

28.Furthermore, there is no 'National' jurisdiction set out in the *Constitution*. Because the NRAS is absent a host Commonwealth Act it lacks the benefit of federally consistent legislation. As per s1 of the *Constitution*, Queensland does not have sufficient plenary power to exercise Commonwealth legislative jurisdiction to enact a national scheme that disenfranchises the democratic rights of Australians[32] to have input on this law.

Queensland is unlawfully exercising Commonwealth executive power

29.Sections 61 and 62 of the *Constitution* posits that a Federal Executive Council exercises federal executive power. Queensland has gone beyond power by enacting the *National Law* and the *Regulations* which purport to directly control Commonwealth officers and modify the administration of Commonwealth Acts[33].

Implied right to a freedom of political communication

30.The First and Second Respondents in Exhibit B3 at [54] state "The suspension decision prevented Dr Bay from working as a doctor while expressing those views.", and at [81] they admit, "…the real reasons for Ahpra's decision, which were about Dr Bay's potential to undermine confidence in the public health responses to COVID-19.". Thus, the implied right to a freedom of political communication is indivisibly linked with the lawful standard for the duty to warn and this Matter.

Conclusion

31.This Matter is ripe for a s 40 removal to the original jurisdiction of this High Court for an urgent and nationally significant matter of constitutional interpretation that only this Court can ultimately provide.

Dated: 3 April 2023

William Anicha Bay

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[29] *Health Practitioner Regulation National Law Act* 2009 Part 1 s 3 Definitions ss 1; see also Part 2 s 4 ss 1.
[30] *Heath Practitioner Regulation National Law Act* 2009 Part 2 s 4 and footnote 18 at [5] of the Application for Removal.
[31] The arguments as to why this assertion is correct can be found in Exhibit A2 to the Affidavit at paragraphs [342-435].
[32] *LibertyWorks Inc v Cth of Australia* [2021] HCA 18 at [44] held that representative democracy is constitutionally implied.
[33] See Exhibit A2 at [210-213] and footnote 19 to [6] of the Application for Removal for the applicable sections in the *Regulations*