SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 14178/22

Applicant	Dr William Anicha Bay
	AND
First Respondent	AUSTRALIAN HEALTH PRACTITIONER REGULATION AGENCY
	AND
Second Respondent	THE MEDICAL BOARD OF AUSTRALIA
	AND
Third Respondent	STATE OF QUEENSLAND

SUBMISSION TWO –

MATERIAL AND SUBMISSIONS IN REPLY TO THE CONSTITUTIONAL AND JURISDICTIONAL ARGUMENTS AND INTERIM INJUNCTIVE RELIEF AND THE INTERLOCUTORY APPLICATION OF THE RESPONDENTS

Material to be read

A) Submissions of the First and Second Respondents in regard to the Constitutional and Jurisdictional Arguments and Interim Injunctive Relief (**Submission A/B**), and Submissions of the Third Respondent Respondents in regard to the Constitutional and Jurisdictional Arguments (**Submission C**); and

B) Application of the First and Second Respondent (**Respondents' Application**); and

C) Affidavit and exhibits of Michael Lucey filed 10 February 2023 (**Lucey Affidavit**); and

D) Submissions and exhibits to the Applicant's Originating Application, his affidavit and its exhibits, and this submission (**Submission Two**); and

E) Draft Interlocutory and Final Orders as documented below.

Dr William Bay
PO Box 860
North Lakes Qld 4509
Phone No: 0459788772
Email: williamabay@proton.me

Table of Contents

Overview of Submission Two

The Applicant's argument is distilled and summarised into a threefold, well-substantiated assertion that the Respondents to the matter of *Bay v AHPRA &* Ors (the **Matter**) have committed the following egregious acts of misrepresentation against the Commonwealth Constitution, the people of the Commonwealth of Australia, and in the application of the administrative decisions of AHPRA and the Board; the Applicant himself:

1. First, the State of Queensland has gone beyond powers by purporting to exercise Commonwealth legislative power by enacting the so-called '*National Law'* in Queensland and applying it nationally in place of lawful Commonwealth legislation and the Constitution itself. Put simply, the foundation of the Applicant's constitutional and jurisdictional arguments is that **the *National Law* is not a lawful Commonwealth law**[1]**,** and the only true and lawful National Law is that of the *Commonwealth of Australia Constitution Act (The Constitution).*

2. It follows that the State of Queensland should not be purporting to exercise Commonwealth legislative or executive power. Once the implications of the true nature of the *National Law* are fully understood it becomes clear that is a necessity to quash the decisions of the First and Second Respondents by virtue of the clear constitutional invalidity of a *National Law* that does not hold lawfully hold National legislative or exercise National executive power.

3. Specifically, the *Health Practitioner Regulation National Law Act* 2009 (the ***National Law***) has been created by the Third Respondent to be the host legislation of a National Registration and Accreditation Scheme[2] to unconstitutionally allow for the several States and Territories of the Commonwealth of Australia to purport to give national legislative effect to a single unified 'National' (i.e. Commonwealth) law by way of adoption of the *Schedule* to the *National Law* (the ***Schedule***) and create concomitant National entities (**AHPRA and the Board** (the First and Second Respondents) without concomitant and lawful Commonwealth legislation.

4. The State of Queensland has also unlawfully changed the limits of state and federal power via the naming of the *Health Practitioner Regulation National Law* (Queensland) (the ***National Law (Queensland)*** and the naming and enactment of the *Health Practitioner Regulation National Law Regulation* 2018 (the ***Regulations***), wherein by such labelling of drafted and enacted State laws and subordinate legislation as a National/Commonwealth law and regulations, the Third Respondent purports to hold Commonwealth legislative and executive power which according to the Commonwealth Constitution it clearly does not.

5. In committing these legislative acts the State of Queensland has expanded the limits of State legislative power (in favour of itself) which it cannot lawfully do absent a High Court judgment, or a referendum and resultant amendment to the *Commonwealth Constitution*. Ultimately, if the Court were to allow this unconstitutional *National Law* to stand without reform or a declaration of invalidity, it would be tantamount to allowing a direct violation of the *Constitution* by implying that the Constitution does

1 *Broadbent v Medical Board of Queensland* [2011] FCA 980; 195 FCR 438 at [127] "the National Law Act, plainly enough, is not a law of the Commonwealth."
2 Exhibit O-1

not bind all states and parties in Australia which Covering Clause 5 of the Constitution specifically declares to the contrary[3].

6. Second, the First and Second Respondents have misrepresented their identity by the use of the titles "Australia" to imply and convey Commonwealth executive power and jurisdiction to mere State entities, but are in fact State entities masquerading and operating as National entities, with the significance at law being that these misrepresented entities are claiming to have and act with National/Commonwealth jurisdiction with which they do not lawfully possess.

7. By unlawfully using this misidentification of their names and purporting to have Commonwealth authority, the 'Australian' Health Practitioner Regulation Agency and the Medical Board of 'Australia' has made administrative decisions unlawfully and beyond powers on health practitioners across Australia (including the Applicant) and in so doing have harmed the Applicant in his career and income-earning ability whilst simultaneously interfering with the doctor-patient relationship, a medical practitioner's duty to warn of material risks to their patients, and by impermissibly restricting his, and all health practitioners' lawful exercise of their Constitutionally implied public right of a freedom of political communication. The State of Queensland has, by unlawfully giving legislative powers to these entities, also harmed the Australian public by removing their Constitutionally implied right to participation in a representative democracy.

8. Third, misrepresentations to this Court of the Solicitor for the First and Second Respondents as to why the Applicant's request for relief should be dismissed has perverted the course of justice by unlawfully casting doubt on the character of the Applicant to gain an unlawful advantage in this Matter.

9. The provably knowing misrepresentations of Counsel for the First and Second Respondents to this Court has unlawfully misdirected the Applicant's full use of his limited time and financial resources (especially as a suspended medical practitioner prohibited from seeking gainful employment) away from fully advancing his arguments in response to the constitutional and jurisdictional submissions of the Respondents, in favour of having to direct resources to defend his own character and the true nature and intention of his application for judicial review. This action of Counsel has therefore harmed the Applicant and obstructed the Court's ability to determine true justice in this Matter.

10. Consequently, the Applicant firmly objects to this alleged act of professional and/or criminal misconduct and seeks relief from the Court from this act by way of the Court diminishing the weight given by this Court to the arguments of the First and Second Respondents. This just and appropriate adjustment to the credibility of the First and Second Respondents submissions would then strongly favour an immediate dismissal of the First and Second Respondents Interlocutory Application, and in-turn, strongly favour an immediate finding for the Applicant's reasonable request for appropriate Interim Relief.

---

3 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.."

11. In summary, it is alleged that all of the above threefold fraudulent fruits are an offspring of the unlawful legislative tree grown from the unconstitutional seed of the *National Law* in 2010 that was planted by a deceptive 2008 Intergovernmental Agreement under the auspices of COAG[4] whereby it is alleged all colluding parties were aware this was not a standard vertical cooperative federalism model but a constitutionally perilous horizontal one.

12. This unlawful fruit now threatens to usurp the judicial powers of the High Court, to usurp the legislative power of the Commonwealth Parliament, to fundamentally undermine the Commonwealth Constitution, and in so doing remove the representative democracy promised to the Australian people themselves.

13. Therefore, it is the duty of this Court to defend the Australian people, the Constitution, and the judicial system by invaliding this unconstitutional and illegal '*National Law*'.

14. The Applicant, as just one of the members of the Australian public, humbly seeks the Court's orders detailed below to provide him immediate relief from the ongoing harm he has been subject to by the unconstitutional wielding of unlawful powers under s 156 and s 160 of the *National Law* by the misidentified and unlawfully empowered AHPRA and Medical Board of Australia.

15. By the granting of orders in favour of the Applicant it will simultaneously benefit the Applicant, the public interest, the judicial system, respect for and operation of the *Constitution,* and the legislative jurisdiction of the Commonwealth Parliament.

16. In essence, there has scarcely been a more meritorious case advanced for the relief of an unlawful administrative decision than this. And for that reason, all of the three Respondents' arguments must fail and orders sought by the Applicant be granted.

Background to the Matter

17. On 17 August 2022, the First and Second Respondents (AHPRA and the Board respectively) made a decision to suspend the Applicant's registration as a medical practitioner (the **Decision**) pursuant to s156 of the *Health Practitioner Regulation National Law* (the *National Law*).[5]

18. The Applicant applied to the Court on 15 November 2022[6] for relief in respect of a) the conduct and decision of the First and Second Respondents pursuant to s43 of the *Judicial Review Act* 1991, and b) the constitutional and jurisdictional issues pertaining to the legislation of the *National Law* by the Third Respondent (the State of Queensland) (collectively; the **Matter).**

19. On 30 November at the Directions Hearing, Boddice J gave orders (issued (as amended) on 2nd December 2022) for the Applicant to make a submission in reply to the Respondents' constitutional and jurisdictional arguments and interim injunctive relief submissions and the Respondent's interlocutory application by 4:00pm March 3rd, 2023.

4 Exhibit O-1
5 Bay Affidavit, Exhibit B-1
6 Court Document 1 (Originating Application) and Court Document 2 (Bay Affidavit)

20. Consequently, the submission and material below (in conjunction with the Material to be read) is made here with respect to proceedings for the second return date of the Application (currently listed for 23 and 24 March 2023).

21. On Friday the 24th of February the Applicant consented to Consent Orders requested by the Third Respondent to allow them the opportunity to respond to the Submissions of the First and Second Respondent. In so far as the materiality of the Third Respondent's submission may change according to this submission of the Third Respondent now due 28th February 2023, the Applicant reserves his right to **also** apply for consent orders to respond adequately to any new matters raised in this new submission due to the limited resources available to him (that being a self-represented Applicant) and due to the pre-existing timetable of the Matter as per the order of Justice Boddice in the Directions Hearing of 30 November, Amended 2nd December 2022 not allowing an anticipation for this unexpected request.

22. Furthermore, and more importantly, the Applicant wishes to advise the Respondents and the Court of his **filing of a Section 40 (1) Application for Order for Removal** under the *Judiciary Act* 1903 (Cth) of the entirety of this matter to the High Court of Australia today, 3rd March 2023.

23. Notwithstanding this High Court application, the Applicant currently asks the Court (and/or the Respondents' consent to doing so) to make the following interlocutory and final orders (which will be substantiated by way of this Submission Two) below:

Interlocutory Orders Sought by the Applicant

Order 1

24. An interlocutory injunction to restrain AHPRA and the Board from enforcing their compliance letter against the Applicant to the extent that the applicant is allowed to acquire gainful employment in any capacity that does not require current registration with AHPRA as a condition of employment.

Order 2

25. An interlocutory injunction to restrain AHPRA and the Board from taking any further regulatory action against the Applicant concerning the matters before the Court until the judicial review is finalised.

Order 3

26. The hearing on the constitutional and jurisdictional arguments of the Applicant and the Respondents (and the Respondents' Application) be adjourned until such time as the High Court of Australia makes a determination to remove (or decline to remove) this Matter to the High Court.

Order 4

27. A declaration that Counsel to the First and Second Respondents did perjure himself to this Court by the use of sworn testimony in an attempt to deceive the Court from obtaining its remit of making a judgment in the interests of justice in the matter under foot.

Order 5

28. The First and Second Respondents' interlocutory application be dismissed with prejudice, except for the Matter as so far as it pertains to the human rights grounds of s 17 and s 20 of the *Human Rights Act* 2019.

Final Orders Sought by the Applicant

In the alternative of Interlocutory Order 3 not being granted, the following final orders are sought:

29. There be issued in the first instance, an order of Prohibition stopping the Third Respondent from enacting or enforcing legislation and regulations which have Commonwealth jurisdiction, or that modify Commonwealth legislation, and to restrain them from exceeding their lawful jurisdiction in this manner in the future.

30. In the alternative, a Declaration that the State of Queensland does not have National or Commonwealth legislative or executive power.

31. A Declaration that the COAG agreement 'Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions'[7] is void ab initio.

32. In the first instance, an order of Prohibition to stop the First and Second Respondents from misrepresenting their jurisdiction and their identity through their names by restraining them from using the word 'Australia' in their names.

33. In the alternative, a Declaration that The First and Second Respondents are correctly identified as State Government entities and to that extent the word 'Australia' should be removed from their names.

34. A Declaration that the *Health Practitioner Regulation National Law Act* 2009 (the ***National Law)*** is invalid in its entirety or that the sections of the Act that purport to bestow Commonwealth jurisdiction are invalid and must be severed from the Act.

35. A Declaration that the *Health Practitioner Regulation National Law* (Queensland) (the ***National Law (Queensland)***) is invalid in its entirety or that the sections of the law that purport to bestow Commonwealth jurisdiction are invalid and must be severed from the law.

7 INTERGOVERNMENTAL AGREEMENT FOR A NATIONAL REGISTRATION AND ACCREDITATION SCHEME FOR THE HEALTH PROFESSIONS, Exhibit O-1 to Bay Affidavit

36. A Declaration that the *Schedule* to the *Health Practitioner Regulation National Law Act* 2009 (the ***Schedule***) is invalid in its entirety or that the sections of the *Schedule* that purport to bestow Commonwealth jurisdiction are invalid and must be severed from the *Schedule*.

37. A Declaration that the *Health Practitioner Regulation National Law Regulation* 2018 (the ***Regulations***) is invalid in its entirety or that the sections of the Regulation that purport to modify Commonwealth legislation including the *Ombudsman Act 1976* Cth (s 24), the *Freedom of Information Act* 1982 (Cth) (s 13), the *Australian Information Commissioner Act* 2010 (s 6), and the *Federal Court of Australia Act* 1976 (s 19 (d)(i)) are invalid and must be severed from the *Regulation*.

38. A Declaration that the word 'National' must be severed from:

    A) Health Practitioner Regulation National Law Act 2009

    B) Schedule to the *Health Practitioner Regulation National Law Act* 2009

    C) Health Practitioner Regulation National Law (Queensland)

    D) Health Practitioner Regulation National Law Regulation 2018

    to ensure that the names of these enactments accurately reflect their lawful jurisdiction.

39. There be issued in the first instance, an order of Certiorari directed to the First and Second Respondents quashing their s 156 immediate action decision and their s 160 investigation against the Applicant made on 17th August 2022.

40. There be issued in the first instance, an order of Mandamus, directed to the First and Second Respondents, requiring them to remake the s 156 immediate action decision to suspend the Applicant and the s 160 decision to begin an investigation, according to law.

41. In the alternative, a Declaration be made that the First and Second Respondents' s 156 and s 160 decisions made on 17th August 2022 were made unlawfully.

42. A declaration that QCAT does not have the requisite federal judicial power to make determinations on constitutional matters involving federal jurisdiction.

43. Each party to pay their own costs.

44. Such other or further orders as the Court deems fit.

Submission Two Introduction

45. The basis of the Applicant's claim and this Submission Two are three constitutional questions which are raised to this Court and to the High Court for determination as well. Those being:

46. **Constitutional Question One**: Does Covering Clause 5[8], and Chapter I, Part I, s 1 [9], and Chapter VI, s 122[10] of the *Constitution* so limit the exercise of the plenary legislative powers of the Parliament of the State of Queensland (the Third Respondent) to invalidate the legislative instruments: the *Health Practitioner Regulation National Law Act* 2009 (***the National Law***), the *Schedule* to the *Health Practitioner Regulation National Law Act* 2009 (***the Schedule***), *Health Practitioner Regulation National Law* (Queensland) (the ***National Law (Queensland)*** and the *Health Practitioner Regulation National Law Regulation* 2018 (***the Regulations***); where such legislative instruments purport to exercise national legislative power (which is in substance Commonwealth legislative power), by utilizing the singularly unremovable legislative powers of the *Schedule's* Part 11 s 245 ss 1[11] and s 246 ss 2[12], and the extraterritorial powers of Part 1 s 8[13] and Part 8 s 38[14] of the *Schedule* to overcome absent enabling Commonwealth legislation and an absent Constitutional s 51(xxxvii.) referral of powers, to attempt to apply *the Schedule* as a National or Commonwealth law in all other States and

---

8 **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.

9 **1. Legislative Power.**
The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth."

10 "**22. Government of territories.**
The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth..."

11 245 National regulations (1) The Ministerial Council may make regulations for the purposes of this Law.

12 (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.

13 8 Extraterritorial operation of Law - It is the intention of the Parliament of this jurisdiction that the operation of this Law is to, as far as possible, include operation in relation to the following— (a) things situated in or outside the territorial limits of this jurisdiction; (b) acts, transactions and matters done, entered into or occurring in or outside the territorial limits of this jurisdiction; (c) things, acts, transactions and matters (wherever situated, done, entered into or occurring) that would, apart from this Law, be governed or otherwise affected by the law of another jurisdiction.

14 38 Application This Law has effect in and in relation to the coastal sea of this jurisdiction as if that coastal sea were part of this jurisdiction.

Territories by the use of the *National Law*'s Part 2 s 4 phrase "so applies as if it were part of this Act"[15] or similar wording in other State and Territories' adopting acts, and thus unlawfully abandons each State and Territories' power to retain their legislative power by requiring a majority of each participating jurisdictions to agree to it[16]?

47. **Constitutional Question 2**: By way of Chapter II s 61 and 62 of the Constitution is it ultra vires the State of Queensland's executive power to nationally regulate health practitioners via the National Registration and Accreditation Scheme[17], and create "one single national entity"[18] named the Australian Health Practitioner Regulation Agency19 (AHPRA) (the First Respondent) and the Medical Board of Australia[20] (the Second Respondent) where s 51(xxiiiA.) of the Constitution[21] does not provide a head of power for the national (or Commonwealth) regulation of health practitioners, and the Commonwealth Parliament is omitted from the national scheme, and where neither body can be correctly or lawfully identified as an Australian entity, and whereby there is a lack of Commonwealth legislative oversight on the exercise of executive power held by these national entities and one state (Queensland) has been given the authority to regulate health practitioners at a national, that is Commonwealth level[22]?

48. **Constitutional Question Three**: Does the Queensland Civil and Administrative Tribunal (**QCAT**) have the federal judicial power to interpret and make binding rulings on matters involving the interpretation and application of the *Commonwealth Constitution* relevant to purported jurisdictional errors of law (as held by *Owen v*

---

15 *Health Practitioner Regulation National Law (Victoria) Act* 2009 No. 79 of 2009 Part 2, s4; *Health Practitioner Regulation National Law (Tasmania) Act* 2010 Part 2, s4; *Health Practitioner Regulation National Law (South Australia) Act* 2010 Part 2, section 4; *Health Practitioner Regulation National Law (WA) Act* 2010 Part 2 s4, ss(1) (with the Schedule in this jurisdiction only being the Schedule legislated in Western Australia; *Health Practitioner Regulation National Law (ACT) Act* 2010 'About This Publication' 'National Law'; *Health Practitioner Regulation National Law (NSW)* No 86a of 2009 'Status Information' 'Notes" & *Health Practitioner Regulation (Adoption of National Law) Act* 2009 (NSW) Part 2 s4; *Health Practitioner Regulation (National Uniform Legislation) Act (NT)* 2010 Part 2 s4.

16 Part 11 Division 4 s 246 ss 2 of the *Schedule* "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."

17 Part 1 s 3 and Part 1 s 5 of the Schedule

18 *Health Practitioner Regulation National Law Act* 2009 Schedule Part 1 s 7(1)

19 *Health Practitioner Regulation National Law Act* 2009 Schedule Part 4 Division 1 s23 ss (1)

20 *Health Practitioner Regulation National Law Act* 2009 Schedule Part 5 Division 1 s31 ss(1)

21 Section 51 (xxiiiA.) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances:

22 National Law Part 1 S 7 ss 3 (b) - An entity established by or under this Law may exercise its functions in relation to— 2 or more or all participating jurisdictions collectively.

Menzies (2012)[23] in the Queensland Court of Appeal despite *Kable v The Director of Public Prosecutions for New South Wales* (1996)[24] holding otherwise) so that access to the Queensland Supreme Court and the High Court of Australia in its original jurisdiction is limited?

49. Irrespective of these foundational constitutional questions (and whether they are removed to the High Court or not), the Applicant argues that the Applicant's claim for interim injunctive relief should be examined forthwith to provide a timely measure of relief in matters of an interlocutory nature whilst the larger (and final) issues are being determined.

50. To be brief, it is argued that the Applicant's claim for interim injunctive relief (Order 1 and Order 2) must succeed due to none of the three Respondents making any substantive arguments against the Applicant's submissions and/or material to date.

51. The First and Second Respondent's claim for dismissal of this judicial review under s 13 or s 48 of the *Judicial Review Act* 1991(Qld) must fail as the Applicant seeks a review of the constitutionality of the *National Law* (not a merits review of the decision), and it would also be in the interests of justice for this matter to be heard, and the constitutional validity of the act (the *National Law*) purporting to give the option of hearing this matter in QCAT is in dispute, and there is currently a matter before the High Court of Australia to be determined regarding the constitutional validity of this act (the *National Law*) precluding a summary dismissal.

52. The Applicant's claim for final relief on the identified constitutional and jurisdictional grounds (whether they be determined by either the High Court of Australia, this Court in its Federal Jurisdiction, or on remittal back to this Court for further examination) must succeed because:

    a. The *National Law* and its concomitant National Registration and Accreditation Scheme (NRAS) is a constitutionally impermissible scheme because of its violation of Covering Clause 5, and Chapter 1, Part 1, Section 1, and Chapter VI, s 122, and Chapter II s 61 and s 62, and sections 106, 108, and 109 of the *Commonwealth Constitution* (the *Constitution*).

    b. The use of the word "National" in the legislation enacted by the Third Respondent, and the use of "Australia" in the First and Second Respondents' names constitutes a misrepresentation of the identification of the laws and parties to this Matter and thus a lack of jurisdiction for determining this Matter in the Respondents' favour.

    c. One single national entity cannot hold national executive power over the Commonwealth of Australia when the source of that power is not a Commonwealth act.

    d. Section 156 of the *National Law (*and/or the *Schedule, and/or the National Law (Queensland) and/or the National Law (NSW))* impermissibly burdens the

23 QCA 170; [2013] 2 Qd R 327 at [52] and [61]
24 *Kable v The Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51

implied freedom of political communication inherent to the *Constitution* as the section of those laws is inconsistent with a system of representative democratic Government in Australia and is disproportionate and unnecessary in carrying out the objectives of the *National Law (or similar laws).*

e. Section 8 of the improperly identified and impugned *National Law* seeks to unlawfully extend the jurisdiction of the Queensland legislature beyond the territorial boundaries of the State of Queensland.

f. Multiple administrative errors in the application of the s 156 and s 160 of the impugned *National Law* exist, not least of which is the fact that the First and Second Respondents have never particularised the exact statute under which either of these administrative decisions were made.

Outline of Argument

53. This outline of Submission Two will be divided as follows:

Part 1 – Submissions responding to the First and Second Respondents' Interlocutory Application demonstrating why their application should be dismissed with prejudice owing to the lack of reason to their argument and that this application is grounded in a misrepresentation to the Court.

Part 2 – Submissions in reply to the Interim Injunctive Relief explaining why the interim injunctive relief must be granted because of an absence of arguments to the contrary and Counsel for the First and Second Respondents attempts via unlawful means to pervert the course of justice in this matter.

Part 3 – Submissions in reply to the Constitutional and Jurisdictional Arguments demonstrating the accuracy of these arguments and how the lack of constitutionally permissive laws, schemes, and administrative bodies has resulted in a lack of jurisdiction to take administrative action against the Applicant under the impugned and misidentified '*National Law'.*

Part 1 – Submissions Responding to the Respondents' Application

Summary dismissal of the Matter is not appropriate

54. The Respondents' Application should be dismissed with prejudice due to the following reasons that show a clear lack of ground to their arguments and the unlawful manner and grounds (that is misrepresentation to the court via perjury) upon which this application was made.

55. Instead, the First and Second Respondent's application for dismissal of the Applicant's application for a s 43 Judicial Review of the administrative decision to immediately suspend the Applicant's Matter under s 156 of the *National Law* should be dismissed in

favour of a full hearing on the Constitutional Matters (or an adjournment thereof to allow the High Court to do so) and to allow for the Applicant's request for interlocutory relief be heard.

56. The Applicant's Matter does have merit and cannot be dismissed summarily due to the significant public interest, and pertinence and validity of, the constitutional and jurisdictional questions to the Applicant's Matter involving the impugned *National Law* and the identity of the respondents (as well as other constitutional, jurisdictional, and administrative issues) which will be discussed in detail below.

57. Firstly, the merits of the Applicant's constitutional arguments are to be examined by the High Court as a consequence of their assessment of the s 40 Application for an Order or Removal that is currently in process[25]. For the Supreme Court to proceed and dismiss the matter before such a High Court decision is made would effectively subvert the original jurisdiction of the High Court in a matter for which the original jurisdiction of the High Court cannot be ousted by legislation even with the clearest of words, pursuant to *Plaintiff s157/2002 v Commonwealth* (2003) 211 CLR 476 and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

58. As such, dismissal under s 13 or s 48 *Judicial Review Act* 1991 would be contrary to law. Notably the Third Respondent agrees with this in Outline of Submissions for the Third Respondent in Response to the Application for Summary Dismissal at paragraph 14. This nullifies the First and Second Respondents' arguments at paragraph 20, 21, 22. Notably, paragraph 22 includes false statements of fact regarding the timeliness of the Applicant's submissions and misleading inferences regarding the purported lengthiness of submissions and regarding my intentions in the matter which amount to unsubstantiated and inadmissible character evidence. Thus, paragraph 22 is invalid on its face.

59. Furthermore, dismissal under the Court's inherent jurisdiction on purported lack of merit of questions of law (which has yet to be tested and determined) would also be contrary to law as it would deprive the High Court of an assessment as to merit under its original jurisdiction through the current s 40 Application. This would be contrary to the right of access to the original jurisdiction of the High Court for matters of this type pursuant to s 40 of the *Judiciary Act* 1903.

60. Further, it would be contrary to justice by deciding the matter based on unsubstantiated assertions of the Respondents absent a just hearing of the merits of the matter. Richardson J of the New Zealand Court of Appeal in *Moevao v. Department of Labour* ((29) (1980) 1 NZLR 464, at p 481.) (As quoted by Mason CJ in *Jago v District Court of New South Wales* (26) (1989) 168 CLR 23): stated "public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike".

61. Notably, the case of *Walton v Gardiner* (1993) 177 CLR 378 which the Third Respondent cites as authority to support their submission in support of the application for dismissal under the inherent jurisdiction of the Supreme Court; is a case relevant to an unreasonable delay of proceedings; and is relevant only to the supervisory jurisdiction of the Supreme Court over a Tribunal and is not a case of authority relevant to the jurisdiction of the Supreme Court relevant to a current application in the High

25 See the 2nd Affidavit of William Anicha Bay

Court's original jurisdiction. Notably, the Supreme Court does not have an inherent supervisory jurisdiction over the High Court. Now that a s 40 application is on foot it is the jurisdiction of the High Court to decide on the manner in which this matter should progress. These facts adequately distinguish the case of *Walton v Gardiner* from the facts of this current Matter.

62. To begin, it is worth pointing out that it was stated in *Palmer v Western Australia* [2021] HCA 5; 246 CLR 182 at [225] that, "…the starting point in an assessment of the validity of any administrative action or delegated legislation is the source of authority for that administrative or legislative act." Therefore, it is only after that question has been answered can the administrative action then be examined further. Therefore, the court must examine the validity of *National Law* (and variations thereof) first, or in the alternative allow the High Court to do so, before proceeding further, including by way of a summary dismissal.

63. In paragraph 1 of Respondents' Submission A/B they state that the judicial review of the Applicant (the Matter) must be dismissed due to s 48 of the *Judicial Review Act* 1991. Section 48 of the Act states that '(1) The court may stay or dismiss an application under section 20, 21, 22 or 43 or a claim for relief in such an application, if the court considers that— (a) it would be inappropriate— (i) for proceedings in relation to the application or claim to be continued; or (ii) to grant the application or claim; or (b) no reasonable basis for the application or claim is disclosed; or (c) the application or claim is frivolous or vexatious; or (d) the application or claim is an abuse of the process of the court. Section 48 of the Act does not apply to the Matter because as a reasonable basis for the application has been disclosed due to the respondents declaring there are constitutional issues at hand in the Outline to Argument court document.

64. Furthermore, the application is neither frivolous or vexatious as it involves a matter being the first time the Applicant has ever brought an application to Court and involves a very serious matter, that being the suspension of his medical license prohibiting his from earning a living, and the suspension destroying his career and professional reputation. This matter also involves many matters of public interest, such as a doctors' duty to warn, the implied public right to a freedom of political constitution, and the invalidity of Queensland making laws for the Commonwealth. Finally, this application is not an abuse of the process of the Court as the application was filed within time in a Court with the only jurisdiction available to rule on the constitutional matters at hand.

65. Because it has been determined that the States cannot determine the limits of federal power in the Qld Rail Case[26] at [28] where it was said, "… it would be necessary to observe that a State Parliament cannot determine the limits of federal legislative power."; it follows that the Applicant's Section 40 application for Order of Removal cannot be undermined by a summary dismissal as this would amount to a lower court making a pre-emptive finding of the High Court, thus unlawfully removing the power of the High Court to make such determinations by making the s 40 power otiose.

66. Furthermore, it is the duty of the Court to not proceed to summary dismissal for the reason that under s 78B of the *Judiciary Act* 1903 (whereby such notice has been given to all the Attorneys-General and the Commonwealth Attorney-General is yet to decide

26 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11; 256 CLR 171

whether to intervene or not[27], the Court cannot pre-emptively remove the privilege of the Attorney-General to intervene in this Matter. Once again, to grant a summary dismissal would be to render s 78B otiose, again making such an action unlawful.

67. As to what guidance the Court should look to, to grant or deny the adjournment; the Applicant relies on the judgment of Gaudron and Gummow JJ at [40] that "a failure to accede to a reasonable request for an adjournment can constitute procedural unfairness"[28].

68. Another example of the guiding principles for exercising the discretion to refuse an adjournment are set out by Kaye J in *Brimbank Automative Pty Ltd v Murphy at [29]*:

    "..a court should not refuse an application for an adjournment, where to do so would cause injustice to the party making the application, unless the grant of the adjournment would occasion irreparable prejudice to the other side, such prejudice not being capable of being remedied by an appropriate order as to costs or otherwise."

69. It is argued that refusing the Applicant's request for an adjournment on the Constitutional matters would amount to an injustice by short-circuiting the High Court s 40 Removal process. In contrast, for the Respondents, there would be no prejudice against them as an adjournment would merely prolong the current status quo, i.e., an indefinite suspension against the Applicant because of impugned *National Law* powers.

70. Furthermore it was found in *Sterling Pharmaceuticals Pty Ltd v Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287 and *L & W Developments Pty Ltd v Della* [2003] NSWCA 140 that a stay of proceedings is appropriate pending the determination of proceedings in another forum. This reasoning points strongly to allowing the Applicant's request for an Order for Adjournment (Order 3) to be granted.

71. Furthermore, at [8] in the Outline of Argument[30] from the Directions Hearing on 30th November 2022, the First and Second Respondents stated: "The First and Second Respondents contend that the Jurisdictional Issues should be determined by the Court as a preliminary issue, prior to determining the balance of the Applicant's Application". As such the First and Second Respondents have already declared that dismissal is not appropriate.

72. This also amounts to an agreement by the First and Second Respondents that a Court not a Tribunal (leaving aside the issue whether QCAT is determined to be a court invested with Federal judicial power by Queensland or not, which will ultimately be determined by the High Court in the same s 40 Order for Removal or by appeal if required) should determine the jurisdictional issues. The Applicant agrees with this contention of the Respondents, and ergo, this is a 'fait accompli' that the First and Second Respondents' reasons to deny the Applicant's application are without grounds and should be dismissed.

27 See exhibits T-2, T-3 (Commonwealth Attorney-General responses)
28 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597
29 *Brimbank Automotive Pty Ltd v Murphy* [2009] VSC 26
30 Court Document - Outline of Argument on Behalf of First and Second Respondent

Submission in Reply to Third Respondents Reply to First and Second Respondent's Submission

73. The Third Respondent submitted by way of consent orders on 28 February 2023 a new submission[31] that outlined their support for the summary dismissal. They relied on one (of two) grounds being that the Applicant's argument on the constitutional and jurisdictional arguments of the *Health Practitioner Regulation National Law (Qld)* (National Law (Qld) are not reasonably arguable. On this very statement alone, it is contended that there is an arguable basis before the Court because the Third Respondent has, again, added confusion to an already confusing model of National Laws that are called a singular *National Law* by misidentifying the law upon which the Applicant had an immediate action suspension decision made on. Until the very name and title of the law upon which the Applicant was suspended under can be determined there are questions of fact and law to be determine which means there are grounds for argument. Hence, the Third Respondent's argument as to this ground must fail.

74. It is noted that the Third Respondent has not accepted aspects of the First and Second Respondent's submissions about QCAT's jurisdiction. At paragraph 14 of the Third Respondent's submission, they have agreed that the Applicant's application cannot be dismissed under s 13 of the *Judicial Review* Act but instead have argued that summary dismissal can still be granted on the grounds that Dr Bay[32]'s application on constitutional grounds is "not reasonably arguable".

75. For all the reasons written below in Part 1 and Part 3 of this Submission Two that pertain to arguments contained in Submission A/B and Submission C; it will be demonstrated clearly that there is a reasonable basis for arguing the constitutional and jurisdictional validity (or lack thereof) of the impugned *National Law*. For this reason, it is not appropriate to summarily dismiss this Matter, especially in the context of those very constitutional matters being underfoot the Commonwealth Attorney-General's consideration and the High Court's consideration.

76. The Third Respondent has also submitted by way of consent orders on 28 February 2023 a new submission that outlined their support for the summary dismissal on the grounds at paragraph 2 b) that, "insofar as Dr Bay[33]'s application relies on grounds arising from the *Human Rights Act* 2019 (Qld), Dr Bay[34] was entitled to seek merits review of the decision to suspend his registration in … QCAT.".

77. They elucidate their argument in support of these grounds from paragraph 15 where they state under the heading, "The availability of merits review in QCAT warrants summary dismissal of the human rights grounds". After taking the Third Respondent's submission into account (but only so far as to the human rights aspect of the Matter) the Applicant concedes that he **may** have had cause to take these human rights matters to QCAT (by leaving aside the jurisdictional issues of the impugned National Law and

31 Court Document - Outline of Submission for the Third Respondent in Response to the Application for Summary Dismissal

32 Note: this is their unlawful reference to a protected title not the Applicant's.

33 Note: their unlawful characterisation of the Applicant being a medical practitioner is theirs alone.

34 Note: their unlawful characterisation of the Applicant being a medical doctor is theirs alone.

what law if any the applicant has been suspended only) and thus withdraws his arguments on these human rights grounds, but on those human rights grounds alone.

78. For clarity, it is submitted that those human rights grounds as enumerated in the Applicant's Submission One-Amended and Originating Application to be withdrawn are:

    a. The right to religious beliefs as per s 20 of *the Human Rights Act* 2019.
    b. The right to not be subjected to medical or scientific experimentation or treatment with informed consent as per s 17 of *the Human Rights Act* 2019.

79. To that extent then, if the Court decides the summary dismissal is warranted, it is argued that this decision should only extend so far as to the human rights grounds this Matter was argued on (as documented immediately above) **and no further**.

The Applicant does not recognise QCAT's decision making powers

80. It is not disputed that the Applicant has not made an application for a review of the First and Second Respondents' decision in QCAT. This was a purposeful action taken by the Applicant after examination of the confusing nature and jurisdiction of the *National Law* and the immediate action decision documentation delivered to the Applicant[35].

81. Leaving aside for one moment the fact that the First and Second Respondents **have never identified the law upon which he was suspended under**, by virtue of not making an application to QCAT for a review of the s 156/ s 160 decision the Applicant has demonstrated his firm commitment to his legal argument that the misconceived *National Law* (or whichever variant the First and Second Respondents failed to specify) does not have jurisdiction to make administrative decisions either for or against him. He has also not consented to be being bound by any purported authority of QCAT. The Applicant continues to not consent to any power by QCAT to make a determination on the administrative decision of the First and Second Respondents for the reasons given above and below.

82. For the avoidance of doubt, the Applicant declares and argues that he is not requesting a merits review in this Court which is accepted is the jurisdiction of QCAT. Notably, the High Court has held[36] that tribunals cannot exercise both non-judicial and judicial powers. Further, all of the cases relied upon by the First and Second Respondents at footnote 14; including *Electrical Licensing Committee v Whatalec Pty Ltd*; *Electrical Licensing Committee v Brindley* (2021) 8 QR 328 (Holmes CJ); *Blundell v Queensland Building and Construction Commission* [2018] QSC 58 (Martin J); are distinguished from this Matter as none of those cases challenged the validity of the operation of s 13 of the *Judicial Review Act* where a matter of Judicial review was seeking an answer on questions purely of law regarding jurisdiction and the *Commonwealth Constitution* and its interpretation and application. As discussed in the subheading 'State legislation cannot ouster right of review' below, based on High Court precedent a privative clause, even with express wording, cannot oust a right to recourse to the High Court or Supreme Court for matters that this Application is bringing.

35 Exhibit B-1

36 In *Kable v DPP* (NSW) at [165], the Court held that while State legislatures can confer upon State courts non-judicial functions, they cannot confer upon them functions that are incompatible with the exercise by those courts of the judicial power of the Commonwealth.

83. Whilst it is noted that for the purposes of Queensland jurisdiction the Queensland Court of Appeal has determined in the *Owens v Menzies* 2013 case that QCAT is not a tribunal but a court; the Applicant further notes (and will expound upon further below) that this Queensland ruling is in conflict with settled case law from the High Court (including *Kable V DPP* (1996)[37]), and this is the very reason for (one of) the Applicant's reasons to apply for an Order for Removal under the *Judiciary Act* 1903.

84. In summary, the Applicant could not have reasonably been expected to go to QCAT when the very law upon which the Applicant was being penalised against was uncertain. To go to QCAT would be tantamount to conceding that the law the Applicant was being penalised under was the *Health Practitioner Regulation National Law* (Queensland). The Applicant has not had the benefit of having it clarified by the First and Second Respondents what law he was and is being penalised under. To now claim, as Counsel to the First and Second Respondents seem to be, the Applicant was penalised under the *Health Practitioner Regulation National Law* (Queensland) is a misrepresentation of the facts. Indeed, throughout the Respondents' Submission A/B the Respondents confuse the *Health Practitioner Regulation National Law* (Queensland) with 'the *National Law'* and the *Health Practitioner Regulation National Law Act* 2009. (insert paragraphs where they do this)

QCAT does not hold federal judicial power

85. In *Kable v Director of Public Prosecutions* (NSW) [1996] HCA 24; 189 CLR 51, it was determined that states are not free to legislate as they please and cannot evade the Constitution by turning over the power of courts to tribunals. Indeed, in *Gould v Brown* [1998] HCA 6; 193 CLR 346 at [116] it is stated, "First, the judicial power of the Commonwealth cannot be vested in a court that is not specified in s 71 of the Constitution."

86. The *Queensland Civil and Administrative Tribunal Act* 2009 act at section 3, "Objects The objects of this Act are— (a) to establish an independent tribunal to deal with the matters it is empowered to deal with under this Act or an enabling Act;". It is argued that QCAT is not empowered under rulings issued by the High Court that tribunals do not have power to exercise federal judicial power.

87. The fact that the Owens v Menzies (2013) case has stood unchallenged for 10 years does not mean it is settled law or fact. In *R v Kirby; ex parte Boilermakers' Society of Australia* (1956)[38] the impugned law had been standing for 30 years.

88. In *Ward v the Queen*[39], statements by Gibbs J at [4] meant that a State court hearing a matter has been invested with federal jurisdiction because it was a matter between a state and a resident of another state, between residents of different states, or between states thus making it a matter subject to s75 (iv) of the Constitution.

89. This is important because appeal rights are made direct to the High Court pursuant to

37 *Kable v Director of Public Prosecutions* (NSW) [1996] HCA 24; 189 CLR 51
38 R v Kirby; ex parte Boilermakers' Society of Australia [1956] HCA 10; 94 CLR 254
39 Ward v The Queen [1980] HCA 11; 142 CLR 308

s73(ii) of the Constitution, not to another court of the State. All of the Applicant's arguments cannot be heard by a tribunal such as QCAT, as his arguments are Constitutional arguments, and he is challenging the legality of the Board to make the decision, not the merits of the decision therein.

90. The Supreme Court cannot therefore refuse to hear this Matter, nor can it refuse to exercise the judicial powers of the Commonwealth by way of peril of s 33 of Judiciary Act 1903 ouster of office.

91. QCAT, like the NCAT[40] does not answer the description of court for the purposes of Chapter III of the Constitution. It is primarily created as an administrative Tribunal and not a court, regardless of whether it can have state judicial power conferred upon it or not or whether it is called a "court". The case *of R v Kirby; ex parte Boiler Makers' Society of Australia* (1956) makes this clear where the Court of Conciliation and Arbitration was found not to be a court for the purposes of Chapter III , as the judicial powers of the Commonwealth cannot be vested in bodies or persons other than a court.

92. The Arbitration and Conciliation "court" was not created under Chapter III, but rather under section 51(xxxv.) of the Constitution for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Its predominant function was administrative and not judicial in nature, just as is the case in QCAT and as such QCAT cannot exercise the judicial powers of the Commonwealth by combining both administrative and judicial powers which is strictly prohibited under the Constitution (s 71 separation of powers doctrine). These powers can be mixed at the state level but not at the Federal level. As soon as a matter arises under a matter under s 75/76 of the *Constitution*, federal jurisdiction must be invoked. The judicial power of the Commonwealth is a pure power, only judicial, and as such it cannot be both administrative and judicial. That is why QCAT is NOT the appropriate court or however so named to handle this Matter.

93. This is why the QCAT, even though the State of Queensland or the Queensland Court of Appeal may give it the description of a court and may even have many characteristics of a court it is primarily established as an administrative tribunal and Chapter III of the Constitution does not permit a combination of administrative and judicial powers in the one body for the purposes of sections 75 and 76 of the Constitution. It is on this basis that the QCAT lacks jurisdiction to exercise the judicial powers of the Commonwealth in the resolution of matters that fall within the ambit of matters contained in sections 75 and 76 of the Constitution.

94. The correct jurisdiction to adjudicate upon this Matter arising under the *Constitution* or its interpretation is the Supreme court of Queensland (or the High Court in a case of a removal order), which forms a part of the integrated Australian judicial system in which the High Court sits at the apex, with the invest of federal judicial power in the Supreme Court often referred to as **the autochthonous expedient** for which Chapter III provides. It is expedient for the Commonwealth to utilise the courts of the States in the exercise of its judicial powers to reduce the cost of creating separate federal courts throughout the country to adjudicate upon matters contained within sections 75 and 76 of the Constitution, but this does not include allowing such matters to be adjudicated in QCAT.

40 See *Burns v Corbett* 2018 HCA below.

95. In the first paragraph of *R v Kirby; ex parte Boilermakers' Society of Australia* [1956] HCA 10; 94 CLR 254, Dixon C.J., McTiernan, Fullagar and Kitto JJ. said, "Chapter III of the Constitution does not permit of the exercise of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth by a body established for purposes foreign to such power, notwithstanding that such body is organized as a court and in a manner which might otherwise satisfy ss. 71 and 72 of the Constitution, nor does it allow a combination with judicial power of functions not ancillary or incidental to its exercise but foreign to it. Thus, the Commonwealth Court of Conciliation and Arbitration, though under s. 51 (xxxv.) of the Constitution there is legislative power to give it the description and many of the characteristics of a court, is established as an arbitral tribunal which cannot constitutionally combine with its dominant purpose and essential functions the exercise of any part of the strictly judicial power of the Commonwealth."

96. In summary, state judicial power and the judicial powers of the Commonwealth are not the same, the latter cannot be mixed with any administrative powers of the State, and this is exactly what would happen if the QCAT attempted to exercise the judicial powers of the Commonwealth in matters contained in sections 75 and 76 of the Constitution. Therefore, QCAT cannot be invested with federal jurisdiction pursuant to section 77(iii) of the *Constitution* enabled by section 39(2) of the *Judiciary Act* 1903 (Cth).

97. More importantly, it cannot exercise the judicial powers of the Commonwealth pursuant to section 71 of the *Constitution*. As Toohey J in *Kable v DPP*[41] pointed out at [21] citing Professor Lane, "jurisdiction and the judicial powers of the Commonwealth are two distinct notions" and in truth it is the judicial powers of the Commonwealth that truly matter.

QCAT cannot not rule on matters involving parties from different states

98. The High Court held in *Burns v Corbett* [2018] [42] that the Civil and Administrative Tribunal of New South Wales (NCAT) did not have jurisdiction to deal with matters involving parties from different States, and that "federal jurisdiction could not be conferred on a Tribunal as it was not a 'Court of the State".

99. This matter involves the First Respondent being a corporation registered in the State of Victoria[43.] Therefore, QCAT is without jurisdiction to hear this matter as a point of law.

100. Furthermore, the *National Law* purportedly being a National (that is Commonwealth) law means findings regarding the jurisdiction and constitutionality of this law affect all States and Territories (not just Queensland) and thus decisions on the legality of this impugned law are beyond the jurisdiction of QCAT, thus meaning no remedy is available for the Applicant, thus making the attempt or suggestion of taking this Matter to QCAT futile.

41 Kable v Director of Public Prosecutions (NSW) [1996] HCA 24; 189 CLR 51
42 *Burns v Corbett* [2018] HCA 15; 265 CLR 304
43 Exhibit I-1

The case of Owens V Menzies 2013 is distinguishable from the Matter

101. The Applicant argues that QCAT does not have the judicial power to interpret and make binding rulings for laws purporting to have national jurisdiction (I.e., the *National Law*, the *Schedule*, the *National Law* (Queensland), the *Regulations*) on matters involving federal jurisdiction. However, since *Owen v Menzies* (2013)[44] in the Court of Appeal Queensland has determined that QCAT does have the right to determine matters of federal jurisdiction with federal judicial power it is relevant to determine how this Matter is distinguishable.

102. The Case of *Owens v Menzies* (2013) is distinguishable from the Applicant's matter because the Owen's case only involved the jurisdiction of QCAT so far as it pertained to matters confined to facts and questions limited to the territorial boundaries of Queensland as it only involved questions regarding the *Anti-Discrimination Act 1991* (Qld). Sections 3 and 3A of the *Anti-Discrimination Act (Qld)* made clear that this was a law of Queensland only and was not to be applied as if it is were the law of any State or Territory like the adoption model in the National Registration and Accreditation Scheme (NRAS).

103. As the *National Law* is purported to have national effect via S 8 Extraterritorial powers, QCAT does not have requisite jurisdiction to rule on this Matter. Therefore, the decision in *Owens v Menzies* (2013) cannot be applied.

The QCAT Act does not confess to hold federal judicial power

104. Federal jurisdiction matters are those within sections 75 and 76 of the *Commonwealth Constitution*. Nowhere in the *Queensland Civil and Administrative Tribunal Act* 2009 (QLD) (**QCAT Act**) does it refer to the tribunal's power to adjudicate on Constitutional issues which are by definition the original judicial powers of the High Court of Australia, or powers that can be exercised by courts vested with federal judicial power. QCAT is therefore not authorised under the Constitution, the QCAT Act, or any act of the Commonwealth to exercise federal judicial power.

105. Furthermore, when carrying out the objects of the QCAT act, the QCAT says at s 4 that it must achieve the objects of the act at subsection (b) to "encourage the early and economical resolution of disputes " and at subsection (c) to "ensure proceedings are conducted in an informal way". Consequently, QCAT is not an appropriate forum for the resolution of the jurisdictional and constitutional questions because conducting a proceeding in an informal way regarding interpretation of matters of the Constitution is insulting to the Constitution's supremacy in Australia's judicial system, and it would be impossible for QCAT to provide for an early resolution of the Applicant's matter because, as QCAT is not a court, it needs to refer matters of law under s 116 ss (5) "If the presiding member is not a legally qualified member or an adjudicator and the tribunal as constituted for a proceeding does not include a legally qualified member—(a) the tribunal's decision on the question is the decision of a legally qualified member nominated by the president". This means that the first hurdle to overcome in this matter, that is "Is the National Law constitutionally valid?" and "Have the respondents been properly identified?" would immediately need to be referred to a legally qualified member and in the absence of such would delay justice, and justice delayed is against

44 *Owen v Menzies* [2012] QCA 170; [2013] 2 Qd R 327

the objects of the QCAT act.

106. Furthermore, it against the rulings of the High Court (as described above) that a tribunal can make decisions involving the exercise of federal judicial power. The suggestion that QCAT is the appropriate forum for the determination of such serious constitutional matters is an insult to the primacy of the High Court and the Constitution in Australia, and, as such, by reason of covering Clause 5 of the Constitution;55 QCAT is not the appropriate forum to determine such weighty matters.

State legislation cannot oust the right of review to the Supreme and High Court

107. The Applicant is requesting a judicial review of jurisdictional error, constitutional invalidity, and purported errors of law (the majority of which are jurisdictional in nature) in the Matter. Nothing within the application has requested a merits review. It is not the jurisdiction of the Supreme Court to undertake a merits review, and it is not the jurisdiction of QCAT to undertake a judicial review. It is irrelevant if QCAT can make comment on purported errors of law and it is irrelevant if the decision-maker thinks a merit-based remedy is "more suitable" as they stated at paragraph 19 of their Submission A/B. The Applicant has the power to decide on the most suitable lawful avenue for his application in accordance with his lawful rights, until such time (if eventuating) the Court determines otherwise.

108. In response to First and Second Respondent's *third reason*[45] at paragraph 17 in their Submission A/B, the Applicant contends that that is an irrelevant reason as whether the Applicant's knowledge (or lack thereof) of a possible avenue of QCAT appeal since this does not remove his lawful right for alternative (and more appropriate) avenues of review under the circumstances of the case. It is not in the interests of justice for the Matter to be dismissed as the Matter involves questions of law that affect every State and Territory of our country, every health practitioner and every citizen and resident of our country.

109. The First and Second Respondents argue in their Outline of Argument document that the *National Law* provides the Applicant with a right of appeal to the Queensland Civil and Administrative Tribunal (QCAT) at [10][46]and that the First and Second Respondents advised the Applicant of this right at [10][47], but he did not pursue this path. Whilst the (constitutionally contested) *National Law* does allow for a QCAT appeal at s199; the express wording of s 199 does not mandate QCAT as the only avenue for appeal and does not exclude a judicial review in the original jurisdiction of the Supreme Court, as to which, s 199 is silent. Such silence to exclude the original jurisdiction of the Supreme Court within s 199, indicates that parliament did not intend to do so; and privative clauses are strictly construed according to the clear and express wording of the parliament[48].

110. At s199 of the *National Law* it states:

45 "*Third,* Dr Bay was informed of his QCAT appeal rights when the suspension decision was made so he cannot complain he was not aware that of the ordinary QCAT appeal avenue."
46 Court Document - Outline of Argument on Behalf of First and Second Respondent
47 Court Document - Outline of Argument on Behalf of First and Second Respondent
48 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [504] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

"A person who is the subject of any of the following decisions (an appellable decision) may appeal against the decision to the appropriate responsible tribunal for the appellable decision-...".

111. Section 14 of Schedule 7 of the *National Law* states:

"Meaning of "may" and "must" etc

(1) In this Law, the word
"may", or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.

(2) In this Law, the word
"must", or a similar word or expression, used in relation to a power indicates that the power is required to be exercised.

(3) This clause has effect despite any rule of construction to the contrary".

112. Thus because of the use of the word 'may', it is clear that the intention of parliament was not to mandate an appeal in QCAT and was not to attempt exclude judicial review in the Supreme Court and thus, based on the express wording of s 199 it is the intention of parliament that s 199 not operate as a privative clause.

113. Notwithstanding that even if s 199 did operate as a privative clause, a privative clause cannot oust the High Court's original jurisdiction to grant relief[49]; and a privative clause cannot oust the jurisdiction of a state Supreme Court to grant relief for jurisdictional error[50]. In Kirk[51] at paragraph [98] the High Court held that the "supervisory role of the supreme courts exercised through the grant of prohibition, certiorari, and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts." In Kirk[52] at [99] it was held that depriving the state supreme courts of supervisory jurisdiction would 'create islands of power immune from supervision and restraint'.

114. Notably, the High Court has held that any such privative clause that may attempt to usurp the jurisdiction of the Supreme Court could be read down rather than being declared invalid[53]. Clearly, this decision does not deem such a privative clause as valid.

115. The Applicant's matter before the Supreme Court of Queensland is requesting relief on the basis of multiple jurisdictional errors and is raising questions that involve the *Commonwealth Constitution* including its interpretation and application; and thus, s199 of the *National Law* cannot be interpreted as a privative clause to oust the jurisdiction of the Supreme Court[54] or to oust the jurisdiction of the High Court in its original jurisdiction[55].

---

49 *Plaintiff s157/2002 v Commonwealth* (2003) 211 CLR 476.
50 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
51 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
52 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
53 Ibid.
54 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
55 *Plaintiff s157/2002 v Commonwealth* (2003) 211 CLR 476.

116. As held in *Probuild Constructions*[56] at [59], "...there is now no doubt that recourse to the Supreme Court cannot be taken away by statute even by the clearest of words". This statement was with reference to a judicial review where there had been a purported jurisdictional error. Thus the statement at [14] in Submission A/B of the First and Second Respondents; the "this Court has dismissed proceedings of this kind in several cases involving appeal rights to QCAT" is false; as the Applicant's matter is distinguished from the cases referenced for this point as his matter is focussed on purported jurisdictional errors and errors of law regarding the interpretation and application of the Commonwealth Constitution and the referenced cases were not. Thus, the argument of the First and Second Respondents at [14] has no basis in law and must fail. As such it is not in the interests of justice for this Matter to be dismissed under s 13 or 48 of the *Judicial Review Act.*

117. The Applicant declares that he has purely and simply exercised a lawful right to judicial review of multiple errors of law regarding jurisdictional and Constitutional matters. The Applicant submits that s 199 of the *National Law* should be read down such that it does not operate as a privative clause[57] regarding this matter.

118. Furthermore, it is noted that it has been found that "judicial review for jurisdictional error is constitutionally protected"[58]. "The ability of legislatures to insulate administrative tribunals from judicial review by means of such clauses is restricted by the Constitution of Australia"[59]. In addition, "there is a further presumption in construing privative clauses that Parliament did not intend to limit access to the courts"[60].

119. In *Kirk v Industrial Court of New South Wales*[61] the High Court extended to the state Supreme Courts the constitutional argument from Plaintiff s157/2002 v *Commonwealth*[62] that a privative clause cannot oust the High Court's original jurisdiction to grant relief under s75(v) when it held that a privative clause could not oust the jurisdiction of a state Supreme Court to grant relief for jurisdictional error. This is because it is part of the constitutional role of state Supreme Courts, as Ch III courts, to be able to supervise the exercise of state executive and judicial power. Furthermore, it was held in *Kirk v Industrial Court of New South Wales* at [99] that depriving the state Supreme courts of supervisory jurisdiction would "create islands of power immune from supervision and restraint".

120. Finally, if the High Court's original jurisdiction were able to be ousted by State legislation it would remove the original jurisdiction of the High Court entirely which is contrary to the Commonwealth Constitution which bestows original jurisdiction on that institution.

---

56 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 160 ALD 385 at [59].
57 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
58 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476
59 *Deputy Federal Commissioner of Taxation v. Richard Walter Pty. Ltd.* [1995] HCA 23, (1995) 183 C.L.R. 168 at 194; *Re Refugee Review Tribunal, ex parte Aala* [2000] HCA 57, (2000) 204 C.L.R. 82
60 *Hockey. v. Yellend* [1984] HCA 72, (1984) 157 C.L.R. 124
61 (2010) 239 CLR 531.
62 (2003) 211 CLR 476.

The applicant is not seeking a review of the merits of the decision

121. The Applicant is not bringing forth a matter to the Court to argue that the decision to suspend the Applicant's registration was the wrong decision. This type of argument would indeed be best progressed in a tribunal like QCAT which the Applicant has clearly demonstrated by words and action he is not interested in.

122. Instead, the Applicant is bringing forth a matter to the Court by way of a s 43 Judicial Review application to argue that the law upon which the decision to suspend the Applicant's registration was made is unlawful, unconstitutional, and even if the Court finds the *National Law* to be lawful, the application of the law by the First and Second Respondents was made without lawful jurisdiction, proper regard to the *Constitution* and/or was made beyond powers. Furthermore, the Applicant has argued that even if the Court finds that the First and Second Respondents did make their decision to suspend under the *National Law* with proper jurisdiction, it was a decision infected with multiple administrative errors63 that are yet to be debated.

123. The Applicant made a submission as to merits of his conduct to help inform the Immediate Action Committee hearing on August 16, 2022. During this process, AHPRA and the Board displayed bad-faith by not allowing natural justice or due process, even so far as to not allow the Applicant's attendance at his own hearing, further by not specifying the allegations against him, and by even allowing for AHPRA to act as both a complainant, a determinant, and the Chair of the Committee, Dr Anne Tonkin, to be both responsible for deciding the matter and also being a victim of the Applicant's alleged impugned conduct.

124. Clearly, there were significant conflicts of interest involved in this determination process which led the Applicant to question why AHPRA and the Medical Board did not and do not follow lawful procedure in Australia. The answer to that question was revealed upon research (whilst he was suspended from working in a career that he had no previous adverse findings ever made against him) into the entire National Scheme (NRAS) which AHPRA administers and the Board derives its purported authority from, which revealed that the *National Law* and those administrative bodies were itself and themselves (respectively) unlawful.

125. Once that determination was uncovered, the Applicant logically decided that the correct and lawful path was to expose the unconstitutional nature of the National Law itself to review by a court of lawful jurisdiction, thereby hopefully freeing himself not just of AHPRA and the Board's unlawful administrative decision on him, but all other health practitioners in the Commonwealth. That is why this case has immense public interest and is why it is expected the High Court will take up this matter for a s 40 removal under the *Judiciary Act* 1903.

126. Indeed, in similar matters in other states like Victoria the case of *Stogiannis v Pharmacy Board of* Australia (Review and Regulation) [2022] VCAT 365 at [55] it was found that if the practitioner, "… takes issue with the manner in which the Suspension Decision was made … she may raise that matter in a proceeding in the Supreme Court."

63 See Bay Affidavit and Originating Application

127. For the avoidance of doubt, the Applicant hereby again affirms the he has never sought nor does not want a hearing on the merits (at this stage), and that is why he exercised his option under the disputed *National Law* to not take the Matter to QCAT.

128. The First and Second respondents refer to the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (**QCAT Act**) s 20 as authority for the *third reason.* s20 states: "(1) The purpose of the review of a reviewable decision is to produce the correct and preferable decision. (2) The Tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits".

129. Section 20 is an irrelevant section and has no effect on the Applicant's right to judicial review of conduct and decision through a Chapter III Court as the entirety of the Matter raises questions of law **not merits**, and the requested remedies include declarations on the status of the law including a determination of the jurisdiction of the First, Second and Third Respondents and other remedies none of which are able to be provided by QCAT under a s20 review of the merits. A Ch III Court and a Judge are the Courts of appropriate jurisdiction for the questions of law the Applicant has raised and for the remedies he has requested.

130. The assertions of the Respondents at [15] of their *first reason i*n Submission A/B are false. The focus of the Applicant's matter is the primary jurisdictional questions of law regarding the identity of the parties and the validity of the *National Law* which involve matters of the interpretation and application of the *Commonwealth Constitution* which are matters that have no relationship to the Applicant's alleged conduct other than to the extent that they affect the identity of the First and Second Respondents and the validity of the enactment under which the decision has been made.

131. These are not matters of an appeal of the substantive decision but are matters that must be answered before any further legal process can lawfully proceed. Notably, and as mentioned above, a privative clause cannot oust the jurisdiction of the Supreme Court or the original jurisdiction of the High Court in a matter of my type that raises the jurisdictional questions as my matter raises.

132. Further, the nature of the *National Law* in being enacted as applied legislation hosted by the state of Queensland affects the law of every State and Territory of Australia and affects the regulation of every health practitioner in Australia and as such jurisdictional questions regarding the interpretation and application of this law which forms the substance of the rest of my matter cannot reliably be decided by QCAT and as such it is not in the interests of justice for QCAT to be charged with making a decision that impacts the law of the whole country and impacts the health practitioners of the whole country and also thus impacts every citizen of Australia through the impact it has on the careers and conduct of nationwide health practitioners.

It is in the interests of justice to hear the matter in the Supreme and High Court

133. In paragraph 1 of Respondents' Submission A/B they state that the judicial review of the Applicant (the Matter) must be dismissed due to s 13 of the *Judicial Review Act* 1991. Section 13 of the Act states: "When application for statutory order of review must be dismissed:

(b) provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by another court or a tribunal, authority or person; the court must dismiss the application if it is satisfied, having regard to the interests of justice, that it should do so."

134. It is not in the interests of justice to dismiss this matter because the remedies sought in this matter (as stated in the Final Orders above) apply to all persons in the Commonwealth of Australia and are remedies that are not available through QCAT. The decision in this matter will affect every state and territory of Australia as the law in question is purported to be applied as a national law. It is not plausible to suggest that the Applicant could have brought the proper contradictor (the State of Queensland) to the QCAT tribunal to provide these remedies he seeks.

The case law relied upon in Submission A/B is irrelevant

135. All of the cases relied upon by the First and Second Respondent in their Submission A/B at footnote 14; including *Electrical Licensing Committee v Whatalec Pty Ltd*; *Electrical Licensing Committee v Brindley* (2021) 8 QR 328 (Holmes CJ); *Blundell v Queensland Building and Construction Commission* [2018] QSC 58 (Martin J); are distinguishable from the Applicant's matter as none of these cases challenged the validity of the operation of s 13 where a matter of Judicial Review was seeking an answer purely of questions of law regarding jurisdiction and the Commonwealth Constitution and its interpretation and application.

136. The First and Second Respondents have argued that the Matter should be dismissed (for not going to QCAT) as they have quoted *Electrical Licensing Committee v Whatalec Pty Ltd; Electrical Licensing Committee v Brindley* (2021) 8 QR 328 (Holmes CJ); which is a case about whether the applicants had a reviewable matter that could have been taken to QCAT. This is not the issue here in this Matter.

137. At [20] of this case it is stated, "It follows that s 172 of the Electrical Safety Act provides for review by QCAT of decisions made under s 121(1)(a), so that each respondent has an entitlement to seek review by that tribunal." Consequently, in the interests of justice that case was dismissed. This case is not relevant to this Matter for while they did apply for a judicial review the decision to dismiss the case on the privative clause; the reasons for dismissing the judicial review were entirely inconsistent with the reasons for this judicial review in this Matter. Those reasons being this Matter is about constitutional and jurisdiction issues. Their case was about whether the Electrical Safety Act made for a reviewable matter in QCAT.

138. The First and Second Respondents have also argued that this matter should be dismissed like the case of *Blundell v Queensland Building and Construction Commission* [2018] QSC 58. In this case the applicant brought a judicial review against QBCC who sought to dismiss the case under s 13 of the Judicial Review Act. Blundell argued that the administrative decision required review due to a decision based on no evidence, failed to provide proper reasons for the decision, a breach of natural justice occurred, and the decision had involved an error of law, was made with irrationality, and was infected with jurisdictional error.

139. At [20-21] it is reported, “The review by QCAT is the usual type of review conducted by similar tribunals around Australia..”. At [29] “it is also argued that there is a public interest aspect to this. That is, with respect, an overreaching submission”, but Blundell was only arguing as to the public interest in regards to “the extent of indemnity available under the statutory insurance scheme for the non-performance of insured work”.

140. At [33], it is stated, “The “interests of justice” permits consideration of a wide range of factors which may include the public interest and will usually include the interests of the parties themselves.”. Ms Blundell relied upon *Nelson v Q-Comp* as to the lack of natural justice being the basis for the public interest. But the Applicant’s Matter wholly comprises reviews of error of law and jurisdiction with issue of far reaching (that is Nation-wide) interest as it pertains to the limits of state legislative and executive power. Furthermore, the Applicant is not contesting the merits of the Decision, but the lawful authority on which the Decision was made.

141. As discussed above under the subheading ‘State legislation cannot ouster the right of review to the Supreme and High Court’, based on High Court precedent a privative clause even with express wording cannot oust a right to recourse to the High Court or Supreme Court for matters that my case is bringing. This makes these case law cases entirely distinguishable and thus irrelevant.

QCAT cannot provide the Applicant with suitable (Commonwealth) relief

142. The Applicant submits, as submitted by the Third Respondent in Outline of Submissions for the Third Respondent in Response to the Application for Summary Dismissal at paragraph 10: “QCAT cannot, in the exercise of administrative power, provide, ‘a definitive answer to the question of constitutional validity’. Such an answer ‘requires the exercise of… judicial power’ (specifically, Commonwealth judicial power) pursuant to *Re Adams and the Tax Agents’ Board* (1976) 12 ALR 239, 241 (Brennan J) (“*Re Adams*”).

143. The Applicant agrees with the Third Respondent in Outline of Submissions for the Third Respondent in Response to the Application for Summary Dismissal at paragraph 13: “Accordingly, QCAT could not, in the exercise of the administrative power on an appeal under s 199(1)(h) of the National Law (Qld), determine the constitutional validity of the National Law (Qld)”. The Applicant further submits that this restraint also applies to the validity of the other relevant statutory instruments and relevant Acts and also applies to the other constitutional validity questions including those relevant to the implied right to a freedom of political communication.

144. In Response to Respondents’ Submission A/B at their *second reason* at [16]: the good reason for choosing these proceedings instead of appealing the decision to QCAT is; the Applicant has originated a judicial review on the basis of multiple errors of law; which involve issues of jurisdictional errors of law and or the errors of law involving the interpretation and application of the *Commonwealth Constitution.*

145. These are matters affecting all other states and territories of Australia due to the use of applied legislation or adopting laws of the Queensland Parliament. The questions of law raised by this Matter are not matters that affect this case alone but rather are

matters that affect every other health practitioner in Australia and thereby the answers to the questions of law in this matter affect every citizen Australia-wide.

146. Thus, QCAT is not the appropriate route of appeal for a judicial review of multiple complex constitutional and jurisdictional matters, decisions upon which affect the law of every State and Territory of Australia; and affect the regulation of all health practitioners across Australia and thus affects every citizen of Australia. It would not be in the interests of justice for QCAT to proceed in making these decisions which will have far reaching consequences throughout the nation of Australia and on every citizen of Australia.

The identification of the law, and the parties is still in question

147. The Applicant argues that a s 13 of the *Judicial Review Act* 1991 dismissal does not have relevance because subsection (b) references a 'provision made by a law'. In this Matter, the very law itself, that being the *National Law* is being questioned as to its Constitutional validity. If the validity of the law that prescribes the option of seeking a review by a tribunal is itself in question, the logical and appropriate course of action would be to take the Matter before a court (and not a tribunal) invested with Federal Jurisdiction to determine matters involving interpretation of the Constitution.

148. Therefore, it would NOT be in the interests of justice to have this Matter dismissed as it is in the interests of justice to first determine what lawful authority the *National Law* has. This is especially relevant since even the identification of **what law the *National Law* is** has yet to be determined. (And this misidentification will be discussed further below.) Pursuant to s 13(b) *Judicial Review Act* 1991 (Qld), if the law under which "provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by another court or a tribunal..." is the subject of a question of validity (as is the case with this Matter) then s 13 (b) cannot be interpreted and applied lawfully until the validity of the "other...Act" in this case the *National Law* is determined by a Court of competent jurisdiction.

149. The Applicant submits that s 13 (b) has no lawful force as a primary jurisdictional matter until the *National Law* is deemed valid (which indeed it may never be).

Counsel for the First and Second Respondents has made misrepresentations to the Court

150. Dismissal of the matter based on an application by the senior solicitor for the First and Second Respondents (who claims full responsibility for its contents[64]) cannot be allowed whilst the matter of the solicitor's misrepresentation to the Court of factual matters and by implication his intention to obstruct the court of justice is under foot.

64 Lucey Affidavit at paragraph 1: "I have responsibility for this matter, along with a number of junior lawyers under my supervision at McCullough Robertson, Lawyers."

151. This matter is under foot whilst the question of the fact of whether Michael Lucey committed perjury (or forms a basis for an indictment for perjury) is determined by this Court; the evidence to which will be submitted below (although Mr Lucey has by way of making the affidavit already provided the majority of such evidence). Consequently, it would be against the interests of justice to dismiss the matter while substantive matters of this nature are under foot.

152. Furthermore, it follows that if a finding of fact that Mr Lucey did make misrepresentations to the Court, the lens through which the Court should view all current and future arguments, applications, and statements of fact of the First and Second Respondents is a lens of discolouration and unreliability owing to these misrepresentations. If the fact (when established by this Court) that Michael Lucey, Solicitor for the Respondents did perjure himself (or in the alternative did misrepresent facts) to this Court by the use of sworn testimony to deceive the Court from its true goal, that being the administration of justice, it would be hard to reason how the author of the Respondents' Application (and thus the Application itself) can be taken seriously.

153. In conclusion, the above paragraphs demonstrate clearly that there are multiple substantive issues underfoot that require the adjudicature of this Court and demonstrate clear why this Matter cannot be dismissed summarily without due consideration and oral argument.

Part 2 – Submissions in Reply to the Interim Injunctive Relief

154. The Applicant made two requests for interim relief:

Order 1: An interlocutory injunction to restrain AHPRA and the Board from enforcing their compliance letter against the Applicant to the extent that the applicant is allowed to acquire gainful employment in any capacity that does not require current registration with AHPRA as a condition of employment.

Order 2: An interlocutory injunction to restrain AHPRA and the Board from taking any further regulatory action against the Applicant concerning the matters before the Court until the judicial review is finalised.

The First and Second Respondents are guilty of the action prohibited by the Compliance Letter

155. In paragraph 2 of Respondents' Submission A/B**,** Counsel unlawfully states the name of the Applicant as 'Dr Bay'. Under the *National Law* and as explained in the impugned Compliance Letter it is unlawful to represent a suspended Medical Practitioner with a protected title that could convey the meaning that the applicant is a doctor. The use of the title 'Dr' is a clear inference that the Applicant is a doctor when he is in fact not (due to the s 156 unlawful immediate action suspension power). As such, the person responsible for the creation of the document according to the Lucey Affidavit, Michael Lucey, is liable for up to a $60,000 fine and/or 3 years jail as per Part 7 Section 113 of

the *National Law*[65].

156. This unlawful representation by the First and Second Respondents defeats the very purpose of what the s 160 Compliance letter purports to do, i.e., to not allow the Applicant to work in any type of occupation that could be inferred as connoting medical practice i.e., being a doctor. By identifying the Applicant as a doctor the First and Second Respondents have acted unlawfully under the very law (the *National Law*) these respondents are penalising the applicant on. This points to the First and Second Respondents not understanding the law which they seek to exercise administrative authority under and the unjust nature of this Compliance Letter.

The Power of AHPRA to Constrain Work Depends on the Registration Power

157. As per Exhibit X-5[66] AHPRA have clarified in a letter to another health practitioner that the power to regulate practitioners is dependent on their registration power/function. AHPRA has written, "The National Law applies to you because of your registration." Therefore, AHPRA have no power to restrain my employment beyond that of occupations that require registration and Order 2 should be granted forthwith.

158. By using this very definition of what employment is lawful for (the suspended) Dr Bay this is a very simple and logical test that would not require the lengthy wording of the Compliance Letter that the First and Second Respondents seek to continue to enforce on the Applicant and thus unlawfully prohibit his employment in a variety of occupations.

The Applicant's character has been inappropriately impugned

159. At paragraph 5 of the Respondents' Submission A/B they state that "Dr Bay informed the Medical Board that he had been practicing (sic) as a medical practitioner and that he was not vaccinated against COVID-19. On the basis of that submission, the Medical Board formed the reasonable belief that Dr Bay had been practising in contravention of the law requiring COVID-19 vaccination.".

160. This is an unreferenced claim and is factually untrue. At no stage did the Applicant inform the Medical Board he was not vaccinated. At most, on page 16, paragraph 39 b)ii) of his submission to the Board[67] the Applicant, by way of his solicitor at the time, **paraphrased** a transcript provided by a private company regarding a social media interview with Meryl Dorey where his solicitor wrote "before (the Applicant) ultimately deciding against it (the vaccine)".

161. The Applicant made clear in his submission that he objected to the Board not

65 113 Restriction on use of protected titles (1) A person must not knowingly or recklessly— (a) take or use a title in the Table to this section, in a way that could be reasonably expected to induce a belief the person is registered under this Law

66 Exhibit X-5 Letter to Beulah Martin to the 2nd Bay Affidavit

67 Exhibit A-2 – Written submissions to AHPRA

particularising the accusations against him[68] and never conceded[69] that the transcripts were a factual representation of what he had said. To the contrary the Applicant had pointed out the AHPRA and the Board, that in the absence of any particularised complaints it would be impossible for the Applicant to make and reliable submissions in respect of them. It is important to make this distinction, due to this being a clear example of the lack of due process followed by AHPRA and the Board, and now can also be taken into consideration when considering the reliability of the First and Second Respondents' statements.

162. Furthermore, to add further context to this accusation, no legal action by the Queensland Police Service or Queensland Health or any other entity has ever begun[70], let alone made a finding that the Applicant was practising illegally at any time.

163. At paragraph 81 of the First and Second Respondents' Submission A/B they write that the Applicant was, "required to be vaccinated to engage in healthcare work". This is another attack on the Applicant's professional standing and is simply not true. As the Applicant was not a Queensland Health (that is Government) employee[71], he was not required to be vaccinated until the Queensland Chief Health officer Public Health Directions came into effect on 15 December 2021. As explained clearly in the Bay Affidavit to the Originating Application, the Applicant chose to resign his position rather than accept forced vaccination or work illegally.

164. The assertion that the Applicant was practising the profession of medicine illegally is a purposeful defamation of the Applicant's character by Counsel to the First and Second Respondents since all these facts to the contrary were laid out clearly at paragraph 27 of the Applicant's affidavit[72.] Consequently, this unlawful and repeated impugnment of the Applicant's character should be set aside with prejudice as a consideration to this Matter, especially when this Matter does NOT involve a merits review of the decision but rather the (lack of) jurisdiction the First and Second Respondents had when they made the decision to suspend the Applicant's registration.

165. This defamation of the Applicant's character will become increasingly relevant when the misrepresentation of Counsel for the First and Second Respondents are discussed below in the subsection 'Counsel for the First and Second Respondents has lied under oath to the Court'.

The Applicant has not forfeited his interest in the injunctive relief

166. In paragraph 9 (a) of Respondents' Submission A/B Counsel claims the Applicant

68 Exhibit A-2 – at page 11, paragraph 27, ". Given the Respondent has not gone to the effort of particularising its allegations, Dr Bay is instead forced to summarise the evidence for the Respondent himself.."

69 Exhibit A-2 at page 11, paragraph 28, "Assuming the transcripts are complete and accurate representations of those speeches and videos (we note that they are produced by a private corporation)"

70 2nd Affidavit of William Anicha Bay

71 See Background in the Bay Affidavit for context and history

72 Bay Affidavit "I resigned from Strathpine 7 Day Medical Centre on 7 December 2021 for personal reasons primarily due to the imposition of the Chief Health Officer's (CHO) direction for mandatory vaccination. It is true that I remain unvaccinated for Covid-19 to this day, but it is not true that I breached any State or Commonwealth laws pertaining to the vaccination of health care workers."

has abandoned his claim for interim relief as he has "since stated to the respondents that he no longer intends to press that part of his application".[73] This is a harmful mischaracterisation of the truth.

167. For the avoidance of doubt (although there is none), the Applicant makes it clear that he intends (as he always has) to press for interim relief as he is doing now in this very Submission Two. The email the First and Second Respondents rely on in the Lucey Affidavit to allege that the Applicant is abandoning his claim further supports (**not detracts**) from the Applicant's strong intentions and efforts to seek interim relief.

168. The exhibited emails to the Lucey Affidavit unmistakeably document the Applicant's objection to the unlawful interference in the judicial process of this Court and the Matter before us by the First Respondents accelerating the s 160 investigation into the Applicant by way of an 'own-motion' investigation against the Applicant communicated to the Applicant on 19 December 2022 (as discussed in the Applicant's Amended Submission One at paragraph 52, 56, and 60).

169. Counsel for the First and Second Respondent has knowingly inappropriately and potentially illegally conflated the concession of the Applicant to defer the matter of an urgent injunction application to stop the accelerated investigation before the 23 March hearing (in the interests of minimising costs for both parties) with abandoning his Interlocutory Relief application.

170. In the exhibit to the Lucey Affidavit marked MJL-1 it is shown the Applicant in an email on December 23rd, 2022 writes,

"I would also like to draw your attention to:

…

B) I respectfully request Counsel for the First and Second Respondents to confirm in writing as soon as practicable, to my email for service, a proposal for a resolution of the following issue:

Background:

On the 19th of December, AHPRA and the Medical Board notified me of further proceedings in the s160 investigation against me (see Exhibit X-3), including a formerly undisclosed "own motion" investigation into my conduct.

AHPRA and the Board have requested that I respond to a further step in the s160 National Law investigation (under penalty of further regulatory action if I fail to do so.) by 10 January 2023.

As this investigation is directly subject to the matter before the Court (and the request for Interlocutory Relief) their action and potentially anything I respond to AHPRA may be

73 Submission A/B. Misrepresentation also found at paragraph 10, "By email, Dr Bay advised solicitors for Ahpra and the Medical Board that he no longer intends to seek the interim relief sought in his originating application." The Submission A/B then footnotes at 13 the evidence for this lie as the Lucey Affidavit.

considered to be interfering with a matter before the Court and would be prejudicial to my case.

I have expounded upon these issues comprehensively in my submission at the section entitled Interlocutory Order Two Submission.

I think it is unfair to be threatened with indirect legal consequences for both responding to and/or not responding to this legal letter from AHPRA. Thus, I put it to you that the First and Second Respondents are acting unlawfully.

Ergo, I ask Counsel for the First and Second Respondents to seek authority from AHPRA and the Board to consider staying this investigation until 23-24 March 2023 and withdrawing their request for me to respond in writing to their allegations, and then notifying me of this withdrawal in writing.

If your clients are unmoved by the persuasiveness of this perspective , I suspect that I will need to proceed to filing for an urgent hearing in the new year for immediate interlocutory injunctive relief.

In the interests of both parties being further entangled unnecessarily, I suggest that AHPRA stays its investigation until this matter can be decided lawfully in the Court, to which I hope you'll agree.".

171. This exhibited communication **is incontrovertible proof** Mr Lucey, who is a recipient to this email and the very person who exhibited it to the Court in his Submission A/B knew that the Applicant was seeking a new and urgent injection on the grounds of a new and accelerated own-motion investigation by AHPRA.

172. In the exhibit MJL-2 to the Lucey Affidavit, an email from the Applicant to Mr Lucey and Crown Law, it is written, "Hi Michael, Your apology for the delay is accepted. I acknowledge your position on the matter of the ongoing investigation. I advise that at this stage I won't be seeking an urgent injunction so as to not further complicate our matter. Instead I will be presenting the merits of my matter before the Court (and through submissions) as instructed by Justice Boddice…"

173. This text makes explicitly clear by way of the words, "I won't be seeking an urgent injunction so as to not further complicate our matter. Instead I will be presenting the merits of my matter before the Court (and through submissions) as instructed by Justice Boddice.." that the Applicant did not abandon his application for Interim Injunctive Relief. To the contrary it demonstrates that the Applicant would be presenting the merits of his matter before the Court as planned and by submission like this Submission Two now submitted to the Court. This text does only states that the Applicant "**wouldn't be seeking an urgent injunction so as to not further complicate our matter**". Counsel for the First and Second Respondent has conflated (knowingly) the issue of the urgent injunction matter with the established 23-23 March hearing where the Interim Injunctive Relief was to be and will be discussed.

174. It is disappointing and shocking that the learned Counsel for the First and Second Respondents has tried to portray the Applicant's reasonableness in minimising further legal entanglement (in the face of a fresh and potentially illegal investigation of his client) as a documented admission of relinquishment of Interim Injunctive Relief where these very exhibits demonstrate the opposite to be true.

175. For Counsel to the First and Second Respondents to then submit these exhibits as sworn evidence to the Court of the Applicant's unwillingness to take this Matter seriously and then further demonstrate Counsel's misrepresentation that the Applicant has relinquished his request for interim relief by not even making a submission in response to the Applicant's request for interim relief is profound. The significance of this misrepresentation will be discussed below at 'Counsel for the First and Second Respondents has lied under oath to the Court'.

Counsel for the First and Second Respondents has lied under oath to the Court

176. Michael James Lucey, solicitor for the First and Second Respondents in an affidavit he swore on oath on 10 February 2023 (and attached to Submission A/B of the First and Second Respondents) confirms that he is a partner for McCullough Robertson Lawyers who are the solicitors for the First and Second Respondents in the above mentioned matter.

177. In this sworn affidavit he confirms he has responsibility for this matter and thus the contents of Submission A/B are taken to be his. In this matter he submitted to the Applicant and the Supreme Court of Queensland on the 10th February 2023 a document entitled Submission of the First and Second Respondent (Submission A/B).

178. In paragraph 10 (the second instance of knowing misrepresentation) of the Respondents' Submission A/B Mr Lucey claims, "by email, Dr Bay advised solicitors for Ahpra and the Medical Board that he no longer intends to seek the interim relief sought in his originating application."

179. The subject matter of the email to which Mr Lucey was referring to (Exhibit MJL-2) referred to the Applicant's decision to not purse a new and urgent and additional interlocutory application due to an attempt by AHPRA to accelerate the s 160 investigation into the Applicant that the Applicant had politely requested Counsel to consider (as documented in the Applicant's Submission One – Amended at paragraphs 52-60) the judicial appropriateness of considering that this very issue was the substance of the interim relief to be heard on 23 March 2023.

180. Thus, this assertation in paragraph 10 is a lie and thus a misleading of the Court and a covert attempt at a perversion of justice in this Matter to which a summary finding in favour of the Applicant's interim relief is requested.

181. Such a finding would be appropriate not only as a consequence of the misleading of the Court but also since the Respondents have offered **no defence to the Applicant's request for interim relief**. Such a serious misrepresentation in Queensland's highest court should be taken into consideration by the Court when considering the merits of this Matter and the Applicant's appealable rights.

182. As discussed above, the Applicant (as demonstrated by Counsel's own affidavit in support) had actually written, "I advise that at this stage I won't be seeking an urgent injunction so as to not further complicate our matter. Instead, I will be presenting the merits of my matter before the Court (and through submissions) as instructed by Justice Boddice." The Applicant, as documented, in the interest of both parties and this Court chose not to pursue an extra, urgent application for an injunction against this new and accelerated s 160 investigation. To now have this good-faith decision to be used as the basis for an attempt at a misdirection of justice is not becoming of Counsel for the First and Second Respondents and should be censured[74] and provide a strong basis for granting the Applicant's reasonable request for interim relief.

183. Because of the strength of the evidence presented to the Applicant by the Counsel for the First and Second Respondent himself, the Queensland registered legal practitioner Michael James Lucey is hereby accused by the Applicant, (the Suspended) Dr William Anicha Bay, applicant in the matter Bay v AHPRA & ORS 14178/22 in the Supreme Court of Queensland of misrepresentation of the truth on one occasion (but in two instances) to the, and thereby seeking to pervert the course of justice in a Supreme Court matter which may amount to perjury and/or unsatisfactory professional conduct or professional misconduct according to the *Legal Profession Act 2007* (Qld).

184. Additionally, Mr Lucey can be shown he is knowingly making a misrepresentation by way of his email (MJL-2) in the last paragraph clearly making reference to a new matter (the urgent injunctive relief) stating, "To the extent that you may seek to injunct the investigation, the First and Second Respondents consider that such relief is unjustified and will oppose such a course. ". It is therefore incontrovertible that Mr Lucey knew there were two distinct matters.

185. In summary, what these submissions, affidavit and emails amount to is a clear documentation of an attempt by the solicitor of the First and Second Respondents to gain legal advantage under Queensland's highest court by sacrificing truth and professional standards to seek a material advantage for the First and Second Respondents in this Matter before the Supreme Court.

186. It is to this unlawful and unprofessional conduct that the Applicant draws the Court's attention to and the Applicant makes note how this interference has directly and negatively affected his legal rights in the matter before the Supreme Court (by consuming the self-represented Applicant's limited time and financial resources), and as such, may amount to a miscarriage of justice and/or contempt of court.

187. Furthermore, dismissal of the matter based on an application by the solicitor for the First and Second Respondents cannot be allowed whilst the matter of the solicitor's misrepresentation to the Court of factual matters and by implication his intention to obstruct the court of justice is under foot.

188. This matter is under foot whilst the question of the fact of whether Michael Lucey committed perjury (or forms a basis for an indictment for perjury) is determined by this Court or another; the evidence to which has been submitted above.

189. Consequently, it would be against the interests of justice to dismiss the matter while substantive matters are by definition under foot.

---

74 The Applicant made a formal complaint regarding this serious matter to the Legal Services Commission of Queensland on 22 February 2023, File Number 71022807.

190. Furthermore, it follows that the lens through which the Court should view all current and future arguments and statements of fact of the First and Second Respondents is a lens of discolouration and unreliability owing to the fact (when established by this Court) that Michael Lucey, Solicitor for the Respondents did perjure himself75 (or in the alternative did misrepresent facts) to this Court by the use of sworn testimony to deceive the Court from its true goal, that being the carriage of justice.

If not perjury then fraud

191. At common law the position of what constitutes fraud is set out in *Derry v Peek* [1889] UKHL 1. Fraud is proved when it is shown that a false representation is made knowingly, without belief in its truth or was recklessly careless as to whether it be true or false. As discussed above, Mr Lucey knowingly made a false representation to the Court by way of a sworn affidavit submitted to this Court. In doing so, he submitted evidence without belief in its truth as it can be clearly demonstrated he was fully abreast of the facts and correspondence leading up to Submission A/B and his inclusion of the 2 exhibits to the Lucey Affidavit. Therefore, the Applicant contends that this conduct may also fulfill the legal criteria for fraud.

192. In the context of the above allegations, it is worthwhile to now consider Mr Lucey's further attack on the Applicant's character. At paragraph 7 of the Respondents' Submission A/B Mr Lucey claims that the Applicant did make, "amended submissions on constitutional, jurisdictional and interim relief on 25 January 2023, outside of time limit for submissions ordered by Boddice J on 2 December 2022." This is a mischaracterisation of the facts of the matter.

193. On the 25th of January 2023, the Applicant merely amended his Submission One that had been filed 4 days before time on 23 December 2023 with the insertion of only three extra paragraphs (and footnotes) clearly marked, and with them clearly identified and explained for the benefit of the Respondents on an email[76] on the same day.

194. This misrepresentation of the facts should be seen as a further attempt by Counsel to the First and Second Respondents to impugn the character of the Applicant[77], and as such, the Applicant rejects this insinuation entirely, especially since, the amendment was duly accepted by the Registrar of the Supreme Court of Qld under the *Uniform Civil Procedure Rules* 1999 Part 3 Division 1 section 378 to make an amendment to his submission[78].

75 Under Section 123 of the *Criminal Code* 1899 (Qld)
76 Exhibit M-2 Notification of Amended Submission One
77 This now totalling four instances of attacks on the character of the Applicant. Attack 1 being the accusation in open court by Counsel for the First and Second Respondents on November 30, 2022 that the Applicant might be livestreaming. Attack 2 being the accusation that the Applicant had worked illegally as a doctor for a time. Attack 3 being the lie that the Applicant had abandoned his request for Interlocutory Relief. Attack 4 being the misrepresentation of the facts surrounding the amendment to Submission One of the Applicant.
78 See page 1 of filed copy of Submission One – Amended to witness the seal of the Court.

Part 3 – Submissions in Reply to the Constitutional and Jurisdictional Arguments

Jurisdictional error on Behalf of the First and Second Respondents

195. In paragraph 2 of Respondents' Submission A/B they make reference in the footnotes to the "National Law 155 (a)" and "National Law, s 156 (1)(a)(i) and (ii), (e)" being the authority upon which the Applicant's medical registration was suspended under the *Health Practitioner Regulation National Law* (Qld). This is a misrepresentation of the facts in this Matter and as such will be dealt with now.

196. The Applicant points out to the Court that Counsel for the First and Second Respondents has failed to properly identify the law upon which this matter turns. Indeed, in the letter sent to the Applicant conveying the First and Second Respondents' decision on the Applicant's registration on 17th August 2022[79] AHPRA and the Board failed to identify the law upon which the administrative decision was made. At no stage in the decision thus far, has AHPRA or the Board referred the Applicant to a law called the *Health Practitioner Regulation National Law* (Qld).

197. Instead, the facts of the matter are that the Applicant was penalised under a law named in the decision letter in the section entitled 'Decision' as "Health Practitioner Regulation National Law (the National Law)"[80]. The fact is, even in the Notice to Attend Immediate Action Committee[81] the law that was referenced there under their purported powers to call me to a hearing for a s 156 consideration of immediate action was named, "Health Practitioner Regulation National Law (the National Law)".

198. This promotes significant procedural and jurisdictional errors on behalf of the Counsel to and also the First and Second Respondents themselves. The Applicant disputes that the law Counsel for the First and Second Respondents are now relying upon is the correct law in question, as it was **never determined** which of the eight or more[82] State and Territory "National Law"(s) the Applicant was being subject to in the Decision letter.

199. Where a law cannot be identified no lawful authority to exercise administrative power according to law can be made. Furthermore, there is no *National Law* as the footnotes to Submission A/B would suggest. There are only acts authorised by the parliaments of the several States and Territories, and that of the Commonwealth Parliament. There is no 'National Parliament' and there is no 'National Law'. If there is such a law the Applicant or this Court is yet to see or hear of it. The Applicant begs the Court to recognise that the First and Second Respondents do not even know the law upon which they seek to rely on for their authority.

200. It is essential to the understanding of this Matter that the correct law is identified. Furthermore, the Applicant claims that he cannot be penalised under a misidentified law as it prevents the fair and lawful defence to a charge he knows not of. The presumption of innocence demands that when harmful administrative action is taken against this or

79 Exhibit B-1 AHPRA Notice of decision to take immediate action
80 See Exhibit B-1 page 1
81 Exhibit A-3 Notice to attend immediate action committee
82 See Exhibit X-1 for a full list of the National Law(s)

any applicant those so affected must have the complaint and the sections of the law upon which they are alleged to have contravened particularised.

201. At no stage in the administrative decision by AHPRA and the Board has the relevant law been identified, so this makes a review of the decision impossible and should lead the Court to a summary finding of relief for the Applicant due to the lack of jurisdiction that the First and Second Respondents ever exercised in this matter. And, as Justices Gaudron and Gummow held at [53] in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597, "a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all."

The Effect of the *National Law* is to invalidate the Constitution

202. Clause 5 of the *Constitution* establishes the supremacy of Commonwealth laws. If the State of Queensland is allowed to continue to exercise Commonwealth (that is national) legislative and executive power, then the distinction between State and Commonwealth power will become increasingly blurred beyond recognition.

203. Specifically, if State laws are allowed to act with Commonwealth legislative power then this renders Chapter 1 Part 1, s 1, and Chapter 5 s 106, 108, 109, and Chapter 6 s 122 of the *Constitution* otiose which cannot be permitted under law.

204. If Australia does not have well-defined Commonwealth (that is national) laws and administrative bodies then Covering Clause 5 of the *Constitution* ceases to have effect. If Covering Clause 5 ceases to have effect then the *Constitution* ceases to have effect. If the *Constitution* ceases to have effect, then Australia (as a nation created by this document) ceases to have effect.

205. Ergo, if the *National Law* is not invalidated by this Court, the Commonwealth of Australia is rendered otiose.

Queensland does not have the legislative power of the Commonwealth

206. Notably, in *Kable v DPP* [1996] Justice Gaudron held at [12] that "the states are not free to legislate as they please"[83].

207. Notably, in *R v Hughes* [2000] it is stated at [74][84]:
"Division of legislative responsibility: It was also common ground (and correctly so) that neither the Federal Parliament nor a State Parliament or Territory legislature enjoys the power, by its own legislation, to change the substantive character of a law that it enacts so as to make it the law of another Parliament or legislature. The Constitution provides for both the Federal and State Parliaments. It empowers the creation of the legislatures of the Territories. The character of each legislature is fixed by its constitutional origins, purposes and powers. One could not, by its own declaration or assertion, turn itself into another. **Nor by any legislative formula could one enact laws amounting to laws of another.** The constitutional division of

83 *Kable v Director of Public Prosecutions* (NSW) [1996] HCA 24; 189 CLR 51
84 *R v Hughes* [2000] HCA 22; 202 CLR 535

legislative responsibility between the constituent legislatures of Australia confines each to its own legislative concerns." (emphasis added). Therefore, the States must be kept in their Constitutional lane, otherwise the Covering Clause 5 and the Constitution itself is invalidated.

208. At paragraph 24 of Submission C the Third Respondent in footnote 45 makes the unconstitutional assertion that "Section 1 of the Commonwealth Constitution (which vests the legislative power of the Commonwealth in the Federal Parliament) has no bearing on the legislative power of the Parliament of Queensland." This is demonstrably false because this section clearly expresses that only the Federal Parliament can legislate for the Commonwealth. This is on the face of it, contrary to the express wording of the *Constitution*, and it is clear by implication that the States don't have Commonwealth legislative power.

209. In paragraph [21] of Submission C the Respondent says that the quote from *R v Hughes* 20000 regarding, "a State Parliament cannot 'by any legislative formula ... enact laws amounting to laws' of the Commonwealth" is not applicable. The Applicant contends that pursuant to the Qld Rail case[85] the express wording of the *National Law* including its title and its purported unlimited extra-territorial effect and the *Regulations* made under it which expressly purport to modify acts of the Commonwealth Parliament clearly demonstrate that the substance of the *National Law* amounts to the Queensland Parliament enacting law that amount to laws of the Commonwealth.

210. The State of Queensland is alleged to purport to act as if it were the Commonwealth and by doing so misleads the public, legislators, lawyers, and Australian health practitioners by implying that the *National Law* is a Commonwealth law and AHPRA and the Board are national, i.e., Commonwealth entities. The Third Respondent exercises this unlawful power specifically at s 235 (2) (a) of the National Law where it says, "For the purposes of subsection (1), the Ombudsman Act applies— (a) as if a reference to the Commonwealth Ombudsman were a reference to the National Health Practitioner Ombudsman".

211. This is misleading and deceptive conduct by the State of Queensland creating multiple direct s 109 Constitutional inconsistencies between Federal and State laws, and by so naming the Commonwealth Ombudsman incorrectly this is prima-facie evidence that the State of Queensland is usurping the power of the Commonwealth, and indeed the Commonwealth Ombudsman has even submitted to this subversion of Commonwealth power already by formally identify themselves on the Ombudsman website as the National Health Practitioner Ombudsman[86].

212. When this fact is taken together with the *Health Practitioner Regulation National Law Regulation 2018* at Part 5 s 24 where the *Regulations* clearly state that it is modifying provisions of the *Commonwealth Ombudsman Act*[87]*;* this amounts to a

85 Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail [2015] HCA 11; 256 CLR 171

86 The Commonwealth Ombudsman on its website https://www.nhpo.gov.au/legislation states that "The National Law gives the Ombudsman and Privacy Commissioner powers" whilst also admitting that these powers are in fact from Ombudsman Act 1976 (Cwlth), the Privacy Act 1988 (Cwlth), the Freedom of Information Act 1982 (Cwlth).

87 24 Application of Ombudsman Act For the purposes of section 235(2)(b) of the Law, this Part sets out

direct usurpation and reversal of the hierarchy of powers found in the Commonwealth *Constitution*.

213. At s 25 of the *Health Practitioner Regulation National Law Regulation* 2018 the misidentification is exponentially expanded by this Regulation misidentifying key Commonwealth parties with new names, even so far as to replace the Governor-General with the Ministerial Council.[88] The clear violation of the jurisdiction of the Commonwealth continues with renaming at s 25 ss (d) of the Commonwealth Government to the Queensland Government, and at s 25 ss (e) with the renaming of the Prime Minister of Australia to a member of the Ministerial Council, and at s 25 ss (h) the renaming of the Federal Court of Australia to the Supreme Court of Queensland, and s 25 ss (k) the renaming of agreements and communications between Ministers of Commonwealth and States/Territories as communications and agreements only between Ministers of States and Territories.

214. This clear and wilful misidentification of Commonwealth parties is tantamount to treason but for the lack of force used in this usurpation of powers, but it is something that a Court invested with federal jurisdiction should take very seriously when considering the limits of power held by and purported to be exercised by the Respondents.

215. Support for the idea that State cannot exceed their Constitutional legislative remit is found in the case of *Mobil Oil Australia v Victoria*[89] where at [121] it is stated, "..**State law in such a case is invalid to the extent that it exceeds the constitutional power of the Parliament of the State concerned**".

216. Continuing, *Mobil Oil Australia Pty Ltd v Victoria* [2002] at [141] held, "It follows that the basic proposition that Mobil advanced can be accepted. A point will indeed be reached in the legislation of one State having extraterritorial effect upon persons, events or things in another State, that will contradict **the implied limitations on State legislative power inherent in the federal Constitution**".

217. Continuing in *Mobil Oil Australia Pty Ltd v Victoria* [2002] at [100] it is stated, "The authority of the Supreme Court over Mobil cannot expand the power of the Parliament of Victoria so as to enlarge the ambit of those matters in respect of which, consistently with the federal Constitution, that Parliament may validly make laws. Because the authority, jurisdiction and powers of the Supreme Court may be traced to, and must ultimately be sustained by, the provisions of the federal Constitution**[116], no statute, federal or State, and no rule of the common law or equity could expand the legislative powers of the Parliament of Victoria beyond those that the federal Constitution provides or permits**."

---

modifications of the Ombudsman Act as it applies as a law of a participating jurisdiction for the purposes of the national registration and accreditation scheme.

88 25 References in Ombudsman Act to particular terms The Ombudsman Act applies as if— (b) a reference to the Governor-General were a reference to the Ministerial Council

89 *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1

218. However, in the *Australia Act* 1986 s 2 states:

"Legislative powers of Parliaments of States 2. (1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.

(2) It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia".

219. The Applicant submits that the correct interpretation of the *Australia Act* s 2 (1) is that the express words "full power to make laws for the peace, order and good government of **that State**..." is clear that the Parliament of Queensland can only make laws for the government of the State of Queensland not for the other States and Territories such that a law of the Queensland Parliament applies "as if" it were a law of another State and Territory.

220. As such it is submitted that a correct interpretation of the meaning and effect of the words "that have extra-territorial operation" is the manner in which such operation of the Queensland criminal code is applied to enforce liability under the Queensland Code upon criminals who perpetrated a crime in Queensland but are not residing in Queensland.

221. It is further submitted that the correct interpretation of *Australia Act* 1986 s 2 (2) is that it does not exclude the limits on State legislative power implied within the *Commonwealth Constitution.*

222. The following statement from the Respondent in Submission C at Paragraph 12 and 13 attests to the State of Queensland purporting to hold Commonwealth legislative power:

"The *National Law* also applies each of the following Acts 'as a law of a participating jurisdiction for the purposes of the national registration and accreditation scheme':

> a) the *Australian Information Commissioner Act 2010* (Cth) (see s 212A of the National Law); b) the *Privacy Act 1988* (Cth) (see s 213 of the National Law); c) the *Freedom of Information Act 1982* (Cth) (see s 215 of the National Law); and d) the *Ombudsman Act 1976* (Cth) (see s 235 of the National Law).

Each of the above Acts is applied as in force from time to time, with certain modifications specified in the National Law, and 'other modifications made by the regulations'."

223. When State Parliament's enact laws asserting an excess of jurisdiction, pretending in effect to be a law-maker for the whole of Australia, the consequences are confusion and uncertainty of legal obligations which was the purpose of the federal Constitution to avoid.

224. Accordingly, it is beyond the power of the Queensland Parliament to purporting to govern the rights and obligations of persons in other States as the Act of the Queensland Parliament may be prejudicial to the interests and wishes of persons in those states; and this is also contrary to the system of elected democratic government and lawful legislative processes as established by the *Commonwealth Constitution.*

225. Thus, it is beyond the power of State and Territory Parliaments to host legislation that applies "as if" it was an act of another State of Territory. Such legislative models impermissibly exceed the power of the Parliament of Queensland and of other State and Territory Parliaments inherent in the *Commonwealth Constitution.*

226. In [18] of Submission C the State of Queensland argues that 'The States, like the Commonwealth, have power to apply, as their own law, a law of another jurisdiction." They use the reference of R *v Hughes* (2000) and *Gould v Brown* (1998) to argue that adopting the text of the legislation of another jurisdiction is not an abdication of a State's legislative responsibilities, however those case law decisions were made regarding vertical federal cooperative schemes where the States were adopting the laws of the Commonwealth, resulting in a strong and unified national, that is Commonwealth law, to provide consistency and authority to a National Scheme.

227. Furthermore, these vertical Cooperative Federalism arrangements all included an Act of the Commonwealth Parliament as part of the arrangement (which is absent in this impugned Scheme) and either included a s 51 (xxxvii.) referral of powers (initially or inevitably) from the State to the Commonwealth, or were an exercise of power that the Commonwealth Parliament already had thus not requiring a referral.

228. In paragraph 26 the Respondent in Submission C says that "none of the Application Acts purport to enable the Queensland Parliament to exercise Commonwealth Jurisdiction." To clarify, the Applicant's contention is that these Application Acts are a method by which the State of Queensland is exercising Commonwealth legislative power in substance (and by name) by these states adopting the *Schedule* and lacking the unilateral power to undo the *Regulations*.

229. The Third Respondent agrees that it is the combined powers of the respective State and Territory adoption acts that confer legislative power on the National Scheme and result in national jurisdiction (thereby at the very least conceding to the scheme being national in nature and name). Because Queensland is the host of the *Schedule,* and Queensland is the State that is exerting national influence and national power in the absence of an over-arching Commonwealth Act; this horizontal cooperative federalism model is best viewed **not as cooperative but as subversive to Federalism.** Thus, the National Registration and Accreditation Scheme is best identified as a 'subversive federalism' not 'cooperative federalism' scheme.

230. Furthermore, it is clear that a state (such as Queensland) cannot legislate for a territory (as per the Part 11 s 122 of the *Constitution*). It is therefore unlawful for the Schedule and the Regulations to be applying to the ACT and the NT.

231. To avoid these constitutional irregularities, it is the Applicant's contention that a s 51 (xxxvii.) referral is desirable for the avoidance of doubt as to the legality of National Schemes (but not necessary). **What is necessary is the inclusion of a Commonwealth, that is, a national law, in national schemes**.

232. A s 51 (xxxviii.) request is the other way for States to ensure that their powers be used Constitutionally. The other way is where neither a s 51 (xxxvii.) or s 51 (xxxviii.) power has been used and it has just involved vertical cooperative federalism between the several states and territories but very importantly: with the inclusion of the Commonwealth via a Commonwealth act.

233. The case of *Byrnes v The Queen [1999] HCA 38; 199 CLR 1* determined the legality of federal cooperative schemes but did so without considering a scheme not involving a Commonwealth Act like in the NRAS. What has never been looked at via the High Court (which makes it ripe for decision and examination) is whether a State can run national schemes on their own. The Applicant relies on Chapter , Part 1, Section 1 stating that only the federal parliament can create federal laws to strongly suggest the High Court will find these type of Schemes constitutionally invalid. It is for these demonstrably grounds there is merit for this Application to be heard non-summarily and found in favour of the Applicant's requested final orders.

Misidentification of the Law – State law acting as if National law

234. The question that is central to so many of the Respondents' arguments[90] is, "Does the name of a law or entity matter?" Juliet in the famous play 'Romeo and Juliet' by the immortal bard William Shakespeare quipped, "What's in a name?" and when one is dealing with Constitutional law and the processes of the judicial system, the answer is "Everything!" where **form as well as substance also matters**, as will become apparent by the following arguments.

235. The Applicant's explanation of what the *National Law* best-understood is:

> COAG (now AFRA) has used and is using the **drafting device** of a horizontal applied laws subserve federalism adoption-of-laws model to place Queensland at the legislative and executive head of an **unconstitutional ultra-vires National scheme** to regulate Australian health practitioners in place of a lawful and intra-vires Commonwealth scheme. To unlawfully convey Constitutional legitimacy it relies on the drafting device (that is state legislative authority) to convey lawful and limited state authority when in fact the substance, the name, the text, and the operation of the impugned *National Law* (which are actually many laws) **all demonstrate a National (I.e. Commonwealth) character in substance** which by reason of the Constitution is unlawful because only the Commonwealth can create and administer National, I.e. Commonwealth laws.

236. Despite this understanding, it is confusing to many as to whether the *National Law* is a state or national law. On 17 August 2022, the First and Second Respondents

90 E.g. At [40] and [41] in Submission A/B and at [1 b)]and [22] of Submission C.

(AHPRA and the Board respectively) made a decision to suspend the Applicant's registration as a medical practitioner (the **Decision**) pursuant to s156 of the *Health Practitioner Regulation National Law* (the *National Law*). The Applicant contends that there is no such law in the entire Commonwealth of Australia so named the "*Health Practitioner Regulation National Law* (the *National Law*). This is where the confusion starts but does not end.

237. The use of the name 'National' in the National Laws and 'Australia' in AHPRA and the Medical Board of Australia is misleading as it commands authority and acts to inhibit lawful challenge of the law by way of misleading those who labour under it to believe it is a Commonwealth law.

238. AHPRA and the Board have submitted at paragraph 40 of Submission A/B that the *Schedule* to the *National Law* (what they call the National Law (Qld)) despite its name, only regulates health practitioners to the extent they have a connection with Queensland. To the contrary, the *National Law* by operation of the *Regulations* overrides Commonwealth law, even so far as to set the terms of appointment and renumeration and work directions for Commonwealth officers[91], that being the Commonwealth Ombudsman (now renamed the National Health Practitioner Ombudsman by the National Law's unlawful authority.)

239. The statement by the First and Second Respondents at paragraph 24 of Submission A/B that; "the National Law is an Act of the Queensland Parliament that regulates the registration, training and conduct of health professionals throughout Queensland"; constitutes an error of law. The fact that the *National Law*, as an Act of the Queensland Parliament, purports to establish one single national entity; and purports to have virtually unlimited extraterritorial power via Part 1 s 8; and because the *Regulations* made under the enactment of the Queensland Parliament purport to modify Commonwealth Acts in a manner that results in the Queensland Parliament exerting direct control over the executive government of the Commonwealth; and because the Act and its amendments are automatically applied in the other participating States and Territories; demonstrates that this Act of the Queensland Parliament does not purport to have jurisdiction limited only to "throughout Queensland".

240. The statements by the First and Second Respondents at paragraphs 24 and 40 however, demonstrates their recognition that the constitutionally lawful jurisdiction of the Queensland Parliament is limited to "throughout Queensland" (despite Part 1 s 7, Part 11 s 246, and Part 8 s 193B stating otherwise) and that it "regulates health practitioners to the extent they have a connection with Queensland". This is a clear demonstration that the name *National Law* and the names of the First and Second respondent including the word Australia lead stakeholders into jurisdictional error and must be corrected in order for such error to be avoided; and in order to save the validity of the Act itself.

241. The serious impact of this confusion with regard to jurisdiction is clearly stated at paragraph 41 in the First and Second Respondents' submission where they state, "Dr Bay appears to be confused by the idea that AHPRA is not a Commonwealth body, as he himself recognises. Indeed, some of Dr Bay's confusion appears to stem from letters Dr Bay has obtained from the ACT Health Minister and the South Australian Health Minister which state that Ahpra is not a state government agency. Those responses are

91 S 14, s 26, s 27, s 28, s 29, s 46 of the Regulations.

no doubt explained by the fact that Ahpra has the character of a national agency regulated by laws in each State.".

242. Therefore it is demonstrable there is some confusion about the *National Law* and the names of the entities even from the very Health Ministers[92] who are responsible for overseeing and appointing the very agencies they themselves regulate via the Ministerial Council (the HMM[93]).

243. AHPRA and the Board argue that "In any event, those matters are irrelevant to the question of Ahpra's legal status..". Importantly, the explanation for the confusion as provided by the First and Second Respondents at paragraphs 41 and 42 suggests that they perceive that there is currently an alternative arm of Government available within Australia able to regulate health practitioners, that being neither a State nor Commonwealth agency but a 'national agency'. The Applicant submits that there is no such constitutionally valid national government or agencies (by reason of these terms' omission from the *Constitution*); and that these ongoing assertions that such a government exists results in jurisdictional error and calls into question the legality of administrative decisions being made by the First and Second Respondents in the exercise of the unconstitutional national jurisdiction enacted by legislation of the State of Queensland and other State and Territory legislation, or a combination of such.

244. Furthermore, an assertion that AHPRA is a creature of national government rather than of state or territory government is unconstitutional as it purports to remove AHPRA from any government oversight be it Commonwealth, State or Territory. According to the rule of law, the government and its agencies must remain accountable under the law and thus it is unconstitutional for AHPRA to be identified as holding national jurisdiction which does not exist as a constitutional arm of the Australian Government pursuant to the *Commonwealth Constitution*.

245. Even though the substance of the *National Law* is impugned as being unlawful, the name still has power. The name of this law (and the First and Second Respondents) has been used to deceive in regards to the First and Second Respondent's purported lawful authority and thus turn the *Constitution* upside down. Indeed, in the letter from the ACT Health Minister, herself a HMM member, she writes that AHPRA gets its power from the, "*Health Practitioner Regulation National Law Act 2009* (the National Law), enacted in every State and Territory". This is a different understanding to the adoption-of-laws model her organisation's Counsel has reported to this Court where it was said only the *Schedule* to the National Law is applied in the Several States and Territories.

246. If the Court severs the word 'National' and 'Australia' from the laws and parties as requested by the Applicant; regulation of health practitioners can still be achieved but now by less misleading means (notwithstanding regulation of health practitioners will need to devolve to State-based regulation absent a Commonwealth referendum or s 51(xxxvii.) referral.) If the laws and entities are named correctly; we expose that the emperor has no clothes. If a naked emperor is unable to be called a clothed emperor despite protestations to the contrary, the fact that the emperor was naked the whole time becomes apparent to all. It for this reason (and to avoid confusion, and they

92 See Exhibit K-1 Response from Mark Butler MP, and Exhibit V-1 Letter from ACT Health Minister, and Exhibit Z-1 Letter to Dr Bay from Chris Picton MP

93 See Exhibit P-1 for a full list of members of the Ministerial Council

tyranny it results in) that a 'spade must be called a spade'.[94]

247. An excellent way of resolving this confusion is to dispense (for a moment) with trying to determine what the suite of National Laws, called the *National Law* **is**, and focus on what it **is not**. It is asserted that the *National Law* is **not a valid law of the Commonwealth**. There should be and can be no disagreement amongst any of the parties as to the validity of this statement. The validity of this statement is demonstrated by absence of a Commonwealth enactment with the title, "the Health Practitioner Regulation National Law (Cth)" or variations thereof. The way in which this fact is proven suggests again that titles and names are indeed important.

248. Indeed, titles and names **are** important. If the Applicant were to have gone to QCAT (as repeatedly suggested by the Respondents) the first requirement in any matter brought before them would be the **correct and specific identification of the parties to the Matter**. Without naming them correctly no joinder, nor remedy (and thus no matter) can be heard.

249. The importance of names and tittles is also held to be true by AHPRA and the Board who are preventing the Applicant's lawful right to work in Australia by threatening up to 3 years jail and/or a $60.000 fine[95] by way of the impugned Compliance Letter for in any way using the "protected title" of 'medical practitioner'. Respondents 1 and 2 cannot on one hand argue titles are not important or relevant and then take such drastic action on the other hand. On this basis alone, the Applicant should be immediately granted his request for interim interlocutory relief at Order 1.

250. It is asserted that a Commonwealth law is a law that operates all of the time across the whole of the country in a uniform manner as per Covering Clause 5 of the Constitution. Since there are many different acts, laws, regulations, jurisdictions and processes involved in the singularly entitled "National Law" this cannot fulfill this definition. Therefore**, the *National Law* is NOT a Commonwealth law,** but The State of Queensland does purport it to be, and acts if it were by giving Commonwealth executive power to the First and Second Respondents.

251. National Laws are commonly and plainly identified as Commonwealth Laws. The Commonwealth's own Parliamentary Education Office confirms this[96] in their explanations of Chapters V and VI of the Constitution where they write, "… national law overrides the state law.". It is notable to point out at this stage that nowhere in the Constitution does the word "national" appear. Therefore, by virtue of their omission from the Constitution, **National laws cannot be lawful** otherwise they would have been so described or prescribed in this foundational and supremely important document.

252. If the Respondents argue the *National Law* is a national law then this law must apply nationally, that is with commonwealth power, and is uniform, and operates all the time. But clearly (and as accepted by the Respondents) the *National Law* is not a

---

94 First expounded by the 1st Century Greek scholar Plutarch in 'Apophthegmata Laconica', as translated by Nicolas Udall in 1542 thus, "Philippus answered, that the Macedonians wer feloes of no fyne witte in their termes but altogether grosse, clubbyshe, and rusticall, as they whiche had not the witte to calle a spade by any other name than a spade."."

95 Part 7 Section 113 of the *National Law*

96 https://peo.gov.au/understand-our-parliament/how-parliament-works/the-australian-constitution/the-australian-constitution-in-focus/

National law but a suite of states laws.

253. Leaving aside the deceptiveness of the naming of this arrangement for the time being, the only dispute between the Respondents and the Applicant therefore is whether this suite of states laws (and in particular the ones made by the State of Queensland) being called the 'National Law' and making up the horizontal subversive federalism NRAS model; **is constitutional or not.** It is to this question that the Court must direct its energies to.

254. The issue of the legality (or lack thereof) of the extra-territorial operation of the **National Law** on my conduct in NSW will be examined in the subheading 'Constitutionally Impermissible Model – Extra-territorial powers'. The key principle at question is, "Does the *National Law* (an unlawful Commonwealth law) operate throughout the several States and Territories excluding any conduct occurring interstate?" The answer to this key question (however unlawful it may be) is "Yes."

255. The facts are clear that AHPRA is attempting to regulate the Applicant's conduct in Queensland (as well as nationally) from a single national entity based in Melbourne utilising multiple State-based legislative instruments that the Respondents all agree exist. Therefore, the *National Law* cannot apply in Queensland, New South Wales, or any other State by want of federal legislative power under Chapter 1 Part 1 Section 1 of the *Constitution* and by way of the Respondents exceeding the s 61 and s 62 executive power limits imposed by the Constitution.

256. The Applicant does not need to demonstrate how the *Schedule* applies to **him** unlawfully for his Matter to succeed. All he must do is demonstrate how the Schedule or the *National Law*, and/or the *Regulations* or however so **described is unconstitutional**. Once that determination is made, any and all decisions made under the *National Law* (including the impugned s 156 and s 160 decision) will be determined as being made without lawful power, and must follow with an order of certiorari forthwith.

257. In other words, once the legislative goose of the *National Law* is killed (via its demonstrated unconstitutionality) all its administrative eggs (AHPRA, the Board and all its decisions) must be, and will be, discarded as a matter of course.

258. In essence, what must be held in mind is that all Acts, whether state or federal **are subject to the Commonwealth Constitution,** including the *National Law* of Queensland pursuant to section 106 and clause 5 and section 51 and other sections of the Constitution in relation to the Commonwealth respectively. The Constitution has created the hierarchy or supremacy of powers, namely Clause 5 and section 109 where state Acts are subordinate to a valid federal Act. Clause 5 and s 109 keeps the states subservient in the hierarchy and subject to the Constitution.

259. The real question then becomes, does the *Schedule*, that is, the *National Law* of Queensland have lawful legislative jurisdiction (and lawful executive power) on practitioners registered in another State and across the nation? According to the *National Law* and AHPRA and the Board the answer is "Yes", but the registration power when properly viewed in substance and in name makes the answer "No". The Queensland-originating *National Law* is not a true national law because a national law would operate uniformly, at all times, throughout the entirety of the Commonwealth. This demonstrates why national laws are only allowed to be laws of the

Commonwealth Parliament, and not (ultra-vires) laws of the States. Thus, the state of Queensland can have no legal claim to labelling their state act as a "National Law.". To do so otherwise, is to invite jurisdictional and constitutional error.

260. Alternatively, if it is examined whether it is lawful to elevate State laws to the equivalency of laws of the Commonwealth we shall find the answer is "No.". This is by reason of a s 109 Constitutional crisis whereby there is no resolution of conflict between the enactments of National v Commonwealth laws. To allow state laws (like the *Schedule*) to be called a 'National Law' makes s 109 of the Constitution nugatory or otiose. But clearly, Queensland has no lawful authority to render the Constitution pointless. Consequently, it holds that the Third Respondent is in effect **determining the limits of state and federal power by unlawful legislative means.**

261. The States (including the Third Respondent), have also, by creating a "National Law" of their own accord have rendered section 51(xxxvii) of the Constitution otiose, and it must be remembered as what was said in the *Queensland Rail case*[97] by French CJ, Hayne, Kiefel, Bell, Keane, and Nettle JJ at [28] that the states cannot determine the limits of federal power:

"Taken as a whole, the QRTA Act makes plain that it proceeds on the footing that the Authority's relations with its employees are not governed by the Fair Work Act 2009. It may be accepted, therefore, that one purpose of the QRTA Act was to create an entity which would provide labour to QRL in circumstances where the relations between employer and employee would be governed by State industrial relations law. If s 6(2) were to be understood as intended to do no more than take the Authority outside the federal industrial relations law, by taking the Authority outside the reach of s 51(xx), it would be necessary to observe that a State Parliament cannot determine the limits of federal legislative power. More particularly, it would be necessary to observe that whether an entity is a corporation of a kind referred to in s 51(xx) presents an issue of substance, not mere form or label. But s 6(2) has a larger purpose than simply attaching a label designed to avoid the application of an otherwise applicable federal law."

Therefore, the "National law" of Queensland cannot be labelled a national law as such, and would constitute a foundation for fraud in the name to do so otherwise.

262. If a State Act like the National Law had lawful extra-territorial operation (excluding jurisdictional facts beyond its boundaries), they would amount to being given the status of a federal (that is national) law which they clearly are not.

263. The use of the word, "National" is a convention that denotes a federal or Commonwealth act. For the State of Queensland to adopt this term in the title of its legislation is misleading. Synonyms (as defined by Merriam-Webster Thesaurus[98]) for the word "misleading" include: fallacious, fraudulent, deceitful, dishonest, mendacious and duplicitous but to name a few. By using a misleading title, the health professions are being invited to participate in a scheme that is all of these things if the name "National Law" is not severed from the Act to save it from invalidity or preferably, the entire National Law declared invalid. Calling or labelling an Act a "National Law" when it is not; is inviting others to participate in a lie.

---

97 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11; 256 CLR 171
98 https://www.merriam-webster.com/thesaurus/misleading

264. None of the Board's (lawful) functions or powers would be affected or ameliorated in any way whatsoever by severance of the labels "National Law" and "Australia" from the regulatory Act or its administrative bodies. Thus, the label "National Law" could be severed from the impugned Act to save it from invalidity and should read the ***Health Practitioner Regulation Act*** **(Qld)** and the word or label "Australia" must be also be severed from the regulatory bodies AHPRA and the Medical Board and read as the **Queensland Health Practitioner Agency** and the **Medical Board of Queensland** to prevent impersonation of a Commonwealth body.

265. It is confusing as to whether the *National Law* is a state or national law. On 17 August 2022, the First and Second Respondents (AHPRA and the Board respectively) made a decision to suspend the Applicant's registration as a medical practitioner (the **Decision**) pursuant to s156 of the *Health Practitioner Regulation National Law* (the *National Law*). The Applicant contends that **there is no such law in the entire Commonwealth of Australia** so named the "*Health Practitioner Regulation National Law* (the *National Law*) and thus the decision made against him is absent any lawful jurisdiction, but the confusion continues:

266. In the transitional act of the Qld Parliament in 2010 at the start of the Scheme the legislation pronounced that the National Law was **not to be taken as a law of the State of Queensland anymore but as a National Law.** At section 15 of the *Health Legislation (Health Practitioner Regulation National Law) Amendment Act* 2010 (QLD) it is so stated, "'9ATransitional regulation-making power'(1)A regulation (a *transitional regulation*) may make provision about a matter for which—(a)it is necessary to make provision to allow or facilitate the change from the operation of a law of the State relating to health practitioners to the operation of the Health Practitioner Regulation National Law."

267. What then is this National Law? It is as the name suggests, a national, that is a Commonwealth law. However, the subterfuge is that this law is misleading, deceptive and unlawful because whilst its name and character is of a national law, it only created by a Qld State act, and adopted by the several states and territories but without the involvement of the Commonwealth thus making the *National Law* not a lawful Commonwealth law and thus constitutionally invalid.

268. The key question of law is: "Can the State of Queensland (or any state) create national laws for the Commonwealth of Australia?". To begin answering this question, the Court must determine if the National Law is equivalent to a law of the Commonwealth. If the answer is yes, then clearly the Qld Parliament cannot create such national laws. If it is found as a question of fact that the National Law is just a State law (and thus without national jurisdiction) then we have the case of a state law masquerading as National law, that is a Commonwealth Law. Therefore, it is important to ascertain if it there is any difference in meaning, labelling, or substance between a National Law or a Commonwealth Law.

269. Previous *National Law* schemes like the one involving the Commonwealth Corporations Act of the Capital Territory were accepted as valid National Laws because there was a Commonwealth act covering the national scheme. The question to this Court is whether a National Law (created by a State) can be named or have jurisdiction to be a National Law **without a concomitant Commonwealth law.**

270. Furthermore, the rules of statutory interpretation would require the ordinary meaning of National to mean precisely that, a law pertaining to the Nation of Australia. The health practitioners regulated by the National Registration and Accreditation Scheme cannot be expected to know what law or laws they need to abide by when the name is misleading and the jurisdiction of the law is always in question. This comes into focus acutely when it is remembered that **the Applicant still does not know what law** the administrative action that has been taken against him under is.

271. To argue that jurisdiction under the *National Law* is a simple matter based purely on what state the practitioner is registered in, does not resolve the matter of jurisdiction because different processes and penalties apply across different states as each state act of the 'National Law' is different. This creates a constitutional crisis whereby jurisdiction can be challenged as the Constitution does not resolve (and the High Court) has so far not been able to determine what happens with conflicting State acts.

272. Normally jurisdiction is conferred on the State that has the greater nexus to the conduct that is subject to the administrative action. The *National Law* however claims to hold unlimited extra-territorial jurisdiction by way of s 8 of the *Schedule* and determines that jurisdiction shall be conferred on a tribunal in the state or territory "in which the practitioner's principal place of practice is located"[99] not on the location of the jurisdictional facts in question.

273. To bring this in clearer view, the Applicant argues that his conduct in the State of New South Wales should have been reviewed under the authority of entities operating according to the *Health Practitioner Regulation National Law* (New South Wales) not the National Law Queensland (aka the *Schedule*). Again, the absurdity (and illegality) of one *National Law* having different varieties across the Nation is plain here. The fact that the one single national entity, the Medical Board of Australia, purports to hold authority to make a s 156 and s 160 determination against the Applicant regardless of the location of his conduct disguises the fact (unlawfully) that the penalties AND processes for the administration of justice in New South Wales under the New South Wales National Law **is different to that of Queensland**.

274. The differences between the Queensland and New South Wales "uniform National Law" are stark. Both Queensland and New South Wales are state jurisdictions both operating under different versions of the *National Law* with different co-regulatory adjudication bodies[100]. In Queensland it is the Office of the Health Ombudsman and in New South Wales it is the Health Care Complaints Commission that acts as co-regulatory jurisdictional entities. Both entities, being different and in different states, are enacted under different acts yet all purport to be part of a unified national regulatory scheme, but operate with different sections of the *National Law* that applies to practitioners, and different health, performance and conduct processes of review, and even different Acts to regulate those co-regulatory adjudication bodies.[101]

275. As seen from the above extensive explanation, it is difficult to determine what the National Law **is,** but it seems what perhaps can be agreed upon by all parties is that **the National Law is not a bona-fide Commonwealth law**, that is a law of the Commonwealth Parliament. Therefore, the only real question to resolve this matter

99 Section 193B 3) (a) (ii) of the *Health Practitioner Regulation National Law* (Queensland)
100 See Part 3 s 7A Co-regulatory jurisdiction of the *National Law*
101 *Health Ombudsman Act* 2013 (Qld) and the *Health Care Complaints Act* 1993 (NSW).

quickly and efficiently is, "**If a National Law is not a Commonwealth Law, can it have Commonwealth legislative power?"** The answer is plainly "No" by reason of Chapter 1 Part 1 Section 1 of the *Commonwealth Constitution*.

276. Therefore since we have now established that the *National Law* cannot exert Commonwealth jurisdiction how can it seek to regulate practitioners at a Commonwealth, that is a national level?

277. The simple answer is that it can't; at least not lawfully. The *National Law* cannot authorise AHPRA and the Board to regulate practitioners at a National Level and it follows that there cannot be a single national entity (that is AHPRA and the Medical Board of Australia) to regulate at a national level either. Thus, once the invalidity of the jurisdiction and the legislative power of the *National Law* is established (by want of constitutional jurisdiction) the only question to be determined in regards to the s 156 and s 160 decisions against the Applicant is whether they were decisions made under a National, that is a constitutionally invalid law. As the answer is "Yes" then every and all aspects of the administrative decisions made against the Applicant must be quashed with prejudice.

278. The decisions must be quashed with prejudice because the application of these constitutionally invalid 'National Laws' and 'Australian' entities will continue to have unlawful application and operation across the Nation until a declaration is made by this (or the High Court) that these laws are to be invalidated in their entirety.

279. In *Broadbent v Medical Board of Queensland* [2011] FCA 980; 195 FCR 438 at [128] it is stated that the *National Law* provided no transfer of State power to Commonwealth power. This is true. However, what was not mentioned and left unsaid, was that the *National Law* and NRAS has involved a transfer of Commonwealth to State power. It is the misunderstanding that the Commonwealth must be involved in an adoption of laws model to give it Constitutional validity that has resulted in this disastrous vertical-subversive-federalist-National Laws- adoption-of- laws model.

280. The NRAS is not the expression of cooperative federalism that Justice Greenwood seeks in *Broadbent v Medical Board of Queensland,* because the Justice fails to consider that for cooperation to occur between two sides (one state and one federal) **both sides need to be involved**, i.e., to cooperate. Instead, what we have is the complete domination of powers in this NRAS set-up by an Intergovernmental Agreement where the State of Queensland has replaced the Commonwealth as the head of power (or host) of this 'cooperative' arrangement. This is unconstitutional because only the Federal Parliament can legislate for the Commonwealth by way of Chapter 1 Part 1 Section 1 of the *Constitution* and agreements between parties, however well-intentioned cannot override this foundational document vital to the survival of our nation. **Truly, the only lawful National Law is that of the Constitution itself.**

281. In Submission C the Respondent writes, in paragraph 1 b), "As the National Law operates nationally, its name is accurate. In any event, even if the name were misleading, that could provide no basis upon which to impugn the Law's validity.' The Respondent also makes reference to this argument at paragraph 22. The Respondent uses the reference of cf *Kuczborski v Queensland* (2014) 254 CLR 51, 65 [14] (French CJ). At [14] French CJ write, "The term "association" in the VLAD Act is defined as meaning any of a corporation, an unincorporated association, a club or league and any group of three or more persons by whatever name called, whether

associated formally or informally and whether the group is legal or illegal. Only a tiny minority of the range of the bodies or groups covered by the definition of "association" could conceivably attract the description "vicious" or "lawless". The term "vicious lawless association", which appears in the title to the VLAD Act, is not defined and appears nowhere in the body of the Act. It is a piece of rhetoric which is at best meaningless and at worst misleads as to the scope and substance of the law."

282. This case is distinguishable from the correct identification of the *National Law* because the term "National" has both been defined and appears in almost 1,488 instances in text of the *National Law*. Also, the word 'national' is a well-defined and easily understood word in plain English, and by implication of the NRAS applying to states and territories, and S 8 conferring nationally extra-territorial powers; the definition clearly refers to the Nation of Australia.

283. The term national is also defined as being National by the application of the Regulations that operate at a National, that is Commonwealth, level. Regardless, as well may be argued and French CJ states, the included text of an Act's title can be misleading as to the scope and substance of the law. But in fact, there is no dispute on the definition or meaning of "National" for as the Third Respondent writes, its name is accurate. Therefore, the legal authority referred to by the Third Respondent is moot.

284. The Third Respondent agrees that the *National Law* operates nationally but it is this national operation that impugns the Act because **it is ultra-vires the power of a State Parliament to create laws to operate nationally** as that is the constitutional jurisdiction of the Commonwealth parliament. Naming it a *National Law* creates confusion regarding the lawful jurisdiction of the act and leads to jurisdictional error and thus the Matter before us here.

285. The world national or the words national jurisdiction are not mentioned in the *Constitution* at all, and thus it follows that State (or any State) exercising national jurisdiction is an exercise of powers beyond powers which is unconstitutional.

286. Regardless of whether a State act is called a State act or not, the manner and substance in which it operates (as per the findings in the *Qld Rail case)* defines the jurisdiction which is being exercised and national jurisdiction is beyond the power of State parliaments.

287. The confusion of the naming of the 'National' law (or laws) continues: At [40] of Submission A/B the First and Second respondents agree that the National Law Qld does not and cannot regulate health practitioners across Australia. They agree it is a misleading name as the act only regulates health practitioners to the extent they have a connection to Queensland. This is noted.

288. When it comes to the proper interpretation of statute the name of the act forms part of a proper method of statutory interpretation and must represent the lawful jurisdiction of the Act which the First and Second respondents have submitted is limited to Queensland, but it is clear even by the text of the National Law itself that in fact the National Law does apply to all jurisdictions of Australia102.

102 See Part 1 s 7 ss 3 (b) and s 8 of the *Schedule*

289. Further, at [40] the First and Second Respondents' reasoning in Submission A/B is irrelevant in light of the *Qld Rail case* because this case shows that a misleading name creates an error of law and that would be detrimental to the ability of any court to make a binding decision in this Matter and this Matter itself is evidence that a misleading name creates confusion with regard to jurisdiction of an act of parliament.

290. The word 'national' points to jurisdiction and points to a false jurisdiction and the First and Second respondents arguably do not dispute this falsity as shown at [40].

291. At [41] of Submission A/B there is further evidence of confusion in the name and role of the NRAS by the concession that the Health Ministers Meeting ministers (which comprise the Ministerial Council under the 'National Law') are equally confused.

292. Paragraph 7 of the Third Respondent's Submission C admits that each state/territory prints and produces its own law and affixes the name of that state/territory to the law. It follows that the National Law is not a National Law in name or substance (but operates as if it were) but rather should be seen as a collection of different state and territory laws all with different sections, application, jurisdiction, timing, amendments and publications dates. For the State of Queensland to pretend this is of no consequence is wrong for (correct) jurisdiction is a foundational matter to all law and all courts.

293. The pertinency of the correct identification of what National Law is being applied to the Applicant, and what actually is the National Law, and which parts of the National Law is being applied to the Applicant in the impugned decision is made more apparent where conduct occurs across state borders. Seen in this context the principles of natural justice dictate that the Applicant's request for judicial review be considered strongly in favour of the Applicant, if not merely from a modicum of caution owing to the shaky administrative (that is jurisdictional) grounds upon which this decision was made on.

294. It is noted at [9] of Submission C that the Third Respondent seeks to conflate the *Health Practitioner Regulation National Law* (Queensland) with the broader and simpler (yet more deceptive) term 'National Law'. The Applicant wishes to point out this may create (further) confusion as identifying and equating the Queensland version of the *National Law* as the *National Law* avoids examining the issues pertaining to a proper understanding of the unconstitutionality of the *Health Practitioner Regulation National Law* Act 2009, the *Schedule*, and by inference, the *Regulations*. Furthermore, the attempt at simplifying understanding of the National Law(s) (done however so incorrectly) by the Third Respondents demonstrates textual evidence of a) the confusing nature of the National Law and b) even the authors/creators of the National Law find it difficult to deal with and explain. They may argue this abbreviation was done to simplify understanding of their arguments, but the Applicant disagrees. This has only further highlighted the broad scope of misunderstanding this suite of laws brings to the Court and ipso facto demonstrates there are substantial grounds for argument to this Matter and the First and Second Respondents' Application for summary dismissal should itself be denied.

295. At paragraph [20] in the Third Respondents Submission C they argue that the legislative authority for the *National Law* comes from each state or territory NOT the Qld host act. But this is not true as the Third Respondent at Paragraph 9 identified the *National Law* as the National Law (Queensland). Despite that error, the "National

Law" is misleading and cannot allow for natural justice as it is misrepresented as a singular national law when by the Third Respondent's own admission it is actually 8 Nationally (confusing) laws.

296. Even at this stage, if there was any doubt as to whether national could still be confused with the word Commonwealth, and by implication confuse matters of jurisdiction and lawfulness, the Applicant points to the authority of Justice Mason at [3] in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* [1983] HCA 29; 158 CLR 535 where he defines the "status of the Commonwealth as a national government.". It is clear that national means Commonwealth and vice-versa and this means the State of Queensland is mislabelling their laws and acting beyond powers.

297. Finally, what all this misidentification of the law amounts to is tyranny of not knowing the law. There can be no ounce of justice served if the citizens (and health practitioners of which the Applicant is but one) do not know the law by its name or substance from which they are (purportedly) subject to.

298. This is made clear by remarks of Chief Justice Barwick at [5] of *Watson v Lee* [1979] HCA 53; 144 CLR 374 where he writes, "To bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny."

Misidentification of the Parties

299. Everything changed at federation. There was a new supreme law of the land, the Constitution, and it created a supreme court to be called the High Court pursuant to section 71 of the Constitution. It also created a new supreme legislative authority to be known as the Commonwealth Parliament whose laws operate uniformly and throughout the Commonwealth properly deserving the label national laws. The colonies which were later to become States only continued to have state legislate powers pursuant to s 107 and made subject to the Constitution by reason of s 106 and Covering Clause 5.

300. The States now wish to elevate the status of their legislative making powers to that of the Commonwealth Parliament by affixing the label "National Law" to the regulatory act over health practitioners and giving the title or label "Australia" to their administrative bodies for which there is no authority under the Constitution to do so. If there is no authority for the states to create or call their State acts "national laws" it naturally follows that there can be no outflow of executive power to crate administrative bodies called the Medical Board of Australia or the Australian Health Practitioner Regulation Agency either. The label "Australia" is once again reserved for Commonwealth administrative bodies, not bodies of the States.

301. A question is posed: Section 23(1) of the National Law establishes the Australian Health Practitioner Regulation Agency **(AHPRA)** (the First Respondent) as a body corporate (s 23(2)) and represents the State (s 23(3)) but what state?

302. Similarly, each National Board is a body corporate (s 3lA(l)) and represents the State (s 31A(2)) but which state and why aren't they so named?

303. Section 4 of the National Regulations establishes the Medical Board of Australia (Medical Board) (the Second Respondent) as the National Health Practitioner Board for the medical health profession, but what is national, and has it been define? Interestingly, the answer is not to be found in the definitions section of the National Law or the Schedule or the National Law (Queensland). A definition of nation is omitted. The application proposes his own definition (which has been shown above to be consistent with case law. National means Commonwealth. It thus follows that there is no head of power (as per *Wong v the Commonwealth*) for the Commonwealth to regulate health practitioners so this Commonwealth regulation (in substance and in name if not by enactment) is thus beyond powers by reason of s 51(xxiiiA.) and 61 of the Constitution.

304. Similarly, just like, "The Office of the Medical Board is a creature of legislation of the Queensland Parliament." in the situation regarding the composition of Medical Boards prior to the illegal formulation of National Boards in 2010, it follows then that because the Medical Board of Australia is also a creature of legislation of the Queensland Parliament (i.e. the *Health Practitioner Regulation National Law Act* 2009) then it is clearly demonstrated that the Medical Board of Australia is really the Medical Board of Queensland. The mere labelling of this same entity does not change the source of its authority or its jurisdiction, yet it purports to do so by applying its decisions to regulate conduct across the Nation and allowing the registration and regulation of health practitioners across the entire Commonwealth which is beyond powers of the Queensland Medical Board. What would be constitutionally correct and intra-vires is precisely the set-up that existed prior to 2010 where there were state medical boards each looking after the registration and regulation of practitioners within their own state or territory.

305. The creation of the National Boards has clearly failed the guiding principle of the impugned *National Law* at section 3A subsection (2) (a) by not regulating practitioners in a transparent and accountable way, where it says, "the scheme is to operate in a transparent, accountable, efficient, effective and fair way". Rather, this confusing, tyrannical and opaque system of a conglomeration of state laws masquerading as a single *National Law* purporting to operate as a single national entity has obfuscated the authority and reporting lines upon which health practitioners are subject to and has resulted in the indefinite suspension of many health practitioners (some for years on end), and has resulted in numerous Federal Parliamentary inquiries demanding reform of the system yet none has been forthcoming. All this is perhaps because it has been so hard to determine what the National Registration and Accreditation Scheme is, who its agencies are, and who they report to.

306. The statement of the First and Second Respondent at paragraph 27 in Submission A/B that; "in exercising functions associated with Queensland, the Medical Board of Australia likewise draws on the powers conferred on it by the National Law (Qld)"; demonstrates how the misrepresentation of the name Australia being used for the Medical Board creates confusion as to jurisdiction and results in jurisdictional error due to the confusion of concerned stakeholders. As such it is required that the word Australia be removed from their name in order to avoid jurisdictional error.

307. It is argued that the matter of the identity of the First and Second Respondents is a primary jurisdictional issue which requires a decision before any court can make any decision of binding force (including a decision to dismiss the matter); as while the true

and lawful identity of the parties remains in question, joinder cannot be created and without joinder the Court has no jurisdiction to rule on the matter.

308. Therefore, it would be contrary to the interests of justice for the Court to proceed until the parties have been correctly and lawfully identified. The submissions of the First and Second Respondents demonstrate why this is such an important question which must be resolved before any further decision can be made by the Court. In Submission A/B it is stated that Ahpra and Medical Board have made the submissions on 10 February 2023 but these are not the First and Second Respondents so named in this matter and these names represent a new and unidentified identity notwithstanding that the names used in the matter are misleading names due to the presence of the word Australia in them.

309. In paragraph 1 of 'Submissions of the First and Second Respondent's Application filed February 10, 2022 (sic)' (Respondents' Submission A/B) they seek to refer to the Australian Health Practitioner Regulation Agency as 'Ahpra'. This is a further misidentification and representation of the true identity of the First Respondent. Who in fact is the First Respondent? Is Ahpra to be construed as a person, and if so, who is this person and why are they representing as the First Applicant. The Applicant requests that the First Respondent, being the Australian Health Practitioner Regulation Agency (AHPRA), make submissions to this Court, under the named identity they represent; not as new natural or artificial person or entity identified as 'Ahpra'. The Applicant submits that the act of replacing the name AHPRA with the name Ahpra is another attempt by the First Respondent to distance itself from its true and misleading name AHPRA (that being the inclusion of the word Australia) and as such is committing another act of jurisdictional error.

310. In paragraph 1 of the Respondents' Submission A/B they state that the Second Respondent is identified as the 'Medical Board'. Whilst this could be argued as an abbreviation, in light of previous misrepresentations, this could also be construed as an attempt by Counsel for the First and Second Respondents to hide the misleading nature of the inclusion of the word 'Australia' in the name of the Second Respondent i.e. the Medical Board of Australia to distract the Court from the misleading nature of this name. If it is found the Second Respondent has misled the Court on their true identity then this would result in a finding of jurisdictional error thus this case must be found in favour of the Applicant.

311. At paragraph [20] the Third Respondent in Submission C alleges that the Qld National Law does NOT nationally regulate health practitioners. They allege the states in concert nationally regulate health practitioners. The Applicant argues that this is fundamentally incorrect because the National Law is an act of the Queensland Parliament that is being applied and achieving national regulation through the express wording of Part 1 s 7 (1) s 7 ss 3 (b), Part 1 s 8, Part 8 s 38 and Part 11 S 246 ss 2 and in context, by the adoption acts of the several state and territories utilising their Part 2 S 4 application of the words "as if" or similar to adopt the legislation of the state of Queensland.

312. In paragraph 33 of the Respondent's Submission C the Respondent argues that the misidentification of the parties is irrelevant to their lawful power and the Applicant's argument should be rejected on this basis. However, the Applicant argues that the Respondent did not explain why his arguments had failed. Furthermore, their reference to the case law holding that entities can derive their existence from more than one Act

is not disputed, but what the Applicant seeks to convey clearly instead is that the State of Queensland is operating a national scheme with national (that is Commonwealth jurisdiction) via the s 8 extraterritorial powers and the Part 11 s 245 Regulation powers to go far beyond the s 61 executive powers of the Constitution (only the Federal Executive can hold federal executive power).

313. Furthermore, at [33] of Submission C all the case law referred to again makes reference to schemes or case law involving Commonwealth Acts. A significant example of this is this the case law relied upon by the Respondent at footnote 70 in Submission C where they make reference to *David v City North Infrastructure Pty Ltd* (2012) 2 Qd R 103 where at paragraph 32 it is stated, "I accept the submission that an entity can be "established" under more than one Act. That proposition is supported by *Joint Coal Board v Cameron*, wherein reference was made to the "ingenious legislative device" by which the Board was constituted by or in accordance with a Commonwealth Act and was also constituted by or in accordance with a State Act. The Commonwealth Act established the Board as a body corporate having the attributes, functions and powers specified in the Act, to the extent to which those powers and functions were not in excess of the legislative power of the Commonwealth. The State Act did likewise to the extent of the legislative powers of the State." Certainly, this case law reference explains clearly how necessary it is to have a Commonwealth act involved in the lawful conferral of executive power to a national body.

314. In paragraph 35 of Submission C of the Third Respondent they offer no argument in opposition to the Applicant's use of the *Qld Rail case* to support his argument that the substance of a national scheme needs to be examined (not just merely in or of the name) to determine the true nature of an act or law. Therefore, in absence of any counter-arguments the Applicant holds this arguments are correct and **must** succeed.

315. Similarly, the use of label "Australia" by a Government body also denotes a Commonwealth body, which clearly the Medical board of Australia is not, it is a regulatory body of the State, specifically Victoria[103]. Issues of joinder arise between parties in a legal proceeding when the correct identification of the parties creates a threshold jurisdictional element to the Matter. It is alleged the Medical Board of Australia is impersonating a Commonwealth body. Accordingly, the label "Australia" must also be severed from the state regulatory body because it too is misleading and therefore potentially fraudulent and thus contrary to law.

316. Again, to refer back to the immortal bard: "*What's in a name?".* The answer is everything, one's name, one's reputation, one's career, income and accountability. Indeed, the Applicant fights hard in this matter to succeed due to the imposition of his name being struck off the register of medical practitioners in Australia.

317. But where is the Medical Board of Queensland and where is the Queensland Health Practitioner Regulation Agency in all of this? The First and Second Respondents cannot argue simultaneously that their power is derived from a State act, register their body corporate in a State (Victoria), and then claim that their identity is actually a Commonwealth body. It is intolerable and unlawful.

318. Their counterargument that they are not Commonwealth entities, but mere National entities must fail as there are no such entities holding executive power under the

103 See Exhibit I-1

Constitution. The Constitution makes for the division between State and Commonwealth (legislative and executive) power – there is no third category of 'National'. Again, the number of times the word 'National' is referred to in the Constitution is zero.

319. By way of comparison, the *Queensland Rail case* was a case where the state of Queensland denied the entity it created answered the description of trading corporation within the meaning of section 51(xx) of the Constitution so it could place its employees outside of the reach of the Fair Work Act 2009 (Cth) even though the entity had all the attributes and activities of a trading corporation. In essence they were saying that their entity could not be labelled a trading corporation even though it plainly was.

320. In this Matter as opposed to the *Qld Rail case*, the State of Queensland (by its legislature authority) has essentially "reverse engineered" the deception, by admitting that its National Law Act is to be viewed as just a State act, but still insists on (to this day) not amending the Act to remove the label "National Law" which is a term properly reserved for laws of the Commonwealth Parliament. It is for this reason the Applicant has sought to remove this Matter to the High Court by way of s 40 Order for Removal whilst the Commonwealth Attorney-General makes up his mind whether to intervene or not. Clearly, the case for intervention is made and is expected to be in favour of it being so.

321. For the avoidance of doubt, it is asserted that National laws are Commonwealth laws as they by definition apply nationally and uniformly throughout the country. The State created Act (the *National Law*) does neither and is thus invalid as it is not a law of the Commonwealth Parliament which creates laws to apply nationally or uniformly throughout the nation. It follows then that Queensland does not have the legislative power to create Commonwealth bodies in substance and not in name. Therefore, Queensland cannot affix the label "National Law" to the Act itself, nor use the label "Australia" as a suffix or prefix to its regulatory bodies for the aforementioned reasons.

322. At [42] in Submission A/B the Respondents write about AHPRA that, "its powers derive not from an single law but all of the National Laws enacted in each State and Territory." They therefore are in agreement that the National Law is not in fact a singular national law as it is so named, and neither is it national, but a mixture of state laws. Is it lawful to label something that which it is not? The *Qld Rail case* would suggest not. Even with the subject matter being reversed what was found is that the label given to the Qld Rail corporation was misleading and that labelling did lead to an error of law and ultimately a loss of the case. This similar subject matter and reasoning provides grounds for why the Applicant's application should not be dismissed summarily and provides a strong argument for why State legislation cannot affix misleading names without consequence. It is asserted that the State of Queensland has no authority to create misleading Commonwealth entities nor label them as such.

323. The Respondents' counter argument on this point is that the State of Queensland is not responsible for the creation of these misrepresented Commonwealth entities and thus cannot be held accountable. This is akin to the lack of responsibility taken from all of the responding Health Ministers of the HMM in writing regarding their lack of responsibility for the administration of AHPRA as they claim it is not within their jurisdiction (despite them literally being the members of the peak body empowered under the impugned National Law to carry out this task).

324. It seems that no legislature, no Minister, and no State is willing or able to take responsibility for these entities. Where nobody is taking responsibility, it is only reasonable and just that accountability be directed to the host of the vertical subversive federalism scheme, that being the Third Respondent. The Applicant believes that the Health Ministers and the State of Queensland may have an element of plausible deniability to responsibility, but only because this vertical subversive federalism scheme has been set-up ultra-vires by powers unconstitutionally given to the State of Queensland to do so.

325. The fact that the Intergovernmental Agreement of 2008[104] authorised this ultra-vires arrangement by agreement is no excuse to abrogate multiple provisions of the *Constitution*. In a representative democracy their must be clear lines of accountability between the legislature and the executive, if not then what we are left with is a situation akin to the time before 1215 in England and the Magna Carta, where the unfettered powers of the Sovereign reigned supreme and brough tyranny to the people.

326. Indeed, it is perhaps no coincidence that the Respondents claim to be exercising the plenary power of the State of Queensland. What the Respondents fail to appreciate is that plenary power so ended on January 1st, 1901, in Centennial Park, Sydney. Since that time and up to and including now, (despite what the Respondents think) the legislative and executive power of the State of Queensland is restrained by this foundational and legally supreme document known as the *Constitution*. It is this document that the Applicant relies upon to invalidate the powers which AHPRA and the Board purport to have and the validity of the *National Law* it is said to rest its laurels on.

327. In this Matter before the Court, the true identity of the Second Respondent is lawfully identified as the "Medical Board of Queensland" and not the "Medical Board of Australia". In this Matter before the Court, the true identity of the First Respondent is lawfully identified as the "Queensland Health Practitioner Regulation Agency" and not "Australian Health Practitioner Regulation Agency". The obvious remedy to save the impugned Act and its organisations from invalidity is to sever the label "National Law" from the impugned Act, and secondly to sever the label "Australia" from AHPRA and the Medical Board of Australia to avoid impersonation of a Commonwealth body and consequent jurisdictional error. Alternatively, and preferably the Court should invalidate the National Law in its entirety and so order the unlawful state entities to rename themselves according to law.

Cannot do by Agreement what Cannot be done by the Constitution

328. The COAG Intergovernmental Agreement 2008 sought to do by agreement that which could not be done by the law of the Commonwealth. That is, it was an agreement to regulate health practitioners at a federal level absent a federal law.

329. In *Broadbent v Medical Board of Queensland* [2011] FCA 980; 195 FCR 438 at [129] the Justice misses this important distinction when he makes reference to the

104 See Exhibit O-1 Intergovernmental Agreement for a NRAS

Explanatory Notes to the *Health Practitioner Regulation National Law Bill* 2009 (Qld) at p 7 where he notes:

"The COAG agreement identifies Queensland as host of the proposed National Law. [The National Law Act] incorporates and builds on the legislative provisions of Act A, which was designed to encompass the COAG agreement made between the Premiers and Chief Ministers of all States and Territories, and the Prime Minister of Australia. The regulatory model is one of **federal co-operation by agreement between States and Territories**." (emphasis added)

330. Federal co-operation in the impugned NRAS is missing a necessary and fundamental part and party to lawful and truthful federal cooperation, that is: the party of the Commonwealth. Just because the Commonwealth Government of the day agreed to this unconstitutional arrangement in 2008 does not make the Scheme legally valid now or then.

331. The Applicant contends that one constitutionally correct method by which states can refer their heads of power to the Commonwealth is via a section 51 (xxxvii.) referral. The Applicant rejects the contention in paragraph 28 of the Respondent's Submission where they state that the Applicant has appeared to argue that the *Constitution* impliedly prohibits national schemes by the use of mirror state and territory legislation. The Applicant does not contend this. The Applicant contends that a s 51 (xxvii.) is but one way to effect a constitutionally valid national scheme (another being a referendum for example).

332. Under the facts of this impugned National Scheme, the only way for the scheme to continue to operate lawfully save a wholesale reversion of the NRAS back to a state-based scheme would be by these types of legislative action discussed above. As long as the current NRAS is absent a substantive act of the Commonwealth Parliament or other legislative modifications, this scheme will continue to remain unconstitutional. This is akin to the Constitutional crisis that Australia experience with its Corporations Act national scheme of the 1990's which itself ended in a section 51 (xxxvii.) referral to the Commonwealth to end the uncertainty.

333. At paragraph 28 the Third Respondent states that *R v Hughes [2000] HCA 22; 202 CLR 535* at [26] determined that the idea of s 51 (xxxvii.) referral was rejected. This is not true. And at paragraph of 59 *of R v Hughes* [2000] it was not determined that a section 51 (xxxvii.) was rejected, rather the Court found that it was **nearly incomprehensible as to why this type of National Scheme was adopted** absent this.

334. Notably, following this decision because of the constitutionally uncertainty created by the *R v Hughes* decision a section 51 (xxxvii.) referral did in fact occur in 2001 by way of the Corporations (Commonwealth Powers) Act 2001 of the several states and territories leading to the current Corporations Act 2001 (Cth) existing in Australia to date.

335. Therefore, it follows that, in fact, the opposite is true as to what the Third Respondent contends about the case of *R v Hughes*. Even in paragraph 65 of *R v Hughes* where Justice Kirby says that, "it might have been possible to achieve an efficient system of national regulation of corporations in Australia by other means is irrelevant to the issues presented by these proceedings." This does not mean that Justice Kirby rejected a s 51 (xxxvii.) referral as lawful or even as preferential. And

again, notably, his comment was made in reference to those proceedings alone, and again, what followed after the case was indeed a section 51 (xxxvii.) referral confirming the sensibility of such an action. Furthermore, the facts of *R v Hughes* are distinguishable from this Matter as will be discussed further below.

336. The NRAS is regulating health practitioners at a national level, as conceded by the Third Respondent. The Applicant argues that what cannot be done directly cannot also be done indirectly as a maxim of law (this has been expounded upon in the Applicant's Submission One (Amended) and Originating Application). In paragraph 30 of the Respondent's Submission C they argue that the case of *Wong V Commonwealth* is not supportive of the Applicant's argument that the NRAS is doing indirectly what cannot be done directly.

337. To repeat the Applicant's contention, it is argued that it is beyond the power of a State parliament to enact **national** regulation of health practitioners (by way of Chapter 1 Part 1 Section 1, Chapter VI s 122, and s 51 (xxiiiA.) of the Constitution. The state of Queensland lacks both a general federal head of power and a specific head of power under the Constitution to regulate health practitioners at a national level. The point of Federation in 1901 was to create a new level of government to pass laws affecting the whole of the nation. There was no, and there is no, inclusion of text in the Constitution to allow for the states or territories to make laws at a national level. Any powers not exercisable by the Commonwealth are the powers of the states, and just because it is not expressly stated in the Constitution that the states cannot legislate for the Commonwealth is irrelevant and contrary to a plain English understanding and proper interpretation of the *Constitution* where as much is yet to be finally decided by their Honours.

338. At paragraph 31 the Respondent in Submission C argues that the Intergovernmental Agreement is lawful because the case of R v Duncan; Ex parte Australian Iron and Steel Pty Ltd [1983] HCA 29; 158 CLR 535 states that the Commonwealth can enter into agreements with the states as long as the ends of those agreements are Constitutional. This is precisely the reason why this IGA is unlawful because the illegitimacy of the State of Queensland legislating in place of the Commonwealth and exercising federal executive power is unconstitutional.

339. States cannot abdicate their power as they have so done by participating in this unlawful vertical subversive federal scheme by not allowing for unilateral repeal of the regulations they have subjected themselves to. In Gould v Brown [1998] HCA 6; 193 CLR 346 at [287], it was said that, "The theoretical foundation for the foregoing argument is the rule that a legislature may not "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence". The provision of legislative powers to the several Australian legislatures implies that they will not assign, transfer or abrogate such powers nor renounce or abdicate their responsibilities. Care must be observed in the application of these rules to cooperative legislative schemes within Australia whereby the several legislatures of the nation, in pursuit of the desirable objective of uniform laws, agree to adopt a common standard and to cooperate in its modification and improvement from time to time. This is not a relinquishment of legislative responsibilities. It is the exercise of them. It is not the creation by one legislature of a new and different legislative authority (which would be forbidden). It is the decision of that legislature to exercise its own powers in a particular way. A legislature, such as **a State Parliament, may delegate legislative power so long as it does not abdicate it**." (emphasis added) The Sates and Territories

are abdicating their legislative powers by way of the provisions of the *Schedule*[105] and the enforcement of the irrevocable *Regulations*.

340. It is has been said that one cannot do indirectly what is prohibited directly. In *Ha v New South Wales* [1997] HCA 34; 189 CLR 465 this was made clear by Justice Isaacs where he referenced the Commonwealth Oil Refineries case and said:
"The prohibitions of secs 90 and 92 of the Constitution may be transgressed not merely by a direct and avowed contravention. They are transgressed also by a statute - whatever its ultimate purpose may be, and however its provisions are disguised by verbiage or characterization, or by numerous and varied operations lengthening the connective chain, or by otherwise paying titular homage to the supreme law of the Constitution - if it operates in the end by its own force so as to do substantially the same thing as a direct contravention would do, either in attaining a forbidden result or in using forbidden means. The relevant constitutional prohibitions include both means and results. It is no justification for using forbidden means that permissible results are sought, nor for securing forbidden results that lawful means are employed.".

341. Therefore, it follows that since there is no current head of power for the Commonwealth to regulate health practitioners, it is not lawful for the States in collusion with the Commonwealth to indirectly create a forbidden result which could not be done directly: - that is to create and operate a National Registration and Accreditation Scheme to regulate health practitioners federally.

Constitutionally Impermissible Model – No representative democracy

342. The unconstitutionality of this model is the absence of the Commonwealth in the scheme. It seeks to regulate for the nation without involving the premier national authority, i.e., the Commonwealth and as such undermines the authority of the Commonwealth and thus the Constitution as well.

343. In *Gould v Brown [1998] HCA 6; 193 CLR* it is notable to point out that in the formation of the National Scheme by way of the Corporations Act (Cth) for the Capital Territory that by doing so the commonwealth has consented under one of its acts to this type of cooperative federalism scheme. This is entirely distinguishable from this Matter where no such legislative consent at a Commonwealth level has been enacted.

344. One of the reasons for including the Commonwealth in such schemes (apart from the implicit Constitutional requirement) is that since 2010, with the formation of the National Law and NRAS the citizens of every state and territory (with the exclusion of Queensland) have been excluded (unconstitutionally) from the lawful democratic process of electoral representation and review of both the National Law and the executive power of the AHPRA and the Board. This is because not one elector in any of these States or Territories has input on the legislative amendments enacted by the State of Queensland that the other states and territories adopt automatically as soon as those amendments are made in Queensland.[106]

345. If this NRAS scheme had been implemented lawfully (that is via a s 51 (xxxvii.) referral with an overarching commonwealth law) the democratic rights of all

105 *Schedule's* Part 11 s 245 ss 1105 and s 246 ss 2105
106 With the exception being South Australia which needs to pass an authorising Regulation, and Western Australia which needs to create a new enactment.

Australians citizens, and the checks and balances on the AHPRA and the Boards would have been provided by the federal parliament as provided for automatically by Chapter 1 Part 1 s 1 of the Constitution where the Commonwealth Parliament is given the authority to make such laws.

346. At paragraph 27 of Submission C the Respondent writes that, "the automatic application of amendments in participating jurisdictions 'bypasses the scrutiny of the elected houses of parliament in the participating jurisdictions and thus is contrary to the *Commonwealth Constitution* and is contrary to the system of democratic elected representative government within Australia'.[48] That submission is inconsistent with authority. They then use the case of *R v Hughes* (2000) at paragraph 26 to counter this key argument of the Applicant. However, as is aptly described in other sections of this Submission Two; the case of *R v Hughes* (2000) is very much distinguishable from this matter, with the three key distinguishments being a) the absence of a unifying Commonwealth act in the NRAS b) that it involved the delegation of legislative power vertically to Commonwealth entities and officers (Commissioner for Taxation) which the citizens of Western Australia had voted for in the previous federal election, and c) the Regulations didn't amend the overarching Commonwealth act, it merely applied it. The case of *R v Hughes* found that it was not unconstitutional for states to adopt Commonwealth laws, nothing more nothing less. This is not applicable to this Matter where we are examining a horizontal Adoption of Laws national scheme model.

347. The facts that distinguish *R v Hughes* from this Matter are that the National Scheme in *R v Hughes* was a model of Cooperative Federalism involving the substantive law of an Act of the Commonwealth while in this matter the substantive law is an Act of the Queensland Parliament.

348. The State of W.A. in the R v Hughes case adopted a law that was drafted and passed by the Commonwealth Parliament. As such this law was passed by representatives that were duly elected by the citizens of W.A. when they voted at the Federal election. This is distinguishable from the Matter at hand as it involves State and Territory Parliaments applying or adopting a law of the Queensland Parliament which is a law that has been passed by Representatives that the citizens of the adopting States and Territories did not have an ability to vote for or not vote for and further it is exposing the citizens of the other States and Territories to legislative actions undertaken by a unicameral parliament when they should be represented by a bicameral parliament of members they directly voted for.

349. The Constitutional validity of such horizontal national schemes in this context, where there is no involvement of Commonwealth legislation, has not yet been considered by the High Court, and is ripe for decision and is of great public interest and importance for the nation of Australia.

350. Furthermore, *R v Hughes* did not involve State legislation or Regulations made under State legislation that purport to amend or modify Commonwealth legislation as the Applicants matter does through the *Regulations*.

351. Further distinguishing *R v Hughes* from this Matter is that what was examined in *R v Hughes* was not the host act but the adoption act. It is the host act of Queensland in this Matter that is the subject of the proceedings, with the adoption acts of the several

States and Territories adding context and understanding to the Court as to the true nature of the host act and demonstrating the unlawful consequences of the NRAS when seen at a whole, that is at a National level.

352. The case of *Gould v Brown* [1998] HCA 6; 193 CLR 346 has been relied upon by the Respondent in Submission C to point to the lawfulness of the NRAS. However, this case is distinguishable from this Matter before the Court, because *Gould v Brown* was in reference to a subject matter involving states referring power vertically to the Commonwealth which is distinguished from the facts of this Matter, that being States referring their powers horizontally to the State of Queensland.

353. At paragraph 27 of the Respondent's Submission C they write that Justice Kirby in *Gould v Brown* held that provisions of s 4 of the State and Territories' adoption acts are legal as they are not a relinquishment of legislative responsibilities. However, the NRAS enacted by the *National Law* is distinguishable from this finding in *Gould v Brown* because the several States and Territories are relinquishing their legislative responsibilities by way of a) their citizens not having a participatory role in the legislation of Queensland and, b) Part 11 s 246 ss 2 of the adopted *Schedule* states that the several States and Territories are prohibited from modifying the *Regulations* that the State of Queensland dictates and AHPRA and the Board administer, unless there is a majority of the several jurisdictions agreeing to their removal.

354. This last feature of the National Law statute conclusively demonstrates the irrevocable nature of the legislative sovereignty being given away by the several State and Territory parliaments. This then converts the proper assessment of this national scheme from one of a lawful scheme of delegation (like that described in *Gould v Brown*) to that of **a scheme with unconstitutional abdication of legislative responsibilities.** This reason on its own makes the National Law and its concomitant suite of laws unconstitutional and because of its central importance will be discussed further below.

Constitutionally Impermissible Model – State Parliaments cannot abdicate their legislative power

355. The case of *Gould v Brown* [1998] HCA 6; 193 CLR 346 at [287] suggests that there is nothing stopping states adopting text from other sources and is to not be regarded as an abdication of legislative responsibilities. This case was about the Commonwealth Corporations Act and the National Scheme therein. But in this Matter with the *National Law* and the regulation of health practitioners it is not the adoption of text from a Commonwealth statute that is at play. This Matter is about the several States and Territories adopting another state's law which is an entirely distinguishable matter.

356. The NRAS when viewed at a national level shows the adopting not just of the text of Queensland's *National Law* but the very laws and amendments of another state completely without regard to the constitutional rights of the citizens or electors of the others states to have a democratic say in the amendments of that law.

357. As per *Victorian Stevedoring and General Contracting Co Pty Ltd* and *Meakes v Dignan* [1931] HCA 34; 46 CLR 73, page 79-80 it is stated, "the legislative power was to be exercised only by the body which was composed of representatives of the people.

The purpose of the threefold division and the provision of checks upon the power is to prevent tyranny.". Since Australians have lost their connection between AHPRA and the Board administrators and their elected representatives to control them it is no wonder the Applicant finds himself subject to an unlawful exercise of unconstitutional power. It is this exercise of unlawful power the Applicant humbly asks the Court to reign in.

358. The case of *Capital Duplicators Pty Ltd v Australian Capital Territory* [1992] HCA 51; 177 CLR 248 regarding the issue of abdication of state legislative powers can also be distinguished from this Matter because that case is only about territory tax powers. The court held, "There is no limitation on the power of the Commonwealth Parliament to create subordinate territory law making bodies empowered to make laws for the territory including taxation laws, so long as the Commonwealth Parliament does not abdicate its powers.".

359. In *Gould V Brown* [1998] it says, "A legislature, such as a State Parliament, may delegate legislative power so long as it does not abdicate it.", but this is in reference to *Giris Pty Ltd v Federal Commissioner of Taxation* [1969] HCA 5; 119 CLR 365 at [9] regarding *Cobb &Co. Ltd. v. Kropp* (1967) 1 AC 141 (at p374) where this is purely a case in Queensland involving the ability of the Commissioner for Transport to charge licensing fees on corporations. As per Gibbs J, "If the Legislature confers on an executive body the discretionary power of fixing the amount of a tax and determining the circumstances in which it is to be levied, it does not abdicate its own powers, for the executive body is at all times subject to its control."

360. Thus, this case is, again, an entirely different matter to handing over the democratic (legislative) process of Government to another state. *Gould v Brown* did not draw upon precedent strong enough to enable the wider interpretation of the *Gould v Brown* statements to apply to state legislature adopting the laws of other states. *Gould v Brown* is in any case now superseded by *R v Hughes* 2000.

361. Regardless, all the case law referenced in *Gould v Brown* to give authority to the delegation of State legislative power is notably about the delegation of legislative authority to administrative officers. The Applicant believes the High Court did not contemplate the wholesale abandonment of one State or Territory's entire law-making power (regarding a national scheme) to one single state, let alone the Commonwealth. The difference firmly being the latter would be viewed as a cooperative arrangement for the good government of the Commonwealth of Australia, whereas the current NRAS subjugates the role of the Commonwealth.

362. This subjugation by way of the *Regulations* and lack of an overarching Commonwealth act makes the NRAS not harmonious and creates unresolved jurisdictional confusion, and administrative opacity, and thus tyranny across the entire Commonwealth at the hands of two misidentified agencies acting well beyond constitutional powers.

363. This new horizontal subversive adoption of laws model administered via the *National Law* and the NRAS gives an entirely new head of power and authority to the State of Queensland that did not exist at the time of federation or until 2010 when this Scheme was created.

364. For clarity, the Applicant acknowledges that he has been using strong words in this

Application however he has strong grounds for doing so and does not do so lightly or with a happy heart. But tyranny is the situation which the Applicant (and the rest of Australia's health practitioners) find themselves in due to the legislative power of a State not being exercised according to the Constitution. In summary, the *National Law* and NRAS operates in an area outside, between, and beyond the limits of state and federal power established by the Commonwealth Constitution. And it is for that reason the Applicant seeks the final orders he does.

Constitutionally Impermissible Model – National Schemes without the Commonwealth

365. A cooperative scheme must involve the powers of both the state and the commonwealth: Brennan J in *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535 at 579 stated:

'If the [Commonwealth] Act had merely constituted or authorized the constitution of a tribunal and had vested federal powers of conciliation and arbitration in it without reference to State powers, an attempt by a State Act to vest similar State powers in the same tribunal would fail – not because of a constitutional incapacity in a Commonwealth tribunal to have and to exercise State power, but because the Commonwealth Act would be construed as requiring the tribunal to have and to exercise only such powers as the Commonwealth Parliament had chosen to vest in it.'"

366. The High Court will uphold the legality of cooperative federalism schemes except, "Where legislation is required to implement such agreements, such legislation will be upheld by this Court "so long … as the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the Constitution"" Duncan in [70] of *R v Hughes* [2000] HCA 22; 202 CLR 535.

367. This NRAS is therefore invalid because the ends (a national scheme to regulate health practitioners) is inconsistent with s 51(xxiiiA.) of the Constitution, and the means; because it places the Commonwealth to the side of the States and allows for Queensland to regulate the Commonwealth instead. The key point is that the issue of the constitutionality of horizontal adoption of laws model schemes has not been determined by the High Court because the NRAS has no Commonwealth legislation involved.

368. The First and Second Respondents at paragraph 26 state, "Ahpra must be understood, therefore, not as a Commonwealth body but a national body established in and armed with powers and responsibilities given to it by a mix of State and Territory legislation". The Applicant submits that this statement is a clear representation of the lack of constitutional validity of the impugned National scheme; as the effect of the impugned National scheme is to purport to create national jurisdiction.

369. National jurisdiction, if defined as "power and responsibilities" arising from "a mix of State and Territory legislation", is not a jurisdiction that exists within the *Commonwealth Constitution*. Section 51 of the *Constitution* sets out the sharing of power between the Commonwealth and the States and Territories and does not include national jurisdiction as mix of State and Territory legislation. Chapter VI s 122 of the *Constitution* expressly bestows the Commonwealth with the power to legislate on behalf of the Territories and by implication this excludes jurisdiction from a state

parliament such as the Queensland Parliament.

370. The case of *Lamshed v Lake* (1958) 99 CLR 132 upheld the power of the Commonwealth to make laws under s 122 which operated in the States. *Attorney-General (WA); Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492, held that s 122 laws may operate in the States and are "laws of that Commonwealth" for purposes of s 109. This extinguishes any argument of the purported constitutional validity of this impugned National scheme; which originates wholly on the basis of an enactment of the Queensland Parliament (but in substance with adoption acts of the several states and territories) without involvement of an enactment of the Commonwealth Parliament; this further distinguishes this Matter from the case of *R v Hughes* [2000] which focussed on the *Corporations Act* of WA and the Commonwealth.

371. Pursuant to the *Lamshed v Lake* and the *Australian National Airlines Commission Case* decisions, National schemes originating in a territory pursuant to an enactment of the Commonwealth Parliament may be constitutionally valid in their application as if they were laws of another state or territory; however this impugned National scheme certainly is not constitutionally valid, as it has originated out of the Parliament of the State of Queensland on the basis of an act of the Parliament of Queensland (not the Commonwealth).

372. In *Kruger v Commonwealth* (1997) 190 CLR 1 at 55-58, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 67-70 Dawson J held that "just as the constitutional power of a State does not extend to making laws operating in other States…s 122 was similarly confined.".

373. In *Kruger v Commonwealth* (1997) at 163 Gummow J fully set out his view as to the place of s 122 in the framework of the *Constitution*. Gummow J stated "the power is conferred on the Commonwealth as the national legislature. This is made clear by Clause 5, which renders the Constitution binding on the courts, judges and people not merely of every State, but also "of every part of the Commonwealth". The Constitution is therefore one coherent and integrated instrument for the Government of the Commonwealth. Any Commonwealth laws, including those made under s 122, may operate throughout Australia, and s 109 of the *Constitution* renders inconsistent state law inoperative. Evidently, the High Court has definitively determined what is the correct construction and meaning of national legislature and has determined that national legislative jurisdiction belongs solely to the Commonwealth pursuant to the *Constitution*; and not to State and Territory legislatures or a combination of such. Thus, the impugned National scheme is invalid according to the *Constitution*.

374. When s 111 provides that territory surrendered by a State shall become "subject to the exclusive jurisdiction of the Commonwealth", it refers to the legislative, executive and judicial powers of the Commonwealth under the Constitution. It should follow that Chapters II and III determine the executive and judicial powers. It also follows that limitations on Federal and State legislative powers should apply.

375. In *Commonwealth* v *Cigamatic Pty Ltd* (1962) 108 CLR 372 it was held that the Commonwealth was not bound by State companies legislation which purported to alter the Commonwealth's prerogative right to priority on the winding up of the company. The majority of the Court followed an earlier dissenting judgement of Dixon J in *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508. In *Cigamatic* Sir Owen Dixon had said that a State could not derogate from the rights of the Commonwealth

with respect to "its people" or "its subjects". In *Bogle v Commonwealth* (1953) 89 CLR 229 at 259-60, Fullagar J, and with which Dixon CJ, Webb and Kitto JJ agreed, said in a passage that was obiter that a State parliament had no power to bind the Commonwealth. It follows then that the *Regulations* are invalid to the extent that they purport to do so.

376. In *Brown v Federal Commissioner of Taxation* (1959) 100 CLR 32 at 41, the joint judgement and McHugh J accepted the proposition expounded by Dixon J in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 83 and in *Uther* (1947) 74 CLR 508 at 529-30, that in a federal system of government on party can make laws affecting the executive capacity of the other federal partner only if power is clearly conferred to enable that to be done. As the States have not been given express power by the Commonwealth Parliament to enact its national legislative jurisdiction as bestowed by the Commonwealth Constitution, the impugned National scheme is beyond power of the Parliament of Queensland inclusive of a purported cumulative power of participating states and territories; and the *National Law* and its associated instruments are invalid to the extent that they purport to operate with national jurisdiction. Notably, the constitutional validity of this impugned *National Law* with regard to its effect of being contrary to our democratic collected system of government has yet to be considered by the High Court. However, it is submitted that the impugned National scheme is unconstitutional on this basis and thus the empowering legislation is invalid to the extent that it is not in accordance with Australia's representative democratic system of Government.

377. Consequently, on the basis of all of the above case law, s 8 of the *National Law* which provides as far as possible, it is to have extraterritorial operation, is lawfully and correctly interpreted as not allowing an operation that effects national legislative jurisdiction. Further, the above case law demonstrates that the First and Second Respondents' Submission A/B at paragraph 43 that "nothing in the Constitution prevents the States and Territories from ensuring that their laws are aligned" is incorrect as it is the horizontal manner of alignment in this current National scheme which excludes involvement of the Commonwealth that is impugned.

378. The First and Second Respondents at paragraph 48 in their Submission A/B misrepresents the applicant's submissions and makes a false statement as to those submissions. The Applicant certainly agrees and has previously submitted that the constitutionally valid operation of a law of the State of Queensland is limited to the extent that the matter in question has sufficient connection with their State of Queensland. It is in the purported operation of the *National Law* in excess of this lawful jurisdiction, best demonstrated by the express wording of the relevant provisions of the National Law including Part 1 s 8 and Part 8 s 38; that the Applicant has issue with. It is argued that the High Court case law leads to an interpretation of the substance of the *National Law* as national legislative jurisdiction, and clearly legislative jurisdiction should remain the sole purview of the Commonwealth Parliament.

379. At paragraph [20] the Respondents in Submission C say, "In other words, the National Law applies in each jurisdiction as a law of that State or Territory." this only has ever been found to have been constitutionally valid via case law involving the inclusion of a Commonwealth Act. (and even then, there were questions remaining to the distinguishing of that relied-upon case law.)

380. At [18] in Submission C it argued by the Respondents that there is nothing prohibiting an application of laws model. However, the very legal authority quoted by the Respondent demonstrates the flaw in the Respondent's argument and understanding that there are number of different types of application of laws models, and the authority they reference is regarding a vertical adoption of laws model not a horizontal adoption of laws model. This makes their quote from *R v Duncan* (1983) distinguishable from this current Matter for those reasons.

381. In paragraph 28 of the Third Respondent's submission C it was referenced that within the Federation the polities 'must necessarily co-operate in many ways to achieve peace, welfare and good government for the people within their respective jurisdictions'. What the Respondent fails to appreciate is that without the inclusion of the Commonwealth in a NRAS there is no cooperation; there is only subversion by way of a State purporting to act in place of the Commonwealth.

382. Even if it is to be argued that cooperation was achieved by the Commonwealth willingly giving up its role in the NRAS (as suggested by the intergovernmental agreement) the Commonwealth government is still subject to the Constitution by way of Covering Clause 5 and cannot delegate its federal legislative powers to another State by way of agreement. This is true abdication because they never had the power to give this legislative authority to the state of Queensland in the first place by reason of Chapter 1, Part 1, s 1 of the *Constitution*. Not involving the Commonwealth in the NRAS makes the Commonwealth redundant which is not permissible by the *Constitution*. This NRAS is also making acts of the Commonwealth unconstitutionally redundant by way of the *Regulations* modifying Commonwealth law.

383. At paragraph 29 of Submission C the Third Respondent writes that, "As Brennan J observed in *Duncan,* '[i]t is no argument against the validity or efficacy of co-operative legislation that its object could not be achieved or could not be achieved so fully by the Commonwealth alone'.". However, the case law relied on in this argument is not relevant to this Matter as it involved a Commonwealth law (*Coal Industry Act* 1946 (Cth), *Coal Industry Act* 1941 Cth) in a vertical cooperative scheme, not a horizontal scheme like the impugned NRAS.

Constitutionally Impermissible Model – One single national entity

384. At paragraph 42 of first and second respondents Submission A/B they say that it is multiple National Laws that seem to make AHPRA have a National character, and its powers are not derived from any single law. But the express wording of the *National Law* and the legislative design chosen (horizontal applied legislation), and from the 2008 Intergovernmental Agreement determining the State of Queensland to be the host jurisdiction, it is clear that it was the single act of the Queensland parliament that created the one single national entity and each of the national boards and thus the State of Queensland is the proper contradictor for the remedies upon which the Applicant seeks.

385. Section 7 of the *Schedule*[107] brings this dispute into clear view. Whereas the previous state medical boards were identified as being state authorities by virtue of

107 Single national entity

their members being appointed, "… under legislation of the Parliament of Queensland and by the Governor-in-Council;" as stated at [105] in *Broadbent v Medical Board of Queensland* [2011], it can be argued that the (national) Board is partly a Commonwealth entity because its members are appointed by the Ministerial Council (now known as the Health Ministers' Meeting) which includes the Federal Health Minister, currently Mark Butler MP, but has Yvette D'Ath in a position of supremacy over that of the Federal Health Minister[108].

386. Therefore, the Medical Board of Australia is a quasi-federal body with a committee whose federal authority has been ceded to the State of Queensland, and impermissibly so. It is Constitutionally impermissible because the Federal Health Minister is seeking to do indirectly that which he cannot do directly, that is to regulate health practitioners which is contrary to s 51 (xxiiiA.) of the *Constitution* as affirmed by *Wong v the Commonwealth*.

387. It is also Constitutionally impermissible because whilst cooperative federalism (and national schemes) has been previously endorsed by previous High Court decisions, these decisions involved schemes with a concomitant Commonwealth Act to allow for proper electoral accountability, representative democracy, and the application of Judicial power to enforce orders against officers of the Commonwealth.

388. The removal of a Commonwealth Act in the current NRAS provides for no accountability to which the Federal Minister for Health can be held accountable for any of his actions under the Ministerial Council, and that is because he actually holds no power without a Commonwealth Act. If one of the key members of the Ministerial Council is unlawfully regulating health practitioners (both from a legislative basis and by doing indirectly what he cannot do directly) then all members of the Medical Board of Australia have been unlawfully chosen, for the Federal Health Minister had no authority to choose them, neither from any impugned authority of the *National Law* and because of the constraints against his power by virtue of the *Constitution*. This creates a distinct jurisdictional error on behalf of the entity purporting to make the s 156 and s 160 decision against the Applicant.

389. Thus, this merging of state and federal power without respecting the limits of state and federal power and the supremacy of the Federal Parliament to make federal laws undermines the very framework of our representative democracy, that is the *Constitution* itself. This scheme makes a nullity of s 109 of the *Constitution* and ignores Clause 5 and gives even less respect to Chapter 1 Part 1 Section 1 of the *Constitution*. Our form of representative democracy is inherent to the *Constitution* as stated in paragraph 44 of *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18; 95 ALJR 490. Therefore because of these constitutional infringements **Australia's very democracy is at stake**.

390. In Submission C at Paragraph 1 (c) the Third Respondent argues that, "It is well-established that an entity may derive its existence and its powers from more than one Act, including the co-ordinated Acts of different jurisdictions." However, the authorities the Respondent references are distinguishable from this Matter because these cases make references to Schemes that involve cooperative federal schemes of a vertical nature (that is involving State and Federal legislation) not of a horizontal Adoption of Laws model (the current N.R.A.S.) where it is only the states that are

108 See Exhibit P-1 Health Ministers' Meeting

involved. For this reason, it is not cooperative (and thus not constitutional) for the State (or States) to confer federal executive power on AHPRA or the Board as there is no federal legislative power.

391. In paragraph 34 of the Respondent's Submission C it is stated that s 7 (2) of the *National Law* is the mechanism by which the State of Queensland derives its lawful power to administer one single national entity even without an appropriate acceptance provision at a Commonwealth level because the powers conferred to the single national entity are so conferred by the several States and Territories. The Applicant's argument against this is that the *Health Practitioner Regulation National Law Regulation* (2018) unlawfully delegates Queensland's executive power to the Ministerial Council (as authorised at Part 11 s 245 of the *Schedule*) and in so doing exceeds the Constitutional limits on Federal executive power, that being that states do not hold it.

392. Furthermore, in paragraph 42 of the Respondents' Submission A/B **they declare that AHPRA is not a single national entity.** The Respondents write that AHPRA is a national body, "composed of effectively different state agencies". It seems that no one can agree on what or who AHPRA is, least of all AHPRA (and the Ministers who oversee it) themselves.

393. Furthermore, in *R v Hughes* [2000] there was much constitutional uncertainty as to how and when national schemes could delegate legislative powers vertically to Commonwealth officers and entities, and that uncertainty was in the context of a National Scheme that held within at its foundation a Commonwealth law. The current NRAS does not even have that foundational law and is operating without the legislative or executive cooperation of the Commonwealth so the invalidity of the State of Queensland in purporting to lawfully exercise the administration of a single national entity is clear.

Constitutionally Impermissible Model – Extra-territorial powers

394. To counter the Applicant's arguments that the *National Law* is unconstitutional because of its beyond powers application of its Part 1 s 8 provision in the *Schedule*, the First and Second Respondents referred to the ruling in *Union Steamship Co of Australia Pty Ltd v King* [1988] HCA 55; 166 CLR 1 (the *Union Steamship case*) to defeat his argument.

395. This case has no relevance to this Matter because it did not involve any issues of interstate issues which is a central issue in this Matter. The Applicant is challenging the operation of the *National Law* and the *Schedule* and its ability to operate within the territorial boundaries of another state. No such issue arose in *the Union Steamship case*, the central issue there being whether the state Act operated whilst the ship was at sea, not whether it operated within the territorial boundaries of another State. Nor does it provide any support for the proposition that an Act of one state can have operational effect within the territory of another state.

396. The *Union Steamship case* did not decide that the State act, the Workers' Compensation Act 1926 (N.S.W.) operated within the territorial boundaries of another State all of the time (excluding any conduct or events within the boundaries of another state), which is the central issue in this Matter.

397. The *Union Steamship case* was essentially a matter between the state of NSW and the sea. The sea does not have its own legislative body with defined territorial limits to make laws for people that live on it. Therefore, the ruling in the *Union Steamship case* cannot be relied upon as support for the lawful operation of a State act within the boundaries of another state.

398. Furthermore, all the *Union Steamship case* decided was that seamen who suffer an injury at sea are entitled to compensation under the State Act, the Workers' Compensation Act 1926 (N.S.W.). To deny compensation under the state Act to an employee who suffered injury whilst on the ship designed to compensate workers against injury simply because the injury was suffered whilst at sea is absurd to say the least. In this instance, the ship would be considered a part of the territory of NSW, and thus the state act had no "extra-territorial" operation, let alone operation within another state, which is the central issue in this Matter.

399. Moreover, it is not an authority for resolving which state court has jurisdiction between two competing state acts, or more precisely which state Medical Board, in relation to a set of jurisdictional facts. When the issue of competing State acts is resolved, then and only then, does the court within that jurisdiction apply that state's relevant act. The act in the *Union Steamship case* however, never operated outside of the state's territorial boundaries which created it. It is only the jurisdictional facts that can escape the territorial boundaries of any given state, and not the individual laws of the states which remain firmly confined within their own territorial limits.

400. The concept of "extra-territorial" operation of State acts only operates in reference to circumstances when **something happens interstate,** where you may have two competing States attempting to make a greater claim than the other to jurisdiction over those facts. This is especially relevant where the penalties differ among the States. It also comes into operation by way of the *National Law's* Part 8 s 193B ss 3 (a) powers where it is written, "(3) The National Board must (a) refer the matter to – (a) (i) the responsible tribunal for the participating jurisdiction in which the behaviour the subject of the matter occurred; or (ii) 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;". This demonstrates clearly at Part 8 s 193B ss 3 (a) (i) that it does not matter where the health practitioner is regulated, their impugned conduct will be referred with administrative tribunal merits review in the State or Territory where the conduct occurred. This absolutely determines that the substance and operation of the Board (and AHPRA and the *National Law*) is **a national, not a State-based system.**

401. At paragraph 24 of Submission C the respondents write that, "it is well-settled that State legislation may operate with respect to circumstances outside the State where there is even a 'remote and general connection between the subject-matter of the legislation and the State'". However, the Applicant relies on *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1 at [141] to submit that such State legislation must not, "contradict the implied limitations on State legislative power inherent in the federal Constitution." Furthermore, it is the correct interpretation of the *Australia Act* 1986 s 2 (2) that this Act does not exclude the limits on State legislative power implied within the *Commonwealth Constitution* as well.

402. This issue is particularly relevant with respect to Part 1 s 8 and Part 8 s 38 of the *Schedule* as these sections purport to exert extraterritorial powers that contradict the implied limitations on State legislative power inherent in the *Commonwealth Constitution.*

403. Extraterritorial operation of the *National Law* by way of s 8 of the Schedule creates a Commonwealth law in substance and by use of the word National in form. The extraterritorial operation creates Constitutional crises by bringing to the fore conflicts of different versions of the *National Law* across the country (especially since aspects of the Applicant's impugned conduct was done interstate, that is, at a national level). This is why a singular, uniform national law is necessary to the effective operation of representative democracy and lawful constitutional jurisdiction under Commonwealth law. The absence of such safeguards entraps citizens (and health practitioners) unwittingly in a myriad of complex, variable, inconsistent 'National Law(s)' that have the effect of clear jurisdictional error if not uncertainty, and thus inevitable invalidation of the administrative actions taken under this law or laws.

404. The Respondents in Submission A/B at [40] argue that because the *National Law* is "complementary or uniform legislation' there are no constitutional limitations on the extra-territorial operation of the *National Law*. It follows therefore that **if the Applicant can demonstrate beyond the balance of probabilities that the *National Law* is not uniform or complementary legislation then the Respondents' argument is defeated** and the National Law shall be determined as unconstitutional and thus invalid.

405. **The Applicant can demonstrate the *National Law* is not uniform or complementary legislation**. The W.A. version of the *National Law* has not been updated since 2018[109,] furthermore it does not automatically adopt amendments of Queensland National Law like the other several States and Territories do, perennially resulting in a time-lag and difference between the National Law of W.A. and the other States and Territories. Furthermore, the amendments to the *National Law* in Queensland require the passing of Regulations in South Australia to effect changes from Queensland. Amendments in Queensland are automatically applied in New South Wales but are not required to be published by the NSW parliament within **any** given time, therefore the citizens of NSW (and by way of Part 1 s 8 all Australians) operate under laws that are constantly out-of-date. Furthermore, Queensland and New South Wales are co-regulatory jurisdictions for the purposes of the *National Law*, with the other states and territories not being co-regulatory jurisdictions at all. The implication of this is that there are different professional conduct review processes and even different statutory authorities (the Queensland Office of the Health Ombudsman, and NSW's HCCC) to which health practitioners' conduct is adjudicated in depending on which jurisdiction the *National Law* is determined to apply in. Furthermore, the substance of specific *National Law* provisions is different amongst the various versions of the *National Law*. For example, the immediate action power the Applicant's conduct was impugned under is listed at different parts of the *National Law* depending on which state National Law variation is examined e.g. in NSW it is s 150 that gives the immediate action power, and in Queensland it is s 156. And finally and clearly, the First and Second Respondents demonstrate without a doubt the inconsistency in the National Law by stating in paragraph 83 of Submission A/B concede that in regards to, "… s 150 of the National Law (NSW). **There is no equivalent provision in the**

109 Exhibit Y-2 Health Practitioner Regulation National Law (WA) Act 2010

National Law (Qld).” (emphasis added). By way of these example the Applicant has risen to the challenge of clearly demonstrating the unconstitutional nature of the *National Law* and thus a declaration that **the *National Law* is invalid** is apt to be issued by the Court.

406. In summary, the Respondents argue that the extra-territorial powers of s 8 of the impugned *National Law* are mere lawful provisions of a suite of lawful state laws, merely being named a National Law. The proper understanding, as the Applicant suggests, is that the naming of the *National Law* as the *National Law* is a misrepresentation of the truth, the truth being that the *National Law* is an unlawful child of a multitude of different State parental legislatures created by the unlawful drafting mechanism of individual and inconsistent State laws (with the State of Queensland sitting at the helm of this unconstitutional family) purporting to act if it were a National (that is Commonwealth) law, and therefore **the *National Law* is neither a lawful national (that is Commonwealth) law in name or in substance** and is therefore unconstitutional and must be removed from the Australian polity.

407. In other words, the *National Law* is not a State law or even a number of State laws. This is only true so far as to their creation. Everything else beyond their drafting[110] demonstrates this law exists and operates at a National or Commonwealth level with unlawful National legislative and executive powers. Therefore, the *National Law* is not a true Commonwealth Law, and neither is it a State Law, nor is it even a National Law, in essence **it is not a law at all**.

Constitutionally Impermissible Model – Confusing model

408. As mentioned above, it is confusing as to whether the *National Law* is a state or national law. On 17 August 2022, the First and Second Respondents (AHPRA and the Board respectively) made a decision to suspend the Applicant’s registration as a medical practitioner (the Decision) pursuant to s156 of the *Health Practitioner Regulation National Law* (the *National Law*).[111] The Applicant contends that there is no such law in the entire Commonwealth of Australia so named the “*Health Practitioner Regulation National Law* (the *National Law*). This is where the confusion starts.

409. There need not be such confusion though, as there is only one version of Commonwealth acts. By this reason alone it can be known that the *National Law* is not a Commonwealth law by name or form, as much as it purports to be one (notwithstanding the Respondents deny that it can be so impugned).

410. At [42] of the First and Second Respondents’ Submission A/B it is agreed that the operation of the NRAS is at national level however where the Applicant and the Respondents disagree is in the legality of the method upon which these National Scheme has been enacted. The Respondents argue it is a lawful application of a conglomeration of multiple state and territory laws (despite them being different laws) co-authoring one national body.

110 As per the *Qld Rail case* and Ha v New South Wales [1997] the substance of a law must not evade by a drafting mechanism a proper constitutional examination.
111 Bay Affidavit, Exhibit B-1

411. This legislative design is defective because the constitution only allows for the Commonwealth to create national laws. Second, the Applicant agrees that there can be cooperative federalism schemes, however, the Commonwealth must be involved to effect this (as all previous schemes were and have been) with a Commonwealth statute to give authority, constitutionality, and legitimacy to the scheme. Without this mandatory requirement there cannot be consistency of law across the country (and thus there cannot be a just application of national laws) and this also makes the lawful executive application of these laws via the NRAS impossible, and, even if the states had created a uniform national law what that amounts in substance to is a Commonwealth law absent the commonwealth which is prohibited by the *Constitution* and would be doing indirectly what can't be done directly by the Commonwealth which is the national regulation of health practitioners.

412. It is worthwhile repeating here (as it adds to the Applicant's argument about confusion) that in paragraph 42 of the Respondents' Submission A/B **they declare that AHPRA is not a single national entity.** The Respondents write that AHPRA is a national body, "composed of effectively different state agencies". It seems that no one can agree on what or who AHPRA is, least of all AHPRA (and the Ministers who oversee it) themselves.

413. At [20] in Submission C the Respondent writes that the powers conferred on the NRAS are by virtue of acts of the several states and territories. The Applicant disputes this interpretation because the *Qld Rail case* indicates that the substance of a scheme must be examined not merely the name. The substance of the NRAS is one of a scheme involving not just the adoption acts of the several states and territories but the Application Act (the *National Law*) of Queensland as well. And in doing so, the power conferred on the NRAS is an impermissible power by a central legislative authority that being the State of Queensland which is ultra vires the powers of the State of Qld by way of Chapter 1 Part 1 s 1 of the *Constitution,* and Chapter VI s 122 of the *Constitution*.

414. This summary in Submission C also neglects to mention that a key component of the NRAS which makes it constitutionally impermissible is the omission of an over-arching or enabling act of the Commonwealth Parliament to give it lawful National legitimacy and uniformity and/or to bestow its legislative jurisdiction on a State parliament. Because of this omission of the Commonwealth, it makes it not a cooperative federalism scheme, rather it should be correctly viewed as subversive federalism scheme.

415. At paragraph [22] in Submission C it is written that "As the scheme established operates nationally, the use of the word 'National' in the title of the legislation is accurate, not misleading. Its use does not suggest that the legislation is Commonwealth legislation." The word "national' is reasonably interpreted to the jurisdiction of the relevant act of which it is included in the name. This is misleading in circumstances where an act is an act of a state within the limits of state jurisdiction and such a misleading name regularly results in jurisdictional error (such as in this Matter). This is the very reason this matter has come to this Court for review.

416. At paragraph 23 in Submission C the Respondent writes, "The National Regulations do not amend or modify Commonwealth laws. Instead, the National Regulations modify Commonwealth Acts as those Acts apply as a law of each participating jurisdiction." This is not true, for whilst *R v Hughes* found that a state

can apply the law of the Commonwealth as if it were the law of the State, it did not hold that the State can modify the law of the Commonwealth as the *Regulation* seeks and in fact does do at many sections too numerous to document here. This is once again upending the hierarchy of powers in the *Constitution* in favour of the State having predominance over the Commonwealth which by way of s 109 of the *Constitution* is not true.

417. At paragraph of 22 of the Respondent's Submission C they state that, "As the scheme established operates nationally, the use of the word 'National' in the title of the legislation is accurate, not misleading. Its use does not suggest that the legislation is Commonwealth legislation." This is clear evidence that even the Third Respondent agrees that the Scheme is in operation nationally, the only disagreement is whether national means Commonwealth. As per the *Qld Rail case* it does not matter what the label is; what matters is the substance. The Respondent's assertion that the use of the word of National does not suggest that means Commonwealth is a disingenuous attempt to pervert the plain English meaning of the word National.

418. National is defined by the Cambridge dictionary as: "relating to or typical of a whole country and its people, rather than to part of that country or to other countries". Clearly this is equivalent to the Commonwealth.

419. The only lawful recognised jurisdictions of government within Australia (as per the Commonwealth Constitution) are the Commonwealth and the States. The word 'national' does appear no greater than zero times in the Commonwealth Constitution. So, by definition there is no national law, and thus it must interpreted as Commonwealth law because it cannot be interpreted as a state law for state laws by definition do not cover the nation. To suggest that the true meaning of national is actually best construed as a state law is highly misleading if not subversive to the Constitution and the Australia people's (and health practitioners') understanding of the jurisdiction of this impugned National Law, and for this reason must be disregarded, and preferably orders given by this Court to correct this injustice.

420. At Paragraph 37 of Submission C of the Third Respondent, the Respondent alleges that the Applicant's s 156 decision was made under the *Schedule* to the *Health Practitioner Regulation National Law Act* 2009. This is not factually correct. It has never been determined what law or act the Applicant was penalised under.

421. Furthermore, their interpretation of what law the Applicant was penalised under is different to what law the First and Second Respondents assert the Applicant was penalised under. At paragraph 2 of Submission A/B the First and Second Respondents write, "s 156 of the *Health Practitioner Regulation National Law* (Qld) **(**National Law)" was the law under which the impugned administrative decision was made. This is a perfect example of how confusing and thus unjust this conglomeration of mislabelled, and misleading laws (that are called a singular law and national law where it is not but purports to be) is causing massive jurisdictional and administrative confusion and leading all respondents into jurisdictional error.

422. The Western Australian adoption act (the National Law W.A.) is a good example of the confusing model of this NRAS. There has been no amendment to the National Law since 1 Dec 2018. This makes a consistent national law impossible to obtain as there

has been an amendment to the host *National Law* as recent as 21 October 2022. With AHPRA purporting to hold the registration of health practitioners at a national level (which includes Western Australia) how is possible for any health practitioner (including the Applicant) to obtain any form of justice under this irregular, inconsistent, and out-of-date suite of National Laws? The Applicant asks the Respondents how they can explain the constitutionality validity of a National Law that exists in different variations around the Nation at any given time? This is especially relevant when a) the Applicant's conduct occurred across State borders, b) there is an ongoing s 160 investigation against the Applicant that may involve further cross-border issues c) the state variation of the law that the decision to take immediate action against the Applicant was not stated, meaning that it may be this outdated law the Applicant was subject to.

423. The Western Australia National Law also reveals some more confusion in the adoption of laws model. The Schedule of WA is their own (whilst the wording is from Queensland) they need to pass an act amending all the wording in the Schedule contained within the Health Practitioner Regulation National Law W.A. Also, they pretend to operate the National Law as a state-based law (by passing their own amendments) but still also pretend (like eating cake and having it too) to have a single national law with single effect and a single regulatory agency yet their law doesn't even have Part 1 Section 3A Guiding Principles - Paramount Importance of the protection of the public with the other states.

424. Clearly, the sections of the National Law WA is not the same as the National Law Qld or any other state so how can this be a national law? Yet the Respondents will argue it's not a national law in one breath whilst in the next breath claiming AHPRA and the Board possess national regulatory power. The Applicant asks the Respondents to pick a lane. AHPRA and the Board either possess National (that is Commonwealth) jurisdiction or they don't. All three Respondents cannot continue this charade of swapping and changing the character of the laws they seek to create and administer according to the conveniences of the day and must ultimately confess to what jurisdiction these laws and agencies operate on for want of a complete lack of jurisdictional fairness and natural justice. In the alternative, the Court must make a clear determination as to the true limits and scope of the jurisdiction of these entities and so give orders in favour of the Applicant to that effect.

Constitutionally Impermissible Model – Not an established scheme

425. The frequency and or history of use of and adoption-of-laws model is irrelevant to its constitutional validity. Just because the NRAS has been in effect for 12 years doesn't mean its valid despite the Respondents' assertions to the contrary. By way of example, slavery was valid for many, many years yet that did not prevent an ultimate determination of the illegality of such.

426. At [1] and [17] of the Submission C respectively, the Respondent has argued that similar National Schemes have been frequently used and are a well-established regulatory model. It is of no relevance to the constitutional validity of such schemes how frequently they have been used. What is relevant is their adherence to the limits of

the Constitution. As to their well-establishment, the High Court has not considered the Constitutionality of these schemes. The High Court has only considered schemes involving Commonwealth legislation. This means that such regulatory models are not able to be well-established but are in fact ripe for decision on their legality by the High Court.

427. The validity of horizontal National Schemes has not been ruled upon in the High Court, thus making the NRAS unchallenged to date, and thus makes this case significantly in the public interest and in so doing further makes the prospect of summary dismissal appropriate.

428. Gummow J at [165] in *Gould v Brown* [1998] HCA 6; 193 CLR 346 when examining the Corporations Act national scheme said, "The adoption was of s 82 "as in force for the time being". The result is that s 7 of the NSW Act carries into the Corporations Law of New South Wales the Corporations Law set out in s 82 of the Commonwealth Act as modified from time to time by the Parliament of the Commonwealth in its operation as a law for the government of the ACT. The appellants challenge the competence of a State Parliament to legislate for the ambulatory adoption in this way of the laws made by another legislature[208]. Because the outcome of the appeal will turn upon other issues **it will be unnecessary to determine whether the appellants are correct in their challenge to s 7 of the NSW Act**." (emphasis added).

429. Further commentary on unresolved issues pertaining to adoption of laws models were highlighted in *Gould v Brown* [1998] by Justice Gummow at [159], "The laws of two or more States, by their terms or in their operation, may affect the same persons, transactions or relationships and do so by laws which are in conflict. The Constitution contains no express paramountcy provision by reference to which such conflicts are to be resolved. **As yet, no decision of this Court has remedied the deficiency**." (emphasis added). This again makes this case ripe for decision by the High Court.

430. At paragraph 18 of Submission C the Third Respondent it was stated that, "There is no constitutional objection to such schemes." This an assumption with no basis in law as the schemes in questions (horizontal adoption of laws model schemes) have yet to have their constitutional validity considered by the High Court. And by implication the limits provided by Chapter 1 Part 1 s 1 of the *Constitution* clearly imply that only the Federal Parliament has the legislative power of the Commonwealth, as well as Chapter VI s 122 where it states that the Commonwealth has the responsibility to legislate for the Territories, and by implication not the States. Notably, in *R v Hughes* [2000] it was said at [69] that an example of cooperative schemes lawful under the Constitution include both s 51 (xxxvii.) and (xxxviii.) referrals. No reference was made to schemes where the Commonwealth is a mere passive party, again making interest in this Matter acute.

431. In the case of *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1 at [141] it was stated, "A point will indeed be reached in the legislation of one State having extraterritorial effect upon persons, events or things in another State, that will contradict the implied limitations on State legislative power inherent in the federal Constitution". This issue is particularly relevant with respect to Part 1 s 8 and Part 8 s 38 of the *Schedule* as these sections purport to exert extraterritorial powers that

contradict the implied limitations on State legislative power inherent in the *Commonwealth Constitution.*

432. The following cases are all relied upon in the arguments for the validity of cooperative federalism schemes yet only involve vertical schemes utilising Commonwealth legislation: a) *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* [1983] HCA 29; 158 CLR 535 considered this case involving Commonwealth legislation of the *Coal Industry Act* 1946 (Cth), b) *Hide and Leather Industries Act* 1948 (Cth) considered in *Wilcox Mofflin Ltd v State of NSW* (1952) 85 CLR 488 at 508-511, 526-528, c) *Air Navigation Act* 1920 (Cth) considered in *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1 at 40, 42, 48; d) *Wheat Industry Stabilization Act* 1974 (Cth) considered in *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120 at 179.

433. *R v Hughes* [2000] HCA 22; 202 CLR 535 at [71] says it is, "clear that a high level of cooperation between the constituent parts of the Commonwealth is envisaged." under our cooperative federal Constitution. What is lacking here in the NRAS is just that, cooperation. The NRAS is absent a Commonwealth Act in this national that is Commonwealth scheme.

434. In *R v Hughes* [2000] at [1] it is stated, "The national scheme was implemented by legislation of the legislatures of all the polities that were parties to the Alice Springs Agreement." This included the Commonwealth. This is demonstrably not the case with the 2008 Intergovernmental agreement and the *National Law* and is thus entirely distinguishable.

435. Finally, due to state and federal unanimity on the issue national schemes, these schemes seem not to have been challenged until now, but "Governmental unanimity and convenience cannot override the requirements of the Constitution…" said Kirby J at [272] in *Gould v Brown*. Thus, the Applicant asks the Court to look past the initial Intergovernmental Agreement to cast a critical eye on the legality of this impugned *National Law* and NRAS and provide the Applicant with the relief he seeks.

Qld does not have plenary power beyond that which the Constitution permits.

436. The Applicant relies on the authorities of *Gould v Brown* and *Mobil Oil Australia Pty Ltd v Victoria to* counter the argument regarding the plenary power of the State of Queensland to make whatever laws it sees fit to regulate health practitioners.

437. It is stated, "At the establishment of the Commonwealth, **a State Parliament did not possess universal legislative power**." In Gould v Brown [1998] HCA 6; 193 CLR 346 by Brennan CJ and Toohey J at [5]. (emphasis added)

438. In *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1 it is stated at [100], "The authority of the Supreme Court over Mobil cannot expand the power of the Parliament of Victoria so as to enlarge the ambit of those matters in respect of which, consistently with the federal Constitution, that Parliament may validly make laws. Because the authority, jurisdiction and powers of the Supreme Court may be traced to, and must ultimately be sustained by, the provisions of the federal Constitution**, no statute, federal or State, and no rule of the common law or equity could expand**

the legislative powers of the Parliament of Victoria beyond those that the federal Constitution provides or permits." (emphasis added)

439. In *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1 at [141] it was held, "It follows that the basic proposition that Mobil advanced can be accepted. A point will indeed be reached in the legislation of one State having extraterritorial effect upon persons, events or things in another State, that will contradict **the implied limitations on State legislative power inherent in the federal Constitution**". (emphasis added)

No head of power under the Constitution to regulate medical practitioners

440. The Commonwealth cannot regulate medical practitioners by way of a lack of a head of power due to s 51 (xxiiiA.) and the findings of *Wong V the Commonwealth.* The Respondent in Submission C in paragraph 29 says that just because the Commonwealth can't undertake national regulation of health practitioners does not mean the States cannot regulate health practitioners nationally. The Applicant's counterargument is that he did not say that states cannot regulate health practitioners (in fact, the Applicant suggests this is the preferred method of health practitioner regulation) and the Applicant is not suggesting that there can be no national law to regulate health practitioners, what he is arguing is that such a National Law must be enacted by the Commonwealth by way of a section 51 (xxxvii.) referral or a referendum to allow the national regulation of health practitioners by the Commonwealth.

441. Alternatively, state-based lawful regulation of health practitioners should be and must achieved by the same way that they always were prior to 2010 (and the introduction of the impugned NRAS) that is by stand-alone state acts conferring state based registration schemes on state located practitioners which is exactly what the State Medical Boards around the nation used to do. It is beyond the power of a state parliament to act with Commonwealth legislative jurisdiction.

442. At [253] in *Wong v Commonwealth* the Court explained the relevance of examining the practical operation of an Act when determining juridical issues. The pointed to that it's the practical operation of the Act that matters, not just its terms. Therefore, what matters is what the *National Law* does in substance (i.e. national regulation of health practitioners) that matters not what it says it does (ironically this is the same thing). This finding is consistent with the *Qld Rail case* as well. The Respondent's reliance on the mechanism by which the *National Law* is set up (multiple state acts) as a defence to the unconstitutional substance of the *National Law* is thus bound to fail.

443. Furthermore, in *Ha v New South Wales* Brennan CJ, McHugh, Gummow and Kirby JJ said:

"When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – **its practical operation – must be examined** as well as its terms in order to ensure that the limitation or restriction is **not circumvented by mere drafting devices**. In recent cases, this Court has insisted on an examination of the practical operation (or substance) of a law impugned for contravention of a constitutional limitation or restriction on power." (emphasis added). Consequently, this reasoning will defeat the

Respondent's argument that utilising different states and territories to obscure the source of legislative authority is sufficient to make the NRAS constitutionally invalid and it follows orders in favour of the Applicant are required.

Queensland is exceeding the Executive Power of the *Constitution*

444. By way of s 61 and 62 of the Constitution it is ultra-vires the State of Queensland's executive power to nationally regulate health practitioners via the National Registration and Accreditation Scheme[10], and create "one single national entity"[11] named the Australian Health Practitioner Regulation Agency[12] (AHPRA) (the First Respondent) and the Medical Board of Australia[13] (the Second Respondent) where section 51(xxiiiA.) of the Constitution[14] prohibits the national (or Commonwealth) regulation of health practitioners, and the Commonwealth Parliament is omitted from the national scheme, and where neither body can be correctly or lawfully identified as an Australian entity, and whereby there is a lack of legislative oversight on the exercise of executive power held by these national entities and one state has the authority to regulate the nation.[112]

445. At paragraph [20] of the Respondent's Submission C they state that Queensland does not nationally regulate health practitioners. This is demonstrably untrue by way of Part 11 s 245 and s 246 of the *Schedule* where those sections by enactment of executive power through the *Regulation*s confer national administration. This is also not true by way of the express wording of Part 1 s 7 ss 3 (b) of the *Schedule* where it is written, "An entity established by or under this Law may exercise its functions in relation to- b) 2 or more **or all participating jurisdictions collectively**." (emphasis added). Clearly the statement of fact by Respondent C in paragraph 20 is wrong.

446. Also, at Paragraph [23] where the Respondent in Submission C writes that, "the National Regulations do not amend or modify Commonwealth laws.", that is also demonstrably untrue by any examination of the *Regulations* which shows the following sections modifying Commonwealth laws:

a. Part 3 Application of AIC Act
b. Part 4 Application of FOI Act
c. Part 5 Application of Ombudsman Act
d. Part 6 Application of Privacy Act

All these regulations are (unlawfully) brought into force by the legislative power of the Third Respondent in Part 11 s 245 and 246 of the *Schedule*.

447. Furthermore, the modifications made by the *Regulations* are directly exerting control via the Queensland Parliament's delegated executive power over Commonwealth entities including the Commonwealth Ombudsman. See for example Part 5 Section 28 of the *Regulations*:

28 Modifications about financial matters
The Ombudsman Act applies as if it were modified to provide

112 National Law Part 1 S 7 ss 3 (b) - An entity established by or under this Law may exercise its functions in relation to— 2 or more or all participating jurisdictions collectively.

that the National Health Practitioner Ombudsman must—
(a) ensure the Ombudsman's operations are carried out efficiently, effectively and economically; and
(b) keep proper books and records in relation to the funds held by the Ombudsman; and
(c) ensure expenditure is made from the funds held by the Ombudsman only for lawful purposes and, as far as possible, reasonable value is obtained for amounts expended from the funds; and
(d) ensure the Ombudsman's procedures, including internal control procedures, afford adequate safeguards with respect to—
(i) the correctness, regularity and propriety of payments made from the funds held by the Ombudsman; and
(ii) receiving and accounting for payments made to the Ombudsman; and
(iii) prevention of fraud or mistake; and

448. It is argued that subordinate legislation of the Queensland Parliament (the *Regulations*) modifying Commonwealth acts for any reason equates to the Queensland Parliament exercising Commonwealth or **superior Commonwealth legislative jurisdiction**. This is alarming, unconstitutional, and distinguishable from the case of *R v Hughes* because that case did not involve regulations nor involve regulations modifying a Commonwealth act.

449. Hence, in contrast to the Respondent's statement in paragraph 21, the State Queensland is demonstrably enacting a legislative formula that amounts to a law of and the exercise of the executive power of the Commonwealth which is prohibited by the Constitution[113].

450. In the case of the *Corporations Act* National Scheme as discussed in *R v Hughes [2000]*, this dubious investment of state powers in Commonwealth administrative bodies had the effect of creating a Constitutional crisis resulting in the upwards referral of State power to the Commonwealth. This situation seems to be a matter of 'history repeats' when it comes to the *Regulations* in Part 3 s 8 imposing conditions and duties on Commonwealth officers. It follows then that a similar Constitutional crisis has been uncovered and ultimately may lead to another s 51 (xxxvii.) referral to resolve this situation.

451. In paragraph 34 of Submission C the Third Respondent agrees with the Applicant that the case of *R v Hughes* shows that a state cannot unilaterally invest functions onto officers of the Commonwealth. Yet, that is exactly what the *Regulations* are doing at multiple sections of the *Regulations* as a result of the modifications made by the Queensland Parliament who delegate their executive power to the Ministerial Council and then authorise them to do so at Part 11 s 245 of the *Schedule*.

452. Furthermore, as the High Court has not addressed the constitutional validity of horizontal cooperative federalism schemes it follows the High Court has not fully addressed the constitutional validity of the use of executive power in these schemes.

113 And warned against in the case of R v Hughes [2000].

The Applicant contends however, that a close examination of the substance of the NRAS will reveal to the Court a situation of executive overreach at a state and national level. For this reason, the administrative decisions taken by AHPRA and the Board against the Applicant must be quashed before further harm is done to the Applicant.

Impermissible Burden on Political Communication

453. The guiding principle of the impugned *Schedule* says at s 3A that "restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality." It is argued by the Applicant that restricting political speech of health practitioners by exercising s 156 powers to suspend practitioners for social media statements and peaceful political protest is clearly an impermissible burden on the implied freedom of political communication because it does not balance well with the guiding principle that seeks to make restrictions only relevant to the safety and quality of medical services.

454. Restricting political communication also restricts medical communication and in-effect actually achieves the opposite of the National Law's goals, that is; unsafe medical practice. This is because without the free-flow of information between citizens, Government, and health practitioners it is inevitable poor clinical outcomes will be achieved due to the nature of free-thinking scientific inquiry and publication being central to medical advancement.

455. Indeed, that is exactly what has happened with the Covid-19 vaccine national immunisation strategy that has resulted in excess mortality figures of between 16-19% and many adverse events being reported to the Therapeutic Goods Administration and its VAERS reporting system.

456. The Third Respondent in paragraph 41 of Submission C begins their argument by mischaracterising the Applicant's argument (without reference to his submissions) by implying that his assertion of invalidity of the s 156 of the *National Law* is not with the section of the Act itself but with the validity of the exercise of the Board's power under that section. The Applicant, for the avoidance of doubt, re-asserts that it is the actual section of s156 that is impermissibly burdening the implied freedom of political communication as a public, not as personal right. With that proper understanding now in place the Applicant will begin to respond to the Third Respondent's arguments.

457. The Third Respondent writes in paragraph 39 of Submission C that the correct two-stage test for the invalidity of the impugned act for implied freedom of political communication begins with a consideration whether the law places an effective burden on the implied freedom. The case of *Libertyworks Inc v Commonwealth* (2021) 95 ALJR 490,504 [45]-[46] says that the first step is "…the identification of the purpose which the statute seeks to achieve. That purpose must be legitimate, which is to say compatible with the constitutionally prescribed system of representative government. If the statute does not have a legitimate purpose no further consideration will be necessary, for invalidity will be made out."

458. Because AHPRA and the Board have imposed a Position Statement expressly limiting the freedom upon which health practitioners can comment on government

policy[114] and because the Reasons for Decision[115] state that it was the Applicant's disobeying of Government policy and political process that formed the basis of the s 156 decision against him; that clearly demonstrates that a possible outcome (indeed the very outcome in this matter) is the suppression of a freedom of political communication for all health practitioners through the exercise of the s156 discretionary power.

459. The required standard of care is read in as an implied component of the s 156 determination and the decision makers purport that it forms a part of the standard of care (although the Applicant contests this). Therefore, the s 156 decision has sitting under it the required standard of care that enlivens this power.

460. Since 9 March 2021, this position statement has prohibited speech countering government policy. This has therefore made s 156 of the *Schedule* inconsistent with responsible and representative democratic government thus invalidating s 156 immediately via the McCloy test. Since this first step of the test set out in *Libertyworks Inc v Commonwealth* has demonstrated an incompatible section of the Act then it is demonstrable that the s 156 decision has impermissibly burdened the implied right to a freedom of political communication thus making the administrative decision unconstitutional.

461. The First and Second Respondents in submission one at paragraph 50 misrepresent and misstate the position of the Applicant. The Applicant is impugning the 'Position statement 9 March 2021 Registered health practitioners and students and COVID -19 vaccination' (not the Vaccination Direction) as an impermissible limit on the implied right to freedom of political communication.

462. Referring to the submission of the First and Second Respondents in Submission A/B at paragraph 51, the Applicant submits, that s 156 of the *National Law* is invalid to the extent that it is used to enforce the 'Position statement 9 March 2021 Registered health practitioners and students and COVID -19 vaccination' or to limit health practitioners right to speak freely about political matters or to protest against such matters. This has no bearing on the purported alternative grounds for an exercise of the s 156 power.

463. The Applicant rejects the submissions of the First and Second Respondent in Submission A/B at paragraph 53, as the issue of the safety and efficacy of Covid-19 vaccines is such a significant political issue that it is currently the subject of a Senate inquiry on Long Covid and repeat infections and even the activities of AHPRA and the Board have been repeatedly subject to Senate Estimate Committee hearings in 2022 and 2023.

464. Delivering public communications on Covid-19 as the Applicant did, is directly relevant to political communication by being indivisibly linked to the decision of the Government to approve these vaccines for use in Australia and to make these vaccines a mandatory requirement for work including in Aged Care where the Applicant used to work. The 'Position statement 9 March 2021 Registered health practitioners and

114 See Exhibit G-1 Position Statement: Registered health practitioners and students and Covid-19 Vaccination

115 See Bay Affidavit at [34] and Exhibit B-1Reasons for decision

students and COVID -19 vaccination' itself says in its express words that any discussion that "actively undermine the national immunisation campaign (including via social media) is not supported by National Board's and maybe in breach of the codes of conduct and subject to investigation and possible regulatory action.". This is prima-facie evidence of the subject of Covid-19 vaccines being a political issue.

465. Such a campaign is a government immunisation campaign, the enactment of which, has created serious public safety risks and caused serious public harm and as such my discussion of such risks and harm is directly relevant to the electoral choices the public may make in future elections, particularly in light of the fact that the state government decisions to make vaccine mandates arose from meetings in the National cabinet headed by then Prime Minister Scott Morrison and attended by each of the State Government Premiers. The First and Second Respondents in Submission A/B at paragraph 54 agrees that the Applicant's communications "could be considered to be "political communications" to the extent that his comments were directed to actions of the Government mandating COVID-19 vaccines.".

466. The Applicant rejects the balance of the submissions of the First and Second Respondent in submission one at paragraph 54 as it constitutes a misrepresentation of the position of the Applicant. The Applicant's position is that it is the s 156 and s 160 decisions with reference to the 'Position statement 9 March 2021 Registered health practitioners and students and COVID -19 vaccination' that have impermissibly burdened the implied right to freedom of political communication.

467. Notably at paragraph 54 the First and Second Respondents agree that the "suspension decision prevented Dr Bay from working as a doctor while expressing those views". The Applicant submits that this statement amounts to an admission by the First and Second Respondents that the impugned sections and the 'Position statement 9 March 2021 Registered health practitioners and students and COVID -19 vaccination', directly limit the implied right to the freedom of political communication.

468. The statement by the First and Second Respondents at paragraph 54 that "subject to any other laws (such as relating to harassment), he remains free to express these views without fear of penalty", amounts to an admission of the First and Second Respondents that they are using the fear of the penalty of the s 156 and s 160 powers to effectively and impermissibly limit the implied right to freedom of political communication of health practitioners.

469. The express statement in 'Position statement 9 March 2021 Registered health practitioners and students and COVID -19 vaccination' that, "health practitioners must make sure that their social media activity is consistent with the regulatory framework for their profession **and does not contradict or counter public health campaigns or messaging, such as the Australian COVID-19 vaccination Policy"** is an express demonstration that the "measures which regulate" are directly regulating messaging and warning and that they are actively silencing health practitioners from saying anything that contradicts or is counter to government public health campaigns.

470. This constitutes an express regulation of communication relating to matters of Government and politics which is prohibited by the implied freedom per *Club v Edwards* (2019) 267 CLR 171 at [8]. Such regulation is expressly not limited to the "time, manner and place" of communications contrary to the assertions of the First and Second Respondent, and as such they do fall foul of the implied freedom; for example,

Club v Edwards (2019) 267 CLR 171 at [8]. Such regulation also falls foul of the standard required by the duty to warn pursuant to *Rogers v Whitaker [1992] HCA 58; 175 CLR 479 at [16].*

471. At paragraph 54 in Submission A/B the First and Second Respondents submit that the burden is acceptable because it only affects health practitioners from expressing political views. The Applicant submits that this is an absurd statement as the effect of restraining health practitioners from expressing political views has the effect of limiting the information that other voters have to enable them to make fully informed decisions when it comes to casting their next electoral vote. Voting is a form of political communication and it is for this very reason that the implied right to freedom of political communication exists; choosing electors is a fundamental requirement of our democratic system of representative government.

472. Limiting the ability of voters to be fully informed when casting their votes, constitutes a material unjustified effect on political communication as a whole per *Comcare v Banerji* (2019) 267 CLR 373 at [20]. In *Comcare* at [20] it was further held that the implied freedom extends so far as "is necessary to preserve and protect the system of representative and responsible government mandated by the Constitution". Health practitioners and administration through the *National Law* must protect the public and uphold professional standards and because the abrogation of the implied freedom in this case directly limits the ability of health practitioners to uphold their lawful duty to warn, allowing this abrogation of the implied freedom directly increases the risk to the public and directly causes health practitioners to be in breach of their required professional standards with regard to the duty to warn.

473. With reference to the submission of the First and Second Respondents at paragraph 56 the facts as outlined in their reasons for their decision[116] clearly demonstrates that their action has been taken against the Applicant because he has warned the public of inherent material risks of the medical procedures that have been mandated by the Government.

474. There is no reasonable or rational argument to support the abrogation of the duty to warn in any manner as being protective of public health and safety; and notably it is beyond the power of AHPRA and the board to do so as has been discussed at length in the Applicant's originating application and Submission One - Amended. As evidenced by the Senate inquiry it is the actions of AHPRA and the Board's interference with the ability of health practitioners to uphold their duty to warn that is directly causing distrust about Covid-19 public health measures and about the standing of medical practitioners as a whole and this has been directly caused by their burdening of the implied freedom and thus s 156 and s 160 are not "adequate in its balance" under the circumstances of this Matter.

475. The case of *Comcare v Banerjee* (2019) 267 CLR 373 as cited by the First and Second Respondent at paragraph 59 in Submission A/B is distinguishable from this Matter as the Appellant in the *Comcare Case* was not under any positive duty to warn, whereas the Applicant in this Matter is subject to such positive duty, the requirements of such which are notably not lawfully set by an administrative body and rather are set by the recipients of health services in conjunction with the provider of such services per *Rogers v Whitaker (1992).* The *Comcare Case* is also distinguishable because the Appellant was an employee of the government and the Applicant in this Matter is not

116 see Exhibit B-1

an employee of the government.

476. Contrary to the submission of the First and Second Respondent at paragraph 61, the effect of restraining health practitioners from expressing political views has the effect of limiting the information that other voters have to enable them to make fully informed decisions when it comes to casting their next electoral vote. Voting is a form of political communication and it is for this very reason that the implied right to freedom of political communication exists. Limiting the ability of voters to be fully informed when casting their votes, constitutes a material unjustified effect on political communication as a whole per *Comcare v Banerji* (2019) 267 CLR 373 at [20].

477. The express wording in 'Position statement 9 March 2021 Registered health practitioners and students and COVID -19 vaccination' on page 3 that "in informing their patient or client of a conscientious objection to COVID-19 vaccination, practitioners must be careful not to discourage their patient or client from seeking vaccination" directly refutes the submissions of the First and Second Respondents at paragraph 62 of Submission A/B; and supports the submissions of the Applicant that the Position Statement is unlawfully interfering with the duty to warn.

478. Further, the express wording in 'Position statement 9 March 2021 Registered health practitioners and students and COVID -19 vaccination' on page 1 that "this position statement explains how the Boards existing regulatory frameworks apply to COVID-19 vaccination. It should be read in conjunction with the standards, codes, guidelines, position statements and other guidance published by National Board's" shows that the position statement cannot be separated from the exercise of the discretionary powers under s 156 and s 160. Thus, the position statement can certainly be invalidated as unconstitutional to the extent that it affects the implied right to freedom of political communication and also upon further grounds such that it is contrary to law because it unlawfully interferes with the lawful standard of the duty to warn and in so doing causes a risk to public health and safety and has caused public harm and thus is also contrary to the requirements of AHPRA and the Boards in administering the impugned *National Law*.

479. At paragraph 70 the First and Second Respondents submit that "common law principle can (subject to constitutional guarantees and freedoms) always be overridden by legislation, State or Commonwealth" as a reason why they can limit the duty to warn to effectively stop health practitioners from warning of inherent material risks associated with the COVID-19 vaccines and the associated government rollout and policies. This argument must fail first, based on the submissions of the First and Second Respondents at paragraph 62 where they assert that the "Ahpra position paper is not legislation" thus defeating the notion of it being legislation able to overcome common law. And second, because of the fact the High Court Case of *Rogers v Whitaker (1992)* represents the current lawful standard for the duty to warn and for the duty of care in general for medical practitioners, which is directly relevant to and is relied upon by the courts in determining liability under the *Civil Liability Act* 2003 (Qld). Therefore, the First and Second Respondent's submissions at paragraph 70 are absurd and have no basis in fact or law and must fail on that basis.

480. For the same reasons as discussed regarding paragraph 70 the submission of the First and Second Respondents at paragraph 71 must fail also as this submission is absurd and has no basis in law with regard to the manner in which the decision of *Rogers v Whitaker* is applied in administering the *Civil Liability Act* 2003 (Qld).

Notably, if AHPRA and the Board lawfully interfere with and alter the standards required of the duty to warn (which they cannot) they would be liable under the concept of contributory negligence or liability arising from the *Civil Liability Act* 2003 (Qld).

481. The submission of the First and Second Respondent at paragraph 72 is irrelevant as the Applicant's contention is that it is the 'Position statement 9 March 2021 Registered health practitioners and students and COVID -19 vaccination' and its enforcement through s 156 and s 160 of the National Law that affects the unlawful interference with the lawful standard for the duty to warn pursuant to *Rogers v Whitaker*.

482. This statement by the First and Second Respondent at paragraph 72 demonstrates clearly and expressly that they do not understand what the lawful standard for the duty to warn is. The respondents state at paragraph 72 that, "The vast majority of the medical community is agreed on what counts as the material risks that need to be disclosed to patients before the COVID-19 vaccinations are administered." This statement constitutes an error of law as the standard for the duty to warn can only be determined with reference to the inherent material risks that a person in the position of the patient would find significant or that a doctor should know that a person in the position of the patient would find significant pursuant to *Rogers v Whitaker at [16]*.

483. This standard is clearly different dependent on which patient the standard is being applied to. It is unlawful to attempt to require a uniform standard across all patients as a uniform standard will absolutely result in serious patient safety risk and harm. The standard for the duty to warn is higher for a patient who has special risk factors as was in fact the case in *Rogers v Whitaker (1992)*. These submissions of the First and Second Respondents are flawed from a public safety perspective and are the most serious demonstration of the merits of the public interest in this Matter, that being the protection of public health and safety, through confirmation and reaffirmation of the limits of the administrative power of the First and Second Respondents, such that they cannot lawfully restrict or limit or interfere with the standard for the duty to warn for the benefit of safe and efficacious healthcare.

484. The First and Second Respondents at paragraphs 81 in Submission A/B make an admission that "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". This admission is evidence that the real reason for the decision is to unlawfully limit the implied right to freedom of political communication. Further, it is evidence that AHPRA and the Board are failing to uphold their obligations under the *National Law* to protect the public as the real reason for their decision is to protect confidence in the government public health response **regardless of the harm it is causing to members of the public**. Notably, at paragraph 83 the First and Second Respondents state, "There can be no suggestion that, here, Ahpra took the decision it did to protect public health and safety". This is a reason why there is currently a Senate Inquiry into 'Long COVID and Repeated Covid Infections' and repeat Federal Senate Estimate hearings into the actions of AHPRA and the Board in supressing medical (and political) opinion. Indeed, this very Applicant and his indefinite suspension by AHPRA has been a matter raised by Senator Malcolm Roberts in the Senate directly117.

485. In regards to this, suffice is to say that the discussion under the heading Materiality

117 See Hansard Thursday 10 November 2022, Community Affairs Legislation Committee at page 40

demonstrates the opinion of AHPRA and the Board is that they are above the law. It is for this reason that this Matter has significant merit, and findings against AHPRA is absolutely necessary to protect the public interest. Thus, it is for this reason (amongst many) that the impugned s 156, s 160 decisions must be quashed by an order of certiorari as they have been made contrary to the purpose of the *National Law*.

486. Turning to the arguments of the Third Respondent in this Matter, at paragraph 42 in Submission C they state, "The point was explained in *Wotton v State of Queensland:*

> "[I]f, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of the power thereunder in a given case ... does not raise a constitutional question, as distinct from a question of the exercise of statutory power (*Wotton v Queensland* (2012) 246 CLR 1, 14 (22] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Cotterill v Romanes* [2021] VSC 498 (174] (Niall JA)."

487. The Applicant submits that the proper construction of s156 includes consideration of the grounds upon which the power is enlivened. These grounds are stated in the reasons for decision; and as such the grounds within the reasons for decision must be included as extrinsic material to assist with statutory interpretation of s156.

488. Section 156 contains a generally and broadly worded discretionary power which is ambiguous without consideration of what grounds the decision maker has made to enliven the power pursuant to Schedule 7 Part 2 s 8 (2)(a). In this regard the reasons for decision point repeatedly to the reason for the exercise of the s156 power being the Applicant's alleged conduct related to political protests118 (further demonstrated by their inclusion in the Lucey Affidavit), the Applicant's disagreement with the Government's Covid-19 Immunisation Campaign; and the Applicant's alleged breach of the Covid-19 vaccination Position Statement of Ahpra & National Boards 9 March 2021[119]. This position statement states:

> "**National Boards have approved registration standards, codes and guidelines that together form part of the regulatory framework for each profession.** These frameworks guide the professional practice of registered health practitioners in Australia. **This position statement states the National Boards' expectations of Australian registered health practitioners i**n regard to: • being vaccinated against COVID-19, • administering COVID-19 vaccines, and • providing advice and information about COVID-19 vaccination.1 This position statement explains how the Boards' existing regulatory frameworks apply to COVID-19 vaccination. It should be read in conjunction with the standards, codes, guidelines, position statements and other guidance published by National Boards… **Any promotion of anti-vaccination statements** or health advice which contradicts the best available scientific evidence **or seeks to actively undermine the national immunisation campaign (including via social**

118 See Bay Affidavit at [34] and Exhibit B-1Reasons for decision
119 Exhibit G-1

media) is not supported by National Boards and may be in breach of the codes of conduct and subject to investigation and possible regulatory action".

489. The express wording of this Position Statement demonstrates that the position statement is considered by AHPRA and the Boards as being read in as a requirement of the code of conduct (Notwithstanding that this is an error of law for the reasons discussed previously under the Applicant's duty to warn arguments) and thus this Position Statement according to the express wording of the Statement must be considered as extrinsic material or alternatively must be read in as a purported requirement of the code of conduct (Notwithstanding that such requirement is unlawful).

490. The position statement expressly states that "any promotion of antivaccination statements or", that, "seeks to actively undermine the national immunization campaign (including via social media)"…"may be"… "subject to investigation and possible regulatory action". This is a clear statement that both of the impugned decisions (the investigation under s 160 and the regulatory action under s 156) in this Matter are directly intended to limit or remove the implied right for Health Practitioners to speak against the government immunization campaign, which is a government policy and action which is protected by the implied right to a freedom of political communication.

491. Thereby the impugned provisions s156 and s 160 and the Position Statement itself do not, on their proper construction, comply with the constitutional limitations on burdening political communication. Thus, it is necessary to read down the impugned provisions s 156 and s 160 to ensure that the powers are not enlivened as a result of the lawful exercise of the implied right to the freedom of political communication and to save them from invalidity. Further, the Position Statement is invalid to the extent that it is impermissibly limits the implied right to a freedom of political communication.

492. There is no valid "protection of the public" purpose (as expressed in the Guiding Principles of Part 1 Section 3A Objectives of the National Law) in stifling the freedom of Health Practitioners to speak honestly and freely about inherent material risks associated with medical procedures or with government health campaigns or policies. To undertake such gagging of health practitioners is contrary to law as it causes health practitioners to breach their lawful duty to warn pursuant *Rogers v Whitaker* [1992] HCA 58; 175 CLR 479. Such a breach of the duty to warn can only ever result in increased public safety risk as it equates to untrained political actors, with no connection to the individual patient, being put in a position of ultimate power with regard to what can and cannot be warned of, which is not in the patients' or the public's best interest.

493. In summary, as the provision is not valid in all of its operations the arguments of the Third Respondent in Submission C regarding *Cotterill v Romanes* at paragraph 44 are irrelevant as are the arguments at paragraph 45 as the burden imposed by s 156 is not 'justified across the range of potential outcomes' as discussed in detail above. For that reason s 156 of the *National Law* should be declared unconstitutional and any decisions made under it otiose.

Section 109 Inconsistency of the Fair Work Act

494. After having taken into consideration the arguments of the Third Respondent regarding the *Public Health Act* and the *Fair Work Act* s 109 inconsistency; it is conceded that the Third Respondent's arguments are valid and the Applicant withdraws this issue.

Materiality

495. The arguments in the submissions of the First and Second Respondents at paragraph 76 must fail as the effect of these submissions is contrary to the rule of law, as they assert that AHPRA and the Board are above reproach and above the law and that there is no basis upon which their conduct and decisions can be examined by a Court for errors of law.

496. Further, their submission that the Applicant has the burden of proving that a different decision could have been made is false and irrelevant as the Applicant is undertaking a judicial review of errors of law, jurisdiction and constitutionality, and not a merits review of the decision. As such, the only requirement for this Matter to be heard is the assertion of a purported error of law and the presentation of arguments that lawfully support the assertion. Therefore, the arguments of the First and Second Respondents are without merit and have no basis in fact or law, and in being contrary to the rule of law are also unconstitutional.

Disposition

497. For all the reasons described in Part 1, Part 2 and Part 3 of this Submission Two; the Applicant seeks the interlocutory and final orders listed in the Overview of Submission Two.