

# DISCIPLINARY HEARINGS IN THE REGULATED PROFESSIONS: PROCEDURAL FAIRNESS ISSUES

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*...I think it can be said that personal qualities the Australian public are entitled to expect of a judge, or a person holding equivalent tenure, include fairness, rationality, stability, and dignity.*

*By the last mentioned, I do not mean Grand Pooh-Bah pomposity, or a sheltered lifestyle away from ordinary engagement with the rest of the community, but a basic decency, inner calmness, self-awareness and self-respect.*

The Honourable Peter Heerey AM QC<sup>1</sup>

## OVERVIEW

1. In this paper, I consider procedural fairness issues for board, panel, and tribunal members hearing and deciding disciplinary proceedings, where the proceedings are about a member of a regulated profession, such as registered health practitioners, legal practitioners, teachers and other professionals.
2. At the request of the organisers of the conference, the paper is intended to be of most use to those who are not full-time tribunal members, who are not lawyers, or who may not be as familiar with some of the subtleties of procedural fairness in practice, and some of the debates that have played out in the case law and literature. It does not by any means cover the field of procedural fairness but I hope that it provides a useful overview, and may provide a resource for further discussion. Any commentary is my own.
3. The paper is in three parts:
  - VCAT's role and a snapshot of the cases about the regulated professions that come before us;
  - An overview of procedural fairness components, and, in the context of the no-bias rule, a list of cognitive biases decision-makers need to know about; and
  - Some other procedural fairness hazards for board, panel or tribunal members in disciplinary proceedings.
4. I have tried not to fill the paper with case references. There are some endnotes, and I am indebted to Thomas Patereskos, Member Support Co-ordinator for the Administrative and Human Rights Divisions of VCAT, for his research assistance. He provided the table of 20 or so cases, and the referenced articles that are in the Appendix. The cases focus on procedural fairness issues arising in appeals from decisions about health practitioners but repay reading by anyone interested in learning more about this important aspect of the decision-maker's role. And Forbes' *Justice in Tribunals* (Federation Press) is a comprehensive resource.
5. I have included the quote above, even though we are not judges, because it helps remind us of what those who come before us expect of us. It also includes some words I think are at the heart of an approach to decision-making that

accords with procedural fairness: fairness, rationality, calmness and self-awareness.

## **VCAT'S ROLE: A SNAPSHOT OF OUR DISCIPLINARY JURISDICTION**

6. The Review and Regulation List of VCAT hears and decides disciplinary proceedings involving a range of regulated professions and occupations, some of which are listed below. The Legal Practice List of VCAT hears and decides cases relating to the conduct of legal practitioners.
7. The Review and Regulation List page on our website, [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au), has a link to 'application types'; a list of most of the Acts under which the List hears cases, with information about the proceedings under each Act. At last count there were 83 Acts, about one quarter of which involve disciplinary or registration proceedings of some kind.
8. Disciplinary cases come to VCAT in a variety of ways. VCAT:
  - hears applications for review (merits review) of professional registration and occupational and business licensing decisions made by regulatory authorities, boards, panels and committees. The person affected by the decision makes the application for review;
  - conducts inquiries into the conduct of a range of individuals and licensed corporate entities. The regulatory authority makes the application for an inquiry. This is the application usually made by the Director of Consumer Affairs as the regulator for a number of licensed occupations such as estate agents, conveyancers and motor car traders;
  - hears allegations of professional misconduct and unprofessional conduct, or similar concepts under different names, and makes determinations on referral from National Health Profession Boards, such as the Medical Board of Australia, and other professional boards and panels; and
  - hears applications for findings about conduct, and orders about penalty, made by other professional regulators such as the Victorian Legal Services Commissioner.

### **Regulated Professions**

9. VCAT hears and decides disciplinary and registration related proceedings about:
  - Architects, under the *Architects Act 1991*
  - Building practitioners, under the *Building Act 1993*
  - Health practitioners, under the *Health Practitioner Regulation National Law (Vic) 2009* and its predecessors
  - Legal practitioners, under the *Legal Profession Act 2004* and the *Legal Profession Uniform Law Application Act 2014*
  - Surveyors, under the *Surveying Act 2004*
  - Teachers, under the *Education and Training Reform Act 2006*
  - Veterinary practitioners, under the *Veterinary Practice Act 1997*.

## Health Practitioner Cases

10. There are currently 14 health professions regulated under the *Health Practitioner Regulation National Law*, each with their own National Board:
  - Aboriginal and Torres Strait Islander Health Practice
  - Chinese medicine
  - Chiropractic
  - Dental
  - Medical
  - Medical radiation practice
  - Nursing and Midwifery
  - Occupational Therapy
  - Optometry
  - Osteopathy
  - Pharmacy
  - Physiotherapy
  - Podiatry
  - Psychology.
11. For those interested, Austlii has a useful Australian health practitioner law library on its website, which has a selection of cases from around Australia.
12. An Austlii search of VCAT Review and Regulation List cases involving Health Practitioner Boards provides a snapshot of the range of cases we hear in health practitioner matters. The following is from the published decisions of VCAT on Austlii:
  - In 2014, eight published decisions related to medical practitioners; two to psychologists; six to nurses and midwives; one to an osteopath; one to a Chinese medical practitioner; five to dental practitioners.
  - In 2015, two published decisions related to psychologists; five to medical practitioners; four to nurses and midwives; one to a physiotherapist.
  - So far, of the 2016 published decisions, two relate to medical practitioners; one to a Chinese medicine practitioner; two to psychologists; one to a dentist.

## OVERVIEW OF PROCEDURAL FAIRNESS AND ITS COMPONENTS

13. Procedural fairness is a legal rule of decision making in courts, tribunals and some other decision-making bodies. The term procedural fairness is used interchangeably with natural justice.
14. Procedural fairness has two main components:
  - A fair hearing, which in the context of disciplinary proceedings includes a right to know what the allegations are; a right to be heard on the question

of whether or not the allegations are true; and a right to be heard on whether or not adverse action should be taken; and

- No bias on the part of the decision-maker – real or apprehended.
15. Unfortunately for decision-makers, no comprehensive list of ‘dos and don’ts’ exists. The requirements will depend upon the nature and consequences of the decision; the nature of and the resources available to the decision-maker; the urgency of the situation and other matters. As a general rule, the more serious the issues are, the higher the standard of fairness required.
  16. The following paragraph from Forbes’, *Justice in Tribunals*, third edition 2010, at [7.1] is a useful summary of the two main components:
    - (1) an opportunity to show why adverse action should not be taken (*audi alteram partem* or the “hearing rule”), a sufficient opportunity to say everything that can be said in [his or her] favour; and
    - (2) a decision-maker whose mind is open to persuasion, or free from bias.
  17. ‘A mind open to persuasion’ expresses the second requirement well, in my view: many of the successful appeals on grounds of apprehended bias involve words or actions that suggested to the appellate court that the decision-maker had closed their mind to persuasion.
  18. The underlying principle is that ‘justice must manifestly and undoubtedly be seen to be done’.<sup>2</sup> Another way of expressing it is to say there must be manifest fairness in the proceeding.
  19. Procedural fairness is undoubtedly an obligation of boards, panels and tribunals making disciplinary decisions about regulated professionals, particularly where the decision will impact on a person’s ability to practise their profession. An understanding of the components of procedural fairness, and awareness of the ways in which bias might be apprehended by parties, are important skills for members of those bodies.
  20. Failure to provide procedural fairness is an error of law and a ground of appeal. More broadly, providing procedural fairness enhances confidence in the decision and the authority of the decision-making body. And a fair process is more efficient and effective in the long run.

## **PROCEDURAL FAIRNESS HAZARDS FOR BOARD, PANEL AND TRIBUNAL MEMBERS HEARING DISCIPLINARY CASES**

21. Apprehended bias is a hazard for any decision-maker and I discuss it in some detail below. But there are particular issues for board, panel or tribunal members who are drawn from the same profession as the person whose conduct is under review.
22. They include inappropriate use of one’s own expertise or independent knowledge, and undisclosed conflicts of interest.
23. Other hazards in disciplinary proceedings may arise from the way the complaint or allegations are framed, if for example the allegations are not well particularised.
24. Further, in disciplinary proceedings, where a penalty may arise such as a monetary penalty or a limitation on the person’s ability to practise their

profession, penalty privilege arises. Penalty privilege affects how the case should proceed.

## **Bias**

25. For obvious reasons, those seeking to overturn a decision for breach of procedural fairness will rarely allege actual bias and usually allege apprehended bias.
26. When apprehended bias is alleged, the court considers whether a fair minded person might reasonably apprehend or suspect that the judge, tribunal member or other decision-maker has prejudged or might prejudge the case.<sup>3</sup>
27. Because appeal courts rarely need to assess the actual state of mind of the decision-maker, the appeal will usually concern the decision-maker's conduct, or the way the decision-maker communicated with the parties in the hearing, or how they expressed their decision.
28. Our obligation is to decide a case on the evidence and the arguments before us in the case. The appearance of prejudgment arises if we do or say something that suggests we have made up our mind, before the parties have had the chance to put before us all their evidence and their submissions.
29. I discuss below some practical ways in which we can check our own conduct and communications in a hearing; and improve self-awareness of how we are approaching the case and how we might be seen by those in the body of the hearing room. My own view is that a better understanding of how bias can operate in our unconscious mind helps us take a fair approach and also avoid the greatest hazard, which is actual bias.

## Understanding bias

30. The psychology of cognitive bias is a rich field of research and writing. As decision-makers, we do not need to spend years studying it, although it makes fascinating reading,<sup>4</sup> but we do need to know that the human mind can work in mysterious ways to drive us to the conclusion we favour.
31. Cognitive bias comes in many forms. I have included in the list below those that I regard as posing risks for decision-makers in a legal context:
  - Confirmation bias – the human tendency to evaluate information in a way that confirms our preconceptions; skating over information that does not support our preconceptions and enlarging the importance of information that does.
  - Belief bias – we do not accept the conclusion (“that is unbelievable”) and that in turn colours our evaluation of the logical strength of the evidence or argument.
  - Bias blind spot – the tendency to see ourselves as less biased than other people, or to be able to identify more cognitive biases in others than in ourselves.
  - Anchoring effect – the tendency to rely too heavily, or ‘anchor’ on one trait or piece of information when making decisions – usually the first piece of information that we acquire on that subject.

- Risky heuristics<sup>5</sup> – ‘heuristics’ are shortcuts in processing information that help us simplify complex decisions. They are usually unconscious; they may be learned or in our wiring; but they may make us vulnerable to error in situations that require logical analysis.
32. There is also a generalised unconscious bias I call ‘look, smell or sound bias’, where the person listening may have taken a dislike to the person speaking, without being conscious of it, and where it may affect how they listen or whether they listen at all. One of the reasons mediation is so successful is that parties in dispute may have stopped listening to each other long ago, but when the mediator repeats back what one party has said, the other party may hear and absorb it for the first time.
33. It is impossible to know what is happening in our unconscious mind at any one time, but for decision-makers, just being aware of what *might* be happening unconsciously can help. Knowing that unconscious attitudes and beliefs may be influencing our thinking can help us ensure that we approach a case objectively, recognise any tendency to prejudge, and remain open to persuasion.

What might give rise to apprehended bias?

34. The following are some examples:

- Words or conduct during a hearing suggesting hostility towards or dislike of a party or their representative, or their case or arguments;
- Listening differently – patently engaged and patient when one party is speaking or making submissions, and patently disengaged and impatient when the other party makes submissions;
- Similarly, putting one party ‘through the hoops’ while uncritically accepting the other party’s evidence and submissions;
- Indications of prejudgement such as refusing to hear submissions on a relevant issue, or telling the party or their representative that “it won’t change anything”, or anything else that suggests to an observer that the decision is a forgone conclusion and the decision-maker’s mind is not open to persuasion – even though there is more of the case to be heard;
- Public comment prior to or during the hearing about an issue that is in dispute or is at the heart of the dispute;
- Previous adverse findings as to credit made against a party or witness;
- Prejudicial information obtained in a previous case which is either not relevant to or is inadmissible in the current proceedings, or previous adverse views expressed;
- Speaking privately about the case with a party or their representative before or during the hearing;
- Travelling to or from a hearing in the company of one party or their representative;
- Attending a private function where a party is present or where the function is organised by a person or group aligned with one side of the case; and
- An undisclosed conflict of interest – discussed in more detail below.

35. In *Laws v Australian Broadcasting Tribunal* (1991) 170 CLR 70 at 100 per Gaudron and McHugh JJ said this about suspected prejudgement:
- When suspected prejudgement of an issue is relied upon to ground disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion, irrespective of the evidence or arguments presented.
36. What the courts look for, when a decision-maker has made public statements about issues that are relevant to the case, is a strong view closely related to the issues in the case before the decision-maker, making it reasonable to apprehend that the decision-maker could not keep an open mind about the case or be open to persuasion.
37. The obligation to decide a case on the evidence presented *in* the case means that the panel, board or tribunal member needs to avoid speculation or suspicion unsupported by the evidence, or that is not raised at the hearing.
38. One of the reasons why cross examiners will put a long list of propositions or suggestions to a witness is because fairness requires that the witness be given an opportunity to respond to the proposition or suggestion before it forms the basis of submissions against them. The same principle applies to speculation or suspicion in the mind of the decision-maker. We can draw inferences from the evidence that we have heard, but we must have a sound basis for drawing them, and we should not be influenced by speculation or suspicion not based on the evidence before us, particularly if the parties would not be aware of it.
39. A red flag to appeal courts for the possibility that this has happened is when a decision appears to come 'out of the blue' or to be perverse. The fact that the findings are not obviously linked to the evidence in the case raises the apprehension — has the decision-maker been influenced by something other than the evidence in the case, such as a prejudice or some external consideration? In contrast, a reasonable and reasoned decision, clearly based on the evidence and arguments in the case, reassures the parties that they had a fair hearing.

#### Some practical suggestions

40. Self-awareness in the hearing is important. I make the following suggestions with diffidence because they are probably things most of us do as a matter of course:
- Be conscious of whether your tone and body language differs depending on who is addressing you: check that you are using the same tone of voice, preferably a calm tone, when addressing both parties.
  - Be aware of feeling cross or irritated with a party, a witness or a legal representative. If there is external pressure such as urgency or limited available time, take the time that is required to ensure the case is heard properly and procedural fairness observed. An appeal will greatly increase the time and cost of a final outcome.
  - Avoid interrupting cross-examination of a witness, unless you are asking for a question or an answer to be repeated because you did not hear it — the hazards include interfering with the case being put in cross-

examination and influencing the evidence; and giving the impression of 'jumping down into the arena'.

- Check your listening – are you internally impatient for a witness to finish, perhaps because you feel that you have heard enough? Are you listening out for evidence that confirms a view you might be forming about the case, but skating over or switching off when evidence contrary to that view is presented? If you are tired, it is likely the parties are as well; take a short break.
- When you read the papers for the first time, keep in mind that whatever you read is yet to be proved. If you are reading the allegations but do not yet have the other party's response, remind yourself, if you need to, that they are questions of fact to be decided after the whole of the evidence has been heard.

### **Inappropriate use of own knowledge or expertise**

41. Can panel, board or tribunal members in professional disciplinary proceedings use their own knowledge or expertise in making findings of fact?
42. This question arises because members are often appointed to a particular body because of their professional knowledge or expertise. A number of the enabling Acts that give VCAT jurisdiction in professional disciplinary matters require the Tribunal to be constituted by or to include at least one member with professional qualifications in the particular profession, or who has knowledge of or experience in the field.
43. So, for example, in applications under the *Health Practitioner Regulation National Law*, the Tribunal must be constituted by at least three members, of whom at least two must be health practitioners, with professional qualifications in the health profession regulated by the National Board that is party to the proceedings [s.11AJ].
44. The knowledge and expertise of members qualified or experienced in a particular field can be important in ensuring that the Tribunal understands the evidence and makes the appropriate findings. The very reason for appointing such members is so that they may use their expertise in deciding the case. But there are limits: 'over use' of one's own knowledge and expertise can be a procedural fairness hazard.
45. A denial of procedural fairness may arise because of the principle that decisions must be made on the evidence given and the submissions made by the parties at the hearing. It is manifestly unfair for adverse findings to be made against a person for reasons which may have been in the mind of the Tribunal but which were not aired at the hearing, and would, if aired, have been contentious.
46. There is a useful review of the case law in the Western Australian Court of Appeal decision in *Dekker v Medical Board of Australia* [2014] WASCA 216, at paras 54 – 69.
47. Rather than paraphrase the decision, I have set out below paras 63 – 69, which summarise the issue, with case citations and legislative references omitted. As is often the case in relation to procedural fairness, the summary begins with a caveat:



63. Accordingly, it would be difficult, and unwise, to attempt to state in any comprehensive and prescriptive way all the circumstances in which it would be 'appropriate' to use the 'knowledge and expertise' of the medical members of the Tribunal. The following should be read in light of these observations.

64. It would ordinarily be appropriate for the Tribunal to use the knowledge and experience of its medical members to understand and adjudicate upon questions of medical evidence...

65. The Tribunal is nevertheless not bound by the opinion of its medical members and the majority... may conclude, for example, that certain matters are established on the evidence before it even if the medical members of the Tribunal are not so satisfied....

66. The Tribunal's use of the knowledge and experience of its members must always occur with due observance of the requirements of natural justice... The touchstone of procedural fairness is the avoidance of practical injustice. The specific content of the requirements of procedural fairness depends upon the particular circumstances of the case...

67. Subject to the preceding observations and what follows, it may be expected, ordinarily, that matters of general knowledge and experience within the medical profession may be used by the Tribunal without specific notice of those matters being given to the parties... Accordingly (and generally speaking), it may be expected that the Tribunal may, without specific prior disclosure, reject arguments or assertions of medical fact which, according to the general knowledge and experience of the specialist members of the Tribunal, are unfounded... *Specific disclosure would generally be required in relation to particular medical facts or matters known to and considered relevant by the medical members of the Tribunal, which are outside of the general knowledge and experience of the medical profession, so that the parties may have a proper opportunity to deal with them...*[my italics]

68. Also, in disciplinary proceedings it would not be appropriate for a medical fact in respect of which there was no evidence led, and which was material to the proof of improper conduct against a doctor, to be positively supplied by the Tribunal from its own knowledge and experience without the doctor being put on proper notice... Notice may be express or, in some cases, it may fairly be concluded that notice was necessarily implicit having regard to the particular nature of the allegations of the medical board and the way in which the proceedings were conducted.

69. The observations of Moffat P (Glass J agreeing) in *Kalif*<sup>6</sup> are also pertinent in this context:

I should emphasise that the subtle demands of justice required of any tribunal should not be overlooked. There are considerable dangers in an expert tribunal using expert knowledge in respect of which there is a genuine difference of view within the body of the profession concerned. The issue should then be dealt with by evidence. In any event it is best that the subject matter of expert opinion considered [relevant<sup>7</sup>] by the expert tribunal be clearly brought to the attention of the parties at the appropriate time (265).

### **Undisclosed conflicts of interest**

48. One of the questions that arises in procedural fairness case law is whether a decision-maker ought to have disclosed to the parties that they knew of or had a connection with a party or a witness.

49. The question is an important one where members hearing the case are in the same profession as the person against whom disciplinary proceedings are

brought, particularly if the profession is a small one where ‘everybody knows everybody else’.

50. Apprehended bias can arise if the decision-maker is found to have an undisclosed relationship with a witness, a party or the party’s representative. The reason why this can create problems is that cases must be decided on the evidence and arguments presented in open hearing: the parties may become understandably concerned that the decision-maker has been influenced by the relationship or connection in deciding the case.
51. Potential conflicts include a pecuniary interest in the outcome of the case; a family relationship with a party or one of their witnesses; religious, professional or social connections or friendships; attending the same school or college in the past; and being a member of the same club.
52. Should every connection or scrap of knowledge be disclosed, no matter how remote or trivial? Not surprisingly, the answer depends on the nature of the connection or the knowledge; its relevance to the issues in dispute; and whether a fair-minded observer might ‘raise their eyebrow’ at the fact that the decision-maker did not disclose it.
53. Not every connection has to be disclosed, but the decision-maker must think about it and do so, if possible, well before the hearing. Whether an actual or perceived conflict arises may depend on the nature and strength of the connection. Some questions to consider might be:
  - Is it something that might raise a doubt in the mind of a fair minded lay observer?
  - Is it a relationship or connection that might put a question mark over your impartiality in the minds of the parties?
  - Is it a long-standing or close connection?
  - What would the headlines be?
54. If in doubt, err on the side of caution. In most cases, simple disclosure, and asking the parties if they have any concerns, will be enough, particularly if the connection is remote or trivial. The most common response to a disclosure of this sort is that the parties are not troubled by the matter disclosed. In other cases, an application to disqualify you might be made, or an independent decision not to hear the matter might be made by you.
55. The following extract from a decision by Her Honour, Judge Davis, Vice-President, in *Paul Francis Durney v Yarra Community Housing*, [2015] VCAT 2063, summarises the principles relating to when a decision-maker ought to disqualify (or recuse) themselves. At paragraphs 6 and 7 of her decision, Judge Davis said:
  - 6 The governing principle in relation to disqualification for apprehended bias, when applied to a tribunal member, is that a tribunal member is disqualified if a fair minded lay observer or bystander might reasonably apprehend *that there is a real and not remote possibility that a member might not bring an impartial mind to the resolution of the question or questions that they are required to decide.*<sup>8</sup>

- 7 The party seeking disqualification must do three things. First, identify what it is that might lead the member to decide the case other than on its legal and factual merits. Second, articulate the logical connection between that matter suggesting bias and the feared deviation from the course of deciding the case on its merits. Third, establish that there is an ensuing apprehension of bias on the part of a fair minded lay observer, it must be taken to be aware of the nature of 'ordinary judicial practice' and that that apprehension is reasonable<sup>9</sup>...
56. Potential conflicts of interest may also arise from a previous judgment of a party or witness, such as when the same member heard a previous case involving the same professional and in that case expressed adverse views or drew adverse conclusions about credit. The conflict arises from the concern that those views might be carried into the current hearing, with the result that the member will bring a prejudiced mind to bear on the issues in the case.
57. At paragraph 8 of *Durney*, Judge Davis said:
- Where prejudgement is relied upon, what must be firmly established is a reasonable fear on the part of the bystander that the decision-maker's mind is prejudiced in favour of a conclusion already framed, so that he or she will not alter that conclusion irrespective of the evidence or arguments presented. That reasonable fear must be firmly established because it is to be expected that decision-makers may have formed views or inclinations of mind with respect to particular subjects in the course of their professional careers which will be put to one side in determining proceedings on the evidence and on the merits.<sup>10</sup>
58. For similar reasons, a member who had active involvement in the investigation that led to charges being laid should not hear the case. The principle there is that one cannot be a prosecutor and judge and be seen to bring an unbiased mind to the hearing of the case — an apprehension of bias is inevitable.
59. The following issues concern procedural fairness in how the hearing is conducted.

### **Failing to provide an opportunity to be heard on penalty after adverse conduct findings are made and other issues**

60. In recent years, appellate courts have made it clear that proceeding directly from making adverse conduct findings to determining penalty and failing to give a person the opportunity to be heard on penalty after the findings have been made will be a breach of procedural fairness.
61. In *King v Healthcare Complaints Commission* [2011] NSWCA 353, the New South Wales Court of Appeal held that the tribunal acted in breach of its duty of procedural fairness in ordering deregistration of a doctor without first publishing its findings of professional misconduct and giving the parties an opportunity to adduce evidence and make submissions on the appropriate consequential orders [paras 202-204].
62. The Court of Appeal also considered other aspects of procedural fairness such as whether the allegations had been properly particularised (a person is entitled to know the case sought to be made against him or her and given an opportunity of replying to it); and whether the tribunal had found the doctor guilty of conduct which in important respects was not alleged against him.

63. Similar issues arose in *Lucire v Healthcare Complaints Commission* [2011] NSWCA 99. At paragraphs 62 to 66, Basten JA observed:

There were two critical features that demonstrated that the course adopted by the tribunal was procedurally unfair. First, the pleading obscured the substance of the case presented by the Commission. It would have been preferable if the Commission had been required to redraft the complaint. Second, each party should have been accorded the opportunity to present evidence and address submissions on penalty after and in the light of the findings.

64. If the allegations are unclear or poorly particularised, the panel, board or tribunal should consider requiring that they be re-drafted. The hazards of inadequate particulars are two-fold: the person charged with misconduct has a good argument that they were not given sufficient notice of the exact allegations made and the opportunity to defend themselves; and the decision-maker runs the risk of finding proven allegations that were not clearly made. No-one should have to guess what exactly is alleged and the factual basis claimed to support the allegations.
65. Care needs to be taken when an allegation involves a mental element on the part of the person charged. If a person is charged with 'knowingly' doing something it will not usually be open for the tribunal to find that they did so 'recklessly'. What would usually be required would be an amendment to include the alternative of recklessness well before the evidence concludes.
66. Finding a person guilty of serious conduct on the basis of an element not alleged may raise a significant question of procedural fairness. Conversely, adopting a cautious approach and holding the prosecuting body to the allegation made will not usually be an error of law, particularly where the charges relate to conduct that would constitute a criminal offence.<sup>11</sup>

### **Penalty Privilege in Disciplinary Cases**

67. When does penalty privilege arise and what is it?
68. In *Legal Services Commissioner v Spaulding* (Legal Practice) [2015] VCAT 292, Garde J, President, observed at [19]:
- Penalty privilege will arise in proceedings of disciplinary character against legal practitioners, health practitioners, and other persons, and in general in any proceedings where monetary exaction, loss of office, forfeiture, or other penalty may arise.
69. Where penalty privilege arises, it will not generally be appropriate to *require* the party exposed to a penalty, before the close of the case against them, to file anything more than an outline of argument which identifies in broad terms what is in issue, although they may elect to do more. A person exposed to a penalty should not be required to set out in detail their proposed evidence, or a detailed acceptance or denial of facts. Those principles were established in *Towie v Medical Practitioners Board of Victoria* [2008] VSCA 157.
70. This means that some of the tools used in civil proceedings are not appropriate in disciplinary proceedings; for example notices to admit, where a party is required to say whether they admit or deny particular allegations, and are taken to admit the facts set out in the notice if they do not respond.

## Conclusion

71. As observed above, no manual exists which gives decision-makers a comprehensive list of what will constitute a breach of procedural fairness and what will not.
72. There are endless subtleties in where the line has been drawn in particular cases; and the case law reflects errors made by decision-makers at all levels, including experienced judges. I would expect that in nearly every case, the error was unintentional. It is often the case, on my reading, that a procedural fairness error has occurred in the context of time or other administrative pressure.
73. Nevertheless, the general principles are evident and the central principle is that proceedings, particularly the kind discussed in this paper, should be manifestly fair. A person facing serious allegations with potentially serious consequences for their professional life is entitled to expect a fair process and a decision-maker who brings to the hearing a mind open to persuasion and a willingness to suspend judgment until all the evidence and submissions have been heard.
74. The Honourable Peter Heerey AM QC set out his list of the personal qualities to be expected of a judicial officer in a different context, but the words he used are a good reminder of what is required of all of us when we make these important decisions, and I end by repeating them: fairness, rationality, calmness and self-awareness.

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<sup>1</sup> Report of inquiry into complaints about the Honourable Vice President Michael Lawler of the Fair Work Commission and related matters, February 2016.

<sup>2</sup> *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 256, at 259, per Hewart LCJ.

<sup>3</sup> *Webb v The Queen* (1993-1994) 181 CLR 41, at p47, per Mason CJ and McHugh J. In *Webb*, the issue arose because in a murder trial, on the morning of the judge's summing up, one of the jurors gave a bunch of flowers to a person at the courthouse with a request that it be given to the deceased's mother.

<sup>4</sup> See for example *Before You Make That Big Decision...* Kahneman, Lovallo and Sibony, Harvard Business Review, June 2011. Dr Daniel Kahneman's book, *Thinking, Fast and Slow*, Farrar, Straus & Giroux (2011) includes a summary of his ground-breaking work in collaboration with Dr Amos Tversky on cognitive biases and their impact on decision-making.

<sup>5</sup> Heuristics are usually categorised separately from cognitive biases, see, for example, *Judgment Under Uncertainty: Heuristics and Biases*, Tversky and Kahneman, Science, Vol. 185, No. 4157, September 1974.

<sup>6</sup> *Kalil v Bray* [1977] 1 NSWLR 256.

<sup>7</sup> There is a typographical error ('irrelevant') in the quotation from *Kalil* in *Dekker*, as published on Austlii; the word 'relevant' is the word that appears in the authorised report of *Kalil* at p.265.

<sup>8</sup> Referring to *Ebner v The Official Trustee and Bankruptcy* [2000] HCA 63 at [6], (2000) 205 CLR 337 at 344; *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2 at [37].

<sup>9</sup> Referring to *Ebner*, and *Bahonko v Moorfields Community and Others* [2012] VSCA 89 at [27] – [28].

<sup>10</sup> Referring to *CUR 24 v Director of Public Prosecutions* [2012] NSWCA 65 at [36].

<sup>11</sup> See, for example, the remarks of McDonald J in *Director of Consumer Affairs v Meng* [2015] VSC 668 at [28] – [34]

## Appendix

### Health Practitioner Disciplinary Cases: Appeals on Procedural Fairness Grounds

	Case Name	State	Health Profession	Key procedural fairness issue/ruling
1.	<i>Dental Board of Queensland v B</i> [2004] 1 Qd R 254 [15]-[26]	QLD	Dentist	Procedural fairness required that the panel assessors' advice on sanction be informed by the parties' submissions
2.	<i>Sudath v Health Care Complaints Commission</i> (2012) 84 NSWLR 474 [101]	NSW	Medical practitioner	Procedural fairness requires the opportunity to lead relevant and probative evidence inconsistent with that relied on by the Commission. 'It does not matter that this material also challenges facts on which convictions were based, provided that it is not proffered for the purpose of impugning those convictions or the fairness of his trial.'
3.	<i>King v Health Care Complaints Commission</i> [2011] NSWCA 353 [202]-[205] (note also [10], [173-185])	NSW	Medical practitioner	Requirement to have a separate hearing on penalty. Note also commentary on sufficiency of reasons; and useful summary of the cases on the right to reasonable notice of the charges and an opportunity to answer them
4.	<i>Lucire v Health Care Complaints Commission</i> [2011] NSWCA 99 [60]-[66]	NSW	Psychiatrist	The pleading obscured the substance of the case presented at the Commission, and it would have been preferable if the Commission had been required to redraft the complaint. Each party should have been accorded the opportunity to present evidence and address submissions on penalty after and in the light of the findings.
5.	<i>Donnelly v Health Care Complaints Commission (NSW)</i> [2011] NSWSC 705 [145]-[167]	NSW	Psychologist	Tribunal failed to accord procedural fairness to the plaintiff in respect of the making of the protection orders and their duration by not affording him a reasonable opportunity to be heard on the question.
6.	<i>Chowdhury v Health Care Complaints Commission</i> [2010] NSWCA 56 [36]-[40]	NSW	Medical practitioner	Tribunal made protective orders which had not been sought by the Commission and were beyond the allegations in the complaint, and therefore did not give an opportunity for the applicant to be heard.
7.	<i>Lloyd v Veterinary Surgeons Investigating Committee</i> [2005] NSWCA 456 [1],[85], [87], [89]	NSW	Veterinary surgeon	Tribunal denied the appellant procedural fairness in failing to provide him with the opportunity to call evidence and make submissions on the merits of a condition containing a restriction that he only be employed in a practice where there were at least two full-time veterinary surgeons. Such a denial of procedural fairness constituted an error of law.

	Case Name	State	Health Profession	Key procedural fairness issue/ruling
8.	<i>Daskalopoulos v Health Care Complaints Commission</i> [2002] NSWCA 200 [32]-[54]	NSW	Medical practitioner	The extent of the differences between the particular and the finding, and the lack of any clear formulation during the hearing of any amended particular or allegation in relation to that particular resulted in a denial of procedural fairness.
9.	<i>Sabag v Health Care Complaints Commission</i> [2001] NSWCA 411 [1], [77]-[117]	NSW	Medical practitioner	The appellant was denied procedural fairness, in that the allegation that he was incompetent and that he misled community agencies were not notified to the appellant, nor were they litigated, so that the appellant did not have the opportunity of meeting those allegations.
10.	<i>X v New South Wales Medical Board</i> (1993) 32 ALD 330	NSW	Medical practitioner	There was no legislative intention to exclude procedural fairness in the exercise of a delegated power to suspend medical practitioners from practising. The flexibility of the rules of procedural fairness could accommodate a hearing prior to the making of a suspension order, especially where the material disclosed no urgency overriding the right to a hearing.
11.	<i>Nitschke v Medical Board of Australia</i> (2015) 301 FLR 122 [142]-[152]. Note also [23] – [40].	NT	Medical practitioner	The appellant was not given adequate opportunity to respond to the broader range of conduct ultimately relied upon by the Tribunal.  Also discussion of the immediate action regime.
12.	<i>Kruger v Pharmacy Board (SA)</i> (1979) 22 SASR 339, p.343-349.	SA	Pharmaceutical chemist	On an inquiry proceeding under s 19 of the <i>Pharmacy Act 1935</i> (SA), the pharmaceutical chemist charged is entitled to a full right to be heard in accordance with the rules of natural justice, including the right to be represented by solicitor or counsel.  Also discussion of the proper use of expertise.
13.	<i>Omant v Nursing and Midwifery Board of Australia &amp; Anor</i> [2014] VSC 512	VIC	Registered nurse	Tribunal erred by failing to give the parties an opportunity to be heard on the penalty determinations made.
14.	<i>Dewan v Medical Board of Australia</i> [2011] VSC 588 [7]-[8]	VIC	Medical practitioner	Tribunal gave judgment in respect of the issue of penalty and orders without giving the appellant a hearing and without receiving his submissions in relation to these matters. This constituted a denial of procedural fairness.
15.	<i>The Psychology Board of Australia v D</i> [2010] VSC 375 [26]-[32]	VIC	Psychologist	Denial of opportunity to prosecuting body to insist on publication where suppression order of practitioner's name made by Tribunal without such application by parties or prior disclosure by Tribunal of intention to do so. Considerations of cost (in recalling the parties) or expedience have

	Case Name	State	Health Profession	Key procedural fairness issue/ruling
				no part to play.
16.	<i>Towie v Medical Practitioners Board of Victoria</i> [2008] VSCA 157 [35]-[39]	VIC	Medical practitioner	The appellant was denied procedural fairness because: <ul style="list-style-type: none"> <li>the application of the respondent should not have proceeded further following Dr Towie's request that it be adjourned;</li> <li>as the Tribunal had resolved to proceed to hear the application, it was incumbent upon the Tribunal to make clear that it intended to do so and the Tribunal was obliged to afford the unrepresented appellant a meaningful opportunity to deal with the substance of the allegation.</li> </ul>
17.	<i>Dekker v Medical Board of Australia</i> [2014] WASCA 216 [50]-[69], [92]-[93]	WA	Medical practitioner	It was not open to the Tribunal to rely on the knowledge and experience of its own members in finding a specific professional duty because such a duty was not put to the appellant.
18.	<i>Sakalo v The Medical Board of Western Australia</i> [2002] WASCA 178 [43]-[45]	WA	Medical practitioner	It is highly undesirable, at least where conduct warrants suspension or removal from the roll, to hear submissions as to findings of improper conduct and as to penalty at the same time.

#### Other notable cases

	Case Name	State	Health Profession	Key procedural fairness issue/ruling
19.	<i>Kozanoglu v Pharmacy Board of Australia</i> (2012) 36 VR 656 [122]-[129]	VIC	Pharmacist	Failure to take into account the appellant's previous good record when considering whether to take immediate action, and, if so, the nature of any conditions that ought to be imposed.
20.	<i>Weinstein v Medical Practitioners Board of Victoria</i> (2008) 21 VR 29 [28]-[33], [34]-[40]	VIC	Medical practitioner	The panel was authorised to inform itself in any way it thought fit subject always to the overriding obligation to accord procedural fairness. The notional fair-minded lay observer with knowledge of the objective facts was to be taken to understand both the character of the panel's function as investigator and the nature of the express power to inform itself. Thus informed, the observer would have had no reason to doubt the panel's impartiality in undertaking the Google search of the name of an overseas surgeon whose expert opinion was relevant to one aspect of the allegations with the purpose of checking the surgeon's qualifications. Search disclosed by panel in the course of the hearing.



	Case Name	State	Health Profession	Key procedural fairness issue/ruling
21.	<i>Commonwealth v Director, Fair Work Building Industry Inspectorate</i> (2015) 90 ALJR 113	Cth	Civil penalty proceedings in the Federal Court against two trade unions	The decision in <i>Barbaro</i> does not apply to civil penalty proceedings and a court is not precluded from receiving and, if appropriate, accepting an agreed, or other civil penalty submission.

### Articles and other references

22. Timothy Bowen and Andrew Saxton, 'Procedural fairness in medical investigations and disciplinary proceedings' (2008) 16 *Journal of Law and Medicine* 512
23. Gail Furness, 'Discipline or bondage: Aspects of the disciplinary jurisdiction governing medical practitioners' (1997) 20(3) *University of New South Wales Law Journal* 760
24. AHPRA – [Procedural Fairness/Natural Justice - LPN 17](#)