

## Health Insights

# A warning to health practitioners: is your professional indemnity insurance in place?

The Victorian Civil & Administrative Tribunal (VCAT) has sent a loud message to all health practitioners to actively check that their professional indemnity insurance (PII) arrangements are in order by suspending a psychologist who failed to do so<sup>1</sup>. The practitioner in question had delegated the task of paying all insurance renewals to a family member, including his PII cover. Unfortunately, that person omitted to do so resulting in a lapse of PII cover from 23 February 2015 to 29 June 2017.

The National Law requires registered health practitioners to hold PII arrangements in relation to the practice of their profession and specifies that practitioners must not practise unless such arrangements are in force.<sup>2</sup> This requirement is emphasised each year during the annual renewal process for registration which requires, as part of the application process, that practitioners declare:

- 1) that they have not practised the health profession during the preceding period of registration without appropriate PII arrangements being in place, and
- 2) if registration is renewed, that they will not practise the health profession going forward unless appropriate PII arrangements are in place<sup>3</sup>.

Dr Favio Elzo, a psychologist, made false declarations about the status of his PII to AHPRA and the Psychology Board of Australia (the **Board**) in the course of renewing his registration online on four consecutive occasions. In reality, Dr Elzo did not hold PII cover for nearly two and a half years and the Board alleged that on each occasion he knew and/or ought to have known that he did not hold relevant PII cover for the period and knowingly and/or recklessly made a false declaration(s) to AHPRA.

Although Dr Elzo admitted all of the facts contained in the allegations made against him, he disputed that he had “knowingly and/or recklessly” made false declarations to AHPRA – rather, he submitted he had “carelessly or hastily” made the declarations.<sup>4</sup> He did admit, however, that he “ought to have known” that he did not hold the relevant PII cover for the period.

Given this admission, the issue was therefore whether Dr Elzo behaved recklessly when making the declarations in circumstances where he “ought to have known” that he did not hold the relevant PII cover.

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<sup>1</sup> *Psychology Board of Australia v Elzo (Review and Regulation)* [2020] VCAT 345

<sup>2</sup> Section 129(1) Health Practitioner Regulation National Law Act 2009

<sup>3</sup> Section 109(1)(a) Health Practitioner Regulation National Law Act 2009

<sup>4</sup> *Psychology Board of Australia v Elzo (Review and Regulation)* [2020] VCAT 345, paragraph 31

After some discussion at the hearing, it was agreed between the parties that the term “recklessly” was appropriate in circumstances where Dr Elzo was:

*“...responsible for ensuring he held the required PII at all relevant times and that, although he relied on another person to pay insurance renewals, he was ultimately responsible and ought to have ensured it had been done before making the declarations.”<sup>5</sup>*

Dr Elzo was found to have engaged in professional misconduct in two respects – one being the failure to maintain his PII arrangements, and the second being the making of false declarations to AHPRA about the status of his PII arrangements. He was also found to have engaged in unprofessional conduct for failing to notify the Board about the lapse in his PII coverage which contravenes section 130(1) of the National Law (to read more about the potential disciplinary consequences for failing to comply with the notification obligations contained in section 130(1) of the National Law please click [here](#)).

VCAT reprimanded Dr Elzo for his conduct, and determined to suspend him for one month “in order to ensure that not only he but other psychologists were on notice that a failure to hold PII cover was unacceptable and that the making of false declarations about that matter would not be tolerated”<sup>6</sup>.

While Dr Elzo attempted to persuade VCAT that there was no need for a suspension because he had learned his lesson and because it would be punitive in circumstances where he had a young family and was the sole earner, VCAT was unmoved. The Tribunal considered that a suspension was important in the interest of general deterrence and was consistent with other cases where suspensions had been used as a means to ensure that health practitioners take their insurance obligations seriously.<sup>7</sup> The Tribunal also said that the suspension would serve to remind practitioners who “change their mode of practice or who work at some times as an employee and at others privately, to ensure they hold the required PII cover for all of their professional roles at all times”<sup>8</sup>. For completeness, we note that a condition was also placed on Dr Elzo’s registration to the effect that he was required to provide a certificate of currency for his PII cover on an annual basis, for a minimum of five years.

Interestingly, in a VCAT decision delivered not even one month later a pharmacist received a very different disciplinary outcome for failing to maintain his PII arrangements for a period of four months<sup>9</sup>. The lapse occurred in circumstances where the pharmacist was “working in different places, including interstate, a new insurance company had taken over the PII policy, and the cycle for insurance renewals did not correspond with the cycle for renewal of registration.”<sup>10</sup> Unlike Dr Elzo, it was not alleged that the pharmacist made false declarations to AHPRA that appropriate PII arrangements were in place when in fact they were not<sup>11</sup>. VCAT turned to the case of Dr Elzo when determining the appropriate finding and outcome for the pharmacist, and concluded that given the time period in question (four months versus two and a half

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<sup>5</sup> Ibid, paragraph 33

<sup>6</sup> Ibid, paragraph 8

<sup>7</sup> Ibid, paragraph 58

<sup>8</sup> Ibid, paragraph 59

<sup>9</sup> *Pharmacy Board of Australia v Elias (Review and Regulation)* [2020] VCAT

<sup>10</sup> Ibid, paragraph 5

<sup>11</sup> Ibid, paragraph 15

years) and in the absence of any false declaration, the pharmacist's conduct could be characterised as unprofessional conduct as opposed to the more serious finding of professional misconduct. The outcome was that his registration was made subject to a condition requiring him to submit to an annual audit of his PII arrangements for five years.

It is fair to say that the comparison of these two cases highlights the seriousness with which the National Boards and VCAT will treat a lapse in a health practitioner's PII arrangements and that the outcome of disciplinary proceedings concerning the same will be aggravated by the length of time that the lapse endured and the making of any false declaration to AHPRA. In particular, Mr Elzo's case serves as a stark reminder for all health practitioners about the importance of ensuring that PII arrangements are in place for all aspects of practice, and to be particularly careful if you do not undertake the task of renewing your PII cover yourself.

Meridian Lawyers regularly assists practitioners regarding AHPRA investigations and disciplinary proceedings. This article was written by Principal Kellie Dell'Oro and Associate Anna Martin. Please contact us if you have any questions or for further information.



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