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IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S ECI 2024 03341

CRAIG GORMAN — Plaintiff

v

SPEECH PATHOLOGY ASSOCIATION OF AUSTRALIA LIMITED (ACN 008 393 440) — Defendant

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S ECI 2024 03341

JUDGE:	Watson J
WHERE HELD:	Melbourne
DATE OF HEARING:	20 September 2024
DATE OF JUDGMENT:	23 January 2025
CASE MAY BE CITED AS:	Gorman v Speech Pathology Association of Australia Ltd
MEDIUM NEUTRAL CITATION:	[2025] VSC 4

CORPORATIONS – Company limited by guarantee – Professional association – Complaint against member by parent of patient – Whether complaint was investigated according to proper procedure – Exercise of powers under the defendant's constitution – Whether plaintiff was afforded procedural fairness – Whether undertakings were oppressive, unfairly prejudicial or unfairly discriminatory – *Corporations Act 2001* (Cth) ss 140, 232.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr E White with Ms C O'Neil	Tony Hargreaves & Partners Lawyers
For the Defendant	Ms M Isobel with Ms C Dawes	Meridian Lawyers

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HIS HONOUR:

Introduction

1 The plaintiff, Mr Craig Gorman, is a speech pathologist and a member of the defendant, Speech Pathology Association of Australia Limited ('the SPA'). The SPA investigated a complaint made against Mr Gorman by a parent of one of his patients. A lengthy process culminated in a decision by the SPA Board of Directors ('SPA Board') on 24 July 2023 that Mr Gorman had breached SPA ethical values, principles and practice standards ('the breach decision'). The SPA then engaged in a further process to determine the appropriate sanction for the breach it had found. On 7 June 2024 that process culminated in the SPA Board of Directors ('SPA Board') ratifying certain 'undertakings' with which Mr Gorman was required to comply ('undertakings').

2 Mr Gorman contends that:

(a) the investigation conducted by the SPA was procedurally unfair and therefore oppressive to him; and

(b) the undertakings are oppressive, or unfairly prejudicial, or unfairly discriminatory to him.

3 He seeks orders that the breach decision and the undertakings be set aside and various declarations made.

4 For the reasons that follow, orders should be made to that effect.

The parties

5 Mr Gorman is a registered speech pathologist and has been practising in Victoria since 1980. Mr Gorman's areas of specialty include paediatric speech pathology, autism related speech and language disorders, and management of communication and swallowing following stroke or progressive neurological disorders. He has at all material times been a member of the SPA.

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6 The SPA is the national peak body for the speech pathology profession, trading as 'Speech Pathology Australia' and is a not-for-profit public company limited by guarantee.

7 Dr Patricia Bradd is the Chair of SPA's Ethics Board ('Ethics Board'). She affirmed two affidavits in the proceeding and gave evidence at the hearing.

8 Her first affidavit of 19 August 2024 provides a useful description of the SPA's important role in the regulation of the speech pathology profession;

> Speech Pathology is a self-regulated health profession in Australia. SPA is recognised by the Australian Government as the professional body for setting and monitoring the minimum professional standards of the speech pathology profession in Australia, regulates the certification of both members and non-members. SPA has a commitment to protect the public by ensuring that speech pathologists working in Australia practice in a way that upholds the standards expected of them. This is distinct from regulated health professions such as medicine and nursing, which are regulated through the *Health Practitioner Regulation National Law* by the Australian Health Practitioner Regulation Agency.
>
> SPA completes their role through several functions, including:
>
> (a) by administering the Certification Program; and
>
> (b) by receiving, investigating, and making findings in relation to complaints about speech pathologists who are members of SPA or who hold non-member Certified Practicing Speech Pathologist ("**CPSP")** status.
>
> The Certification Program is in place to ensure that Certified speech pathologists provide safe, effective, and evidence-based services. To be eligible to become a CPSP, speech pathologists must meet specified recency of practice and continuing professional development ("**CPD**") requirements, and agree to be bound by the SPA Code of Ethics (the "**Code of Ethics**"), among other standards. …
>
> Speech pathologists do not need to be a member of Speech Pathology Australia to be a CPSP. Speech pathologists who hold CPSP status are entitled to provide services to individuals that are funded by Medicare, the National Disability Insurance Scheme, the Commonwealth Home Support Program and private health funds. Speech pathologists without CPSP status do not have this entitlement.
>
> Any person who has identified that a speech pathologist may have breached the Code of Ethics is able to make a complaint to the SPA. These complaints can be made informally or formally. The Ethics Board of Australia ("**Ethics Board**") is responsible for receiving and investigating formal ethics complaints, determining whether the speech pathologist's conduct breached

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the Code of Ethics or not, and making recommendations on penalties and undertakings to the SPA Board.

The evidence

9 Mr Gorman read and relied on four affidavits: three of his own dated 1 July 2024, 25 July 2024 and 21 August 2024, and one of his solicitor dated 24 July 2024. He also gave oral evidence and was cross-examined.

10 The SPA read and relied on the following affidavits: affidavits of Dr Bradd dated 19 August 2024 and 11 September 2024; and affidavits of Ms Lucy Sutherland, the Vice President Governance of the SPA, dated 12 September 2024 and 18 September 2024. Dr Bradd also gave oral evidence.

11 The SPA sought to rely on materials regarding 'informal' complaints regarding Mr Gorman. The SPA sought to rely on the informal complaints not for the truth of the facts asserted in those complaints but for the number of them. This was said to be a matter I could take into account in the exercise of any discretion I should exercise in relation to relief. I did not admit evidence of the informal complaints into evidence. The informal complaints had not been relied upon by the SPA in its decision making regarding the breach decision and the undertakings nor had they been investigated by the SPA according to its procedures and upheld. I did not regard evidence of the number of informal complaints without any assertion that those complaints were justified as probative of anything relevant.

The Constitution and the Code of Ethics

12 The SPA Constitution ('Constitution') amongst other things sets out the objects the SPA, creates classes of membership (including Certified Practising Member), establishes the SPA Board and provides for disciplining of members by an Ethics Board.

13 Clause 5.1 sets out the objects of the SPA. Relevantly these include the promotion of the profession of speech pathology, improving and maintaining a high standard of

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conduct amongst the profession and deciding questions of professional ethics and conduct for members.

14 Clause 23 of the Constitution provides:

> 23. Disciplining Members
>
> 23.1. The Board must establish an Ethics Board or other similar Committee as an advisory and investigative committee of the Board with the power to:
>
> (1) investigate complaints about a Member;
>
> (2) make recommendations to the Board in relation to disciplinary findings about a Member;
>
> (3) make recommendations to the Board in relation to an appropriate penalty; and
>
> (4) perform any other function concerning a complaint against or in relation to the disciplining of Members;
>
> In accordance with the Ethics Board Procedures or other similar document published by the Board for Members from time to time.
>
> 23.2 Following recommendations provided by the Ethics Board, the Board may:
>
> (1) make findings about a Member in relation to a disciplinary matter;
>
> (2) impose penalties in relation to a disciplinary matter, including the expulsion of a Member; and
>
> (3) publish the results of a disciplinary finding with any applicable penalty.
>
> 23.4 A Member must comply with any penalty imposed by the Board.
>
> 23.5 The Board may impose such further or alternative penalty, including the expulsion of a Member, as it considers appropriate, in circumstances where a Member has failed to comply with any penalty imposed by Board.

15 The Code of Ethics ('code') is a 12 page document.

16 Under the heading 'Using this Code of Ethics' it provides:

> This Code of Ethics binds each member of Speech Pathology Australia. As a result, it contributes to responsible speech pathology practice and an ethical speech pathology community. Members of Speech Pathology Australia make a commitment to read, understand and comply with this Code of Ethics within all professional interactions. This commitment is renewed annually through the membership process of Speech Pathology Australia.

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17 The code identifies four ethical values:

(a) Respect and dignity;

(b) Responsiveness;

(c) Quality and safety; and

(d) Professionalism and integrity.

18 Alongside these values the code defines five inter-related ethical principles: autonomy, beneficence, non-maleficence, truth and veracity, and justice and fairness.

19 The code provides more detail regarding the application of those values and principles in three areas:

(a) Professional practice;

(b) Quality service; and

(c) Knowledge.

20 Specific provisions of the code relied upon by the SPA in this case are set out in the discussion below.

The Ethics Board procedure

21 The procedures adopted by the SPA and agreed by the SPA Board for the investigation of complaints are contained in a document entitled 'Ethics Board Background and Procedures (November 2020)' ('the Ethics Board procedure').

22 The Ethics Board procedure stipulates that in carrying out its function of receiving and investigating complaints, identifying breaches of the code and making recommendations on any sanctions for breaches the Ethics Board must adhere to the principles of procedural fairness.

23 Below I detail the Ethics Board procedure insofar as it is relevant to this matter.

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Initial consideration

24 A complaint from a member of the public or member of the profession about a suspected breach of the code is initially referred to a member of the SPA staff, the Manager Ethics and Professional Issues. If the complainant proceeds with a formal complaint they are required to fill out a written complaint. The Manager Ethics and Professional Issues refers the complaint to the Chair of the Ethics Board.

25 The Chair of the Ethics Board will not investigate a complaint if the complaint does not concern a possible breach of the code or is frivolous or vexatious. Unless the Chair of the Ethics Board extends the limitation period, a complaint will not be investigated if it is made more than 12 months from the date on which the most recent incident the subject of the complaint occurred.

The Investigation Panel

26 If the Chair of the Ethics Board determines the complaint warrants further investigation they are to convene an investigation panel, comprising three members of the Ethics Board.

27 The respondent to the complaint is required to provide a response to the complaint within 28 days.

28 The investigation panel is required to consider the complaint and the response. It may (but is not required to) provide the response to the complainant and may (but is not required to) provide the complainant with an opportunity to provide a 'further submission' regarding the complaint. If a further submission is made by the complainant this also will be provided to the respondent who may make a further response.

29 Neither complainant nor respondent have a right to make any further submission to the investigation panel but the panel may request further information at any time during the investigation process.

30 The investigation panel determines whether there has been a breach of the code and

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if so makes recommendations regarding penalties and/or required undertakings and actions.

31 Penalties can include, but are not limited to:

(a) financial recompense to the complainant;

(b) suspension of the respondent's membership;

(c) expulsion of the respondent;

(d) specific directives as approved by the SPA Board; or

(e) a combination of these.

32 Required undertakings can include, but are not limited to:

(a) completion of professional development or training (on clinical areas and/or business management practices, privacy, record keeping etc.);

(b) changes to reporting practices;

(c) changes to clinic management procedures;

(d) completion of sections of the Ethics Education Package;

(e) professional supervision (paid);

(f) referral for a Certified Practising Member audit; or

(g) a combination of these.

33 Within 28 days of the conclusion of its investigation the investigation panel prepares a 'brief' for the Chair of the Ethics Board which includes:

(a) identification of which Code of Ethics principle(s), values and/or standards of practice has/have been breached;

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(b) information detailing the panel's decision-making process; and

(c) the panel's recommendations regarding penalties, required undertakings and actions.

Review by Chair of Ethics Board and Vice President Communications

34 The Chair of the Ethics Board reviews the brief and:

> will confirm the decision, and, in consultation with the Manager Ethics and Professional Issues, finalise the recommendations for penalties, required undertakings and actions to ensure they are consistent with these procedures and the [SPA's] constitution.

35 The Chair of the Ethics Board then prepares a summary of the outcome which is forwarded along with all relevant materials to the Vice President Communications of the SPA (now known as the Vice President Governance), a member of the SPA Board.

36 If the Vice President Communications considers the complaint has been investigated in accordance with the complaint procedures they present relevant information to the SPA Board.

SPA Board ratification

37 If the SPA Board is satisfied that:

(a) the complaint was investigated in accordance with the Ethics Board procedure; and

(b) the outcome does not appear unfair or unreasonable,

it will ratify the decision and outcome of the investigation panel.

38 On the other hand if the SPA Board is not satisfied that:

(a) the complaint was investigated in accordance with the Ethics Board procedure; or

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(b) the outcome does not appear unfair or unreasonable,

it refers its concerns to the Chair of the Ethics Board. If those concerns cannot be resolved, the Chair of the Ethics Board is to refer the matter to the investigation panel. The investigation panel meets, considers the issues raised by the SPA Board and provides a response (which may include a variation of its previous findings, penalties, required undertakings and actions) to the Chair of the Ethics Board. The above procedures regarding consideration of the report by the Chair of the Ethics Board, the Vice President Communications and the SPA Board repeat.

After the Board – the further investigation panel

39 Once the SPA Board has ratified the decision of the investigation panel the Vice President Communications may present information, collated by the Manager Ethics and Professional Issues, detailing the complaint history of that particular member.

40 On receipt of that information the SPA Board may direct the Chair of the Ethics Board to convene a further investigation panel.

41 The further investigation panel is to consider the findings of the investigation of previous formal complaints for that member and to determine an appropriate sanction for the current complaint, taking into account the member's complaint history.

42 The respondent to the complaint is to be provided with all relevant information to be considered by the second investigation panel and is to be invited to provide a written response to that material within 28 days of that invitation.

43 The further investigation panel makes recommendations regarding penalties and/or required undertakings and actions having regard to the findings regarding previous formal complaints and the finding of breach of the earlier investigation panel (as ratified by the SPA Board).

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Review by Chair of Ethics Board and Vice President Communications

44 The further investigation panel then prepares a 'brief' for the Chair of the Ethics Board. The Chair of the Ethics Board reviews the decision of the further investigation panel and 'finalises' the recommendations to ensure they are consistent with the Ethics Board procedure and the Constitution and prepares a report to the Vice President Communications.

45 The Vice President Communications then reviews all material relevant to the further investigation panel's recommendations to ensure the recommendations were determined in accordance with the complaint procedures. If satisfied that this is so the Vice President Communications presents the recommendations to the SPA Board.

(Second) SPA Board ratification

46 If the SPA Board is satisfied that;

(a) the recommended sanctions were determined in accordance with the Ethics Board procedure; and

(b) the outcome does not appear unfair or unreasonable,

it will ratify the sanctions recommended by the further investigation panel.

Review

47 A complainant or respondent has 28 days from the notification of the SPA Board's decision to seek a review.

48 The review is heard by a review panel comprising:

(a) a practising solicitor; and

(b) two members of the Ethics Board who were not part of the investigation panel.

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49 The review panel is required to:

(a) consider submissions from relevant parties;

(b) determine whether the process of decision-making was in accordance with the principles of procedural fairness;

(c) ensure that there was procedural fairness, and it was afforded to all parties;

(d) determine whether the ratification of the Ethics Board's findings is within the power of the SPA Board in accordance with the Constitution; and

(e) notify the SPA Board of its decision in writing.

50 The review panel may:

(a) find and make a recommendation that the SPA Board's ratification of the investigation panel finding was made in accordance with the principles of procedural fairness and is within the power of the Board; or

(b) refer the ratification back to the SPA Board for reconsideration in light of the review panel's findings.

51 The Chair of the Ethics Board is to advise the complainant and respondent as soon as practicable but no later than 28 days after the review panel has made its decision.

52 The Ethics Board procedure provides:

> The decision becomes final once any review procedures have been completed. There is no further right of review.

The complaint against Mr Gorman

53 On 28 October 2021 Ms B made a complaint to the SPA ('the complaint').

54 The complaint is on a template form. The substantive portions of the complaint are as follows (with the sections from the template form in ordinary type and Ms B's responses in italics):

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What happened?
[C] came out of his weekly session extremely upset and withdrawn from everything.

When did it happen?
16.10.2020

This was [C's] 11th session with Craig …

Who was involved?
Craig Gorman

Please describe any other relevant information
I was not advised until in the waiting rooms for [C's] second session I wouldn't be going in [the] room with him.

In front of other parents.

[O]n the 16:10:20 [C] showed me a downward punch sign he uses when he gets hurt by a swing, sibling or something falls & hurts him when I asked him if he wanted to go back to Craig & other days since when asked.

What have I done already to try and deal with this issue …?
Ask Craig before every session if [C] was ready for me to be in the room. Craig always said, I'm holding [C] back if I join session.

Taken [C] out.

The main issues I'm concerned about are

Not advising parents child is to be left alone until second session in waiting room.

Continually telling me when I ask to be in room that [C] would do better without me.

The impact of the issue for me has been

Craig continuing sessions without me while [C] was throwing things & banging. [C's] speech was not improving & [C's] temper started showing a lot more frequently.

As a result of my complaint I would like
Parent to be in room with child during session

Craig to explain to a higher authority why he insisted on parents not being in the room with child.

55 On 1 November 2021 the SPA sent Mr Gorman a letter providing a copy of the complaint and an 'Information Sheet, Ethics Complaints Investigation' and requesting that he respond to the issues raised in the complaint in writing within 28 days.

56 On 6 December 2021 Mr Gorman responded to the complaint in writing, his

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response was extensive. In summary it said:

(a) C was seen on an individual basis because of the clinic's COVID-19 Safe Policy procedures;

(b) These procedures had been mandated by relevant authorities, were displayed prominently in the clinic and had been explained to Ms B at the initial consultation, at the start of C's second session and reinforced in a text message on 4 August 2020.

(c) Contrary to Ms B's complaint, she was not spoken to in front of other parents at the commencement of the second session as there were no parents or children present at that time;

(d) Ms B was not told C would do better without her;

(e) During all sessions the door to the therapy room was left ajar;

(f) Ms B did not request to join the session at the commencement of every session, in fact her only request was at the start of the second session;

(g) That C had tolerated the session on 16 October well, had enjoyed the interaction and left the session with 'a smile on his face';

(h) That Mr Gorman had provided Ms B with feedback regarding C's performance and that Ms B had appeared happy with the service Mr Gorman had provided (Mr Gorman provided screenshots of text messages as attachments to his letter which he said demonstrated this); and

(i) Ms B made several negative references to government restrictions, lockdown and home schooling demands, she was not wearing a mask at the first consultation and had to be reminded to wear a mask on two other occasions and appeared disgruntled to do so.

57 Mr Gorman attached to his letter of 6 December 2021:

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(a) A copy of the Directions from the Deputy Chief Health Officer (Communicable Disease) in accordance with emergency powers from declared state of emergency – Stay Safe Directions (No 2), dated 21 June 2020;

(b) A copy of the Dandenong Neurology and Specialist Group CovidSafe plan, dated 12 August 2020;

(c) A photograph of signage at the Dandenong Neurology and Specialist Group clinic reception area and a photograph of an alcove of the main waiting area;

(d) A schematic plan of the room in which the therapy sessions with C took place;

(e) The Melbourne Speech Clinic's Speech Pathology Mission Statement;

(f) The SPA guidelines relating to patient density;

(g) A graph showing COVID-19 pandemic statistics; and

(h) Screenshots of various text message interactions with Ms B.

The first investigation panel

58 The complaint was referred to an investigation panel ('the first investigation panel') on 7 December 2021. The first investigation panel met via Zoom on 20 December 2021. It considered the complaint and the respondent's response of 6 December 2021. It did not conduct any interview with either Ms B or Mr Gorman. At the end of the Zoom meeting it had reached a unanimous view that Mr Gorman had breached the code.

59 On 18 January 2022 the first investigation panel provided a report ('first IP report') to the Chair of the Ethics Board.

60 The first IP report concluded that Mr Gorman had breached the code in the following areas:

- Values- Responsiveness, Quality and Safety

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- Principles- Autonomy, Justice and Fairness
- Professional practice:
    - o 1.2 Professional conduct
        - ▪ Professional Conduct: We provide safe, quality professional services. We have relevant and suitable service delivery policies and procedures and comply with them and
        - ▪ communicate our policies and procedures in a responsive and timely manner
    - o 2.1 Consent, privacy, and confidentiality
        - ▪ We ensure informed consent has been obtained from clients for the services we offer, including for the information we collect and the cost of the services.
    - o 2.4 Service planning and provision
        - ▪ We are innovative and evaluate the services we provide on an ongoing basis to ensure that they are as efficient and effective as possible.

61 The breaches were described in the following terms:

> The speech pathologist's response to the central claim of non-inclusion of the parent in the therapy room cited reasons of safety related to the distancing requirements as a result of the COVID19 pandemic. In his submissions, the speech pathologist established that there were risk management reasons for limiting the number of people in the clinic room at any time due to the pandemic and its effects at the relevant time. However, it was clear from the complaint that the complainant did not understand the reasons she could not attend therapy with her son; and the speech pathologist did not establish that he had communicated his risk management policies to the complainant in a way that she understood.
>
> It was not evident that an appropriate risk management framework had been developed specific to the speech pathologist's speech pathology business, including to mitigate the legal and ethical risks associated with: (a) the speech pathologist seeing paediatric clients in a small clinic room without a parent or carer being physically present; and (b) establishing, documenting, and maintaining informed consent to treatment without direct parent oversight or participation in therapy sessions. In addition, no alternative service delivery options were offered or communicated to the parent that would have enabled her to observe and/or participate in her son's therapy sessions without needing to be physically present in the room, e.g., through closed circuit televisual or telehealth options.

62 The first investigation panel found that the complainant's 'claimed breaches … with regards to safety and welfare, and privacy' were not supported by the evidence.

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63 The first IP report went on to provide various recommendations regarding 'undertakings' which should be imposed on Mr Gorman for the breaches it had found.

SPA Board ratification – first IP report

64 On 24 January 2022 Dr Bradd, as Chair of the Ethics Board, prepared a brief to the Vice President Communications of the SPA endorsing the findings of the first investigation panel and providing further detail of the undertakings required of Mr Gorman as recommended by the first investigation panel.

65 On 2 February 2022 the SPA Board met to review and discuss the first IP report and the brief prepared by Dr Bradd. The SPA Board ratified the recommendations of the first investigation panel and on 9 February 2022 Mr Gorman was advised of the outcome.

First review panel

66 On 8 March 2022 in a letter to the SPA, Mr Gorman sought a review of the SPA Board's decision on the basis that it was procedurally and substantially deficient. The letter provides a detailed substantive response to the findings of the first investigation panel. In summary it says:

(a) regarding the allegation that Mr Gorman had not effectively communicated the reasons Ms B could not attend therapy with her son and had not communicated the risk management policy in a way she understood:

(i) that the COVID-19 policy was on visual display and had been discussed with Ms B;

(ii) that the clinic door was kept ajar during therapy;

(iii) with Ms B's consent video recordings were made of the therapy;

(iv) that the Mission Statement invited her to contact him at any time to

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discuss any aspect of the treatment; and

(v) at the end of each session Ms B was asked if she had any questions.

(b) regarding the allegation that it was not evident that an appropriate risk framework had been developed to mitigate risks associated with seeing small children without a parent or guardian present:

(i) that Mr Gorman felt it clinically appropriate to see C in the absence of Ms B and that the decision was made under the exceptional circumstances of the pandemic and was discussed with Ms B;

(ii) that Ms B was permitted to wait in the waiting room and that the door was left ajar so Ms B could discreetly observe the therapy;

(iii) that there was ongoing communication with Ms B regarding C's progress;

(iv) that Mr Gorman had current working with children certification, that a copy of the Mission Statement was provided to all clients, that there was a privacy policy on the website and that there was clear signage regarding the COVID-19 policy;

(c) regarding the allegation that he had not documented consent, that Mr Gorman had documented Ms B's consent to the manner of treatment in his clinical notes at the end of the first session.

(d) regarding the allegation that no alternative service delivery options had been considered:

(i) that Mr Gorman did consider telehealth delivery and ruled it out as inappropriate for clinical reasons;

(ii) there was no other room at the clinic that could be used; and

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(iii) if Ms B had raised any issue Mr Gorman would have considered livestreaming his sessions on Zoom to her phone but she had raised no issue.

67 The 8 March 2022 letter attaches Mr Gorman's clinical notes of his sessions with C.

68 A review panel ('the first review panel') was formed in accordance with the Ethics Board procedure.

69 On 11 May 2022 the first review panel, after reviewing the decision of the first investigation panel, determined as follows:

> 4 Findings of Review Panel
>
> 4.1 The Review Panel determined that the process of decision making was not in accordance with the principles of procedural fairness and that procedural fairness was not afforded to the Practitioner.
>
> ..
>
> 4.2 Further the Review Panel determined that the Practitioner was not afforded the opportunity to make any submissions regarding the proposed outcome and specifically the penalty and/or required undertakings and actions.
>
> 4.3 Further, the Review Panel determined that the ratification of the Ethics Board's finding was not within the power of Speech Pathology Australia's Board of Directors because of the matters outlined in the above paragraph.
>
> 4.4 Further it was determined that the decision was flawed on substantive grounds. The reasons for this decision are:
>
> (a) That it could not be satisfied that there was an inadequate risk framework developed on the available information;
>
> (b) That it could not be satisfied that the Practitioner did not communicate the risk policies adequately on the available information.
>
> 4.5 There was additional information which was not requested and which might have been relevant to the decision. For example, the details of the specific policy that existed at the Clinic at the relevant date of the consultation and specific details of what the Practitioner communicated to the Complainant regarding the request to wait in the waiting room, including the details of when precisely this was communicated.

70 On 9 June 2022 Mr Gorman was advised of the first review panel's decision and was

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notified that the matter would be referred back to the SPA Board for further consideration.

SPA Board ratification – first review panel

71 On 8 July 2022 the SPA Board upheld the decision of the first review panel and referred the complaint to a new independent investigation panel ('second investigation panel').

Second investigation panel

72 On 22 July 2022 Mr Gorman was sent a letter advising him of the SPA Board's decision, that the complainant would be provided with additional information provided by Mr Gorman in the 8 March 2022 letter and that Mr Gorman would be given an opportunity to provide further information to the second investigation panel.

73 On 18 August 2022 Mr Gorman's solicitors wrote to the SPA. They enclosed a copy of Mr Gorman's risk management policies and procedures. The letter noted that Ms B was to be provided with the materials which Mr Gorman had filed and requested that Mr Gorman be provided with any response she provided to those materials. The letter also asked that Mr Gorman be provided with minutes of and materials relied upon for the SPA Board's decision of 8 July 2022 and like material for the first investigation panel. The letter requested that Mr Gorman be provided with a substantive response to the matters raised by the 8 March 2022 letter.

74 On 12 September 2022 the SPA wrote to Mr Gorman's solicitors stating that 'if the investigation panel considers it appropriate and relevant to the issues being considered, [it] will give Mr Gorman an opportunity to review part or all of any response given by the complainant and to respond to it'. The SPA refused to provide Mr Gorman with the materials he had requested relating to the decision of the SPA Board or the first investigation panel and said it had adequately responded to the issues raised by the 8 March 2022 letter.

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75 On 19 October 2022 the SPA provided Mr Gorman with a copy of Ms B's response to the materials he had filed. Ms B's response is relatively brief:

> Nothing Craig has put forward am I even going to entertain with a page by page reply. Victorian CHO never at any point during pandemic stated parent could not be present, this is something [SPA] should already be aware of. CHO made clear 1 parent could attend and no siblings. Attached is a letter by Craig from Craig stating this person/family (family meaning more than 1) will be attending his office during these times. There are no documents signed by me, only Craig and it's not dated. [SPA] has the ability and is well within the law to contact other clients of Craig's to confirm his (sic) been seeing kids alone long before covid. I have been honest about very short videos Craig sent me and I replied politely, even when Craig was more concerned about not being able to fit in another client after cancellation because my daughter had a seizure. (written in text Craig put forward).

76 The letter referred to in the response is a letter dated 5 August 2020 which states that the patient/family is travelling to a medical appointment and is thus exempt from current travel bans. The response also encloses the Mission Statement which has been signed by Mr Gorman but is not signed in the space for a parent or guardian to sign.

77 On 11 November 2022 Mr Gorman's solicitors wrote to the SPA. In that letter they allege:

(a) that the Mission Statement was given to Ms B;

(b) that the wording of the 5 August 2020 letter is referrable to travel to the clinic not what occurred in the clinic; and

(c) that it was the policy of the clinic to adhere strictly to density restrictions in place at the time.

78 On 21 November 2022 the SPA advised Mr Gorman the complaint would be referred to the second investigation panel and reiterated he would not be provided with the SPA Board papers he sought.

79 On 5 April 2023 the second investigation panel sent two letters, one to Mr Gorman and one to Ms B, neither received a copy of the letter sent to the other.

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80 The letter to Ms B asked her six questions. On 23 April 2023 Ms B responded to that letter. For ease of reference the panel's questions (in ordinary type) and Ms B's responses (in italics) are shown together below with an additional response provided by Ms B:

> 1. Did you receive an initial assessment report for [C]? If you did, would it be possible to provide a copy of this report?
> *No initial assessment was given or sent to me.*
>
> 2. Did Mr Gorman discuss therapy goals with you?
> *No. Only once did he bring me into the room to show me a puzzle [C] was doing. Every other hand over with [C] was done in the waiting room, with other patients from neurologist and Craig's next client.*
>
> 3. What information did Mr Gorman provide about the goals and expected outcomes of therapy during the period when COVID related restrictions were in place?
> *No information was provided during covid about goals or expected outcomes. Only a printed form giving me permission to drive to his office. (provided)*
>
> 4. What was your understanding of your role in the intervention? Did you understand what the session goals were, what the activities were, and how you could build on the therapy with activities at home?
> *I was given nothing to follow up on at home. I was to sit in waiting room and try not to interrupt or distract [C]. Craig told me several times [C] will do better without me.*
>
> 5. Did Mr Gorman discuss any alternatives to in-person services during the period when COVID restrictions were in place (e.g. telepractice)?
> *No discussion of any kind over alternative services during covid.*
>
> 6. In your complaint you noted that you were concerned about Mr Gorman "continually telling me when I ask to be in room that [C] would do better without me". Did Mr Gorman also explain other reasons why you were not permitted into the room (e.g., COVID related restrictions)?
> *No other reason why I couldn't enter was given at anytime. Craig had me in room at end of one session to show me video of [C] doing puzzle. He can't use the social distancing excuse. He did handover in waiting room!*
> *Never have I received daily session notes or term goals.*
>
> *7. No initial report or assessment was sent to me. Certainly nothing states my child would be alone without me.*
> *Craig has been doing sessions alone with other children long before [C] came along. I'm sure [SPA] has access to this information.*

81 The 5 April 2023 letter to Mr Gorman sought his response on five issues:

(a) Information on 'how Mr Gorman engaged the complainant in carryover and

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implementation of therapy goals into the home environment';

(b) How Mr Gorman communicated the therapeutic/rehabilitation program with Ms B;

(c) Whether Mr Gorman had completed an initial assessment report for C;

(d) What were the therapy goals and what was the intervention approach used;

(e) Whether Mr Gorman discussed approaches or service delivery other than face to face which could have been used during the restrictions in force at the time.

82 Mr Gorman's solicitors responded by letter dated 3 May 2023. In that letter they complain that the questions asked are not the subject of the complaint by Ms B, that Mr Gorman has not been provided with any proper identification or particularisation of a disciplinary offence and that the long period which has elapsed has created an unfairness to Mr Gorman. Under cover of those objections Mr Gorman provided a response to the second investigation panel's request for information.

83 In summary Mr Gorman's response to the questions posed by the second investigation panel are:

(a) He engaged with Ms B at the end of each session with C in a private alcove area of the waiting room. In that engagement he provided Ms B with detail regarding the progress of the session, information regarding verbal responses, aspects of language modelling, activities/play and functional activities that could be used in the home;

(b) The Mission Statement contained an invitation to clients and families to raise matters regarding therapy. Ms B did not. The therapeutic goals and approaches were discussed at the initial consultation and then after each session;

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(c) The therapy goal was to achieve maximum growth and functional use of C's receptive and expressive verbal language skills, acknowledging some use of limited signing. The therapeutic approach taken was a blend of the Intensive Interaction Approach with due consideration to the Total Communication and Early Intervention technique. Mr Gorman then provided some detail regarding the implementation of that approach which he said was taken from his clinical notes. A formal initial assessment was not requested by Ms B or NDIS;

(d) His answer to question 4 was the same as to question 3;

(e) Ms B requested ongoing face to face consultations. It was discussed and decided that due to C's challenges, 'telepractice' would be ineffective and futile.

84 At no stage was Mr Gorman provided with a copy of the letter the second investigation panel had written to Ms B or to her response. At no stage was Ms B provided with a copy of the letter the investigation panel had sent to Mr Gorman or to his response.

85 The second investigation panel met on 30 May 2023 by teleconference. The second investigation panel had before it the initial complaint, Mr Gorman's response dated 6 December 2021,[1] the letter dated 11 November 2022 from Mr Gorman's solicitors, the Complainant's further response dated 12 October 2022, information from the SPA with regards to COVID-19 restrictions and requirements for health services in October 2020, Ms B's response of 23 April 2023 and Mr Gorman's response of 2 May 2023. The second investigation panel did not interview Mr Gorman or Ms B. On 30 May 2023 it concluded its investigation and determined that Mr Gorman had breached the code.

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1 The second investigation panel report describes this document as dated 30 November 2021.

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86 On 7 July 2023 the second investigation panel finalised its report ('second IP report').

87 In the second IP report the panel extracts various statements from both Ms B's statements and Mr Gorman's various responses.

88 The second IP report identifies four key areas of concern with regard to the complaint, being evidence-based practice, engagement with parent and responsiveness to parent's needs, clinical documentation and competency.

89 In relation to evidence based practice the second IP report concludes that during COVID-19 temporary use of telehealth services for treatment of C should have been preferred. It referred specifically to the following statement in the Industry Restart Guidelines Allied Health and Other Primary Health Services (September 2020).

> *Telehealth services must be preferred as the first option for care delivery and provided where and as appropriate.*

90 The second investigation panel had concerns regarding the clinical reasoning and evidence-based rationale for providing individual intervention for C without family involvement.

91 The second IP report states that Ms B and Mr Gorman had differing perspectives on the extent of communication with regards to therapy goals and approaches, expected outcomes of therapy during the period when COVID-19 restrictions were in place, the role of the parent during intervention, carryover and implementation of therapy goals into the home environment, and alternative models of service delivery during COVID-19. As may be seen from the above, in fact Mr Gorman and Ms B have diametrically opposed views regarding the level of engagement which occurred after sessions with C regarding those matters. The second IP report goes on to find that Ms B's responses indicate she was not 'fully informed' regarding those issues and so the panel concludes it has concerns that the information was not provided to her by Mr Gorman in a form that was accessible to her and that she was not fully engaged

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as a partner in the therapeutic process. The second IP report notes a 'lack of kindness and understanding' in Mr Gorman's submission regarding Ms B's desire to be present in C's therapy sessions and refers to evidence regarding how to effectively present information to parents and address differences of opinion in a respectful manner.

92 In relation to clinical documentation the second IP report records the panel's concerns that those notes did not clearly document communication between Ms B and Mr Gorman.

93 The second IP report then identifies further concerns (but without any explanation or elaboration) in relation to the following professional standards:

a. Domain 1: Professional conduct
1.1. Provide ethical and evidence-based practice
1.4 Collaborate with individuals, their supports, our colleagues and the community
1.5 Maintain high standards of communication, information sharing, and record keeping
1.6 Consider the needs of individuals and communities in clinical decision-making and practice

b. Domain 2: Reflective practice and life-long learning
2.2 Use critical reflection to inform professional development and practice
2.4 Participate in professional development

c. Domain 3: Speech pathology practice
3.4 Plan speech pathology intervention or service response

94 Then under the heading 'Specific breaches identified: ethical values, ethical principles, ethical practice standards' the second IP report records that Mr Gorman breached the code in the following areas:

Values:

Respect and dignity: We promote a professional culture which embodies kindness through taking time to value, listen, and show compassion to others. In our professional work, we provide person and relationship-centred care through respecting the worth of all people. We recognise and respect diversity, including the range of characteristics that make each person and community unique.

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Responsiveness: We collaborate, engage, advocate, and partner with individuals, families, colleagues, other professionals, and the community to respond to their needs.

Quality and safety: We provide quality and competent professional services which follow evidence-based practice principles.

Principles:

Autonomy: We respect the rights of others to self-determination and to make free and informed decisions. We support client autonomy in the way that we gain and share information.

Benificence: We seek to benefit through our actions.

Ethical Practice Standards:

1.2 Professional conduct, namely: "We provide safe, quality professional services; we have relevant and suitable service delivery policies and procedures and comply with them; we keep current, accurate and complete clinical and administrative documentation; comply with Speech Pathology Australia's current practice guidelines"

2.2 Accurate and timely information, namely we make sure the information we provide is clear, accurate and sufficient, and that it is provided in a timely manner. We communicate in a respectful and professional way. We provide information that is accessible and understood by clients, their families and significant others.

2.4 Service planning and provision, namely our practice reflects the contexts and interests of our clients and is responsive to need; we inform clients of the potential outcomes of a therapeutic procedure that can be reasonably expected based on the best available evidence.

3.2 Evidence based practice, namely we ensure our professional practice is underpinned by the best available and generally accepted evidence. We consider evidence from systematic research as well as the best available evidence from clinical practice and the preferences of a fully informed client.

95 The second IP report also recommended Mr Gorman be required to comply with certain 'undertakings'.

SPA Board ratification – second IP report

96 On 12 July 2023 Dr Bradd, as Chair of the Ethics Board, sent a brief to the Vice President Communications, stating she was satisfied procedural fairness and due process had taken place and endorsing the findings of the second IP report and further 'clarified' the July 2023 undertakings.

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97 On 20 July 2023 Dr Bradd wrote a letter to the Vice President Governance regarding the complaint and Mr Gorman's disciplinary history – including reference to a formal complaint made against him in 2016. The letter recommended that Mr Gorman's complaint history be taken into account in determining appropriate undertakings in accordance with section 4.15 of the Ethics Board procedure.

98 On 24 July 2023 the SPA Board ratified the findings of the second investigation panel and the undertakings recommended by Dr Bradd. Insofar as it ratified the findings of the second investigation panel, the Board made the breach decision. Notwithstanding its ratification of the undertakings recommended by Dr Bradd, the SPA Board then resolved to form a third investigation panel ('third investigation panel') to consider the previous investigations of formal complaints made against Mr Gorman, the findings of Mr Gorman's previous investigations, the associated previous undertakings Mr Gorman had already completed and to determine and recommend an appropriate sanction in light of the recent complaint.

Third investigation panel

99 On 18 August 2023 Mr Gorman was sent a letter from the SPA that informed him that it had been determined that his conduct was a breach of the code, setting out the reasons a breach had been determined in the same terms as the second IP report. Mr Gorman was also advised that a third investigation panel (though in this and subsequent correspondence it referred to the third investigation panel as the second investigation panel) had been formed to consider his complaint history and that he would be notified of any penalties or undertakings he would be required to comply with once they had been determined. The letter went on to state:

> As soon as the outcome and any required undertakings are ratified by the [SPA Board], all review procedures regarding this complaint will have been completed and, in accordance with the Ethics Board procedure, you have no further right of review.

100 On 4 September 2023 the SPA received a letter from Mr Gorman's solicitors in response to the letter dated 18 August 2023, stating that the alleged investigation and

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findings provided by the SPA were flawed on various substantive and procedural grounds and requested documents from the various investigation panels, the review panel and the SPA Board.

101 On 18 September 2023 the SPA sent a letter to Mr Gorman's solicitors denying that there had been substantive and procedural flaws in the procedures or the investigation process regarding the complaint and refusing to provide him with the requested documents. The letter went on to advise that in accordance with section 4.15 of the Ethics Board procedure Mr Gorman would be provided with information to be considered by the investigation panel. The letter reiterated that as soon as the SPA Board had ratified the required undertakings Mr Gorman would have no further right of review.

102 On 5 October 2023 the SPA emailed Mr Gorman's solicitors attaching materials which it said would be considered by the third investigation panel. That email attached the notification to Mr Gorman of the decision of the SPA Board to ratify the decision of the first investigation panel and materials in respect of earlier breaches of the code by Mr Gorman which had been found by the SPA in 2010 and 2016.

103 On 16 October 2023 the SPA received a letter from Mr Gorman's solicitors providing further submissions regarding Mr Gorman's view that the investigation and findings conducted by the SPA were flawed and addressing, in a limited way, the materials which had been attached to the 5 October 2023 email. The SPA responded to that letter on 26 October 2023 advising that Mr Gorman's submissions would be provided to the third investigation panel.

104 On 29 November 2023 the third investigation panel completed its review of materials and made recommendations for undertakings to be complied with by Mr Gorman.

105 On 18 January 2024 the third investigation panel finalised a report ('third IP report'). The third IP report appears to rely on the findings of what it describes as the 2021 IP (being the first investigation panel) in conjunction with the earlier breaches as

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establishing a consistent pattern of prior breaches upon which it relies to determine appropriate undertakings for the breach found by the SPA Board in July 2023. It is not plain how it could do so in circumstances where the first investigation panel's recommendations had not been adopted by the SPA (once the SPA Board endorsed the findings of the first review panel) and the third investigation panel was in fact determining the appropriate sanction in relation to the same complaint.

106 The third investigation panel's recommendations to the Chair of the Ethics Board were extensive. They may be summarised as follows:

(a) Mr Gorman was required to provide evidence of 100 points of continuing professional development activity for the 2024-25 membership year;

(b) Mr Gorman was to engage in six months of self-funded intensive professional supervision with a professional supervisor approved by the SPA. Such supervision to initially involve weekly one hour meetings which may be reduced after three months to fortnightly one hour sessions if the professional supervisor recommends. This supervision would include an audit of 10 of Mr Gorman's client files per month for the first three months dropping to five files per month for the next three months if the professional supervisor recommends;

(c) Two items of self-evaluation, one after three months and the other after six months.

SPA ratification of third IP report

107 On 19 February 2024 Dr Bradd sent a brief to the Vice President of Governance. The brief recorded Dr Bradd's satisfaction that procedural fairness and due process had taken place and set out the third investigation panel's recommended undertakings.

108 On 27 February 2024 the SPA Board ratified the recommended undertakings determined by the third investigation panel ('undertakings decision').

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109 On 12 March 2024 the SPA sent a letter to Mr Gorman advising him that the SPA Board had ratified the findings of the third investigation panel and advising him of the undertakings.

Second review panel

110 On 9 April 2024 Mr Gorman requested a review of the undertakings decision on the grounds that the decision was legally unreasonable, irrational and illogical and made in circumstances of a denial of procedural fairness.

111 On 10 April 2024 the SPA received a letter from Mr Gorman's solicitors requesting that any undertakings determined by SPA Board be stayed for ten business days to enable Mr Gorman to consider his position and make any application he may wish to make.

112 On 22 April 2024 the SPA responded to Mr Gorman advising that a review would be conducted by another review panel ('second review panel') and that no action would be taken against him until the review process was finalised.

113 On 21 May 2024 the second review panel finalised a report. The key findings of the second review panel report are as follows:

> **6 Conclusion**
>
> 6.1 In addition to considering the specific grounds raised by the Practitioner, in accordance with its role, the Review Panel has also considered the material relating to the Decision of the Board of Directors and its ratification of the Sanctions.
>
> 6.2 The Review Panel is satisfied that the process of decision-making undertaken pursuant to section 4.16 of the Procedures was not made in accordance with the principles of procedural fairness.
>
> 6.3 In the above circumstances the Procedures require that the Review Panel:
>
> (a) refer this matter back to the Board of Directors so that it can consider an appropriate action;
>
> (b) inform the Chair of the Ethics Board of the decision in writing; and
>
> (c) notify the Board of Directors of its decision and the reasons for the decision.

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> 6.4 The Review Panel has provided these reasons to the Manager, Ethics and Professional Issues, in order that this may be effected.

114 On 29 May 2024 Dr Bradd, as Chair of the Ethics Board, and Ms Sutherland, as Vice President Governance, wrote to the chair of the second review panel seeking further information as to why the panel had reached its conclusion regarding a lack of procedural fairness.

115 The chair of the second review panel provided the following response by email on 29 May 2024 (agreed to by the other two panel members the following day):

> I can confirm that the Panel agreed that SPA had followed the Procedures correctly and as written. Therefore, in response to the letter from the Board, I can confirm there are no sections of the Procedures we identified as not being complied with. I invite my fellow panellists to correct me if I am wrong about my recollection of our findings during the review.
>
> However, for my part and as defined in the Reasons at 4.3(b), procedural fairness does not mean simply following procedure. It means giving a person who will be adversely affected by a proposed decision a reasonable opportunity to consider the information that will be before the decision-maker (here, the Board) and be given the opportunity to respond to that information
> (usually in the form of written submissions).
>
> It was not the lack of adherence to the Procedures, but the lack of the aforementioned opportunity to respond that led to the Panel's conclusion that there was not procedural fairness afforded to the Practitioner.
>
> If the Review Panel was only tasked with confirming that the Procedures had been followed, then that is as far as the Panel would have taken its investigation. However, in circumstances where the Review Panel is required to ensure that procedural *fairness* (not procedural *compliance*) had been afforded to all parties, it was unable to confirm this had been done.

SPA Board reject second review panel decision

116 On 7 June 2024 the SPA Board rejected the second review panel's findings that the undertakings decision was not made in accordance with the principles of procedural fairness and upheld the findings and recommended undertakings of the third investigation panel. The SPA Board concluded that:

a. "the respondent was offered several opportunities throughout the process of the investigation and consideration of his complaint to make submissions in relation to all relevant matters being investigated by the Review Panel"; and

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b. "such an additional requirement has not been applied to any other investigation and has not been applied by any other investigation panel or review panel, since the Ethics Board Procedures were adopted".

117 On 18 June 2024 a letter was sent from the SPA to Mr Gorman's solicitors advising of the outcome and confirmed that the undertakings that were ratified by the SPA Board on 27 February 2024 and communicated to Mr Gorman by letter on 12 March 2024 stand. That letter did not advise Mr Gorman that his review had been upheld by the second review panel and indeed Mr Gorman and his advisors only became aware of that fact in the course of this proceeding.

Mr Gorman's contentions

118 In summary Mr Gorman contends:

(a) the code does not create disciplinary offences;

(b) the complaint was made out of time;

(c) there was no power to constitute a second investigation panel after the first review panel's finding was ratified by the SPA Board;

(d) Mr Gorman was not provided with adequate particulars of the disciplinary offences he was alleged to have committed;

(e) Mr Gorman was not provided with the complainant's additional response by the second investigation panel;

(f) Mr Gorman was not provided with copies of the materials upon which the SPA Board relied in ratifying the recommendations of the second investigation panel;

(g) Mr Gorman was denied the opportunity to review the decision of the SPA Board ratifying the recommendations of the second investigation panel;

(h) Mr Gorman was not provided with the material on which the third investigation panel relied and was not given an opportunity to make

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submissions regarding the appropriate sanction imposed upon him;

(i) Mr Gorman was not provided with the material upon which the SPA Board relied in determining to ratify the decision of the third investigation panel;

(j) Mr Gorman was not provided with an opportunity to make submissions to the SPA Board before it ratified the recommendations of the third investigation panel;

(k) Mr Gorman was not provided with the materials provided to the SPA Board before it rejected the decision of the second review panel;

(l) Mr Gorman was not provided with an opportunity to make submissions to the SPA Board before it decided to reject the recommendation of the second review panel;

(m) The SPA Board should not have rejected the decision of the second review panel;

(n) The second and third investigation panels did not provide proper reasons for their various recommendations;

(o) The SPA Board did not provide proper reasons for its decisions ratifying the recommendations of the second investigation panel, ratifying the recommendations of the third investigation panel and rejecting the recommendation of the second review panel; and

(p) The undertakings ratified by the SPA Board are unreasonably oppressive to Mr Gorman.

119 Mr Gorman says that individually and collectively these issues amount to a breach of procedural fairness in the processes surrounding the handling of the complaint against him and that, as a result, the SPA has engaged in oppressive, unfairly prejudicial or unfairly discriminatory conduct contrary to s 232 of the *Corporations*

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Act 2001 (Cth) ('Corporations Act') or that the SPA has breached its contract with Mr Gorman as a member.

Patient safety

120 The SPA emphasised the importance of its role in maintaining professional standards and in protecting patient safety. Both those matters are of the utmost importance and I agree that the SPA's role as the de facto regulator of the profession is critical. In my view that only serves to emphasise the importance of the SPA adopting proper processes when it considers disciplinary issues and complaints. A failure in its processes will have potential implications for the practitioner concerned but also potentially for patients, other practitioners and the standing of the profession. The SPA also submitted that it was important that the community have confidence in the speech pathology profession and its regulation by the SPA. I agree. That is why when it deals with matters relating to discipline and complaints it should ensure that it follows proper processes.

121 It is important to note though that on the material before me I do not accept that any imminent or direct issue of patient safety arises. Counsel for the SPA expressly stated that there was no allegation by the SPA that Mr Gorman had physically hurt or abused any child in therapy. She did submit however that the purpose of the SPA in maintaining standards of practitioners 'all goes to risk and safety'. I accept that some breaches of the code undeniably might have implications for patient safety or pose a risk to the patient or the community but plainly a fair reading of the code does not permit the conclusion that every breach should be so characterised. Improper billing practices for example would potentially constitute a breach of the code but have no implications for patient safety.

122 Further, and critically for this case, at no stage in the SPA's deliberation of the complaint was it ever squarely put to Mr Gorman that his conduct had endangered the safety of C and none of the findings of the second and third investigation panels or the SPA Board amount to a finding of such a serious nature. If C's safety was an

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issue it was imperative that the SPA squarely raise its concerns with Mr Gorman and make express findings in relation to his conduct – it did not do so.

123 Nor is the suggestion that Mr Gorman's conduct poses any imminent or direct risk to patient safety or the community consistent with it taking more than 12 months for the SPA's processes from the ratification by the SPA Board of the first review panel recommendations to the ratification of the second investigation panel recommendations and then a further seven months before the ratification of the third investigation panel recommendations.

The code is not defective

124 I do not accept Mr Gorman's submission that the code is defective because it does not create specific disciplinary offences. For that proposition Mr Gorman relied upon two cases. In *Hawkins v Willis*[2] in the context of a union registered under the then *Conciliation and Arbitration Act 1904* (Cth), the Court held that it required clear words to create a punishable offence.[3] In *Buchanek v Jones*[4] in the context of a union registered under the *Industrial Relations Act 1988* (Cth) the Court held:

> Rules which leave vague the content of offences, so that the guilt of a person charged under them depends upon the collective opinion of a domestic tribunal are likely to offend against s.196 of the Act, on the ground that they impose conditions, obligations or restrictions that are oppressive, unreasonable or unjust.[5]

125 Each of those cases arose in the context of specific legislative limitations on the circumstances in which union rules could provide for the removal of an officer, prescribing the category of offence for which removal was a possibility. In that context it is unsurprising that the court required the rules to identify with precision the offence which permitted removal so that its character could be properly assessed.

126 Members of the SPA agree to be bound by the code on admission to membership

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2 (1981) 58 FLR 364.
3 Ibid 371.
4 [1989] FCA 134.
5 Ibid [12].

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and on annual renewal of their membership. Compliance with the code is a condition of CPSP status. A failure of comply with the code is thus capable of constituting a disciplinary breach which can be dealt with in accordance with the Ethics Board procedure.

127 This conclusion is not affected by the somewhat aspirational and general nature of some aspects of the code. However, where a member is alleged to have breached the code they must be provided with sufficient particulars of which portions of the code they are said to have breached and sufficient particulars of the ways in which their conduct is said to have breached those provisions. As I discuss below I am satisfied that did not happen in Mr Gorman's case.

The complaint was not out of time

128 Mr Gorman's contention that the complaint was out of time because it was made more than 12 months after the incident was alleged to have occurred is not made out. On the basis of Dr Bradd's evidence I am satisfied that she extended the limitation period for the complaint in accordance with her absolute discretion under clause 4.5 of the Ethics Board procedure.

There was power to constitute the second investigation panel

129 I do not accept Mr Gorman's argument that there was no power in the SPA Board to constitute the second investigation panel.

130 Clause 4.12 of the Ethics Board procedure provides as follows:

> The review panel has the discretion to hear new evidence if relevant. On completion of the review, the review panel shall find and make a recommendation that the ratification of the finding was made in accordance with the principles of procedural fairness and is within the power of the SPA Board of Directors or shall refer the ratification back to the SPA Board of Directors for reconsideration in the light of the review panel's findings.
> ...
> The decision becomes final once any review procedures have been completed. There is no further right of review. If there is no review, the SPA Board of Directors' decision becomes final 29 days after the respondent received notice of the decision.

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131 In *Minister for Immigration & Multicultural Affairs v Bhardwaj*[6] ('*Bhardwaj*') Gleeson CJ said:

> There is nothing in the nature of an administrative decision which requires a conclusion that a power to make a decision, once purportedly exercised, is necessarily spent. In *Ridge v Baldwin*, Lord Reid said:
>
> > ''I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid.''
>
> That general proposition must yield to the legislation under which a decision-maker is acting. And much may depend upon the nature of the power that is being exercised and of the error that has been made.[7]

132 *Bhardwaj* deals with an administrative decision under statute but with appropriate adaptation the principle it applies is relevant here.

133 Clause 4.12 in my view does no more than provide that the SPA Board's decision to accept the findings of the first review panel was final and not subject to further review. Properly construed that provision does not in my view necessarily finalise the complaint where the SPA Board determines as a result of the review panel finding to reconsider its earlier ratification of the investigation panel's recommendations.

134 As noted above, after the first review panel made its findings, the SPA Board on 8 July 2022 resolved to 'uphold' the decision of the review panel and form a new investigation panel. The substance of the SPA Board's decision to uphold the decision of the review panel is a decision to reconsider its earlier ratification of the first investigation panel's recommendations and not to ratify those recommendations. The essence of that decision making is to leave the complaint unfinalised.

135 Clause 4.7 of the Ethics Board procedure provides what should happen when the

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6 (2002) 209 CLR 597.
7 Ibid 603 [5]–[6].

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Board is not satisfied that the complaint was investigated in accordance with the procedure or that its outcome was unfair or unreasonable. If the SPA Board's concerns cannot be resolved by discussion with the Chair of the Ethics Board, the Chair of the Ethics Board should refer those issue to the investigation panel for consideration.

136 Mr Gorman says what happened on 8 July 2022 did not follow the procedure set out in clause 4.7. The Chair of the Ethics Board did not refer the issues raised to the first investigation panel, rather the SPA Board determined to constitute a second investigation panel.

137 The Constitution provides that business and affairs of the SPA are to be managed by and under the direction of the SPA Board. Clause 23 of the Constitution provides that the Ethics Board is a committee of the SPA Board. It follows in my view that notwithstanding the way in which clause 4.7 of the Ethics Board procedure is expressed, the SPA Board had power to refer the matter to an investigation panel in its own right and also had power to refer it to a differently constituted panel. Particularly in this case, where referral back to the first investigation panel may have raised issues regarding fairness to Mr Gorman, it was, in my view, entirely appropriate for the SPA Board to exercise its power to refer to a differently constituted panel.

138 There is no reason to construe the Ethics Board procedure as limiting the capacity of the SPA Board, where it has determined to reconsider its earlier ratification of the findings of an investigation panel, from directly referring the matter to a differently constituted investigation panel.

Procedural fairness – principles

139 The SPA emphasised in its submissions that the precise content of the obligation to afford procedural fairness depends on context. It emphasised that the SPA is a private organisation with a board comprised of volunteers without legal training.

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140 However, the fact that the SPA is a private organisation with a board comprised of volunteers is not a free pass. It plays a critical role in the regulation of the speech therapy profession. Whilst membership of the organisation is not a pre-requisite for practice, holding the CPSP status effectively is. Suspension or expulsion from the SPA for a breach of the code would lead to loss of eligibility for CPSP status with an inability to provide services to individuals funded by Medicare, the National Disability Insurance Scheme, the Commonwealth Home Support Program and private health funds. A failure to comply with the undertakings imposed on him by the SPA Board would place Mr Gorman's CPSP status at risk.

141 The SPA relied on the decision of John Dixon J in *Morris v Victorian Farmers Federation* ('*Morris*').[8] His Honour in that case helpfully summarised the relevant principles:

> The jurisdiction of a domestic tribunal is founded on a contract, express or implied. The set of rules of the organisation contains the contract between the members and is justiciable in the court as any contract would be. If a member is expelled by a committee in breach of contract, the court will grant a declaration that their action is *ultra vires*. Parties are not, however, free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the member notice of the charge and a reasonable opportunity of meeting it. They also cannot oust the jurisdiction of the courts. …
>
> Where the domestic tribunal sits in judgment on the members of a trade or profession, as opposed to a purely social club, the court has greater power to intervene.
>
> ...
>
> A more flexible standard of natural justice is to be applied to disputes involving domestic tribunals. However, even so, natural justice still requires the adoption of certain basic procedures so as to allow the parties the opportunity to properly defend themselves. The degree of particularity required in a notice to a member in these circumstances is to be assessed against what was necessary for the plaintiff to be able to properly defend himself. It must be acknowledged that in these respects domestic tribunals are not to be placed upon the same footing as criminal courts. Regard must be had to the fact that charges are laid, and issues are decided by persons who are, for the most part, untrained in legal procedures. Nevertheless, natural

8 [2022] VSC 407.

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> justice requires the adoption of procedures which meet the basic requirements of proper notice, time to prepare and a fair hearing.
>
> …
>
> The rules of procedural fairness require that a person's attention is drawn to the critical issue or factor on which the decision is likely to turn so that they may have an opportunity of dealing with it.
>
> …
>
> As I noted, the standards applicable to private bodies are not as stringent. In both *Radio Yachting* and *Ridgway*, the court made it clear that as long as the conduct was sufficiently particularised, the tribunal was not obliged to provide the plaintiff with additional evidence relevant to the incident that it considered. It is not the case that every piece of relevant and significant adverse material or information need be placed before the plaintiff. Nor is the plaintiff entitled to know about the internal deliberations of the tribunal. That said, if a decision of a private body is going to turn on a particular critical issue, particulars should be put to the plaintiff so that he can fairly respond. As with public decision makers, the question of what is practically fair and just in a domestic or private context will depend on the circumstances. The standard required will be informed by the nature of the power wielded by the tribunal, for example, the implications of membership of the organisation for the member and their livelihood.[9]

142 The SPA is an organisation which sits in judgement on members of a profession and its decisions have potential implications for their livelihood, it is not a mere social club and it is not in the somewhat hybrid category considered in *Morris*. The content of the obligation of procedural fairness and considerations of what is just and fair are informed by those characteristics of the organisation.

143 In the context of this case it is my view that the requirements of procedural fairness required at least the following:

(a) Mr Gorman was entitled to a properly particularised description of the way in which his conduct was said to constitute a breach of the code;

(b) The investigation panels were obliged to provide Mr Gorman with appropriate notice of adverse information which was material to the formulation of their recommendations and provide Mr Gorman with an

[9] Ibid [74]-[75], [79], [85] and [88].

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opportunity to respond to that information;

(c) The SPA Board was obliged to provide Mr Gorman with appropriate notice of adverse information which was material to its decisions and provide Mr Gorman with an opportunity to respond to that information;

(d) The SPA Board was obliged to provide Mr Gorman with an opportunity to make submissions as to whether the SPA Board should adopt the recommendation of the second review panel.

144 For the reasons set out below the SPA's procedures did not afford Mr Gorman those basic requirements of procedural fairness.

Failure to conduct telehealth

145 At no stage did the second investigation panel squarely put to Mr Gorman that a telehealth consultation with C should have been preferred and that his justification for a face-to-face consultation was inconsistent with best practice and constituted a breach of the code.

146 Counsel for the SPA referred to the following finding by the first investigation panel:

> In addition, no alternative service delivery options were offered or communicated to the parent that would have enabled her to observe and/or participate in her son's therapy sessions without needing to be physically present in the room, e.g., through closed circuit televisual or telehealth options.

Counsel contended that this put Mr Gorman on notice that a failure to offer telehealth services was considered a breach of the code and that it was clear Mr Gorman was aware of this in that his submission to the review panel provided a response on this issue.

147 The SPA contends that when it advised Mr Gorman of the second investigation panel it told him that that panel would consider all the material before the first investigation panel. That however, does not in my view convey with any requisite

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precision that Mr Gorman should understand that failing to conduct appointments with C by telehealth was itself a breach of the code. This is so for two reasons:

(a) First, Mr Gorman's review having been successful he was entitled to treat the first IP report findings as having been overturned;

(b) Secondly, and in any event, the first IP report does not say that it was a breach of the code not to conduct appointments by telehealth – at its highest it says it was a breach of the code not to *offer* telehealth. Mr Gorman responded to the latter suggestion in his submission to the first review panel but was given no opportunity to respond to the former.

148 Nor does the letter of 3 April 2023 rectify the failure to put Mr Gorman properly on notice that not conducting appointments with C by telehealth was, in the circumstances, a breach of the code. That letter asked Mr Gorman whether he discussed alternatives other than face-to-face sessions. Nowhere did it suggest that holding face-to-face sessions was itself a breach of the code and that best practice required Mr Gorman to hold telehealth sessions.

149 The second investigation panel relied on the contents of Industry Restart Guidelines Allied Health and Other Primary Health Services (September 2020) in concluding that telehealth options should have been preferred over face-to-face sessions. These guidelines were not drawn to Mr Gorman's attention and he was not provided with an opportunity to make submissions on their effect.

Engagement with parent and responsiveness to parent's needs

150 As noted above the second IP report finds that Ms B's response indicated that she was not 'fully informed' regarding therapy goals and approaches, expected outcomes of therapy during the period when COVID-19 restrictions were in place, the role of the parent during intervention, carryover and implementation of therapy goals into the home environment, and alternative models of service delivery during

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COVID-19. Mr Gorman's statements provided to the panel stated that such information had been provided.

151 If this was a definitive finding that Mr Gorman had not provided such information to Ms B there was a clear denial of procedural fairness. Mr Gorman had not been provided with any indication that Ms B denied having received such information. The panel did not provide Mr Gorman with their letter to Ms B of 3 April 2023 or her response to that letter nor did it provide the substance of those communications to him.

152 In circumstances where the panel had not conducted any interview with either Mr Gorman or Ms B or heard any oral evidence from either of them, I regard this finding by the second investigation panel as better characterised as a finding that Ms B's response indicated that she did not understand the information which Mr Gorman said he had conveyed rather than a definitive finding that Mr Gorman had not conveyed that information. That is consistent with the panel's concern that the information Mr Gorman conveyed to Ms B was not conveyed in a way which was accessible to Ms B.

153 At no stage was Mr Gorman on notice that the second investigation panel considered there had been a failure to communicate with Ms B in a way she understood. In the 3 April 2023 letter Mr Gorman was asked whether he had communicated therapeutic goals with Ms B and he responded that he had. At no stage did the panel squarely raise with him that there had been a failure to communicate with Ms B in a way which was accessible to her.

154 Under this heading the second investigation panel also found that there had been a 'lack of kindness and understanding' in his submissions regarding Ms B's desire to attend her son's therapy sessions. At no stage did the second investigation panel ever squarely raise with Mr Gorman that this could of itself be considered a breach of the code.

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Clinical notes

155 At no stage was Mr Gorman ever advised that the second investigation committee were considering a finding that his clinical notes did not sufficiently document his communication with Ms B and nor was he given an opportunity to respond to such an allegation. It is to be remembered that Mr Gorman was dealing with a complaint by Ms B regarding her not being permitted to attend the sessions with C during COVID-19. He was not told a more general investigation was being conducted into the adequacy of his clinical notes.

Other matters

156 The second IP report also finds that Mr Gorman breached:

a. Domain 1: Professional conduct
1.1. Provide ethical and evidence-based practice
1.4 Collaborate with individuals, their supports, our colleagues and the community
1.5 Maintain high standards of communication, information sharing, and record keeping
1.6 Consider the needs of individuals and communities in clinical decision-making and practice

b. Domain 2: Reflective practice and life-long learning
2.2 Use critical reflection to inform professional development and practice
2.4 Participate in professional development

c. Domain 3: Speech pathology practice
3.4 Plan speech pathology intervention or service response

157 That finding is made without reference to any specific conduct of Mr Gorman. To the extent it relies on the earlier findings it takes matters no further. To the extent that it is meant to be a free-standing finding, it is plainly at such a high level of generality as to be meaningless. For present purposes it is enough to note that at no stage was Mr Gorman given any proper particularisation of how his conduct was said to breach those identified domains.

The 'specific' breaches

158 The 'specific' breaches identified by the second IP report are not specific at all. They

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consist of generalised statements drawn from the code unrelated in any way to Mr Gorman's conduct. At best for the SPA, those identified breaches have to be understood as referrable to the conduct identified earlier in the second IP report about which the second review panel indicated it had 'concerns' but, at the risk of repetition, at no stage in the processes of the SPA was Mr Gorman provided with a properly particularised document detailing the specific way in which his conduct was said to breach specific provisions of the code.

The second investigation panel failed to accord procedural fairness

159 Overall, the second investigation panel did not afford Mr Gorman procedural fairness:

(a) Mr Gorman was entitled to a properly particularised description of the way in which his conduct was said to constitute a breach of the code. He was not given it; and

(b) The second investigation panel was obliged to provide Mr Gorman with appropriate notice of adverse information which was material to the formulations of their recommendations and provide Mr Gorman with an opportunity to respond to that information. They did not do so.

The SPA Board ratification

160 If the second IP report had been given to Mr Gorman then Mr Gorman would have been directly on notice of the way in which the second investigation panel said his conduct breached the code. Had he then been given an opportunity to make submissions some of the defects of procedural fairness in the second investigation panel process may well have been cured. However, Mr Gorman was not given the second IP report or given notice of its findings prior to the SPA Board decision and he was not given an opportunity to make submissions to the SPA Board regarding that report. The failure of the SPA Board to provide Mr Gorman with the substance of the second IP report findings and an opportunity to make submissions to the SPA

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Board regarding those findings was, in the circumstances, a denial of procedural fairness.

161 The SPA Board's ratification of the second IP report in July 2023 was the culmination of a process in which Mr Gorman had been denied procedural fairness. It follows that the breach decision denied Mr Gorman procedural fairness.

The breach decision is oppressive and a breach of contract

162 Mr Gorman alleges that the SPA's conduct is oppressive within the meaning of s 232 of the Corporations Act or alternatively that it was a breach of express and implied terms of the Constitution actionable by the plaintiff on the basis of s 140 of the Corporations Act.

163 I am satisfied that it is appropriate to characterise the SPA's conduct in the way for which Mr Gorman contends.

164 The SPA is not a commercial enterprise. It is a company limited by guarantee for the express purpose of promoting and regulating a profession. It is required by its Constitution to establish the Ethics Board which is given power to take various steps in relation to discipline of members in accordance with the 'Ethics Board Procedures'. Those procedures expressly require the Ethics Board (and thus investigation panels which are committees of the Ethics Board) to accord procedural fairness.

165 The SPA Board was exercising a disciplinary function over a member of a trade or profession. Even without any express provision requiring procedural fairness the Court would imply one.[10] Further, pursuant to the Ethics Board procedure the Board could only ratify the second IP report if it was satisfied that the Ethics Board procedure had been complied with. It could not be so satisfied if there had in fact been a breach of procedural fairness in the conduct of the second investigation panel.

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10 *Morris v Victorian Farmers Federation* [2022] VSC 407, [74] and [78].

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166 The content of what constitutes oppressive conduct for the purposes of s 232 of the Corporations Act needs to be judged by reference to the context, including the nature of the SPA and the nature of the decision making power it was exercising.[11] Most corporate decisions do not involve a requirement to accord procedural fairness but the decision of the SPA to ratify the second IP report did have such a requirement. A failure to accord procedural fairness in those circumstances was capable of constituting[12] and in my view did constitute oppressive conduct for the purposes of s 232 of the Corporations Act.

167 Further, it is my view that, consistent with the holding in *Morris*, there is to be implied in clause 23.2 of the Constitution a requirement that in exercising disciplinary powers provided by that clause the Board is to accord procedural fairness. In ratifying the second IP report, the Board did not do so. Its decision was a breach of the Constitution and therefore a breach of the statutory contract between Mr Gorman and the SPA.

168 Mr Gorman is entitled to have the breach decision set aside.

A review of the breach decision

169 In its letters of 18 August 2023 and 18 September 2023 the SPA asserted that Mr Gorman had no further right of review. Mr Gorman's solicitors in their letter of 4 September 2023, in my view correctly, assert that Mr Gorman has a right of review in relation to the investigation which occurred after the SPA Board upheld the decision of the first review panel. In the event nothing turns on it because I have held that the breach decision should be set aside but had that decision not been set aside, the SPA's purported refusal of a right to review the breach decision would have constituted a breach of the SPA's own procedures and a denial of procedural fairness.

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11 *Ananda Marga Pracaraka Samgha Ltd v Tomar (No 6)* (2013) 300 ALR 492, 556 [418]; *Thomas v Equestrian Australia Ltd* [2022] SASC 151, [53] ('*Thomas*').

12 *Thomas,* [64]–[66].

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The undertakings

170 The undertakings were made as a consequence of the breach decision. That decision having been set aside it follows that the undertakings should be set aside too.

171 In those circumstances I do not need to separately consider whether the processes of the third investigation panel and the Board's ratification of the recommendations of that panel were also defective on procedural fairness grounds. In deference to the submissions of the parties and in case I am wrong in my conclusion that the breach decision should be set aside, I indicate that I agree with the second review panel's finding that the undertakings process miscarried because Mr Gorman was not given an opportunity to respond to the specific undertakings which were being considered by the third investigation committee and subsequently ratified by the SPA Board. In other words, he was denied an effective opportunity to make submissions on penalty.

172 I am however not satisfied that the undertakings in the form they were decided upon are oppressive per se.

173 Mr Gorman gave evidence of the amount of time and money which would be expended by him in complying with the undertakings. In light of my findings it is not necessary for me to express a concluded view on this issue. However having regard to his and Dr Bradd's evidence I am inclined to the view that the content of the undertakings was not per se oppressive.

174 Mr Gorman says that the 100 hour CPD requirement is oppressive because for each hour of CPD activity he needs to do one hour of administrative work and because it is nearly impossible for him to identify 100 hours of activity relevant to his practice.

175 I am satisfied that his estimate of one hour of administrative work for each hour of CPD is a considerable overestimate and that, in any event, some of the activities he described as comprising that administrative work (e.g. documentation of 'reflective learning') could themselves be recorded as CPD activity.

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176 I am also satisfied that Mr Gorman has somewhat overstated the degree to which it is difficult for him to find activities which are relevant to his practice and properly claimable as CPD activities.

177 Mr Gorman complains of the time he will need to spend in order for files to be redacted to preserve confidentiality so that file audits may be conducted. Again, I am not persuaded that the time spent on that activity is as great as Mr Gorman suggests. In any event, spending extra time on redacting files does not strike me as oppressive if the SPA, after a proper process, has formed a view that file audits are an appropriate response to a finding of a breach of the code.

Conclusion

178 For the reasons given, the breach decision and the undertakings should be set aside. The parties should confer on appropriate orders to give effect to these reasons and file consent orders within seven days or in the absence of consent, file their competing proposals together with submissions of no more than three pages in support of their proposed orders.

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