

CRITICAL COMPLIANCE CONDITIONS IN NSW

New South Wales has a different health regulatory framework to the rest of the country in that although the National Law broadly has operation, there is Health Professional Council Authority, Health Care Complaints Commission and various Councils for each of the professions. The *Health Practitioner Regulation National Law (NSW) 86a* is the relevant legislation which provides some unique consideration of critical compliance.

Section 149A(4) of the National Law provides for critical compliance conditions. A critical compliance condition if contravened or breached results in a cancellation of registration.

Section 149A(4) states if the Tribunal makes an order or imposes a condition on the registered health practitioner's or student's registration the Tribunal may order that a contravention of the order or conditions will result in the practitioner's or student's registration being cancelled. Section 148A(5) provides the order or condition concerned then is a critical compliance order or condition.

Section 149C(3) provides that the Tribunal must cancel a registered health practitioner's or student's registration if the Tribunal is satisfied that the practitioner or student has contravened a critical compliance order or condition.

The clear reasoning behind this is that in circumstances where a Tribunal has made a critical compliance order or condition it does so with the intention that if such a compliance condition is breached, then the natural and intended consequence is that the practitioner will have their registration cancelled.

There have been no examples where a breach of 149A(4) have not resulted in cancellation. There are however very few cases where practitioner have breached critical compliance conditions.

Where a registrant has their registration cancelled, they are unable to make application to the relevant authority unless and until a reinstatement order is made by the same Tribunal on application by the practitioner.

Section 149C(7) provides that such a cancellation order may include a provision that such an application for review seeking reinstatement may be prevented or precluded for a period of time.

Once the registration is cancelled then after a period of preclusion, if any, is applied, then the registrant may apply to the review body that the cancellation order be reviewed.

Section 163B(1)(c) provides that the Tribunal may make a reinstatement order on such an application pursuant to Section 163A. After a reinstatement order has been made, then the registrant is at liberty to apply to the National Board for registration.

The effect of this is of course that the National Board would then have to consider - outside the New South Wales jurisdiction through the AHPRA Registration jurisdiction - whether the previous registrant should be registered and then there are considerations of whether a fit and proper test can be met and it is clearly a long process from this point until a practitioner obtains registration.

Application to Health Practitioners

In the event that conditions are placed on a registrant's practice in the State of New South Wales, legal practitioners representing health practitioners and indeed health practitioners need to be aware of the consequence of a breach or a contravention of a critical compliance condition if imposed.

Such a breach will almost inevitably lead to a referral to the Tribunal from the relevant Board for an application for cancellation to be made.

The referral is pursuant generally to 150(3)(b) of the National Law and that means that the Council should refer immediately to the Tribunal.

A preclusion period may or may not be imposed although to date one always is imposed even if it is a very short period as in some recent cases.

But the most important time to act is in relation to the imposition of critical compliance conditions and to ensure that the critical compliance conditions are reasonable and fair in the circumstances and if they are excessive, then the decision of the Tribunal in the circumstances might be appealed within the statutory twenty-eight (28) day period.

In some recent cases in the *Medical Council of NSW v Ghannoum* [2018] NSW CATOD 6, a period of five weeks was imposed as a period of preclusion. In that case the practitioner had failed to attend some CPD requirements.

In *Health Care Complaints Commission v Bours (2)* [2015] NSW CATOD 80 after declining a period of cancellation and imposing suspension in a case that was not a breach of a critical compliance condition, the Tribunal said (at [162]) "The practitioner is spared having to jump the not insignificant hurdle of applying for review of the original order under the National Law and presenting evidence at a fresh Tribunal hearing a to fitness to resume registration."

Also the Tribunal made observations about the seriousness of critical compliance conditions. That the Tribunal views a practitioner's conduct as serious is reflected in the making of such conditions, given their draconian effect.

In a recent 2018 case in which there was a breach of a critical compliance condition, the Tribunal made the following observations before imposing a four week period of preclusion:

On behalf of both the Council and the practitioner it was submitted that the order of the Tribunal should not include a period of preclusion. However both parties indicated that if the Tribunal thought that it was appropriate to set a period of preclusion they each adopted the position that such a period should be short and in the order of 4-5 weeks.

In this regard reference was made to the following factors:

- 1. The practitioner's circumstances*
- 2. The practitioner's candour*
- 3. The singular nature of the breach*
- 4. The breach did not cause any harm to any person because the protective mechanismworked...*
- 5. The practitioner had voluntarily withdrawn from practice for six months prior to the current suspension being imposed*
- 6. It has been some twenty-seven months since the conduct giving rise to these proceedings occurred*
- 7. The current suspension has been in place for seventeen months*
- 8. The mandatory nature of cancellation of registration on the breach*

On behalf of the practitioner it was submitted that the already long period of suspension suffered by him will be a very serious deterrent not only to him but to other practitioners whose registration includes conditions especially critical compliance conditions.

Legal and Health Practitioners should be aware of the strict compliance requirements of these sections and in the event that the critical compliance condition is unreasonable as imposed by the Tribunal, advice should be sought on prospects of appeal or review.

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