

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

No. 03438 of 2012

KATHLEEN PENEV

Plaintiff

v

COUNTY COURT OF VICTORIA

First Defendant

and

DEBRA GILLICK (in her capacity as
Registrar of the second defendant)

Second Defendant

JUDGE: EMERTON J
WHERE HELD: Melbourne
DATE OF HEARING: 8 November 2012
DATE OF JUDGMENT: 27 March 2013
CASE MAY BE CITED AS: Penev v County Court of Victoria & ors
MEDIUM NEUTRAL CITATION: [2012] VSC 143

ADMINISTRATIVE LAW – Judicial review of a decision of the County Court of Victoria – Charges under the *Health Professions Registration Act 2005* (Vic) – Whether County Court made errors of law on the face of the record by misconstruing the relevant offence provisions and asking itself the wrong questions – Whether County Court fell into jurisdictional error by misconstruing or misdirecting itself as to the meaning of the relevant provisions – Whether the County Court could be satisfied that all elements of the offences were proven – Proceeding remitted to County Court for determination according to law – *Health Professions Registration Act 2005* (Vic) ss 3, 80 and 94 – *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr E Nekvapil	Ms K Moorhouse-Perks
For the Second Defendant	Mr B Ihle	DLA Piper

HER HONOUR:

1 The plaintiff, Ms Penev, has practised as a naturopath since December 2001. In the course of her practice, she advertised 'laser acupuncture' services and provided laser acupuncture to an investigator for the Chinese Medicine Registration Board of Victoria (the 'CM Board'). Ms Penev was not registered as a practitioner of Chinese medicine. On 23 June 2011, she was charged with five offences under the *Health Professions Registration Act 2005* (Vic) (the 'HPR Act') by which it was alleged that she had breached the HPR Act:

- (a) in the case of charges 1 to 4, by advertising 'laser acupuncture' services in a manner that contravened the requirements of the HPR Act; and
- (b) in the case of Charge 5, by providing laser acupuncture to the CM Board investigator and by representing to the investigator that she could provide that service.

2 On 22 November 2011, after a contested hearing in the Magistrates' Court of Victoria, Ms Penev was found guilty on each of the five charges. Ms Penev appealed to the County Court of Victoria in respect of each of the offences. On 18 April 2012, the County Court:

- (a) found Ms Penev guilty of each of the five charges;
- (b) in respect of each of the first four charges, fined Ms Penev \$500 and recorded a conviction under s 7(1)(f) and s 49 of the *Sentencing Act 1991* (Vic);
- (c) ordered under s 53 of the *Sentencing Act* that the fines be paid by monthly instalments of \$100, starting on 18 May 2012;
- (d) dismissed the fifth charge without recording a conviction, under s 76 of the *Sentencing Act*; and
- (e) ordered Ms Penev to pay total costs of \$25,281.20 in respect of the proceedings in both the Magistrates' Court and the County Court.

The charges

3 Charges 1 and 5 alleged breaches of s 80(1)(b)(i) and (c) respectively of the HPR Act, which provided:

80. Claims by persons as to registration

(1) A person who is not a registered health practitioner must not intentionally or recklessly –

...

(b) take or use a title, name, initial, symbol, word or description that, having regard to the circumstances in which it is taken or used, indicates or could be reasonably understood to indicate –

(i) the person is a health practitioner in a regulated health profession; or

(c) claim to be registered under this Act or hold himself or herself out as being registered under this Act; or

...

4 Charge 1 was that between 26 November 2010 and 27 May 2011, Ms Penev used words which could reasonably be understood to indicate that she was a health practitioner (acupuncturist) when she was not registered with the CM Board, in that she published on a website that she was qualified to assist with a range of health issues and that her particular areas of speciality included laser acupuncture.¹

5 Charge 5 was that on 19 July 2010, Ms Penev held herself out as being registered as an acupuncturist when she was not registered with the CM Board, in that she conducted an acupuncture consultation, represented that she could provide laser acupuncture services, provided laser acupuncture treatment, charged for the consultation and provided an introductory pack which listed acupuncture as a treatment method employed by her.

6 It was therefore alleged that by advertising and/or providing 'laser acupuncture', Ms Penev held herself out to be a registered practitioner under the HPR Act, that is, a

¹ The advertisement described laser acupuncture as an ancient Chinese therapy which treats diseases by applying fine needles in specific points on the body, the points are stimulated by needles, bringing back the body to its normal, healthy balance.

practitioner whose practice of acupuncture was regulated by the CM Board or otherwise regulated under the HPR Act.

7 Charges 2, 3 and 4 alleged breaches of s 94(1)(c), (b) and (a) respectively of the HPR Act, which at the relevant time provided:

94. Advertising

- (1) A person must not advertise a regulated health service or a business providing regulated health services in a manner which –
- (a) is or intended to be false, misleading or deceptive; or
 - (b) offers a discount, gift or other inducement to attract clients to a business providing regulated health services unless the advertisement also sets out the terms and conditions of that offer; or
 - (c) refers to, uses or quotes from testimonials or purported testimonials; or

8 Charge 2 was that between 17 November 2010 and 27 May 2011, Ms Penev referred to, used and quoted from testimonials or purported testimonials from real or purported patients in the context of advertising a regulated health service (acupuncture/Chinese medicine) on the internet.

9 Charge 3 was that between those dates, in advertising a regulated health service (acupuncture), Ms Penev offered a gift and/or inducement² to attract clients to the business 'Health Wise Therapies' without setting out the terms and conditions of that offer.

10 Charge 4 was that between 16 July 2010 and 8 June 2011, Ms Penev advertised a regulated health service (acupuncture) in a false, misleading and/or deceptive way in that she published an advertisement on the internet advertising that she was able to provide acupuncture services when, at the time of advertising, she was not registered with the CM Board in the division of acupuncture.

² Namely, a 'special' comprising a ten sessions of laser acupuncture, a non-surgical facelift program and \$80 of beauty products.

- 11 Charges 2, 3 and 4 were therefore based on Ms Penev having advertised a 'regulated health service' in a prohibited way. In order to prove the elements of the offences, it had to be established that 'laser acupuncture' was a regulated health service.
- 12 The definitions are critical to understand the offences created by the relevant provisions. Section 3 of the HPR Act contained the following definitions:
- (a) 'regulated health service' means 'a health service usually provided in a regulated health profession'.
 - (b) 'regulated health profession' means 'a health profession that is regulated by a responsible board under this Act'.
 - (c) 'responsible board', in relation to a health practitioner regulated under the HPR Act, means 'the responsible board listed in Schedule 1, established or continued in operation by this Act that registers and regulates the health practitioner'.
- 13 The CM Board was a responsible board that registered and regulated the regulated health profession providing the regulated health services that, as will be seen, could broadly be described as falling within the sphere of Chinese medicine. In essence, Ms Penev is charged with holding herself out to be a practitioner registered by the CM Board to provide a service that falls within the sphere of Chinese medicine, specifically acupuncture, and with advertising the provision of acupuncture, as a regulated health service, in a manner contrary to the requirements of the HPR Act.

The legislative scheme

- 14 The HPR was repealed on 1 July 2012 and the CM Board ceased to exist. For that reason, the respondent to this application for review is the former Registrar of the CM Board, Ms Gillick. I shall refer to Ms Gillick simply as the defendant.
- 15 The regime in the HPR Act and its predecessor legislation was complex, in part because of the evolving nature of the arrangements for the regulation of health

professionals. In 2005, the enactment of the HPR Act effected the repeal of 11 separate registration Acts that had regulated the health professions, including the *Chinese Medicine Registration Act 2000* (Vic) (the 'CMR Act'), and placed the regulated health professions and their registration boards under a single Act. The HPR Act was intended to provide an overarching regulatory framework for all of the registered health professions, while ensuring the specific requirements for each of the professions were met. It provided for the existing registration boards to continue to operate, but under a single regulatory framework, with a consistent set of powers for each board.³

- 16 On 1 July 2010, the *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) commenced, by which Victoria joined the national legislative scheme for the regulation of health professions. This involved the creation of a single national registration scheme for 10 of the 12 professions then registered under the HPR Act. Chinese medicine practitioners and medical radiation practitioners continued to be regulated by the HPR Act until they, too, joined the national scheme on 1 July 2012, at which time the HPR Act was repealed.
- 17 For this reason, at the time of the offences, the HPR Act applied only to the practitioners and services regulated by the CM Board and the Medical Radiation Practitioners Board of Victoria.
- 18 Prior to the enactment of the HPR Act, practitioners of Chinese medicine, including acupuncture, were registered under the CMR Act. The CMR Act established the CM Board to register and maintain a register of practitioners of Chinese medicine. Section 4 of the CMR Act provided that a person could apply to the CM Board for registration as all or any of the following:
- (a) a Chinese herbal medicine practitioner;
 - (b) an acupuncturist;

³ Victoria, *Parliamentary Debates*, Legislative Assembly, 27 October 2005, 1948 (Bronwyn Pike, Minister for Health).

(c) a Chinese herbal dispenser.

- 19 Section 17 of the CMR Act provided for the creation of a register of all registered Chinese medicine practitioners and Chinese herbal dispensers, which was to include divisions for each of Chinese herbal medicine practitioners, acupuncturists and Chinese herbal dispensers. The register in this form and the registration requirements were carried over into the HPR Act in 2005.
- 20 The CMR Act contained provisions similar to ss 80 and 94 of the HPR Act prohibiting the taking or use of the title of registered acupuncturist or claiming to be registered under the CMR Act if the person was not so registered, and prohibiting the advertising of 'a Chinese medicine practice, Chinese medicine services or Chinese herbal dispensing services' in prescribed ways.
- 21 Transitional arrangements in the HPR Act provided for the regulatory boards, including the CM Board, to continue to register and regulate the relevant health profession and for the existing registers to be maintained. The HPR Act contained its own 'generic' provisions for the registration of health practitioners. Part 2 of the HPR Act provided for the registration of practitioners by the different regulatory boards.⁴ Parts 3 and 4 provided for disciplinary procedures and review proceedings in the Victorian Civil and Administrative Tribunal. Part 5 contained the general offence provisions, including ss 80 and 94.
- 22 Importantly, while Part 5 contained explicit restrictions in relation to the practices of dentistry and optometry, it did not specifically prohibit or restrict the provision of other kinds of medical or quasi-medical treatments or procedures. For example, it was not an offence to carry out brain surgery without being registered as a brain

⁴ A person could apply for registration as a health practitioner to the responsible board: HPR Act, s 4(1). As well as general registration, the HPR Act provided for other kinds of registration to meet specific needs: specific registration, registration as a student, provisional registration, interim registration and non-practicing registration. Procedures were set down for assessing and approving applications: HPR Act, ss 14-16. Responsible boards were required to issue a certificate to each registered person and to maintain a register of health practitioners to whom they had granted registration: HPR Act, ss 30 and 31. Once obtained, registration had to be renewed annually: HPR Act, ss 17 and 18.

surgeon. Likewise, it was not an offence to carry out acupuncture without being registered by the CM Board in the division of acupuncture. Rather, the HPR Act imposed a form of regulation founded on restrictions on the making of certain representations, such as claiming to be registered to provide regulated services or to belong to a regulated profession. Thus, s 80(1) prohibited a person claiming or holding out that he or she was a registered health practitioner (or otherwise authorised or qualified to practice in a regulated health profession) if not so registered. Section 80(2) contained a table of 'titles' and types of registration, including 'acupuncturist' and 'registered acupuncturist', and prohibited the taking or using of a title, with or without other words, which could be reasonably understood to induce a belief that the person was registered under the Act with a particular type of registration⁵ authorising the use of the title unless the person was so registered.⁶

- 23 Ms Penev's alleged transgression was not, therefore, carrying out the procedure that she described as 'laser acupuncture', but holding herself out as a person who was registered to carry out laser acupuncture.
- 24 It is common ground that, in continuing to provide exactly the same treatment to her patients but under a different name that does not include the word 'acupuncture' (the term now used is apparently 'laser light therapy'), Ms Penev was not in breach of the HPR Act.

Reasons for decision

- 25 Under the heading 'Issues for determination', the learned County Court judge identified the following issues:
- (1) whether the appellant [Ms Penev] held herself out to be registered under the Act, by describing herself as a person offering laser acupuncture; (alleged breach of s 80(1)(b) and (c))

⁵ Or endorsement of registration.

⁶ Likewise, person could not claim to have or hold him or herself out as having a particular type of registration in the table with the intention of inducing a belief that the person is registered under the Act for that type of registration or endorsement of registration unless the person was so registered.

- (2) whether the appellant [Ms Penev] advertised in ways which breached the Act (alleged breach of s 94(1)(a), (b) and (c)).⁷

26 In this context, her Honour said:

It must be determined whether laser acupuncture is a regulated health service and whether laser acupuncture is a form of acupuncture.⁸

27 Having described briefly the evidence of the investigator who received treatment from Ms Penev, the judge set out in some detail the evidence given by the defendant, who explained what her Honour described as the 'fairly complex' legislative controls and requirements. The Reasons record that the defendant's evidence that an acupuncturist must be registered and, in order to become registered, must provide, amongst other things, proof of completion of a certified course, or sit an examination.

28 The Reasons refer to a number of exhibits to the defendant's affidavit,⁹ including a document entitled 'Frequently asked Questions for Practitioners' prepared by the CM Board, from which her Honour extracted the following question and answer:

Do I have to register if I only perform laser acupuncture?

There may be multiple methods of performing acupuncture that do not involve skin penetration. The issue of penetration is not the relevant point. The *HPR Act* restricts the use of specific professional titles, including acupuncturist and prohibits claiming to be authorised or qualified to offer acupuncture unless you are registered. If the word acupuncture is used in the description of the treatment, as in 'laser acupuncture', and this is conveyed to patients, the practitioner is using a protected title and must, therefore, be registered with the ... Board... ¹⁰

29 The Reasons also make reference to the fact that extracts from Ms Penev's website were in evidence that included testimonials and offers of gifts and free treatment. The judge noted that one of the website extracts described laser acupuncture as 'acupuncture without needles'.¹¹ However, apart from this brief reference, her Honour did not describe or give consideration to the form or contents of the

⁷ *Penev v Chinese Medicine Registration Board of Victoria* (Unreported, County Court of Victoria, Judge Wilmoth, 18 April 2012), 3 ('Reasons').

⁸ Ibid.

⁹ Affidavit of Debra Faye Gillick sworn 19 July 2011.

¹⁰ Reasons 5.

¹¹ Ibid.

advertisements.

- 30 The Reasons record Ms Penev's evidence that she did some training in the use of laser acupuncture in 2004 and received a certificate in 2005 and that she believed that she could advertise under the umbrella of something she called the Therapeutic Goods Advertising Exemption. The Reasons also record Ms Penev's disagreement that laser acupuncture was a form of acupuncture and her evidence that 'laser acupuncture' was just a term that she used.
- 31 The Reasons conclude by summarising the submissions of the parties. It is convenient to extract in full the last part of the Reasons that deal with the submissions of the CM Board, with which the judge agreed in finding the charges proven:

Mr Ihle [counsel for the CM Board] referred to the main purpose of the Act as set out in s 1(a) and (c) as being protection of the public by the provision of registration of health practitioners, and the regulation of advertising of regulated health services.

He submitted that acupuncture is usually delivered by regulated professionals and that it is a regulated health service. He referred to s 80(2) in support of this submission. That sub-section prohibits the use of the title in a Table of titles, which title could be reasonably understood to induce a belief that the person is appropriately registered under the Act. One of these titles is 'acupuncturist'. The sub-section states that the use of other words in addition to the title does not avoid the prohibition.

Accordingly, it was submitted, the addition of the word 'laser' to the word 'acupuncture' does not avoid the prohibition, and so in this case the appellant breached the Act by claiming to specialise in laser acupuncture. It was submitted that the use of the word 'laser' does not indicate some lesser form of acupuncture, or remove it from the operation of the legislation. I accept that submission.

Mr Ihle further submitted that the element of intention or recklessness in the charge under s 80(1) requires the application of an objective test, as to the use of the title, not in relation to what is understood by others. I am satisfied on the evidence that the appellant was reckless in her use of the name or words 'laser acupuncturist'.

As to the alleged breaches under s 94, charges 2, 3 and 4, I accept Mr Ihle's submission that acupuncture is a regulated health profession [sic] by reason of the definition in sub-section 3. He submitted that both acupuncture and laser acupuncture are intended to be covered by the section. I also accept that submission. The appellant advertised acupuncture, even though described as laser acupuncture [sic], and indeed her website offered it as being

acupuncture without the needles.

Having carefully considered the evidence and the submissions of counsel I am satisfied beyond reasonable doubt that each of the charges is proven. Accordingly, the orders of the Magistrates' Court are set aside, and the same orders substituted.¹²

32 The path of reasoning disclosed by the Reasons is therefore based on the following interrelated propositions:

- (a) Acupuncture is usually delivered by regulated professionals and it is a regulated health service.
- (b) Section s 80(2) of the Act prohibits the use of the title 'acupuncturist' by unregistered persons and provides that the use of other words in addition to the title 'acupuncturist' does not avoid the prohibition. Accordingly, the addition of the word 'laser' to the word 'acupuncture' does not avoid the prohibition. The word 'laser' does not indicate some lesser form of acupuncture, or remove laser acupuncture from the operation of the legislation.
- (c) Acupuncture is a regulated health service and laser acupuncture is a subset of acupuncture. Ms Penev herself described laser acupuncture as 'acupuncture without needles'.
- (d) Both acupuncture and laser acupuncture were intended to be covered by the requirements of the Act.

33 Much therefore hinges on the identification of 'acupuncture' as a regulated health service – based largely on the restriction on the use of the title 'acupuncturist' in s 80(2) of the HPR Act – and on the identification of 'laser acupuncture' as a subset of acupuncture – based in part on Ms Penev's own description of laser acupuncture in one of her advertisements.¹³

¹² Reasons 8–9.

¹³ Other than veterinary acupuncture, which was expressly exempted from s 80 of the HPR Act by s 80(14).

Grounds of review

Charges 1 and 5 (brought under s 80 of the HPR Act)

34 Charges 1 and 5 are, in substance, that Ms Penev took and used the word 'acupuncture' in a way that indicated she was a health practitioner in a regulated health profession or that she was authorised or qualified to practice in a regulated health profession.

35 In finding charges 1 and 5 proven, Ms Penev contends that the County Court erred in failing to ask:

- (a) whether laser acupuncture is usually provided in a regulated health profession or by regulated health practitioners;
- (b) whether members of the public would or could reasonably understand Ms Penev's advertising of laser acupuncture to indicate she was a practitioner in the health profession regulated by the CM Board or amount to holding herself out as being registered under the HPR Act.

36 Instead, so Ms Penev contends, the County Court:

- (a) reasoned that it would have been an offence against s 80 for her to offer 'acupuncture' and that it was therefore an offence for her to offer 'laser acupuncture';
- (b) deferred to the CM Board's understanding of the effect of s 80 instead of inquiring whether the use of the compound expression 'laser acupuncture' indicated that she was a Chinese medical practitioner, or constituted a claim that she was registered with the CM Board.

37 Ms Penev further contends that there was no probative evidence to support the conclusion that laser acupuncture was relevantly a subset of acupuncture and that it was not open to infer from the facts as found by the County Court that laser acupuncture was relevantly a subset of acupuncture.

Charges 2, 3 and 4 (brought under s 94(1) of the HPR Act)

38 Charges 2, 3 and 4 are based on the advertising of a 'regulated health service' by an unregistered practitioner. Ms Penev could not be convicted of the offences under s 94 of the HPR Act unless the court was satisfied, beyond reasonable doubt, that 'laser acupuncture' was a 'regulated health service'. In charge 2, the 'regulated health service' was specified as 'acupuncture/Chinese medicine'; in charges 3 and 4, it was specified as 'acupuncture'.

39 Ms Penev contends that the County Court erred because rather than asking whether laser acupuncture was a health service usually provided in a regulated health profession, it asked whether laser acupuncture was *intended* to be a regulated health service. As a result, the court failed to grapple with the factual question whether 'laser acupuncture' was usually provided by Chinese medical practitioners.

40 Ms Penev submits that the County Court conflated what it identified as the intention of the legislature when the legislature included 'acupuncturist' as a protected title under s 80(2), with the factual question of whether laser acupuncture was a regulated health service. Its focus on the protected title 'acupuncturist' and what it thought the legislature must have intended when protecting that title led the County Court to ignore the factual inquiry it was bound to make. Instead, it carried out a task of statutory interpretation and convicted Ms Penev on that basis.

41 Ms Penev further contends that there was no probative evidence to support the finding that laser acupuncture was a regulated health service and that it was not open to infer from the facts as found by the County Court that laser acupuncture was a regulated health service.

Relief

42 As a result of the foregoing, Ms Penev contends that the County Court:

- (a) fell into jurisdictional error because it misconstrued or misdirected itself as to the meaning of the relevant offence provisions in the HPR Act and thereby misconceived the nature of the function it was performing and

misapprehended the limits of its functions or powers; and

- (b) made errors of law on the face of the record by misconstruing the relevant offence provisions and asking itself the wrong questions, and by drawing inferences that were not open to it on its findings of fact.

43 Ms Penev seeks an order that the orders made by the County Court be set aside and the matter remitted to the County Court to be heard and determined according to law.

Analysis

44 In order for Ms Penev to have contravened s 80(1)(b)(i) or s 80(1)(c) of the HPR Act, it had to be established that she was not a registered health practitioner and that she intentionally or recklessly:

- (a) used the words 'laser acupuncture' so as to indicate that she was authorised or qualified to practise in a regulated health profession; or
- (b) claimed to be or held herself out as being registered under the HPR Act.

45 In order for Ms Penev to have contravened s 94(1) of the HPR Act, it had to be established that 'laser acupuncture' was a regulated health service. A regulated health service was defined in s 3 of the HPR Act by reference to the provision of the service in question in a regulated health profession.

46 The offences under each of the provisions were therefore based on the advertising or delivery of services usually provided in a registered health profession, namely the collection of registered practitioners regulated by the CM Board, which services were, by definition, regulated health services.

47 Ms Penev was not registered under the HPR Act and was not authorised or qualified to practice in a regulated health profession or to offer regulated health services. As a naturopath, she practised outside the purview of the CM Board and the regulatory regime in the HPR Act - unless and until she advertised or provided a regulated

health service as part of her practice as a naturopath.

48 A regulated health service was a health service usually provided in a regulated health profession. Practitioners of Chinese medicine belonged to a regulated health profession and services 'usually' provided within the sphere of Chinese medicine were therefore regulated health services. However, a health service did not become a regulated health service with respect to a responsible board only because it was sometimes offered by practitioners registered with that board. As Ms Penev's counsel submitted, it was necessary to have regard to the nature of the service in question, because the definition of a regulated health service might, if read too broadly, encompass services, such as massage or dietary advice, that were widely offered by practitioners of complementary medicine and did not fall within the dominion of a responsible board.

49 The defendant submits that the County Court asked itself the right questions when it said that what must be determined is whether laser acupuncture was a regulated health service and whether laser acupuncture was a form of acupuncture. According to the defendant, it was open on the evidence for the County Court to find, as a matter of fact, that acupuncture *simpliciter* was a regulated health service pursuant to s 3 of the HPR Act and that laser acupuncture was a form of acupuncture. Ms Penev advertised acupuncture, even though she described it as 'laser acupuncture', and her website offered it as 'acupuncture without needles'. The defendant gave evidence that it was correct to say that laser acupuncture was acupuncture without needles and that there were other forms of non-invasive acupuncture.

50 The defendant therefore submits that the County Court directed itself appropriately with respect to the essential elements of each charge and made findings of fact with respect to each of the elements of the offences which were open on the evidence and appropriate for the Court to make.

51 According to the defendant, the County Court's reasoning is supported by what she identifies as the Parliament's intention to 'cover the field' when it legislated for the

regulation of acupuncture. The defendant contends that there are a number of statutory signposts supporting this construction:

- (a) the HPR Act required persons performing acupuncture to be registered with the CM Board or, alternatively, to be endorsed with the responsible board for the profession to which they belonged for the practice of acupuncture.¹⁴
- (b) s 80(2) protected the use of the word 'acupuncturist' and provided that the addition of another word would not alter or diminish that protection;
- (c) ss 80(14) and s 80(15) specifically exempted veterinary practitioners and persons otherwise registered or endorsed to provide acupuncture from the operation of s 80. However, these were the only exemptions from s 80.

52 The defendant also referred the Court to the second reading speech for the *Chinese Medicine Registration Bill*, in which the responsible Minister made specific reference to the way in which the Bill sought to regulate the practice of acupuncture. The Minister said:

There are many practitioners, both unregistered and those registered by another registration board, who will be affected by this legislation – for example, there are other traditions of acupuncture which have derived from the Chinese tradition, such as Japanese acupuncture. It is intended that the board will have responsibility for registering practitioners from any of these traditions.

In such instances, the prime concern of the board should be to ensure that these practitioners are safe and competent to practise within their own tradition of acupuncture, without requiring an understanding of the full body of Chinese medicine knowledge.

It is not, however, intended that the board will regulate the practice of veterinary acupuncturists.¹⁵

53 The Minister noted that 'many registered health practitioners, such as medical practitioners, nurses, chiropractors and physiotherapists' were adopting 'Chinese

¹⁴ Section 80(15) of the HPR Act provided that nothing in s 80 applied to a person using the title acupuncturist if the person's registration had been endorsed under s 97 of the Health Practitioner Regulation National Law as being qualified to practice as an acupuncturist.

¹⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 May 1999, 1463 (Denis Napthine, Minister for Youth and Community Services).

medicine modalities', particularly acupuncture.¹⁶ He observed that the new legislation specifically provided for amendments to the relevant registration acts to exempt these practitioners from the requirement to register with the CM Board in order to use protected titles, providing they had met the qualifications and practice standards of their own board.¹⁷ The Minister said, in respect of unregistered practitioners of other forms of complementary medicine:

The legislation is also not intended to regulate unregistered practitioners of other forms of complementary medicine, except where they make claims to be qualified to practise Chinese medicine, or where they wish to prescribe and dispense Chinese herbs which have been included in schedule 1 of the poisons list under the Drugs Poisons and Controlled Substances Act.¹⁸

54 I accept that the HPR Act and its statutory antecedents created a regime in which practitioners providing a variety of forms of acupuncture - such as Japanese acupuncture - were subject to regulation. It is also the case that the regulatory regime was based, not on prohibitions or restrictions on the actual performance of acupuncture, but on prohibitions or restrictions on the practitioner claiming or holding out that he or she was registered or endorsed by a responsible board to perform acupuncture. The regulatory regime was, as the defendant submits, largely based on title protection.

55 It is not correct, however, that the HPR Act imposed a blanket prohibition on an unregistered person offering any treatment described as 'acupuncture', whether with or without another word. As the Minister said in the passage of the second reading speech to the *Chinese Medicine Regulation Bill* referred to at [53] above, the point beyond which an unregistered practitioner of complementary medicine could not go was, in substance, to claim or hold out that he or she was qualified (or registered) to practice Chinese medicine. Whether that was the case would depend on the nature of the service, the nature of the representation and the circumstances in which it was made.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

56 Having regard to the terms of s 80(1) of the HPR Act, the question for the County Court was whether Ms Penev's use of the words 'laser acupuncture' in the circumstances in which they were used indicated (or could have been reasonably understood to indicate) that Ms Penev was authorised or qualified to practice Chinese medicine¹⁹ or that she was registered by the CM Board under the HPR Act. Plainly, the circumstances in which the words 'laser acupuncture' were used by Ms Penev would be relevant to what the words indicated (or could have been reasonably understood to indicate) to members of the public reading the advertisements or attending a consultation. This called for a factual inquiry. The question under s 94(1) was whether 'laser acupuncture' was a regulated health service under the HPR Act, that is, whether 'laser acupuncture' was a service usually provided by registered practitioners of Chinese medicine. That also called for a factual inquiry.

57 Counsel for Ms Penev conceded that the court could fairly safely infer from the way in which it was treated in the HPR Act that acupuncture *simpliciter* was usually provided by practitioners of Chinese medicine and was therefore a regulated health service. He submitted that, by contrast, 'laser acupuncture', as a composite term, was something that had to be inquired into in order to establish the factual basis for a finding that it was a service that was usually provided by practitioners registered with the CM Board.²⁰

58 I accept that submission. In order to find that 'laser acupuncture' was a regulated health service, the County Court was required to have regard to the nature of the service in question and whether it was a service usually provided by registered practitioners of Chinese medicine.

59 However, rather than approach its task in that way, the County Court accepted the submission that both acupuncture and laser acupuncture were intended to be covered by the definition of a regulated health service in s 3 of the HPR Act and

¹⁹ Or a 'modality' thereof, namely acupuncture.

²⁰ Or other responsible board.

concluded that Ms Penev advertised acupuncture, even though she described it as 'laser acupuncture'. The Reasons disclose only the short path of reasoning based upon acupuncture being a regulated health service and laser acupuncture being a sub-set or form of acupuncture.

60 In my view, the County Court erred when it failed to make findings as to whether 'laser acupuncture' was a health service usually provided by registered practitioners of Chinese medicine and simply accepted that it was a form of acupuncture and therefore a regulated health service. It was not permissible, given the express terms of the HPR Act and the definition of 'regulated health service', to conclude from the fact that s 80(2) makes it an offence to take or use the title 'acupuncturist' with or without another word, that 'laser acupuncture' was something that the legislature intended to regulate under the HPR Act and that, as soon as Ms Penev used the word 'acupuncture' in her advertising, she was exposed to the prohibitions and sanctions in the HPR Act. It was also impermissible, in my view, for the court to simply rely on the fact that in one or more of her advertisements, Ms Penev described laser acupuncture as 'acupuncture without needles' to conclude that laser acupuncture was a form of acupuncture and therefore subject to regulation by the CM Board under the HPR Act.

61 Furthermore, in order to find charges proven under s 80(1), it was necessary for the County Court to consider whether members of the public would or could reasonably understand Ms Penev's advertising of laser acupuncture to indicate she was a practitioner in the health profession regulated by the CM Board or amount to holding herself out to be registered under the HPR Act. That was not a question that could be answered simply by construing the statute. It required attention to the circumstances in which the advertising took place, including such matters as the context and content of the offending advertisements and whether, indeed, 'laser acupuncture' was something that was usually provided by registered practitioners of Chinese medicine.

62 The County Court made no findings about what Ms Penev's use of the words 'laser

acupuncture’ indicated (or might be reasonably understood to indicate) in the circumstances in which those words were used. The Reasons contain no analysis of the content of the advertising, the context in which the advertisements were published, the nature of the treatment itself or the context in which it was provided. The only part of the advertisements referred to in the Reasons is the description of ‘laser acupuncture’ as ‘acupuncture without needles’. This seems to comprise the ‘factual’ basis upon which the court concluded that laser acupuncture was a sub-set or form of acupuncture. However, it was no more than an expression of opinion by Ms Penev. It was not something upon which the court could rely to relieve itself of the task of making findings based on admissible evidence in respect of the elements of the offences charged.

63 In my view, the process of reasoning used by the County Court is questionable even in respect of acupuncture *simpliciter* and the use of the title ‘acupuncturist’. A person who was not registered under the HPR Act and who used the title ‘acupuncturist’ – with or without any other words – committed an offence under s 80(2) of the HPR Act if and only if the use of the title could be reasonably understood to induce a belief that the person was registered under the HPR Act with the type of registration or endorsement that authorised the use of the title.

64 It was not an offence for Ms Penev to use the word ‘acupuncture’ – with or without other words – unless the other elements in s 80(1)(b)(i) and s 80(1)(c) were established, that is, that Ms Penev offered or advertised laser acupuncture in circumstances where it would be understood to indicate that Ms Penev was a practitioner registered by the CM Board (or other responsible board) to carry out acupuncture or its use amounted to a claim to be registered or a holding out that Ms Penev was registered under the HPR Act.

65 Both the starting point and the end point in the court’s process of reasoning was that the use of the word ‘acupuncture’ was inherently problematic, having regard to the

intention of the legislature to 'cover the field' in respect of acupuncture.²¹ This led the court to misconstrue the offence provisions and to misdirect itself as to the meaning of essential elements of the offences with which Ms Penev was charged .

66 Each element of an offence must be proven beyond reasonable doubt. Because it misdirected itself as to the meaning of essential elements of the offences with which Ms Penev was charged, the County Court could not be satisfied that the elements of the offences under s 80(1)(b), s 80(1)(c) or s 94 of the HPR Act were established.

Conclusion

67 The County Court misinterpreted the relevant provisions of the HPR Act and, as a result, misunderstood what was required by those provisions and failed to conduct the inquiries necessary to find the elements of the offences proven. It failed to grapple with whether 'laser acupuncture' was usually provided by practitioners of Chinese medicine and whether a naturopath in Ms Penev's position advertising and offering 'laser acupuncture' could be reasonably understood to be representing that he or she was registered with the CM Board as a practitioner of Chinese medicine.

68 It is an error of law to misconstrue a statutory provision.²² It is also an error of law to wrongly conclude that the facts as found come within a statutory provision²³ or to draw an inference not open on the facts as found.²⁴ In adopting the short form reasoning that I have described, the County Court fell into error. The errors are material in that, had they not occurred, the County Court might have reached a different decision on the charges.²⁵ The orders of the County Court must be set aside and the charges remitted to the County Court to be heard and decided according to

²¹ The court held that the prohibition in s 80(2) of the HPR Act supported a finding that acupuncture was usually delivered by registered health professionals and was a regulated health service and that the addition of the word 'laser' did not remove laser acupuncture from 'the prohibition'. However, s 80(2) itself contained no prohibition on the use of the title 'acupuncturist' *per se*. The prohibition arose if the use of the title could be reasonably understood to induce a belief that the person was registered under the HPR Act with that particular type of registration or endorsement that authorised the use of the title.

²² *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 88.

²³ *R v ACR Roofing Pty Ltd* (2004) 11 VR 187, 202 [42].

²⁴ *Tisdall v Webber* [2011] FCAFC 76, [32].

²⁵ See *Wilson v Country Court of Victoria* (2006) 14 VR 461 .

law.

69 Ms Penev's counsel made lengthy written and oral submissions that the errors were jurisdictional errors based on the High Court's decision in *Kirk v Industrial Court (NSW)*.²⁶ The High Court held that a misdirection by an inferior court as to the construction of an offence provision can give rise to jurisdictional error. Ms Penev submitted that by misdirecting itself as to the meaning of essential elements of the offences with which she was charged, the County Court misconceived the nature of the function it was performing and the extent of its powers in the circumstances of the case and that the errors were therefore jurisdictional errors.

70 The defendant submits that if there was a misdirection by the County Court, it was of a different nature to that in *Kirk* in that it did not lead to a finding of guilt 'where there was no power to do so'²⁷ and that any error was an error made within jurisdiction. According to the defendant, the Court is required to determine the application for review having regard only to the 'record', that is, the charges and the Reasons.

71 That is what the Court has done. There is error of law on the face of the record: the errors are discernable from the charges and the Reasons. It is therefore unnecessary to decide whether the errors are also jurisdictional errors.

72 However, I observe that, like the Industrial Court of New South Wales in *Kirk*, the County Court had a 'wrong understanding'²⁸ of what constituted an offence under the relevant offence provisions and thereby - in my view - misconceived its function and the nature of its power to find the charges proven under the HPR Act.

73 The orders of the County Court convicting Ms Penev of offences under the HPR Act were infected by vitiating errors of law. The orders will be aside and the charges remitted to the County Court to be heard and determined according to law.

²⁶ (2010) 239 CLR 531 ('*Kirk*').

²⁷ *Kirk* 575, [74].

²⁸ *Kirk* 561, [37].

CERTIFICATE

I certify that this and the 21 preceding pages are a true copy of the reasons for Judgment of Justice Emerton of the Supreme Court of Victoria delivered on 27 March 2013.

DATED this twenty seventh day of March 2013.



