[HIGH COURT OF AUSTRALIA.]

THE MEDICAL BOARD OF QUEENSLAND . APPELLANT;

AND

BYRNE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1958.

BRISBANE, *June* 24;

SYDNEY, *Aug.* 28.

McTiernan, Fullagar and Taylor JJ.

Medical Practitioners (Q.)—Medical practitioner—Suspension—Convicted of non-indictable offence—Contravening a Repatriation Regulation by presenting to the Deputy Commissioner of Repatriation a document which was false in stating that he had attended certain patients on specified dates—Medical Board of opinion that he should be subjected to disciplinary punishment—Board proceeding to have him charged before Medical Assessment Tribunal—Practitioner not given an opportunity to be heard by the board before it formed that opinion—Whether Assessment Tribunal had jurisdiction to hear charge—Effect of the opinion of the board on the hearing of the charge by the tribunal—Punishment—Matters that may be taken into consideration—Fact that practitioner knew the statement to be false—Knowledge of falsity not an element of the offence—No allegation or charge of fraud—Case stated—The Medical Acts 1939 *to* 1955 (Q.), *ss.* 37 (1) (iii), 37A, 41 (1), 43 (1).

Section 37 of *The Medical Acts* 1939 *to* 1955 (Q.) provides:—" (1) If the Board is of opinion that any medical practitioner (including any specialist)— . . . (iii) Has been convicted in Queensland of an indictable offence, or has been convicted in any other part of Her Majesty's dominions or elsewhere of an offence which would be indictable if committed in Queensland, or has been convicted in Queensland or in any other part of Her Majesty's dominions or elsewhere of any offence for which in the opinion of the Board he should be subjected to disciplinary punishment under this Act, or . . . it may proceed to have the medical practitioner concerned charged accordingly before the Tribunal and, upon so doing, shall have the conduct of the charge as prosecutor: . . . "

A medical practitioner was convicted on four charges under the *Repatriation Regulations* of presenting to the Deputy Commissioner of Repatriation forms which were false in that they stated that he had attended certain patients. The Medical Board of Queensland being of opinion that he should be subjected to disciplinary punishment in pursuance of s. 37 (1) of *The Medical Acts* 1939 *to* 1955 proceeded to have him charged before the Medical Assessment Tribunal without giving him an opportunity of being heard by the board. The tribunal

found him guilty and in determining his punishment took into consideration the fact, as it so found, that he knew the statement was false, although there was no allegation or charge of fraud.

Held, that the opinion of the board that the practitioner should be subjected to disciplinary punishment is merely a condition precedent to the board proceeding to have him charged before the tribunal and is no part of a judicial process but an administrative safeguard against the formulation of charges before the tribunal based upon convictions for trivial offences or for offences which cannot be thought to call for disciplinary action under the Acts. Consequently, the fact that the practitioner was not heard by the board, nor given an opportunity to be heard by it before the board formed that opinion, did not deprive the tribunal of jurisdiction to hear the charge.

Held, further, that on the question of punishment, the tribunal was not wrong in law in taking into consideration the fact that the practitioner knew the statements to be false, although such knowledge was not an ingredient of the offence under the *Repatriation Regulations* of which the practitioner was convicted and although there was no allegation of fraud in those charges nor any charge of fraud before the tribunal.

Decision of the Supreme Court of Queensland (Full Court), reversed.

APPEAL from the Supreme Court of Queensland.

Vincent Charles Byrne, a medical practitioner, was convicted by a court of petty sessions on four charges that he contravened reg. 189 (1) (*d*) of the *Repatriation Regulations* in that he presented to an officer doing duty in relation to the *Repatriation Regulations* documents false in a particular in that he presented to the Deputy Repatriation Commissioner a form wherein he stated that he had attended specified patients on specified dates and for the disabilities therein stated, which statements were false in that he did not attend the patients specified in the charges on the dates therein set out.

The Medical Board of Queensland served on the respondent four documents in these terms :—" Take notice that you are charged by the Medical Board of Queensland constituted under *The Medical Acts* 1939 *to* 1955 under the provisions of sub-s. (1) of s. 37 of the said Acts that you being a medical practitioner have been convicted in Queensland of an offence for which in the opinion of the Board you should be subjected to disciplinary punishment under *The Medical Acts* aforesaid. Particulars of the charge are as follows :— On the third day of June 1957 in the Court of Petty Sessions Brisbane you were convicted of an offence namely " (the offence was then set out), " . . . And I am further directed by the Medical Board aforesaid to notify you that it is the intention of the Board to refer the charge above set out to the Medical Assessment Tribunal constituted under the said Acts."

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Before the Medical Board formed the opinion referred to in that notice the respondent was not heard by it nor was he given an opportunity to be so heard. When the four charges came on for hearing before the Medical Assessment Tribunal the respondent objected that the tribunal had no jurisdiction to hear the charge because he had not been heard or given an opportunity of being heard by the Medical Board on the issue whether the offences of which he had been convicted were deserving of disciplinary punishment. The Medical Assessment Tribunal constituted by *Philp* J. overruled the objection and found the respondent guilty on each charge and further found that he knew the statements to be false and that consequently he deserved substantial punishment. It was ordered that his registration as a medical practitioner be suspended for three years.

At the request of the respondent, *Philp* J. stated a case for the opinion of the Full Court of Queensland. Paragraph 4 of the case stated was as follows :—" Before the Medical Board formed the opinion as set out in each of the charges the practitioner was not heard by the said Board nor was he given an opportunity to be heard by the said Board. Upon these facts the practitioner objected that the Tribunal had no jurisdiction to hear the said charges. I held that these facts did not deprive me of jurisdiction to hear the said charges " and par. 4 was :—" The practitioner in making the false statements as alleged in the charges knew them to be false and I considered that fact in imposing punishment." A copy of the grounds of the decision of the tribunal was annexed to the case stated and contained this paragraph :—" The evidence placed before me clearly established that the practitioner had been convicted as alleged in each charge and that the Board was of the opinion alleged in each charge. I therefore find the practitioner guilty on each of the said charges." The questions in the case stated for determination were :—" (1) Was I wrong in law in holding that despite the matters set out in par. 4 hereof I had jurisdiction to hear the charges ? (2) Was I wrong in law in finding the practitioner guilty on the said charges ? (3) Was I wrong in law in holding that on the question of punishment I could consider the fact that the practitioner knew the false statements to be false ? (4) Was there (a) any evidence ; or (b) sufficient evidence to support a finding that when the practitioner made the false statements he knew them to be false ? (5) What should be done or ordered by the Full Court of the Supreme Court of Queensland or by the Medical Assessment Tribunal in the premises ?

The Full Court answered the questions as follows:—(1) No; (2) Yes; (3) Unnecessary to answer; (4) Unnecessary to answer; (5) That the decision and order of the Medical Assessment Tribunal should be set aside and in lieu thereof the appellant should be found not guilty of each charge.

The Medical Board of Queensland, by special leave of the High Court, appealed against the order of the Full Court.

H. T. Gibbs Q.C. (with him *F. G. Connolly*), for the appellant. The opinion of the board was merely a condition precedent to the laying of the charge by it and was not an element in the charge itself. The tribunal was not bound by the opinion of the board and had to determine for itself whether the offence of which the practitioner had been convicted was one for which he should be subjected to disciplinary punishment. [He referred to *Reynolds* v. *Stacy* (1).] The opinion of the board did not directly affect the rights or property of the practitioner and the board was not bound to hear him before it formed an opinion. Section 37 (1) of *The Medical Acts* gave to the board the role of prosecutor when the charge came before the tribunal. Hence it was not a body to which the maxim *audi alteram partem* applied when it was forming an opinion as to whether he should be charged. [He referred to ss. 4, 5 (2), 7, 8, 12, 13, 33, 34 (3), 35, 36, 37, 37A (2), 39, 41, 42, 43 and 45.] The words "in the opinion of the Board" in the charge as framed before the tribunal are mere surplusage and could be disregarded without making an amendment: *Hollykomes* v. *Hind* (2). It is unnecessary to remit the case to the tribunal for amendment. The conviction is not a conviction in the ordinary sense. The tribunal makes a finding of guilt, and then makes an order. Although *Philp* J. erred in holding that before conviction he had only to be satisfied that the practitioner had been convicted of the prior offence and that the board was of opinion that the conviction warranted disciplinary punishment, his order was not vitiated by that error because in determining the punishment he did find that the offence of which he had been previously convicted was one which required substantial disciplinary punishment. Even if the opinion of the board were an essential element in the offence and even if the tribunal were bound by that opinion, the board would not be required to hear the practitioner before forming that opinion. The maxim *audi alteram partem* must yield to the intention of the legislature. Although on those assumptions the tribunal would have been bound to convict the practitioner it need not have imposed any of the punishments referred to in s. 41:

(1) (1957) 96 C.L.R. 454.

(2) (1944) 1 K.B. 571, at p. 574.

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General Medical Council v. *Spackman* (1). Consequently the practitioner's rights were not necessarily affected by the opinion of the board. Although fraud was not charged against the practitioner the tribunal was entitled to take into consideration, in relation to punishment, the fact that the practitioner knew the statements to be false.

D. Casey (with him *W. T. Campbell*), for the respondent. The tribunal and the majority of the Full Court were correct in their construction of s. 37 (1). If the opinion of the board is only a condition precedent to the launching of the prosecution by the board it would be redundant because that was already provided for in the introductory par. (1) of the sub-section. The words in s. 37 (1) (iii), " in the opinion of the Board " apply equally to indictable offences as to non-indictable offences. [He referred to *Re Hodgkinson* (2).] The opinion of the board has been made an element in the offence and it must be alleged in the charge and when alleged it is conclusive. The introductory words of s. 41 (1) are not against this construction of s. 37 (1), because the tribunal although bound by the opinion of the board that the offence is one for which he should be subjected to disciplinary punishment, has itself to find that the practitioner committed the offence in respect of which he is charged before it can find him guilty of the charge laid by the board. Section 37A supports rather than detracts from the contention that the practitioner should have been heard by the board before it formed its opinion because it is purely a punishment section substituting the board for the tribunal as the body to impose it on minor matters. An investigation in accordance with the principles of natural justice is contemplated. There is no reason why the opinion of the board that the offence is one for which the practitioner should be subjected to punishment, should not be required in the case of an indictable offence. It was not the intention of the legislature to leave the matter entirely in the hands of the professional body to express its opinion without hearing representations from the practitioner concerned. That would cut right across fundamental principles. Unless the right to be heard, where a man is being affected in his status, is expressly and clearly taken away, the law will provide the necessary protection by insisting on the observance of the principles of natural justice. The judicial function under s. 37 (1) is split into two parts. The part given to the tribunal has to be exercised as such by calling the practitioner before it and giving him the right to be heard. The part of that

(1) (1943) A.C. 627, at p. 634. (2) (1947) 75 C.L.R. 276.

function which has been given to the board should also be exercised in judicial fashion. In the present case the practitioner was convicted of an offence under a regulation of making a simple incorrect statement, with a maximum penalty of £20, not a wilfully false statement. It is possible the board, not being legal men, treated it as a case of false pretences for which the *Criminal Code* provides a punishment of five years imprisonment, whereas had the practitioner been heard before the board he could have explained the true nature of the charge to which he had pleaded guilty. If the board had known the true nature of the offence charged it may well have decided not to prefer charges against the practitioner before the tribunal. As the practitioner was not given an opportunity to be heard the proceedings before the tribunal were invalid from the beginning as there was no valid opinion of the board. [He referred to *R.* v. *Postmaster General*; *Ex parte Carmichael* (1); *R.* v. *Statutory Visitors to St. Lawrence Hospital*; *Ex parte Pritchard* (2); *R.* v. *Newington Licensing Justices* (3); *In re Gosling* (4); *Election Importing Co. Pty. Ltd.* v. *Courtice* (5); *Delta Properties Pty. Ltd.* v. *Brisbane City Council* (6); *Patterson* v. *District Commissioner of Accra* (7); *R.* v. *The Archibishop of Canterbury* (8); *New Zealand Dairy Board* v. *Okitu Co-operative Dairying Co.* (9); *New Zealand Licensed Victuallers' Association* v. *Price Tribunal* (10); *General Medical Council* v. *Spackman* (11); *Russell* v. *Duke of Norfolk* (12); *Edgar and Walker* v. *Meade* (13); *Nakkuda Ali* v. *Jaratrie* (14); and *Ex parte Hopkins* (15).] The tribunal was wrong in its basis of punishment. Although the tribunal said that it was precluded from taking fraud into consideration, it, in effect, proceeded to punish him on the basis of fraud.

H. T. Gibbs Q.C., in reply, referred to *Bonaker* v. *Evans* (16); *In re Hammersmith Rent-Charge* (17); *R.* v. *Cheshire Lines Committee* (18); *The Commissioner of Police* v. *Tanos* (19). In relation to the words "after such investigation as it deems necessary"

(1) (1928) 1 K.B. 291, at pp. 296, 297.
(2) (1953) 2 All E.R. 766, at p. 774.
(3) (1948) 1 K.B. 681.
(4) (1943) 43 S.R. (N.S.W.) 312, at p. 316; 60 W.N. 204, at p. 206.
(5) (1949) 80 C.L.R. 657.
(6) (1955) 95 C.L.R. 11, at p. 18.
(7) (1948) A.C. 341, at pp. 349, 351.
(8) (1944) K.B. 282, at pp. 292-294.
(9) (1953) N.Z.L.R. 366, at p. 418.
(10) (1957) N.Z.L.R. 167, at pp. 187, 190, 198, 203, 210.
(11) (1943) A.C. 627, at pp. 640, 641, 642.
(12) (1949) 1 All E.R. 109, at pp. 118, 119.
(13) (1916) 23 C.L.R. 29.
(14) (1951) A.C. 66, at p. 78.
(15) (1957) 74 W.N. (N.S.W.) 100.
(16) (1850) 16 Q.B. 162, at p. 171 [117 E.R. 840, at p. 844].
(17) (1849) 4 Ex. 87, at p. 97 [154 E.R. 1136, at p. 1140].
(18) (1873) L.R. 8 Q.B. 344, at pp. 349, 350.
(19) (1958) 98 C.L.R. 383, at pp. 395, 396.

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in r. 1, similar words were considered in *Patterson* v. *District Commissioner of Accra* (1). In *Michel* v. *Medical Board of Queensland* (2), the Full Court by a majority held that it had no power to order a new trial by the tribunal. That case is distinguishable from the present case because in that case the proceedings were completely vitiated. The distinction is recognised in *R.* v. *Walsh and Bunting* (3), the case relied on by the Full Court, between a rehearing where a hearing had been completely vitiated and the re-opening of an existing proceeding.

Cur. adv. vult.

Aug. 28.

The following written judgments were delivered :—

McTIERNAN J. The Medical Board of Queensland is appointed under the laws of that State, referred to as *The Medical Acts* 1939 *to* 1955 ; and by those Acts, a Medical Assessment Tribunal is established. It is constituted by a judge of the Supreme Court. One of the functions of the board is to institute proceedings and charges before the tribunal. Section 37 (1) defines a number of cases in which the board may proceed to have a medical practitioner charged before the tribunal. The sub-section provides that in those cases the board shall have the conduct of the charge as a prosecutor. It is an express condition of the power of the board to proceed against a medical practitioner under s. 37 (1) if it is of opinion that he has fallen within one of the cases therein defined. This appeal is concerned with the case, included in cl. (iii) of the sub-section, of a medical practitioner convicted in Queensland of an offence that is not indictable. A medical practitioner does not fall within that case unless in the opinion of the board he should be subjected to disciplinary punishment at the hands of the tribunal for the offence of which he has been convicted. Section 41 (1) gives power to the tribunal to impose such punishment. That sub-section provides that if the tribunal finds any medical practitioner guilty of any charge made against him under *The Medical Acts* it may, according as it shall deem just under the circumstances, erase his name from the register, suspend his registration or order him to pay a pecuniary penalty.

The Medical Board charged the respondent, a medical practitioner, before the tribunal to the effect that he had been convicted in petty sessions at Brisbane of four offences and gave the particulars thereof. They were offences against the *Repatriation Regulations* committed

(1) (1948) A.C. 341, at p. 349.
(2) (1942) S.R. (Q.) 1.
(3) (1902) S.R. (Q.) 6.

by the respondent in the course of his practice. As they were non-indictable offences, the board averred in the charges that in its opinion the respondent should be subjected to disciplinary punishment under *The Medical Acts* for the offences.

The tribunal, which was constituted by *Philp* J., found the respondent guilty of the charge made against him in respect of each offence and suspended his registration as a medical practitioner for three years from the day on which the decision was given.

Section 43 (1) provides for an appeal by case stated from a decision of the tribunal. Upon the application of the respondent, *Philp* J. stated a case in reference to the proceedings. The Full Court of the Supreme Court, in the exercise of the powers contained in s. 45, determined the case stated and ordered the findings of the tribunal and the suspension of the respondent's registration be set aside.

The question of fundamental importance involved in the appeal arises from the words of s. 37 (1) (iii) referring to the opinion of the Medical Board as to an offence which is not indictable. Before the tribunal, an objection to its power to proceed was raised on behalf of the respondent, because he had not been heard or given an opportunity to be heard by the board, on the issue whether the offences of which he had been convicted are deserving of disciplinary punishment. This objection did not extend to any question as to his right to be heard by the board, on the issue whether he had been convicted of the offences or whether they are indictable. It was contended for the respondent that because he had not been heard or given an opportunity to be heard on the former issue, the tribunal had no jurisdiction to hear and determine the charges made against him. *Philp* J. overruled the objection.

His Honour found the respondent guilty of the four charges. In finding him guilty, his Honour said: "The evidence placed before me clearly established that the practitioner had been convicted as alleged in each charge and that the board was of the opinion alleged in each charge. I therefore find the practitioner guilty of each of the said charges".

The learned judge then proceeded to consider the evidence relating to the breaches of the *Repatriation Regulations* of which the respondent had been convicted in order to determine the punishment which the respondent should receive. As already stated the tribunal ordered that the respondent's registration as a medical practitioner be suspended.

On the appeal to the Full Court, the majority (*Mansfield* C.J. and *Townley* J.) held that the charges preferred before the tribunal were void because the respondent was given no opportunity of being

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heard by the board on the issue whether he had been convicted of offences for which he should be subjected to disciplinary punishment. *Matthews* J., the other member of the Full Court, dissented. The judgment of the Full Court set aside the findings of guilt and the order suspending the respondent which were made by the tribunal and in lieu thereof ordered that the appellant be found not guilty on each of the four charges.

In the face of this difference of judicial opinion it is not easy to decide whether the respondent had a right to be heard by the board before proceeding against him in the tribunal. If the tribunal is bound by the opinion of the board referred to in cl. (iii) of sub-s. (1) of s. 37 so that its only function in a prosecution upon that charge is to decide on the nature and the degree of punishment to impose upon the medical practitioner, there would be much force in the contention that the board is impliedly bound by the words of cl. (iii) to notify the medical practitioner to attend to be heard before he is charged. In my opinion there are strong reasons for denying that the opinion of the board is intended to bind the tribunal to find the medical practitioner guilty. First the terms of s. 37 (1) made it prosecutor. It would not be consistent with its functions as prosecutor to find the medical practitioner guilty and then send him before the tribunal for punishment. The only consequence of the opinion of the board, if adverse to the medical practitioner, to which the Act points, is that he is to be charged before the tribunal and that there he is to have a judicial trial. It also follows from the words of cl. (iii) relating to the opinion of the board that the tribunal would not be competent to entertain a charge based upon a conviction for an offence which is not indictable unless the board had arrived at such opinion.

Secondly, the jurisdiction of the tribunal under s. 41 (1) cannot be reduced by the words in cl. (iii) referring to the opinion of the board. There is no room for an implication that those words are restrictive of the jurisdiction of the tribunal under s. 41 (1) to adjudicate upon a charge. The opinion of the board is not a finding to which s. 37 (1) attaches any consequence other than the conviction of the medical practitioner for the offence to which the opinion refers is good cause for proceeding against him before the tribunal. The tribunal is, in such proceeding, judge and the board is prosecutor. Whether the medical practitioner is guilty of the charge and whether any punishment and to what degree ought to be inflicted upon him are issues which are within the province of the tribunal under s. 41. *Philp* J. in giving judgment said : " In my view, s. 37 (1) (iii) provides for the board to consider whether the practitioner has been convicted

of an offence and to form an opinion whether the offence is one for which the practitioner should be subjected to disciplinary punishment. Having formed these opinions in the affirmative the board merely makes a charge. Nothing that the board does in so doing subjects the practitioner to final judgment or punishment and so there is no prima facie obligation on the board to hear the practitioner before arriving at the affirmative opinion and there is nothing in the statute which expressly or impliedly requires such a hearing. The tribunal alone has the power to make the final determination and to punish. When the charge comes before the tribunal the onus is on the board to prove the conviction and to prove that it reached the affirmative opinion ". I agree with those observations. For these reasons I think that the answer to the first question in the stated case should be " No ".

It appears from the first passage which is cited above from the judgment of *Philp* J. on the issue of guilt that he treated the opinion of the board as an ingredient of the charges and being satisfied that the board was of the opinion alleged thereon, proceeded to determine what the punishment should be. As I have already stated, I think that the opinion of the board is not binding on the tribunal on the question whether the medical practitioner should be subjected to disciplinary punishment and that it is an issue as to which the tribunal is free to form its own opinion and on which to act. Perhaps no injustice resulted to the respondent from the view which *Philp* J. adopted as to the effect of the board's opinion. But as, in my opinion, the view is not strictly in accordance with the intention of s. 37 (1), I would answer the second question " Yes ". The opinion of the board is, I think, a matter for recital in a charge under cl. (iii), and proof of the opinion is necessary to found the jurisdiction of the tribunal to adjudicate but it is not conclusive on any matter going to the issue of guilt.

As to question (3). In my opinion the tribunal has ample jurisdiction under s. 41 (1) to consider whether the respondent knew that the statements in respect of which he was convicted in petty sessions to be false, even though fraud was not a necessary element of the offences. In regard to the fourth question. As in my opinion the answer which I give to the second question involves that the matter be remitted to the tribunal, I do not think it is necessary to answer that question.

The foregoing answers appear to me to require that the answer to the fifth question should be that the four charges be remitted to the Medical Assessment Tribunal for a fresh hearing upon the basis

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that the opinion of the Medical Board of Queensland is neither conclusive nor probative of the guilt of the respondent.

As the appellant has substantially succeeded, I think that the appeal should be allowed with costs.

FULLAGAR AND TAYLOR JJ. On 2nd October 1957, *Philp* J., sitting as the Medical Assessment Tribunal under the provisions of *The Medical Acts* 1939 *to* 1955 (Q.), found the respondent, a medical practitioner, guilty of four charges which had been referred to the tribunal by the appellant, the Medical Board of Queensland. Thereafter, upon the application of the respondent, the tribunal stated a case for the opinion of the Full Court of the Supreme Court of Queensland upon a number of questions including the question whether the tribunal had acted without jurisdiction in hearing and determining the said charges. By a majority the Full Court held that the tribunal had acted within its jurisdiction but for reasons which will appear it was held that it had erred in law in holding the respondent guilty. In the result the Full Court set aside the order of the tribunal and directed that the respondent should be found not guilty on each charge. From this order the present appeal is now brought by special leave.

The points raised by the appeal are somewhat curious and it is necessary to go at once to the relevant statutory provisions. The Medical Assessment Tribunal is constituted by s. 33 of *The Medical Acts* " for the better control and discipline of medical practitioners and for the better determination of prescribed matters having a medical element ". By s. 34 the tribunal is authorised to hear and determine any charge made against any medical practitioner under the Act, any application which, under the Act, may be made to the tribunal and any other matter or proceeding which, under the Act, may be referred to or heard and determined by the tribunal. Section 35 of the Act, which consists of a number of paragraphs, defines " misconduct in a professional respect ". Thereafter s. 37 (1) provides as follows :—" If the Board is of opinion that any medical practitioner (including any specialist)—(i) Has had the qualification upon which he relied for registration as a medical practitioner withdrawn or cancelled by the university, college, or other body by which it was conferred, or by the General Council of Medical Education and Registration of the United Kingdom ; or (ii) Has had his name erased from the Register maintained by the General Council of Medical Education and Registration of the United Kingdom or from the register of any other body duly authorised to register medical practitioners ; or (iii) Has been convicted in Queensland

of an indictable offence, or has been convicted in any other part of His Majesty's dominions or elsewhere of an offence which would be indictable if committed in Queensland, or has been convicted in Queensland or in any other part of His Majesty's dominions or elsewhere of any other offence for which in the opinion of the Board he should be subjected to disciplinary punishment under this Act; or (iv) Is guilty of misconduct in a professional respect, it may proceed to have the medical practitioner concerned charged accordingly before the Tribunal and, upon so doing shall have the conduct of the charge as prosecutor: Provided the Tribunal shall not order that the name of any medical practitioner (including any specialist) be erased from the register under paragraph (1) or paragraph (ii) of this sub-section except with respect to a withdrawal or cancellation of a qualification or an erasure of a registration which, if it had occurred in Queensland, would have been an adequate cause for the erasure of the name of the medical practitioner concerned from the register." It will be seen that s. 37 (1) (iii) refers to (1) convictions in Queensland of any indictable offence; (2) convictions in any other part of Her Majesty's dominions or elsewhere of an offence which would be indictable if committed in Queensland; and (3) convictions in Queensland or elsewhere of any other offence for which *in the opinion of the Board* a medical practitioner should be subjected to disciplinary punishment under the Act. Each of the charges against the respondent was concerned with offences in the last category and in the notice which was served upon him the substance of each charge was preceded by a recital that the charge against him was that he had been convicted in Queensland of an offence for which in the opinion of the board he should be " subjected to disciplinary punishment under *The Medical Acts* aforesaid ". Initially, at least, it appears to have been assumed that the concluding provisions of s. 37 (1) (iii) confer upon the board a power to make a final and definitive finding that a particular offence is one calling for disciplinary punishment under the Act. On that view, it was said, the opinion of the board, once formed, is not open to question in subsequent proceedings before the tribunal and this circumstance was seized upon by the respondent to found the contention that he should have been given an opportunity of being heard before the board formed its opinion concerning each of his several convictions. To form the opinion which it did without prior notice to the respondent was, it is contended, contrary to natural justice. This argument failed before the tribunal but in the Full Court the learned Chief Justice took the view that in forming its opinion the board " was acting in a judicial capacity " and that " the opinion of the board

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arrived at in the circumstances disclosed in this case, is a nullity". The same view was taken by *Townley* J. and in the result it was held that the evidence failed to establish an essential ingredient of each charge, that is, that the board had, in law, formed the necessary opinion.

Much might be said for such a final conclusion if, upon the true construction of the relevant provisions, the opinion of the board should be regarded as a definite and substantive factor binding upon the tribunal or if, in forming its opinion, the board could be said to be acting in a judicial capacity. It is, however, in its initial stages that the argument advanced by the respondent both here and in the Supreme Court breaks down. In our view the words in s. 37 (1) (iii)—" for which in the opinion of the Board he should be subjected to disciplinary punishment under this Act "—merely prescribe a condition to be satisfied before the board proceeds " to have the medical practitioner concerned charged accordingly before the tribunal ". The formation of the opinion which satisfies this condition is, in no sense, any part of a judicial process; on the contrary the requirement that it shall be formed before a charge is preferred is but an administrative safeguard against the formulation of charges before the tribunal based upon convictions for trivial offences or for offences which cannot be thought to call for any disciplinary action under the Act. Accordingly when such a charge is made it is for the tribunal ultimately to determine whether the conviction is in respect of an offence for which the practitioner should be subjected to disciplinary punishment.

This is the view to which we think consideration of the general structure of the relevant provisions must lead. But when more particular attention is paid to individual provisions that view is, we think, inescapable. So far no reference has been made to the provisions of s. 37A pursuant to which charges, which are " not sufficiently serious to warrant the Board charging the medical practitioner concerned therewith before the Tribunal ", may be prosecuted before the board itself. In such cases the provisions of s. 37A apply. This means of course that the board may itself entertain a charge against a medical practitioner that he has been convicted of an offence for which in the board's opinion he should be subjected to disciplinary punishment. But before dealing with a medical practitioner under this section the board is, by sub-s. (2), required to notify him in writing of its intention so to do and is required to state in the notice (*a*) the misconduct in a professional respect " or matter of other charge " whereof he is guilty in the opinion of the board; (*b*) a time not earlier than fourteen days after

the date of that notice within which he may make representations in writing to the board, or appear in person and be heard by the board at a place stated in the notice ; and (*c*) that he may elect, in writing given to the board within a time specified, to be dealt with by the tribunal in lieu of the board. By sub-s. (3) the board is required to give due consideration and weight to any representations made to it within the time allowed by the notice and also to hear the medical practitioner if he appears in person before it. Finally by sub-s. (4) he is given a right to elect to be dealt with by the tribunal in lieu of the board. We refer to these provisions because if the argument advanced on behalf of the respondent is correct then in cases where the Medical Board proceeds to deal with a medical practitioner under s. 37A, it would, upon the final hearing, be bound by its previous opinion, formed *ex parte*, that the offence was one which called for disciplinary action. We think that it is clear that no such result was intended. Sub-section (2) of s. 37A makes express provision both as to the time and form of notice to the medical practitioner and it is, we think, beyond doubt that upon considering any charge after notice all relevant matters must be open for determination by the board. The obvious purpose of s. 37A is to provide for a hearing upon notice and for a determination then of all questions of substance. Similarly, if a medical practitioner exercises his right to elect to be dealt with by the tribunal in lieu of the board the same questions must be open before the tribunal. These considerations can, we think, lead only to the conclusion that, whether a medical practitioner is charged directly before the tribunal or whether the charge comes before the tribunal pursuant to s. 37A (4), all questions of substance must then be open including the question whether any conviction for an offence other than an indictable offence is one which calls for disciplinary punishment.

In the result, therefore, we are of the opinion that the order of the Full Court should be discharged but in view of the course taken before the Medical Tribunal it would not, we think, be appropriate to direct that the order of that tribunal be restored. No doubt in making the order which it did the tribunal must have reached the conclusion that the respondent's convictions were in respect of offences for which he should be subjected to disciplinary punishment but we think that the matter should be remitted to the Medical Tribunal in order that the respondent may make such further representations to the tribunal on that issue as he desires to advance.

One other matter remains to be mentioned briefly before parting with the case. Each of the offences of which the respondent had

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been convicted related to the production to an officer of the Commonwealth of a document containing false particulars. In order to secure a conviction it was, however, unnecessary to establish that the particulars were false to the knowledge of the respondent. But this issue was investigated before the tribunal and it had no doubt that the respondent was fully aware of their falsity and, in assessing the punishment which it awarded, it took this circumstance into consideration. Before us it was urged that this should not have been done and that the tribunal should not have looked beyond the bare fact of the conviction. We think there is no substance in this contention and that it was clearly a matter which could properly be taken into consideration for the purposes of proceedings of this character.

Appeal allowed. Order of the Full Court discharged. In lieu thereof order that the questions raised by the case stated be answered as follows: (1) *No.* (2) *The Medical Assessment Tribunal erred in holding that it was bound by the opinion of the board formed pursuant to s.* 37 (1) (*iii*) *of The Medical Acts that the offences for which the respondent had been convicted were offences for which he should be subjected to disciplinary punishment.* (3) *No.* (4) *This matter was not argued.* (5) *In view of the answer to question* (2) *the orders of the Medical Assessment Tribunal should be set aside and the matters remitted to that tribunal for further consideration.*

Order that in accordance with the answer to question (5) *the matter be remitted to the Medical Assessment Tribunal for further consideration. The respondent to pay the appellant's costs of and incidental to the appeal.*

Solicitors for the appellant: *Leonard Power & Power.*
Solicitors for the respondent: *O'Sullivan, Ruddy & Currie*

T. J. L.