Staying an initial disciplinary sanction

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Introduction

1. A decision to impose a disciplinary sanction will generally be subject to some form of review or appeal mechanism. This paper considers some of the main considerations when seeking a stay of the initial disciplinary sanction pending the outcome of the review or appeal.

2. Disciplinary sanctions are creatures of statute. A quick glance at the case-law shows a variety of areas in which disciplinary sanctions are regularly imposed and reviewed. They include disciplinary sanctions relating to:

   (a) Legal practitioners.

   (b) Health practitioners.

   (c) Police officers.

   (d) Migration agents.

   (e) Tax agents.

   (f) Auditors, financial services licensees and liquidators.

3. Each area has its own particular statutory regime. However, disciplinary decisions in each of the examples above can be considered or reviewed in either the Queensland Civil and Administrative Tribunal (**QCAT**) or the Commonwealth's Administrative Appeals Tribunal (**AAT**). Those tribunals are the focus of this paper, but there are of course other disciplinary areas where the concepts I discuss might be relevant.[1]

1 For example, I have left out of consideration at least two important disciplinary areas: public service discipline (see *Public Service Act 2008* (Qld) and *Public Service Act 1999* (Cth)), and military discipline (see

Key legislation

4. Both the AAT and QCAT have the power to review certain disciplinary decisions 'on the merits', and to substitute their own decision. In the conduct of those reviews, both tribunals also have general powers to order a stay of the decision under review. Section 41(2) of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**) provides:

> The Tribunal may, on request being made by a party to a proceeding before the Tribunal (in this section referred to as the ***relevant proceeding***), if the Tribunal is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review, make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or a part of that decision as the Tribunal considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review.

5. Similarly, s 22 of the *Queensland Civil and Administrative Tribunal Act 2009* (**QCAT Act**) provides:

> (3) The tribunal may, on application of a party or on its own initiative, make an order staying the operation of a reviewable decision if a proceeding for the review of the decision has started under this Act.
>
> (4) The tribunal may make an order under subsection (3) only if it considers the order is desirable after having regard to the following—
>
> (a) the interests of any person whose interests may be affected by the making of the order or the order not being made;
>
> (b) any submission made to the tribunal by the decision-maker for the reviewable decision;
>
> (c) the public interest.

6. These two statutory provisions both adopt the concept of whether a stay order is "desirable", and s 22 of the QCAT Act seems to largely mirror the terms of s 41 of the

Defence Force Discipline Act 1982 (Cth)).

AAT Act. However, there are some differences. In particular, the AAT's power includes being able to make an order not just staying but also "otherwise affecting the operation or implementation of the decision". Those words do not appear as part of QCAT's stay power, but it has a separate power relating to interim orders. Section 58(1) of the QCAT Act provides:

> (1) Before making a final decision in a proceeding, the tribunal may make an interim order it considers appropriate in the interests of justice, including, for example—
>
> (a) to protect a party's position for the duration of the proceeding; or
>
> (b) to require or permit something to be done to secure the effectiveness of the exercise of the tribunal's jurisdiction for the proceeding.

7. Finally, there might be some instances where recourse to the *Judicial Review Act 1991* (Qld) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is necessary. In those cases, the judicial review legislation empowers the relevant Court[2] to suspend the operation of a decision where an application for judicial review of that decision has been filed.

Scope of the tribunals' stay powers

8. Both the AAT and QCAT have the express power to order that the operation of a disciplinary decision that is under review be stayed. Straightforward examples of the utility of this power include staying a decision to:

   (a) Cancel a some form of registration or authority to practice.

   (b) Impose conditions on a person's practice.

   (c) Dismiss an officer's employment.

2 Section 29 of the Queensland Act (in relation to the Supreme Court) and ss 15 and 15A of the Commonwealth Act (in relation to the Federal Court and the Federal Circuit Court respectively).

(d) Impose some form of monetary sanction.

9. Plainly enough, if a tribunal orders that the imposition of such a sanction be stayed, then the effect is that the *status quo* should prevail pending the resolution of the proceedings.

10. A slightly more difficult question as to the scope of the AAT's stay power arose in *Civil Aviation Safety Authority v Hotop* [2005] FCA 1023. There, a company held an "Air Operator's Certificate" (**AOC**). The AOC was extended a number of times, but ultimately was to expire on 31 January 2005. The Civil Aviation Safety Authority (**CASA**) gave notice on 14 January 2005 that the AOC was to be cancelled. It seems that CASA essentially allowed the AOC to lapse, and did not renew or extend it.

11. The company applied to the AAT for review of CASA's decision to cancel and to not renew the AOC. It also applied for a stay order under s 41 of the AAT Act. The AAT granted the stay, and ordered that (at [32]):

> … the decision of a delegate of the respondent, dated 14 January 2005 to cancel the applicant's Air Operator's Certificate … ("the AOC") be stayed and that the AOC be extended until the decision of the Tribunal on the ultimate hearing of the application for review.

12. CASA applied to the Federal Court for judicial review. It argued that the AOC simply expired on 31 January 2005 by the effluxion of time, and that therefore a stay order reversing the cancellation could have no practical effect (at [35]). CASA argued that the power in s 41 of the AAT Act "did not permit the Tribunal to make an order that was positive in effect".

13. The Federal Court accepted that the AAT's power under s 41 of the AAT Act was tied to the final relief which the tribunal might be able to grant. Siopsis J said (at [41]):

> … I accept the applicant's argument that the Tribunal's power to make orders under s 41(2) of the AAT Act depends on the Tribunal being able to grant effective relief in relation to the impugned decision at the ultimate hearing of the review

application. It will be a question in each case, therefore, whether the decision the subject of the review application is a decision in respect of which the Tribunal may be able to grant effective relief at the ultimate hearing, having regard to its statutory function as a body empowered to conduct a merits review of the impugned decision. …

14. His Honour rejected, however, the argument that s 41 of the AAT Act did not empower the tribunal to make orders having positive effects. The Court said (at [45]):[3]

> … there is nothing in the language of the section that precludes the Tribunal from making an order in positive terms. In fact, the language used is of wide ambit permitting the Tribunal to make 'such order or orders staying or otherwise affecting the operation or implementation of the decision...as [it] considers appropriate' to achieve the specified purpose. In the context of a refusal to issue a statutory licence to an existing statutory licence holder, in a case where effective relief can be granted at the hearing, this language is wide enough to include an order permitting the review applicant to continue in business until the hearing of the application. This is because the Tribunal's order in those terms would 'affect the operation' of the impugned decision, which would otherwise operate to preclude the review applicant from continuing to carry on its existing business. In other words, the order of the Tribunal affects the operation of the impugned decision because it neutralises its adverse effect and anticipates that a favourable decision with retrospective effect may replace the impugned decision.

15. Accordingly, where a person's application for a licence or registration of some form is rejected on disciplinary grounds, the AAT would seem to have sufficient power to require a grant of the licence or registration pending the final hearing. QCAT seems to have that power under s 58 of the QCAT Act, rather than as part of its stay powers.

General principles

16. The general principles that guide the making of a stay order can be shortly stated. The "two fundamental questions that must be addressed in such cases [are]: does the

3 See also *Shi v Migration Institute of Australia Ltd* (2003) 134 FCR 326.

applicant have an arguable case? Does the balance of convenience favour granting the stay"?[4] Ultimately, the applicant must demonstrate a reason or appropriate case for the exercise of the discretion;[5] or, in the statutory language, that a stay is "desirable".

17. The factors that might be weighed in the "balance of convenience", or the "balance of advantage and disadvantage",[6] are legion.[7] Speaking in relation to a stay of execution of judgment, Keane JA said in *Cook's Construction Pty Ltd v Stork Food Systems Aust Pty Ltd* [2008] QCA 322 (at [12], footnotes omitted):

> … it is not necessary for an applicant for a stay pending appeal to show "special or exceptional circumstances" which warrant the grant of the stay. Nevertheless, it will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment. Generally speaking, courts should not be disposed to delay the enforcement of court orders. The fundamental justification for staying judicial orders pending appeal is to ensure that the orders which might ultimately be made by the courts are fully effective: the power to grant a stay should not be exercised merely because immediate compliance with orders of the court is inconvenient for the party which has been unsuccessful in the litigation.

18. In addition to assessing the merits or strength of the review application, some of the more common factors that are weighed in the balance include:[8]

    (a) Prejudice or harm that would be caused to the applicant.

    (b) Prejudice or harm that would be caused to third parties.

    (c) The public interest.

4 *Deputy Commissioner Stewart v Kennedy* [2011] QCATA 254, [17].
5 *Robb and Rees v Law Society of the Australian Capital Territory* [1996] FCA 157, [20].
6 *Pope v Bar Association of Queensland* [2015] QCAT 305, [6].
7 *Deputy Commissioner Stewart v Kennedy* [2011] QCATA 254, [18].
8 Eg, *VBJ and Australian Prudential Regulation Authority* [2005] AATA 642; *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719, [14].

(d) Whether the review would be rendered nugatory if a stay were refused.

(e) Undertakings or other conditions that are offered.

(f) Timing of the stay application.

19. The category of relevant factors is not closed, and the circumstances of each individual case should guide the approach to seeking a stay order. Ultimately, the onus of persuading the tribunal that a stay order is "desirable" falls on the applicant.[9]

Assessing the merits or strength of the case

20. It will generally be necessary for an applicant to at least be able to show that there is a "good arguable case" or "realistic prospect" of success before a stay will be ordered.[10] A "good arguable case" alone will unlikely be enough to warrant the grant of a stay order, but it is likely that "the stronger the case appears to be, the higher may be the probability that an injustice will be done if" a stay is not ordered.[11]

21. In relation to the approach taken by the AAT, the Federal Court has affirmed the following statement of principle:[12]

> It is well understood that in considering an applicant's prospects of success for the purposes of a stay application, it is not appropriate to conduct a preliminary trial of the issues … Rather, the tribunal must consider whether there are facts and circumstances which, if established at the substantive hearing, would provide a basis for the applicant's success in the review on application; or whether there are points of law raised which, if sustained, would lead to that conclusion …

22. Whilst the tribunal will not conduct a preliminary trial, it will nevertheless make a

9 *Tracey v Medical Board of Australia* [2014] QCAT 684, [15].
10 *Deputy Commissioner Stewart v Kennedy* [2011] QCATA 254, [14].
11 *Seiler v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 48 FCR 83, 98 (per French J, speaking there of assessing the merits in an application for an extension of time).
12 *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719, [31] quoting from *Re Snook and Civil Aviation Safety Authority* (2008) 109 ALD 122.

"preliminary assessment of the strength of the case".[13] In *Deputy Commissioner Stewart v Kennedy* [2011] QCATA 254, the tribunal said (at [16]):

> This is usually done by the applicant's representative identifying a point or points that are said to demonstrate error, with submissions on such points, following which the Court or Tribunal can at least tell whether or not they are fairly arguable. This is not to say that points arising in bulky or complex matters are more likely to be fairly arguable than those in succinct ones. It has been observed that a hopeless appeal will be no less hopeless because it is pursued with quixotic enthusiasm …

23. Depending on the circumstances of the case, an applicant could:

    (a) Identify the facts that are said to make the case strong.

    (b) Identify the evidence, at least in broad terms, that will establish (or dispel) the important facts.

    (c) Identify the points of law (or, perhaps, comparative cases) which support the case.

24. The extent to which it is appropriate to go into evidence will vary from case to case. Where there has already been a hearing at a lower level, with extensive evidence which will be put (or repeated) before the tribunal then it might be useful to refer to that evidence. In other circumstances, there might be compelling tactical reasons against disclosing too much evidence too early in the case. Whatever approach is adopted, though, it must be remembered that the applicant has the onus of showing a "good arguable case" and "mere assertion" will not suffice.[14]

The "balance of convenience" or "balance of advantage and disadvantage"

25. Once the applicant has established a "good arguable case", the tribunal will have to weigh or resolve the competing interests of different parties, persons and the public at

13 *Pope v Bar Association of Queensland* [2015] QCAT 305, [8].
14 *Deputy Commissioner Stewart v Kennedy* [2011] QCATA 254, [24] – [25].

large to determine whether a stay is "desirable".[15] This weighing of the advantages and disadvantages of granting, or refusing to grant, a stay will determine whether an applicant who otherwise appears to have a "good arguable case" should have the benefit of the pre-sanction *status quo* pending the hearing and determination of that case.

26. In *Bryant v Commonwealth Bank of Australia* (1996) 134 ALR 460, it was said (at 463–5):

> In the exercise of the jurisdiction to provide a stay, it has often been emphasised that cases involving a stay of the operation of the criminal law or of laws designed to protect the public (eg deregistration of a professional lawyer or medical practitioner) are in a class different from cases involving no more than the suspension of the operation of orders affecting two private litigants only. …

27. The nature of disciplinary proceedings means that it will always be necessary for the tribunal to consider the public interest when determining a stay application.

The public interest

28. The public interest will generally loom large in the consideration or weighing of any relevant factors in a stay application.[16] In *Robb v Law Society of the Australian Capital Territory* [1996] FCA 1571 (a legal profession disciplinary case), Finn J said (at [21]):

> … it must be remembered that this is not the usual instance of civil litigation in which the question is whether a reason is there to hold a successful party out of the benefit of a judgment obtained until the appeal is heard. Here Mr Robb's "reason" must be considered, not in the context of a judgment giving a benefit to a litigant, but rather as one designedly made to protect both the public and the reputation of the profession.

29. Accordingly, it will be necessary for an applicant to consider and closely analyse the

15 *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130, [52].

16 Although the public interest is not specifically referred to in s 41 of the AAT Act, it is nevertheless relevant: *Australian Securities and Investments Commission v PTLZ* (2008) 48 AAR 559, [42].

nature of the conduct that has been found or alleged:

(a) Is that conduct of itself of such a nature that imposition of the sanction is necessary to protect the public interest (including public confidence)?

(b) Is there a real risk of repetition of the conduct?

(c) Alternatively, would the public interest be jeopardised if the sanction were immediately imposed, rather than only after the final hearing?

30. Where the conduct found or alleged against the applicant affects public safety,[17] or otherwise prejudices the public interest or harms the reputation of the relevant profession,[18] the applicant would need "a reason of some cogency" in order to justify a stay. Where there is little impact on the public interest, or where the public interest can equally be advanced even if the stay is granted,[19] then it may be easier to establish circumstances justifying a stay order.

31. There might also be circumstances where aspects of the public interest favour the grant of a stay. In *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719, a disciplinary board decided to cancel the applicant's registration as a liquidator. The applicant applied to the AAT for a stay order. At the same time, criminal proceedings "arising out of the same factual matrix" were "on the cards" (albeit not yet commenced: at [10]). The stay was refused, and the applicant sought judicial review on the ground that, amongst other things, the tribunal had failed to take into account the potential prejudice to a criminal trial.

32. In the Federal Court, Farrell J held that the tribunal was required to consider the potential impact on a criminal trial as part of the public interest. Her Honour said (at [44]):

… the Deputy President did not consider the balance between the weight to be

17 Eg, *Parkes and Civil Aviation Safety Authority* [2009] AATA 789.
18 Eg, *Robb v Law Society of the Australian Capital Territory* [1996] FCA 1571.
19 Eg, *Sharma v Medical Board of Australia* [2014] QCAT 305, [15].

> given to the public benefit of deregistration (including the benefit of that fact coming to the attention of members of the public) compared to the weight to be given to the public interest in the due administration of criminal justice and possible prejudice to the conduct of criminal proceedings if jurors become aware that the applicant has been deregistered. This is significant where, as here, the Deputy President had the option of accepting an undertaking from the applicant not to practice and the likelihood of an expedited hearing of the Substantive Proceedings. The Deputy President would also have been entitled to take into account that although deregistration alone may engender some publicity, its possible impact on subsequent criminal proceedings and the due administration of criminal justice may be minimised because this fact alone is likely to be susceptible of appropriate directions from a judge.

33. The Court remitted the matter to the AAT for re-hearing. On the re-hearing, the tribunal again refused to grant a stay order: *Levi and Companies Auditors and Liquidators Disciplinary Board* [2013] AATA 576. The tribunal accepted that the refusal to grant a stay "may pose a risk to Mr Levi's receiving a fair trial" (at [31]), but noted that "no brief has yet been provided to the Director of Public Prosecutions" (at [35]). The tribunal was not satisfied that a stay was appropriate, instead indicating that the application should "be dealt with by way of an expedited hearing" (at [39]).

Prejudice or harm to the applicant

34. It is axiomatic that a disciplinary decision or sanction will have some adverse impact on the individual being disciplined. However, even where the impact of the sanction is to de-register or otherwise cause the person to cease practicing his or her profession or occupation, that – however significant – is unlikely to alone justify the grant of a stay order. In *Robb v Law Society of the Australian Capital Territory* [1996] FCA 1571, the Court said (at [23]):

> It is the case whenever an order for suspension is made and an appeal is lodged on arguable grounds, that the practitioner affected can assert that prejudice will be suffered if, the suspension having begun to run, the appeal is successful. This circumstance could not in my view justify, in effect, a stay as of right in all such

circumstances. The decision to stay a suspension order subject to appeal on arguable grounds must in my view involve an instance specific question.

35. Similarly, in *Legal Services Commissioner v Baker* [2005] QCA 482, the Court of Appeal approved the proposition that (at [21]):

> … the prejudice to a practitioner against whom findings of serious misconduct have been made, in not being able to practise until an appeal is heard, is not a reason of sufficient cogency to justify a stay.

36. In *Cruceru v Medical Board of Australia* [2014] QCAT 353, the tribunal said:

> The Tribunal has stated in previous cases concerning applications for stays of registration decisions of national boards under the National Law, that the adverse personal impacts upon a registrant and his family which will be suffered, are not ordinarily of themselves sufficient to warrant the granting of a stay and, in any event, not to be seen as in the same order as the adverse impacts upon patients …

37. The significance of these propositions seems to arise, however, not from the unimportance of the direct impacts on the applicant but on the importance of the public interest. That is, the proposition has its most force where the public interest weighs more heavily in favour of imposing the sanction. Whenever that is the case, and the only harm to the applicant is economic, it might be difficult to establish that a stay is desirable.[20]

38. Even in cases where immediately imposing the sanction will lead to irremediable harm, that will not necessarily outweigh the public interest. In *Parkes and Civil Aviation Safety Authority* [2009] AATA 789, CASA decided to cancel the applicant's chief pilot's licence due to several allegations about his operation of hot air balloons. The applicant applied for a stay, and offered to abide by certain conditions. The AAT accepted that the applicant was "likely to lose his business and perhaps his other assets" if a stay were not ordered (at [10]), but said that "public safety" was the "most important consideration"

20 Eg, *Featherstone v Department of Justice and Attorney-General* [2015] QCAT 223.

(at [12]). It refused the stay application, notwithstanding the "dreadful consequences for the applicant" (at [17]).

39. On the other hand, where staying a disciplinary sanction is unlikely to have a significant adverse affect on the public interest, the impact on the applicant might be grounds for making the order. For example, in *Cleary v Psychology Board of Australia* [2015] QCAT 168, the Psychology Board found that the applicant's professional practice had been unsatisfactory and imposed a condition that she complete a nominated course within 12 months. The tribunal noted that if the applicant were "ultimately successful, she will have gone to the effort and expense of doing that which is ultimately considered to be unnecessary" (at [7]). Conversely, it found that delaying the applicant's completion of the nominated course "will not have had any significant adverse impact upon the public interest" (at [8]). The stay was granted.

Prejudice or harm to third parties

40. Where it can be demonstrated that a refusal to grant a stay order will prejudice identifiable third parties, this might help tip the balance in favour of making the order. In *Cruceru v Medical Board of Australia* [2014] QCAT 353, after noting that adverse impacts on the applicant and his family would not ordinarily justify a stay, the tribunal said (at [37]):

> However, this case has two features which place it outside the category of cases in which that general principle ought to be applied. First is the illness of Dr Cruceru's wife. The inability of Dr Cruceru to practice beyond 30 June 2014 and a consequent inability to fund her treatment may have an immediate and profound effect upon the remainder of her life. That effect would be irremediable.

41. That, along with other considerations, led to the tribunal granting the stay order.

42. When considering factors in support of a stay application, it would be relevant to consider:

(a) Does the applicant have a family relying upon his or her income for support?

(b) Will clients or patients of the applicant be adversely impacted if the stay is not granted?

(c) Will the applicant's employees or associated companies be adversely impacted if the stay is not granted?

43. If these or other forms of prejudice to third parties can be identified and demonstrated, they may support the granting of a stay order.

Review rendered nugatory?

44. If it can be demonstrated that the review would be rendered nugatory if the stay is not granted, this may be a significant factor in favour of the grant of a stay. For example:

(a) Will imposition of the sanction result in the cessation of the applicant's business or practice, without any real prospect of re-starting?

(b) Will imposition of the sanction result in the applicant losing the financial resources to pursue the review?

(c) Will imposition of the sanction result in the applicant being shut out of an opportunity which cannot be recovered at a later stage?

45. I have already noted above the cases of *Parkes and Civil Aviation Safety Authority* [2009] AATA 789 (where a stay was refused despite that probably rendering the review nugatory) and *Cleary v Psychology Board of Australia* [2015] QCAT 168 (where a stay was granted, in part, to avoid the review being rendered nugatory). Aside from the other differences apparent in those examples, it is likely that the deciding factor is how the public interest would be affected. The decision in *Parkes* perhaps gives a hint that, if appropriate conditions or undertakings can be crafted to protect the public, then a stay

order may readily be justified if its refusal would render the review nugatory.

Conditions or undertakings

46. An application for a stay order need not be an 'all or nothing' approach. In some cases, a tribunal may be inclined to grant a 'partial' stay or a stay on conditions even though it would not be prepared to grant a complete a stay. Effectively, it might be possible (and sometimes necessary) to craft a 'tailored' outcome.[21]

47. Section 22(6) of the QCAT Act specifically empowers QCAT, when making a stay order, to "require an undertaking, including an undertaking as to costs or damages, it considers appropriate" or to "provide for the lifting of the order if stated conditions are met". Section 41(6) of the AAT Act enables an order to be "subject to such conditions as are specified", and whilst s 41 does not refer to undertakings the tribunal appears to be able to accept undertakings in relation to stay orders.[22] In appropriate cases, these powers offer a means for applicants to craft orders that the tribunal might be more likely to find "desirable" than a bare stay order.

48. The onus, however, is on the applicant to identify appropriate conditions and to persuade the tribunal that those conditions will be effective. In *Parkes and Civil Aviation Safety Authority* [2009] AATA 789, the applicant offered to abide by various conditions if the cancellation of his chief pilot's licence were stayed. He "proposed engaging an experienced chief pilot of another balloon company in Victoria who would make regular visits and prepare reports on the operation of the applicant's business" (at [7]). The AAT, however, was "not persuaded the proposal or any thing like it will work" (at [16]). The tribunal was particularly concerned that somebody undertaking a supervisory role "would really need to be close at hand", and the stay was refused.

49. *ATP Group Pty Ltd and Tax Practitioners Board* [2015] AATA 225 is an example where a conditional stay order was considered appropriate.[23] There, the applicant applied for

21 Some statutory schemes provide for automatic or mandatory conditions where a stay is granted. See *Issa and Migration Agents Registration Authority* [2014] AATA 870.

22 Eg, *Levi v Companies Auditors and Liquidators Disciplinary Board* [2013] FCA 719, [44].

23 I note that some aspects of the decision are questionable. To the extent the decision suggests that cancellation

an order staying the Board's decision to cancel his registration as a tax agent. The tribunal was influenced by the fact that about half of the applicant's clients were Arabic speakers and, if the stay were not ordered, they would be forced to find a new agent with the requisite language skills. The stay was granted on the condition that the applicant not provide taxation services to any new clients pending the review hearing.

Timing of the stay application

50. The timing of the application for a stay can be significant. Generally, any application for a stay should be brought promptly (and any delay should be explained). In *Tracey v Medical Board of Australia* [2014] QCAT 684, the Medical Board decided to impose certain conditions on a doctor's registration on the basis that his practice of medicine was below the standard reasonably expected. The doctor applied to QCAT for review about one month after the decision, but did not apply for a stay order until after another five months had elapsed. The tribunal said (at [14]):[24]

> … Dr Tracey has made no attempt to explain the delay. The absence of any explanation for the delay is a matter to be taken into account when considering any effect which the decision has had on him and the effect which granting the stay may have on him. …

51. It is also important to consider the timing between the conduct alleged against the applicant, and any disciplinary action then taken. In *Tanari and Migration Agents Registration Authority* [2005] AATA 419, the Authority decided to cancel a migration agent's registration. However, two and half years had elapsed since the conduct in question and, during that period, the agent's registration had been renewed three times whilst the Authority's investigation was ongoing. In those circumstances, and where the agent had been complying with the relevant code of conduct, the tribunal concluded that a stay order was desirable.[25]

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of tax registration should be stayed "unless the public interest requires otherwise", I think it is wrong. The tribunal also appears to fall into the error of not actually assessing, even on a preliminary basis, whether there was a 'good arguable case' (the error discussed by the QCAT appeal tribunal in *Deputy Commissioner Stewart v Kennedy* [2011] QCATA 254).

24 See also *Dey v Medical Board of Australia* [2011] QCAT 227, [10].

25 See also *Sharma v Medical Board of Australia* [2014] QCAT 305, [15].

Summary: preparing a stay application

52. An application for a stay order will generally be filed as an interlocutory application within the substantive proceedings that are on foot seeking to review a disciplinary sanction. The appropriate forum will be identified by the statutory scheme in question. It will often be the AAT or QCAT; but it might be another administrative body, or the Supreme or Federal Court where judicial review is sought.

53. Preparation of the stay application should consider:

    (a) Timing – The application should be filed in a timely way, and where possible it should be filed at the same time as (or shortly after) the initiating process.

    (b) Orders – Careful attention should be given to crafting appropriate orders, including conditions that might overcome any public interest concerns or objections likely to be raised by the other party.

    (c) Strength or merits – It should be assumed that it will be a pre-condition to the grant of a stay that the applicant is able to demonstrate a "good arguable case". The factual and legal arguments that demonstrate the arguable case should be identified.

    (d) Discretionary factors – All public interest considerations should be identified and addressed to the extent possible (including by crafting orders or conditions as appropriate). In addition, any discretionary factors that would support a stay order should be identified. This might include the more common factors identified in this paper, but as the class of relevant factors is not closed, it might include anything that bears on the desirability of ordering a stay.

    (e) Evidence – The discretionary factors that are relied upon in the stay application should be supported with appropriate affidavit evidence,[26] particularly where some

26 Eg, *Tracey v Medical Board of Australia* [2014] QCAT 684, [7] – [8]; *Sharma v Medical Board of Australia*

harm or prejudice is being relied upon. Similarly, where proposed conditions require the cooperation of third parties, the availability of that cooperation should be the subject of evidence.

(f) Progress of the review – Consideration should also be given to what directions should be made by the tribunal. Is an expedited hearing appropriate or desirable? If so, how can that be achieved? If not, will the stay order be effective and workable for the duration of the proceedings?

54. When preparing an application, it will be useful to consider the complementary questions of: What happens if the stay is granted? What happens if the stay is refused? The answers will assist in identifying the strengths and weaknesses in the case, and how they might be relied upon or overcome respectively.

Dated: 1 September 2015.

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Barrister-at-Law

[2014] QCAT 305, [4] – [5].