

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

**OCCUPATIONAL & BUSINESS
REGULATION LIST**

VCAT REFERENCE NO. B102/2006

CATCHWORDS

Occupational & Business Regulation List – Chinese medicine – whether applicant has similar qualification to standard set by respondent – meaning of “similar competencies to a course of study approved by the Board” – whether the applicant has “similar competencies” - *Chinese Medical Registration Act 2000* s 3, s 5(a) and (b), s 6(1)(a) and (b), s 68(1)(a) and (b) - costs – applicant’s application had no tenable basis in fact or law - *Victorian Civil and Administrative Tribunal Act 1998* s 109

APPLICANT	Richard Malter
RESPONDENT	Chinese Medical Registration Board
WHERE HELD	Melbourne
BEFORE	Robert Davis, Senior Member
HEARING TYPE	Hearing
DATES OF HEARING	14 and 15 May 2007
DATE OF ORDER	15 May 2007
CITATION	Malter v Chinese Medicine Registration Board (Occupational and Business Regulation) [2007] VCAT 815

ORDER

- 1 Decision of respondent affirmed.
- 2 The applicant is to pay the respondent’s costs of the application, such costs to be taxed in default of agreement on County Court Scale ‘D’.

Robert Davis
Senior Member

APPEARANCES:

For Applicant	In person
For Respondent	Dr I Freckleton of counsel

REASONS FOR DECISION

Note: These written reasons consist of an edited transcription of reasons given orally at the conclusion of the hearing.

APPLICATION

- 1 This is an application to review a decision of the respondent made 14 November 2006 to refuse the applicant registration as a practitioner in acupuncture pursuant to the *Chinese Medicine Registration Act 2000* (the Act).

BACKGROUND

- 2 The applicant claims to have sufficient competency to practice as a registered practitioner in acupuncture not only because of his practical experience but also because of the three courses in which he has participated. He has obtained a Diploma in Shiatsu from the Oriental Therapies East West College and it would appear that he performed some 1218 hours to complete that course which he completed on 10 December 2004. He also undertook a Dry Needling course which is part of an Advanced Diploma of Remedial Massage and finally, he has undertaken a course at New York which was entitled “Acupuncture & Electro-Therapeutics Research” and he received a Certificate on 2 January 2007. It was a course conducted by the School of International Affairs at Columbia University on 4-7 November 2006. He received a Certificate signed by a Mr Omura whom the applicant states is a very qualified person in acupuncture and is a very honourable man. The applicant states certificates would not be given by Mr Omura that did not mean anything. The certificate certifies that –

Richard Malter has participated in the 4-day 22nd Annual International Symposium on Acupuncture & Electro-Therapeutics accredited by the New York State Boards for Medicine & Dentistry for licensed physicians and dentists toward the 300-hour requirement for the certificate to practice acupuncture, and has attended 40 credit hours of the days symposium.

It then makes it clear that the 40 hours were divided into –

1/3rd credit hours (instruction & clinical demonstration)

1/3rd credit hours (sequential specialization instruction)

1/3rd credit hours (supervised practical training).

- 3 The applicant has also practised with a Dr Henry, who is a medical doctor holding an MBBS for a considerable period of time and I am told that she holds the applicant in very high regard. In fact she has written a reference about the applicant which was tendered. The reference was written on 23 June 2006. It states :

To Whom It May Concern

Richard Malter has been a colleague of mine for the past year working at Angelswood. His work is of the highest standard and patient feedback has been excellent especially in the area of musculoskeletal conditions.

Richard is a very sincere person with a genuine concern for his patients. I have great respect for him and the way in which he practices. He has had much experience teaching and is very competent and knowledgeable in his field.

- 4 A Neri Kedem, who is apparently an Israeli, has also sent a letter which the applicant has tendered in evidence which attests to the applicant's skills. Mr Kedem is what the applicant calls a mentor. He states :

Kiiko Matsumoto is world-renowned for her deep research into the Chinese classic medical books and her translation of this information into a highly effective hands-on Japanese-style clinical practice that also integrates Western medical knowledge. She has recently published Volume 1 of her Clinical Strategies.

I have known Richard since 1992, when I introduced him to oriental medicine. I have acted as a mentor to Richard in his practice of acupuncture since then. Today we are colleagues.

I confirm that Richard Malter has a good understanding and clinical application of Kiiko Style acupuncture. This style is taught in the Clinical Acupuncture Course for physicians at Harvard medical School, USA, as well as in other mainstream acupuncture teaching institutions in the USA.

- 5 The applicant also relies on a statement by Mr Ellis who attended and gave oral evidence. In his oral evidence, Mr Ellis stated that, in his view, the applicant had displayed to him considerable competency in diagnostic techniques in natural medicine which are used in acupuncture and herbal medicine. Mr Ellis is a registered Chinese Herbalist and he also holds some qualification in acupuncture, although he is not a registered acupuncturist. He says in his statement that –

On the question of training in Australia, I first encountered Richard as a student in Eastern medicine theory classes while I was teaching in the diploma course at Shiatsu Australia, a private college in Melbourne. He was the outstanding student of the cohort (or any I have taught before or since) in terms of his pre-existing understanding of the material, his attention to detail in class work, and his thirst for knowledge and further comprehension. This training covered in 60 hours (and 120 hours subsequent student clinic time) the principles of Eastern theory and meridian dynamics, diagnosis and treatment to a depth appropriate to Shiatsu therapists, although Richard was already studying and working well beyond this level.

....

I consider Richard's knowledge and understanding of the meridian and point networks, and in particular his ability to diagnose and treat using this system, to be second to none. I say this having collaborated with Richard directly with clients and observed his work in his clinic, and having discussed many aspects of theory and clinical practice, at length, via email and in person.

I have observed his use of two diagnostic methods, the bi-digital o-ring test (BDORT) and abdominal palpation, both in clinical practice and in personal demonstrations. I am prepared to vouch that I am convinced not only of Richard's mastery of these techniques, but also of their application as legitimate tools for accurate diagnosis in the context of a meridian-based therapy such as acupuncture. ...

I have observed his treatment methods involving various of the standard tools of Chinese and Japanese medicine, including acupuncture needles. At all times my observation has been that his treatment accords with the principles of accepted practice in Eastern medicine, and that he works with needles in a careful and methodical way.

- 6 It is on this basis that the applicant says that he should be registered. He makes reference to the legislation. In my view, it is desirable that the important parts of the legislation in this matter be set out in full.

RELEVANT LEGISLATION

- 7 Section 5 of the Act reads as follows :

5. Qualifications for general registration

A person is qualified for general registration as a Chinese medicine practitioner or a Chinese herbal dispenser if that person—

- (a) has successfully completed a course of study approved by the Board; or
- (b) in the opinion of the Board, has a qualification that is substantially equivalent or is based on similar competencies to a course of study approved by the Board; or

I pause here to say that it is the last phrase that Mr Malter relies on. That is, he says he has “similar competencies to the course of study approved by the Board”. I will say more about the course of studies shortly.

- 8 However, the Act in s 3 defines “registered Chinese medicine practitioner” to mean:

A person registered as a Chinese medicine practitioner under Part 2, whether as a Chinese herbal medicine practitioner or as an acupuncturist or both and whether the registration is general or specific .

- 9 Section 6 of the Act requires the Board to register people of certain competency. Sub-section (1) reads as follows :

6. General registration

- (1) The Board must grant general registration as a Chinese medicine practitioner or a Chinese herbal dispenser to an applicant if—
- (a) the applicant is qualified for registration under section 5; and
 - (b) in the case of an applicant who has not been registered under this section before, the applicant completed the course of study, obtained the qualification or passed the examination referred to in section 5 within the 5 years preceding the application;

- 10 Section 68 of the Act requires the Board to comply with the requirements of the Act and approve certain courses. Section 68(1) reads as follows :

- (1) The Board has the following functions—
- (a) to register persons who comply with the requirements of this Act as to registration so that they may hold themselves out as registered Chinese medicine practitioners or registered Chinese herbal dispensers;
 - (b) to approve courses of study which provide qualifications for registration as Chinese medicine practitioners and Chinese herbal dispensers;

RELATIONSHIP BETWEEN APPLICANT'S LEARNING AND S 5(b) OF THE ACT

- 11 It is pursuant to s 68 that the Board has in fact approved three current courses of study in relation to acupuncture. There have been other courses approved but they are courses that are no longer approved. The first course it has approved is with the Australian College of Natural Medicine and that is a Bachelor of Health Science (Acupuncture) abbreviated title BHSc(Acu). It has also approved the course of Master of Applied Science (Acupuncture) which is a 3 year course at RMIT University and a course Advanced Diploma of Acupuncture – abbreviated title ADDip (Acu) (which is the least stringent of the 3) also conducted by the Australian College of Natural Medicine.
- 12 Dr Freckleton, who appeared for the respondent, conceded that the reading of s 5(b) in relation to the question of similar competency should be a similar competency of the lowest standard course which has been approved by the Board. In this particular instance, the lowest standard course which has been approved by the Board is the Advanced Diploma of Acupuncture.

13 It is said on behalf of the Board that the applicant has not received sufficient clinical supervised training and neither has he completed the subjects as required by the courses approved by the Board. The applicant has done what amounts to, and I find this is a fact, 39 hours of supervised clinical training, whereas the simplest course approved by the Board which is the Advanced Diploma of Acupuncture requires 594 hours of supervised clinical training. Further, the courses that the applicant has undertaken have not included a number of subjects that are required for the Advanced Diploma of Acupuncture (which I have described above).

14 The applicant in his own material admits that he has not done training in courses involving Diagnosis in Chinese Medicine, Channel and Acupuncture Point Theory, Needling Theory and Practice. He also admits that he has not done a course in Internal Medicine, Gynaecology and Obstetrics, Paediatrics, Traumatology and Dermatology.

In relation to the subject of Diagnosis in Chinese Medicine, the applicant dismisses that subject as being a TCM (Traditional Chinese Medicine) subject and is not relevant to his application. In relation to Channel and Acupuncture Point theory, the applicant said -

my practice is based primarily on actual clinical, measurable results, as I have documented, not theory and text book descriptions. I have provided more than ample information that fully covers this material.

15 In relation to Needling Theory and Practice, the applicant said -

some Learning Outcomes are TCM style AP or partly so, and not relevant to my application.

He said other matters are covered by the Dry Needling course.

16 In relation to Internal Medicine, the applicant dismissed that as being a TCM subject and not relevant to his application.

17 In relation to Gynaecology and Obstetrics, the applicant said that this is a TCM subject and is not relevant to his application but he says he uses a direct organ/gland meridian diagnosis to successfully treat these cases.

18 In relation to Paediatrics, the applicant also says this is a TCM subject and not relevant to his application and he uses a direct organ/gland meridian diagnosis to successfully treat these cases.

19 In Traumatology and Dermatology he gives the same explanation. He says that these subjects are not necessary for him because to use his words –

I am arguing that actual real world, clinical experience in the context described, dealing with these subjects in respect of real patients, is certainly equal or greater than student study of these subjects and topics.

20 He then concludes that

The CMRBV has provided no provision to assess the other established forms of acupuncture (AP) practised worldwide in their own unique skills and knowledge and effectively creates a monopoly on the term 'Acupuncture' restricted to 'TCM' style acupuncture practice, which monopoly is artificial in every respect and acts to the great and historic detriment of the Victorian public. Therefore, the CMRBV should expand their view of AP in order to enrich the culture and healthcare of the Victorian public, and accept and approve my submissions for my Registration, and take concrete measures to better overview other applicants in the same context as myself.

21 At the commencement of this hearing on application from Dr Freckleton, I made a ruling that, in relation to the interpretation of s 5(b) of the Act, the sole issue for determination was whether the applicant's qualifications were substantially equivalent or are based on similar competencies to the course of study approved by the Board.

22 The issue to be determined by the Tribunal is a relatively simple issue – that is, does the applicant have similar competencies to the course of study approved by the Board. The applicant maintains he does have similar competencies. However, in my view, it is very difficult to say that he could have such similar competencies bearing in mind that he has not passed or completed a number of the subjects that are required by the Advanced Diploma of Acupuncture. Further, as I have stated, the applicant has a far less supervised clinical practical experience than that required by the course approved by the Board.

23 The applicant called Mr Ellis to say that the way he treats patients is as good, if not better, than the way a lot of people who do have the qualifications that is required, treats them. In my view, that is not to the point. When one looks at s 5(b), in my view, the words "based on similar competencies to a course of study approved by the Board" must be to a course of study, it cannot be read as practical experience alone. I note that the Act provided transitional provisions by a "grandfather clause" to allow people who had experience and to continue working. However, that provision expired in December 2004. Since that time, the way that people have been able to be registered is by successfully completing a course of study approved by the Board and to have similar competencies to that course of studies, it must be demonstrated that the applicant has completed a course which has been assessed and for which a student has achieved results that are satisfactorily similar to that approved by the Board or that the person can demonstrate by objective means that he/she has a similar competency.

24 The applicant relies heavily on the course of study which he did at Columbia University in November 2006. However, it is clear from the evidence of the applicant that that course was never assessed by examination or by work requirements. One does not know how Mr Omura

decided that the applicant should receive the certificate. It is insufficient for the applicant to say to this Tribunal that Mr Omura is a very experienced man and he would not give the certificates out if he did not think they were justified. In my view, the only way that one can be tested after they have completed a course to see if they have achieved a required standard is either by examination or some type of work assignment. Clearly, in his course at Columbia University, the applicant did not do either.

- 25 I think it is desirable at this stage if I say something more about the course work that is required in the approved guidelines as compared with the work that has been performed by the applicant because this is really a comparative exercise which I must do.
- 26 In paragraph 8 of a witness statement by Peter Gigante, who is a qualified Chinese acupuncturist and is also a member of the Chinese Medicine Registration Board of Victoria, does this comparative exercise. He states as follows :

I am of the opinion that Mr Malter has not completed a course of study substantially similar to or based on similar competencies to any of the other courses of study already approved by the Board for the following reasons :

In the Chinese Medicine areas of study outlined in the CMRBV Course Approved Guidelines, there are 17 subjects listed. In the Shiatsu Diploma, there are 7 units which are based around the same topics. Some of the Course Approval Guidelines for Chinese medicine subjects have been partially covered within the Shiatsu units, but there is no scope for equivalence in most. For example, Paediatrics is a stand alone subject for course approval purposes, and approved courses provide between 24-48 hours on the topic. In the Shiatsu Diploma Mr Malter completed, paediatrics comprises one of four topics in one lecture within one unit. The Oriental theory and diagnosis units in the shiatsu diploma also encompass the entire scope of the Huang Di Nei Jing subject in only the first lecture which also includes a brief history of TCM, Daoism, and an introduction to fundamental concepts such as yin and yang, qi and blood, body fluids, meridians and points. Equivalence may be accepted for Traumatology and CM Health Preservation & Enhancement.

In the Biomedical Subjects grouping, there are 11 subjects in the Course Approval Guidelines. In the Shiatsu Diploma, there are 6 units, but 4 are directly related to Structural and Functional anatomy, with part of one of these also covering physiology, and one subject covering pathology. There is no subject introducing research and no assessment criteria evident for any subject which specifies the application of research methodologies. The board has emphasised research capability and application developed throughout Chinese Medicine courses undergoing the approval process as a critical focus for Course Approval Panels.

In the Subjects which are recommended only in the Course Approval Guidelines, one – Tuina (Chinese massage) – may be considered equivalent or greater. The 4 Shiatsu units in the Diploma achieve or exceed an equivalent standard albeit in a Japanese style.

In the areas of Professional Issues and Professional Practice, there is sufficient evidence of equivalence.

Assessment, including criteria, methods, depth of knowledge as well as review and oversight are not equivalent to the guidelines even for the same subjects in the Shiatsu Diploma.

The clinical practicum within the Shiatsu Diploma is substantially less than equivalent to the CMRBV Guidelines, both in terms of total hours and obviously in treatment principles and methods.

27 From the statement of Mr Gigante, it is quite clear to me that the course of Shiatsu is not equivalent in a sufficient way to the requirement by the respondent of the work to be done. Neither is the course in Dry Needling which the applicant has done is equivalent. It clearly had a considerably lesser supervised clinical hours and did not have the same subjects as is required in the Acupuncture course. As I have stated the Dry Needling course did not cover many of the subjects required by the approved courses. I have difficulty assessing what the applicant could have taken away from the course of Columbia University. As I have previously stated that was not assessed. It is very important that registrants for acupuncture be totally competent at what they are doing and the respondent has a duty to make sure that they are able to perform what they purport to do in a proper manner so as to protect the public. Without being assessed an applicant cannot show “similar competency”.

28 Professor Xue states :

The Board in registering persons deemed to be qualified as acupuncturists needs to be confident that a person holding the title ‘acupuncturist’ (or other similar title) is competent to provide the full range of acupuncture services to a member of the public who consults them for such a service. This would be expected to include the differential diagnosis of the person’s condition and the design of a treatment specific to the person’s condition as well as the safe insertion, manipulation, removal and disposal of needles.

29 While the Dry Acupuncture course may give the applicant ability to safely insert needles, in my view, the course is not of sufficient breadth to enable the Board or myself to be satisfied that the applicant would be able to successfully treat patients. The applicant states that his method of diagnosis would enable him to find better the points on the human body. That may or may not be so. In my view, there has been a course approved by the Board and what the applicant must show is that his competency is of a similar standard. The way to show that is through some type of academic achievement which one can assess. In my view, the applicant has failed to

do that. Under those circumstances, I will affirm the decision of the respondent.

COSTS

- 30 Subsequent to giving the oral decision, Dr Freckleton on behalf of the respondent, who has been successful in this proceeding, made an application for costs. In his application for costs Dr Freckleton noted that his client is funded by fees that are paid by various members, that is, the registrants of the Victorian Chinese Medical Registration Board. Legal fees come out of the practitioner's subscription. He also noted that this has been a relatively expensive case.
- 31 In dealing with the question of costs, I am bound by s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*. That section in sub-section (1) states that each party is to bear their own costs. However, sub-section (2) gives me power to order costs and sub-section (3) states that in considering costs under sub-section (2), I may order them if it is fair to do so. It refers to a number of matters where it is said by the legislature that it is fair to award costs. One of those matters is contained in s 109(3)(c) and that is –
- the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law.
- 32 Dr Freckleton, on behalf of the respondent, has said that the applicant's case had no tenable basis in fact or law.
- 33 I have noted that the applicant admits that he has not completed a number of subjects that are required by the course of study as prescribed by the respondent. While the applicant said that he should not have to do those subjects because of experience, in my view, having admitted that he had not completed those subjects and passing some of them off as just being TCM subjects and not relevant to him, he knew or should have known that there was no way he could be successful in this proceeding.
- 34 Dr Freckleton has drawn an analogy between this proceeding and someone who has completed a course in legal studies wanting to be admitted to the Supreme Court without having completed the full university course in Bachelor of Laws and Letters (LLB). In my view that is a very good analogy. Clearly someone who has only completed a Legal Studies course without an LLB would not be admitted to practise.
- 35 The applicant, while he has done some work that is relevant in relation to the course approved for a registered acupuncturist, has clearly done insufficient work and has clearly not passed sufficient subjects. The applicant seems to be taking some moral stand that because he can perform work that others cannot, he should be registered because it will help the people of Victoria. The fact is that Parliament has designated the respondent and not the applicant to decide what is an approved course of study.

36 I am also told that early on in this proceeding yesterday morning, the applicant was warned as to the question of costs but did not heed the same. The applicant said that he believed he had a good case and did not believe he was wasting time and he was not a lawyer. I take all those matters into account. However, in my view, any clear thinking person would know that if they had not completed particular subjects that were required in the course of studies which were approved by the respondent, their chances of success in an application like this would be minimal. Thus I find that the applicant's claim had no tenable basis in fact or law. As such, in my view, it is fair to order that the applicant pay the respondent's costs of this application to be taxed in default of agreement on County Court Scale 'D'.

Robert Davis
Senior Member