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## **THE LAW AND POLITICS OF REGISTERING DOCTORS: LESSONS FROM NEW SOUTH WALES, 1937–42**

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*Doctors who fled from Nazi-occupied and dominated Europe sought to pursue their profession wherever they could. Those who arrived in Australia confronted substantial impediments to doing so. In New South Wales ('NSW'), doctors who represented, registered and educated the medical profession and Members of Parliament attempted to prevent 'refugee doctors', as they were described, from practising medicine. Due largely to protectionism and prejudice, many refugee doctors were denied registration to practise medicine irrespective of their qualifications, skills and experience, and despite the low number of refugee doctors who settled in NSW. This article focuses on the law and politics of registering the medical profession. It analyses the treatment of refugee doctors who sought to practise medicine in NSW between 1937 and 1942, and then reflects on the contemporary relevance of this episode in Australia's history of medical regulation. The article discusses cautionary lessons we might learn from the past so that capable overseas-trained doctors to whom Australia grants refuge are permitted to practise their profession and provide valuable medical services to the community. This article also considers whether changes to the law since that time might constitute some safeguard against repetition of past discrimination.*

### **I INTRODUCTION**

In the 1930s and 1940s, doctors who fled from Nazi-occupied and dominated European countries sought to pursue their livelihood anywhere else they could. A

common path was to seek refuge initially in the United Kingdom ('UK'),<sup>1</sup> where they were described variously as 'refugee', 'alien' and 'foreign'. The term 'refugee doctors' in particular reflects the experiences of medical practitioners who escaped persecution and were stateless, or reluctant to return to Europe.<sup>2</sup> These refugee doctors were permitted to undertake the final exams of the Scottish Triple Qualification Board ('Scottish Board') after a year's clinical study and obtain qualifications ('TQ') on the basis of which the General Council of Medical Education and Registration ('GMC'), the UK's medical licensing and standards body, would register them.<sup>3</sup> Nevertheless, from 1935, pursuant to an order of the UK Secretary of State for Home Affairs, it was expected that most European doctors would leave Britain after studying for the TQ or other qualifications.<sup>4</sup> All doctors whom the GMC registered were 'entitled to practise medicine ... (subject to any local law) in any ... part of Her Majesty's dominions'.<sup>5</sup> Consequently, at this time, refugee doctors increasingly applied to the boards that registered doctors to practise medicine in each of Australia's states.

Many of the refugee doctors who arrived in Australia did so before World War II began and settled in New South Wales ('NSW').<sup>6</sup> This pool represented a tiny portion of the medical profession in that state. Approximately 2,400 to 2,500 doctors were practising there in 1939.<sup>7</sup> Estimates of the number of refugee doctors seeking registration in NSW that year ranged from 48 (according to government

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1 HM Dingwall, 'The Triple Qualification Examination of the Scottish Medical and Surgical Colleges, 1884–1993' (2010) 40(3) *Journal of the Royal College of Physicians of Edinburgh* 269, 273; Kenneth Collins, 'European Refugee Physicians in Scotland, 1933–1945' (2009) 22(3) *Social History of Medicine* 513, 513–14, 516.

2 It is nonetheless acknowledged that use of the term 'refugee doctors' in this context is technically anachronistic, as the United Nations *Convention Relating to the Status of Refugees*, which defines a 'refugee', had not yet been conceived: *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

3 Dingwall (n 1) 269–70; Collins (n 1) 513.

4 Note, 'Registration of Foreign Practitioners in Great Britain and the Dominions and Colonies' (1937) 2(4003) *British Medical Journal* 199, 199 ('Registration of Foreign Practitioners'); Louise London, *Whitehall and the Jews, 1933–1948: British Immigration Policy, Jewish Refugees and the Holocaust* (Cambridge University Press, 2000) 5, 80.

5 *Medical Act 1886* (Imp) 49 & 50 Vict, c 48, s 6, quoted in Note, 'The *Medical Act, 1866*' (1886) 2(1331) *British Medical Journal* 36, 36.

6 John Weaver, 'Pathways of Perseverance: Medical Refugee Flights to Australia and New Zealand, 1933–1945' in Laurence Monnais and David Wright (eds), *Doctors Beyond Borders: The Transnational Migration of Physicians in the Twentieth Century* (University of Toronto Press, 2016) 42, 50 ('Pathways'); Suzanne D Rutland, 'Australian Responses to Jewish Refugee Migration before and after World War II' (1985) 31(1) *Australian Journal of Politics and History* 29, 42.

7 John Weaver, "'A Glut on the Market.'" Medical Practice Laws and Treatment of Refugee Doctors in Australia and New Zealand, 1933–1942' (2009) *Australia and New Zealand Law and History E-Journal* 1, 32 ('Glut'); New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 August 1938, 819 (Herbert FitzSimons).

sources)<sup>8</sup> to 55 (according to the British Medical Association ('BMA')).<sup>9</sup> Notwithstanding their relatively low number, and irrespective of their skills and experience, many refugee doctors failed to secure registration to practise medicine in NSW.

The exclusion of these refugee doctors from the registered medical profession was in no small part due to the efforts of individuals who belonged to the Medical Board of NSW ('Board'), which registered the NSW medical profession; the BMA, which was the peak body for the medical profession in the British Empire; and the University of Sydney's ('University') Senate ('Senate'), Professorial Board, and Faculty of Medicine ('Faculty'). Egon Kunz wrote that these bodies with their overlapping membership constituted 'the triangular power structure of the Australian medical world'.<sup>10</sup> In NSW, the contribution of a fourth force – Members of Parliament ('MPs') who were sympathetic to the entreaties of representatives of the Board, BMA and University – was essential to preventing refugee doctors from obtaining registration to practise medicine. MPs passed legislation that circumscribed their eligibility for it. Their statutes also gave substantial latitude to the Board – several of whose members also occupied prominent roles in the BMA and/or the University – to decide whether refugee doctors were entitled to registration, regardless of their abilities, and to the University to determine whether they could become so entitled. Both bodies exercised their discretion rigidly and ungenerously.

Some Australians, including doctors and even BMA members,<sup>11</sup> as well as MPs, supported refugee doctors and highlighted their capacity to benefit their new home.<sup>12</sup> They argued that denying them registration was indefensible on economic, ethical and public health grounds. The executive of the National Council of Women, for example, queried, 'would the few extra doctors so greatly endanger the livelihood of the many hundreds already established?', and deemed it a moral imperative to 'help [refugee doctors] to establish themselves as self-supporting citizens'.<sup>13</sup> Nevertheless, their voices had little, if any, impact on those who were

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- 8 Weaver, 'Glut' (n 7) 32; Letter from Bertram Stevens to Robert Menzies, 31 July 1939, archived at National Archives of Australia, series number A433, control symbol 1939/2/2197, item barcode 73997, Premier of NSW – Problem of Employment of Alien Refugees (Including Doctors) 1939–40, 36–7.
  - 9 G Moncrieff Barron, 'Letters, Refugee Doctors, to the Editor of the Herald', *The Sydney Morning Herald* (Sydney, 27 November 1939) 5 ('To the Editor').
  - 10 Egon F Kunz, *The Intruders: Refugee Doctors in Australia* (Australian National University Press, 1975) 45.
  - 11 See, eg, regarding Sir James Barrett, ophthalmologist and president of the BMA's Victorian branch: Hilary L Rubinstein, 'Sir James Barrett (1862–1945): Australian Philo-Semite' (1993) 12(1) *Journal of the Australian Jewish Historical Society* 91, 97–9; James W Barrett, 'Refugee Doctors' (1940) 1(6) *Medical Journal of Australia* 212.
  - 12 See, eg, 'Alien Doctors: Cabinet Unlikely to Change Decision', *The Sydney Morning Herald* (Sydney, 8 December 1939) 12 ('Alien Doctors'); New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 October 1938, 2280–1 (Thomas Mutch).
  - 13 'Alien Doctors' (n 12). See also Letter from A Herborn (Honorary Secretary, Peace Section of the Legion of Christian Youth) to Robert Menzies, 1 February 1940, archived at National Archives of Australia, series number A981, control symbol MIG45 part 1, item barcode 178844, Migration Restrictions, Entry and Registration of Foreign Dental and Medical Practitioners.

determined, seemingly due largely to protectionism and prejudice, to exclude refugee doctors from the registered medical profession.

This article examines the attempts by, and collaboration between, MPs and doctors who registered, represented and educated the medical profession to prevent refugee doctors from practising medicine during this period, using NSW as a case study.<sup>14</sup> This article also considers cautionary lessons that we may learn from this history. It is timely to reflect on this period when a high volume of people were displaced from their countries of origin and doctors among them experienced substantial difficulties in obtaining permission to pursue their profession in Australia. The mass of people currently seeking asylum around the globe, in response to war, political conflict and oppression of ethnic, political and religious groups, constitutes a major humanitarian crisis. Australia's treatment of asylum seekers polarises public opinion,<sup>15</sup> and there have been calls to lower Australia's intake generally of overseas-trained doctors ('OTDs'), as they are commonly termed today.<sup>16</sup> The latter have occurred in the context of increases in the number of Australian medical graduates and a perceived 'oversupply' of certain medical specialists particularly in metropolitan locations (despite a simultaneous dependence on OTDs in regional, rural and remote areas, which have historically experienced shortages of doctors, and in emergency medicine).<sup>17</sup> In addition, there was some debate in the recent past about whether contemporary Australian medical registration and accreditation processes discriminated against OTDs.<sup>18</sup>

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- 14 Scholars have discussed the hostility within the medical profession, and specifically the BMA, towards refugee doctors: see, eg, Paul Weindling, 'Medical Refugees and the Modernisation of British Medicine, 1930–1960' (2009) 22(3) *Social History of Medicine* 489, 493, 506–7; Kunz (n 10); Collins (n 1) 520–1. Some studies have focused on the response of the medical profession in specific Australian states to refugee doctors: see Suzanne D Rutland, 'An Example of "Intellectual Barbarism": The Story of "Alien" Jewish Medical Practitioners in Australia, 1933–1956' (1987) 18 *Yad Vashem Studies* 233, 243–4 ('An Example'); Weaver, 'Pathways' (n 6); Peter Winterton, 'Alien Doctors: The Western Australian Medical Fraternity's Reaction to European Events 1930–50' (2005) 7(1) *Health and History* 67; Gabrielle Wolf, 'Moritz Meyer and the Medical Board: Preventing Refugee Doctors From Practising Medicine in Victoria, Australia, 1937–58' (2018) 26(1) *Journal of Law and Medicine* 61 ('Moritz Meyer'); Gabrielle Wolf, 'Machinations of the British Medical Association: Excluding Refugee Doctors from Queensland's Medical Profession, 1937–42' (2019) 59(4) *American Journal of Legal History* 513. This article builds particularly on Rutland's examination of the response of the NSW medical profession to refugee doctors.
- 15 Denis Muller, 'Immigration, Asylum Seekers and Australia' (2016) 75(2) *Meanjin* 59.
- 16 Eliza Borrello, 'Calls for Government to Stop Giving Visas to Overseas-Trained Doctors to Address Rural Shortage', *ABC News* (online, 9 August 2016) <<https://www.abc.net.au/news/2016-08-09/calls-to-stop-giving-overseas-trained-doctors-visas/7706612>>; Sean Parnell, 'Boost for Locally Trained Doctors', *The Australian* (online, 4 December 2018) <<https://www.theaustralian.com.au/national-affairs/health/new-rules-on-overseas-doctors-helps-those-trained-locally/news-story/fea26297569db0ae40061e2e83c876ac>>.
- 17 Interview with Dr Michael Gannon, President of the Australian Medical Association (Sally Warhaft, 774 ABC, 9 August 2016); Australian Medical Association, 'Medical Workforce and Training – 2019' (Position Statement, 26 March 2019) <<https://ama.com.au/position-statement/medical-workforce-and-training-2019>>; Caroline O Laurence et al, 'Personality Characteristics and Attributes of International Medical Graduates in General Practice Training: Implications for Supporting This Valued Australian Workforce' (2016) 24(5) *Australian Journal of Rural Health* 333, 333; Sara Mackenzie, Lisa Brichko and Viet Tran, 'The Evolving Role of International Doctors in the Australian Emergency Medicine Workforce' (2016) 28(5) *Emergency Medicine Australasia* 586, 586, 588.
- 18 See, eg, House of Representatives Standing Committee on Health and Ageing, Parliament of Australia, *Lost in the Labyrinth* (Report, March 2012) ix–xii; Carlos Zubaran and Susan Douglas, 'Peers or Pariahs?

The next part of this article explores the responses to refugee doctors who sought to practise medicine in NSW between 1937 and 1942. These dates are instructive because, from 1937, the BMA's efforts to exclude refugee doctors from the Australian medical profession intensified, and the period in which the Board was regularly addressing refugee doctors' registration applications tapered off by the end of 1942. Part III of this article considers lessons we may learn from the past so that capable OTDs to whom Australia grants refuge are permitted to practise their profession and provide valuable medical services to the community. It also reflects on whether changes to the law since that time might constitute some safeguard against repetition of past discrimination.

## II RESPONSES TO REFUGEE DOCTORS SEEKING TO PRACTISE MEDICINE IN NEW SOUTH WALES, 1937–42

### A *Medical Practitioners Act 1912 (NSW) and Its Application*

Before 4 August 1939, when significant amendments to legislation governing medical practitioners' registration in NSW commenced operation, any 'German or Austrian subject' or 'graduate of any German or Austrian University or Medical School only' was ineligible for registration.<sup>19</sup> MPs had passed the *Medical Practitioners (Amendment) Act 1915 (NSW) ('1915 Act')*, amending the *Medical Practitioners Act 1912 (NSW) ('1912 Act')* and introducing this provision, to prevent doctors who had a connection with Australia's enemies during World War I from practising medicine in NSW.<sup>20</sup> The Board was eager to apply the prohibition wherever possible. For instance, it sought the Crown Solicitor's advice about whether 'Hungary should be regarded as part of Austria' when Szanto Geza, a Hungarian subject and orthopaedic specialist, applied to the Board for registration.<sup>21</sup> Given NSW newspapers' reporting about the Nazi regime, Board

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The Quest for Fairer Conditions for International Medical Graduates in Australia' (2014) 201(9) *Medical Journal of Australia* 509, 510; Mackenzie, Brichko and Tran (n 17) 586-7; Nicole Mackee, 'IMGs Still Treated "Unfairly"', *MJA InSight* (online, 3 November 2014)

<<https://insightplus.mja.com.au/2014/41/imgs-still-treated-unfairly/>>. See also the response of the Medical Board of Australia ('MBA') and Australian Medical Council ('AMC') to concerns raised about discrimination against overseas-trained doctors ('OTDs'): MBA, 'FAQ for Competent Authority Pathway' (23 December 2019) <<https://www.medicalboard.gov.au/Codes-Guidelines-Policies/FAQ/FAQ-competent-authority-pathway.aspx>>; MBA, 'Public Consultation on Proposed Changes to the Competent Authority Pathway and Specialist Pathway for International Medical Graduates' (Media Release, 2 April 2013) <<https://www.medicalboard.gov.au/News/Past-Consultations/Consultations-April-2013.aspx>>; MBA, 'Guides and Reports' (Web Page, 15 October 2019) <<https://www.medicalboard.gov.au/registration/international-medical-graduates/specialist-pathway/guides-and-reports>>.

19 *Medical Practitioners Act 1912 (NSW)* s 4(3) ('1912 Act'), as amended by *Medical Practitioners (Amendment) Act 1915 (NSW)* s 2 ('1915 Act').

20 New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 October 1915, 2701 (John Storey), 2700 (William Robson), 2697 (Arthur Griffith).

21 NSW Medical Board, Minutes of Proceedings, 5 April 1939, archived at NSW State Archives, item number NRS-9871-2, reel 2658.; Letter from JR Fleming, Secretary, NSW Medical Board, to Secretary, Commonwealth Department of External Affairs, 14 April 1939, and Letter from A Mammalella, Consul

members would have realised that many of the refugee doctors applying for registration were Jewish,<sup>22</sup> and, therefore, from September 1935, no longer German subjects. Under the Nuremberg laws, passed in Germany that month, individuals with four Jewish grandparents were declared non-citizens.<sup>23</sup> Yet the Board still required refugee doctors to ‘establish as a fact that [they were] not a subject of Germany’ before it would consider their applications.<sup>24</sup>

Under the *1912 Act*, European doctors who were not German or Austrian subjects and who obtained their qualifications in countries other than Germany and Austria were eligible for registration in two circumstances. First, the Board could register doctors whom a ‘college of physicians or surgeons in Great Britain’, such as the GMC, had ‘licensed or admitted’.<sup>25</sup> Nevertheless, where refugee doctors were eligible for registration on the basis of their GMC registration, the Board pedantically pursued other obstacles to registering them. For example, the Board would only register Maurice Hurst ‘upon production of further information regarding [the] name “Moses Hurwitz” appearing on his passport’.<sup>26</sup> Yet Hurst had already provided a statutory declaration, British passport, certification of his name in the GMC’s register, a document regarding his change of name, and two signed photographs.<sup>27</sup>

The Board also urged the NSW Government to relieve it of its obligation to register refugee doctors who obtained GMC registration by virtue of earning the TQ. In 1934, the Board wrote to the NSW Premier highlighting ‘the position that would arise in respect of exiled German or Austrian Jewish practitioners’ who had the TQ and were therefore eligible for registration ‘unless some safeguard were provided by legislation requiring such practitioners to complete a full course of medical study at a British medical school’.<sup>28</sup> In 1937, the Board nominated its member, Dr Frederick Maguire (who also belonged to the Senate),<sup>29</sup> to repeat this advice to the Minister for Health, Herbert FitzSimons, while he was preparing the Medical Practitioners Bill 1938 (NSW) (‘Bill’), and to propose that this provision apply to all ‘foreign medical practitioners’.<sup>30</sup> The Board also requested Maguire to ask FitzSimons

as a matter of grave urgency ... to obtain an opinion from the legal officers of the Commonwealth as to whether any power is possessed by a State or by the

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General of Italy, to Minister of External Affairs, 12 April 1939, archived at National Archives of Australia (n 13).

22 Rutland, ‘An Example’ (n 14) 243–4.

23 Michael H Kater, *Doctors under Hitler* (University of North Carolina Press, 1989) 193; ‘New German Laws: Antipathy to Jews’, *The Riverine Grazier* (Hay, 17 September 1935) 2; ‘Swastika: German National Flag’, *Daily Examiner* (Grafton, 17 September 1935) 5; ‘Hitler Appeals for League Action in Memel: Germany’s Three New Laws’, *Northern Star* (Lismore, 17 September 1935) 7.

24 NSW Medical Board, 2 December 1936, archived at NSW State Archives (n 21). See also 8 February 1939.

25 Ibid 3 March 1937; *1912 Act* (NSW) s 4(1)(a), as amended by *1915 Act* (NSW) s 2.

26 NSW Medical Board, 7 June 1939, archived at NSW State Archives (n 21).

27 Ibid.

28 Ibid 7 July 1937.

29 University of Sydney Archives, G1/1/23, University of Sydney Senate, Minutes, 5 June 1939.

30 NSW Medical Board, 7 July 1937, archived at NSW State Archives (n 21).

Commonwealth to refuse registration to any medical practitioner who has been registered by the [GMC].<sup>31</sup>

This advocacy aligned with the BMA's agenda, which was unsurprising given the Board's composition. The Board's members were doctors, as required by the *1912 Act*,<sup>32</sup> and, according to MP Thomas Mutch – at least in 1938 – they were all BMA members.<sup>33</sup> Moreover, several Board members occupied influential positions within the BMA (and also the University),<sup>34</sup> including the Board's president, Sir Robert Wade, who was a councillor and president of the BMA's NSW branch.<sup>35</sup> The BMA was a powerful lobby group for a dominant profession,<sup>36</sup> and its parent body in London and Australian branches publicly opposed refugee doctors practising medicine in the British Empire.<sup>37</sup> In 1937, the BMA's Federal Council, an Australian body that formulated policies on medical and political matters of national concern,<sup>38</sup> recommended to the Scottish Board that 'foreign medical graduates should be required to undergo a minimum period of three years' clinical study in Great Britain or Ireland before they were admitted to the qualifying examination'.<sup>39</sup> The Federal Council also resolved that each branch 'should if it think fit' encourage the government in its state to amend relevant legislation 'to prevent registration of German Jewish practitioners' with the TQ.<sup>40</sup> (The Federal Council subsequently expanded on this position, resolving explicitly that it was 'opposed to the registration of alien practitioners in any State of the Commonwealth').<sup>41</sup>

The second circumstance in which European doctors could be eligible for registration under the *1912 Act* was if they completed 'a regular course of medical study of not less than five years' duration in a school of medicine' and 'received after due examination from some university, college or other body ... a diploma, degree or license entitling [them] to practise medicine' in the country in which

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31 Ibid.

32 *1912 Act* (NSW) s 3(2).

33 New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 August 1938, 1158 (Thomas Mutch).

34 For instance, Dr Alan Holmes à Court was a Board member from 1932 to 1938, a council member and president of the BMA's NSW branch, and an examiner in the Faculty: Ann M Mitchell, 'Holmes à Court, Alan Worsley (1887–1957)' in *Australian Dictionary of Biography* (Melbourne University Press, 1983) vol 9; NSW Medical Board, 6 April 1938, archived at NSW State Archives (n 21); University of Sydney Archives, G1/1/22, University of Sydney Senate, 1 May 1939.

35 CRB Blackburn, 'Wade, Sir Robert Blakeway (1874–1954)' in *Australian Dictionary of Biography* (Melbourne University Press, 1990) vol 12; NSW Medical Board, archived at NSW State Archives (n 21).

36 Kunz (n 10) 28, 60; TS Pensabene, *The Rise of the Medical Practitioner in Victoria* (Australian National University Press, 1980) 119, 159, 168.

37 Weindling (n 14) 493, 506–7; Hilary L Rubinstein, *Chosen: The Jews in Australia* (Allen & Unwin, 1987) 178 ('Chosen'); Kunz (n 10) 46.

38 Terence J Johnson and Marjorie Caygill, 'The British Medical Association and Its Overseas Branches: A Short History' (1973) 1(3) *Journal of Imperial and Commonwealth History* 303, 316.

39 'Registration of Foreign Practitioners' (n 4) 199.

40 Federal Council of the BMA, Minutes, 19 August 1937, archived at Wellcome Collection, SA/BMA/A.33.

41 Minutes of BMA Council Meeting, 22 October 1941, archived at National Archives of Australia, series number CP94/1, control symbol bundle 46, item barcode 359497, BMA Council Meetings December 1934 to January 1944.

they obtained it.<sup>42</sup> Yet, applicants could only rely on this ground if either the country in which they obtained their diploma, degree or licence had ‘reciprocity’ with NSW, or they passed the ‘examination prescribed by the Senate’.<sup>43</sup> At this time, Japan and Italy had reciprocity with NSW, meaning that doctors registered in NSW were entitled to practise medicine in those countries by virtue of their NSW registration and vice versa.<sup>44</sup> Nevertheless, most refugee doctors who applied to the Board for registration between 1937 and 4 August 1939 had obtained their qualifications in countries that lacked reciprocity with NSW, such as Czechoslovakia, Hungary and Poland.<sup>45</sup> They therefore needed to complete the University’s assessment to become eligible for registration.

The Senate understood the authority endowed it by the legislature over refugee doctors’ livelihoods and it attempted to thwart them. The Professorial Board explained to the Senate that it was ‘empowered to prescribe the examinations to be passed by certain foreign medical practitioners to entitle them to registration by the Medical Board of NSW’.<sup>46</sup> In 1937, on the Faculty’s recommendation, the Senate decided to increase the difficulty of this pathway to registration. Although the *1912 Act* referred to a single ‘examination’, the Senate required ‘foreign medical practitioners ... to pass the degree examinations of the fourth, fifth and sixth years’ of the Faculty’s course, and to take the examinations ‘in the proper sequence and at the regular times’ and ‘in English’.<sup>47</sup> It appears that the Senate sought thereby to reduce competition for local graduates; a month later, the Faculty claimed that the number of students entering it had grown.<sup>48</sup>

### B *Medical Practitioners Act 1938 (NSW)*

When it commenced operation on 4 August 1939,<sup>49</sup> the *Medical Practitioners Act 1938 (NSW)* (*‘1938 Act’*) removed the prohibition on registering German and Austrian doctors and doctors with qualifications only from Germany and Austria. However, this was not designed to improve refugee doctors’ opportunities to practise medicine. The Premier sought to appease Germany’s government, which refused to participate in NSW’s 150<sup>th</sup> anniversary celebrations unless the ban was

42 *1912 Act* (NSW) s 4(1)(b), as amended by *1915 Act* (NSW) s 2.

43 *Ibid* s 4(3), as amended by *1915 Act* (NSW) s 2.

44 Letter from J Horgan, Secretary, Department of Interior, to Australian Government Trade Commission, 27 May 1940, archived at National Archives of Australia (n 13); Weaver, ‘Pathways’ (n 6) 45–6.

45 NSW Medical Board, 3 March 1937, 5 May 1937, 5 January 1938, 2 February 1938, 6 April 1938, 1 June 1938, 7 September 1938, 1 November 1938, 7 December 1938, 11 January 1939, 8 February 1939, 5 April 1939, 3 May 1939, 7 June 1939, 5 July 1939, 2 August 1939, archived at NSW State Archives (n 21). It is unclear why the Board issued letters to the University in respect of four doctors with Italian qualifications; given the reciprocity between NSW and Italy, they should not have needed to complete the final three years and exams of its medical course to obtain registration in NSW: 3 August 1938, 5 October 1938, 5 July 1939.

46 University of Sydney Archives, G1/1/22, University of Sydney Senate, 3 May 1937.

47 *Ibid*.

48 *Ibid* 6 June 1937.

49 *Alphabetical and Chronological Tables of the New South Wales Statutes (1824–1969)* (Sydney, Government Printer) 612–14 (*‘Alphabetical and Chronological Tables’*).



lifted.<sup>50</sup> Indeed, notwithstanding this change, the *1938 Act* imposed tighter constraints on all European doctors' eligibility for registration than the *1912 Act*, and confined the Board to granting a maximum of eight registration applications from 'persons who are not natural born British subjects' annually.<sup>51</sup> FitzSimons acknowledged that this legislation intended to prevent 'a great influx of foreign doctors'.<sup>52</sup> If refugee doctors were ineligible for registration, they could be barred from immigrating to Australia.<sup>53</sup> From 1938, the Commonwealth government denied refugees permission 'to enter Australia for the purpose of practising as doctors unless evidence [was] furnished that they [were] eligible for registration as medical practitioners in one of the states' or their cases had 'special features'.<sup>54</sup>

### 1 *Medical Practitioners Bill 1938 (NSW)*

MPs' express and implicit reasons for seeking to exclude refugee doctors from the NSW medical profession mirrored those of the BMA. FitzSimons principally argued that the Bill would 'protect not only the 2,500 registered medical practitioners in [NSW], but also the 900 young Australians who are now studying medicine at the Sydney University'.<sup>55</sup> Other MPs similarly maintained that it would ensure foreign doctors did not 'take away the livelihoods' of local practitioners,<sup>56</sup> or 'jeopardise the interests of many young Australian doctors'.<sup>57</sup> A 'prominent member' of the BMA quoted in *The Sun* articulated the same aim: 'Australian doctors had to be protected as far as possible' in light of 'refugee doctors' immigrating, and 'Australian doctors and those who are studying medicine at present will be more than able to satisfy public requirements'.<sup>58</sup>

The BMA was seemingly concerned about refugee doctors competing with local practitioners for income. Doctors already vied with one another to treat the relatively few patients who were willing and could afford to pay for private medical consultations.<sup>59</sup> At the end of the Great Depression, potential 'fee-for-service' patients were still joining 'friendly societies' with which doctors felt compelled to enter contracts, but whose capitation fees (which doctors received

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50 'Protection for Doctors', *The Sydney Morning Herald* (Sydney, 10 February 1938) 10; Rutland, 'An Example' (n 14) 241.

51 Medical Practitioners Act 1938 (NSW) s 18(6) ('1938 Act').

52 New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 August 1938, 817 (Herbert FitzSimons).

53 National Archives of Australia, series number AWM54, control symbol 883/5/21, item barcode 45407, Papers Dealing with the Registration of Alien Medical Practitioners, 'Alien Doctors', Conference of Commonwealth and State Ministers for Health, December 1943 ('Conference of Ministers').

54 Letter from Robert Menzies to Alex Mair, 11 October 1939, archived at National Archives of Australia (n 8) 10.

55 New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 August 1938, 819 (Herbert FitzSimons).

56 Ibid 11 August 1938, 964 (William Frith).

57 Ibid 27 October 1938, 2326 (James Arkins).

58 'Must Protect Own Doctors', *The Sun* (Sydney, 19 July 1938) 7.

59 James A Gillespie, *The Price of Health: Australian Governments and Medical Politics 1910–1960* (Cambridge University Press, 1991) 6–7, 168 ('The Price of Health'); Milton J Lewis, *The People's Health: Public Health in Australia, 1788–1950* (Praeger, 2003) vol 1, 248.

from providing medical services to members) they considered poor remuneration.<sup>60</sup> This ‘lodge practice’ was also tight, however, as poorer patients obtained free medical treatment through means-tested access to public hospitals’ outpatient wards,<sup>61</sup> which employed few permanent salaried medical staff.<sup>62</sup> CHE Lawes, the Federal Council’s General Secretary, informed the Secretary of the Commonwealth Department of External Affairs that

an influx of German Jewish medical practitioners, most of whom I believe would work at fees very much lower than those recognised as equitable in this country, would be a serious matter for Australian doctors.<sup>63</sup>

MP James McGirr recognised doctors’ anxiety that compulsory National Health Insurance (‘NHI’), which the federal government was proposing to introduce, would further constrict their earnings.<sup>64</sup> Indeed, MP Hamilton Knight speculated that the Bill was a ‘precautionary measure ... to protect the [BMA] against the Commonwealth Government if it decides’ to fulfil its threat ‘to import foreign doctors to carry out’ the NHI because local doctors refuse to ‘co-operate with it’.<sup>65</sup> Representatives of the Federal Council had secretly negotiated with the Government regarding the NHI, but 90% of BMA members subsequently voted in a plebiscite against this agreement, believing that it unduly compromised their remuneration.<sup>66</sup> Doctors’ perception that the Federal Council had failed to represent their interests perhaps also fuelled the BMA’s eagerness to oppose refugee doctors practising in NSW; this public campaign could unify the profession and demonstrate that the BMA was defending local practitioners’ dominance of the fee-for-service market.<sup>67</sup> The BMA would continue to advocate for protection of Australian doctors’ private practices after the war began and it was feared that refugee doctors might usurp them if local practitioners enlisted.<sup>68</sup> The Federal Council resolved to ‘request the Commonwealth Government to take

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60 Gillespie, *The Price of Health* (n 59) 8–10; David Damery, ‘Medical Fees: Lodge Practice’ (2002) 31(1) *Australian Family Physician* 47, 47.

61 Gillespie, *The Price of Health* (n 59) 24–5; Lewis (n 59) 248, 250.

62 Robert G Evans, ‘The Transformation of Australian Hospitals between the 1940s and the 1970s’ (2005) 7(2) *Health and History* 101, 110–11, 115, 117.

63 Letter from CHE Lawes, General Secretary, Federal Council of the BMA, to JH Starling, Secretary, Department of External Affairs, 8 March 1934, archived at National Archives of Australia, series number A981, control symbol MIG 46, item barcode 178846, Migration Restrictions, Migration to Australia of German-Jewish Medical Practitioners.

64 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 August 1938, 956 (James McGirr).

65 Ibid 18 August 1938, 1133 (Hamilton Knight).

66 Gillespie, *The Price of Health* (n 59) 93–4; Diane Mackay, ‘Politics of Reaction: The Australian Medical Association as a Pressure Group’ (PhD Thesis, La Trobe University, 1985) 67–8.

67 Thelma Hunter, ‘Pressure Groups and the Australian Political Process: The Case of the Australian Medical Association’ (1980) 18(2) *Journal of Commonwealth and Comparative Politics* 190, 194; Fallon Mody, ‘Racial Prejudice in the Medical Profession? The Case of Refugee Doctors in Australia 1930–1945’ (Proceedings of the 1st Melbourne University Research Conference on the History of Philosophy of Science, 2013) 28  
<[http://www.academia.edu/8016490/Racial\\_Prejudice\\_in\\_the\\_medical\\_profession\\_The\\_case\\_of\\_refugee\\_Jewish\\_doctors\\_in\\_Australia\\_1930-1945](http://www.academia.edu/8016490/Racial_Prejudice_in_the_medical_profession_The_case_of_refugee_Jewish_doctors_in_Australia_1930-1945)> (‘Racial Prejudice’).

68 Minutes of BMA Council Meeting, 30 April 1941, archived at National Archives of Australia (n 41).

steps to protect the practice of men called up for service in the armed forces ... by stopping the influx of alien practitioners'.<sup>69</sup>

The Bill promised to limit the supply of medical practitioners by applying the principle of reciprocity, though FitzSimons and the BMA rationalised it similarly as simply a matter of fairness. The Bill proposed to prevent doctors who obtained their qualifications in a country that lacked reciprocity with NSW from practising medicine there.<sup>70</sup> FitzSimons expressed confidence that his fellow MPs would not 'suggest that the door here should be left wide open to the medical men of these countries which debar graduates of British and [D]ominion universities from practising their profession within the territories under their control'.<sup>71</sup> The BMA shared this view. Its representative, whom *The Sun* quoted, explained, 'Australian doctors are not granted any special privileges overseas, so I don't see why foreign doctors should receive any in Australia'.<sup>72</sup> In 1934, however, the Federal Council had disclosed another motive for its support for registering foreign doctors only if they obtained their qualifications in countries that had reciprocity with Australia. After discussing 'the possible influx of European practitioners into Australia owing to the disturbed conditions on the Continent', it resolved:

[I]n view of the adequate supply of medical practitioners who are graduates of British Universities, it is undesirable to admit graduates of alien countries unless reciprocity of [registration] exists in those countries.<sup>73</sup>

The BMA also agitated to exclude refugee doctors from the Australian medical profession by questioning their professional and ethical standards.<sup>74</sup> Dr Lindsay Dey, president of the BMA's NSW branch, stated, 'the association does not object to competent foreign doctors practising in this State, but will oppose any lowering of the standard of medical education',<sup>75</sup> implying that registration of refugee doctors had the potential to do so. Likewise, in support of the argument that 'the medical profession is not in a position to absorb an influx of foreign graduates', an anonymous 'graduate of Sydney' conjectured in the *Medical Journal of Australia* ('*MJA*'), a BMA publication,<sup>76</sup> that they 'may not' have 'the most desirable professional and ethical attributes'.<sup>77</sup> Echoing this attitude, FitzSimons emphasised that there was no evidence that 'the average' foreign doctor was 'superior to the

69 Meeting of Federal Council of the BMA, 6 and 7 September 1939, archived at National Archives of Australia, series number AWM54, control symbol 213/2/19, item barcode 458390, Meetings Federal Council BMA/Summaries of Minutes re Council and Central Coordination Committee 1939–1943.

70 New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 August 1938, 817–19 (Herbert FitzSimons).

71 Ibid 819.

72 'Must Protect Own Doctors' (n 58).

73 'Influx of Doctors Feared: BMA and Practitioners from Europe', *The Telegraph* (Brisbane, 10 February 1934) 20.

74 Michael Blakeney, *Australia and the Jewish Refugees 1933–1948* (Croom Helm Australia, 1985) 191.

75 'Protection for Doctors' (n 50) 10.

76 CJ Ross-Smith, 'The Evolution of a National Medical Association in Australia' (1962) 1(20) *Medical Journal of Australia* 746, 748; Diane Mackay, 'Politics of Reaction: The Australian Medical Association as a Pressure Group' in Heather Gardner (ed), *The Politics of Health: The Australian Experience* (Churchill Livingstone, 1989) 281, 287.

77 A Graduate of Sydney, 'Influx of European Practitioners' (1934) 1(9) *Medical Journal of Australia* 323, 323–4.

ordinary practitioner' in NSW, and he/she 'probably' was 'not so efficient' as a local graduate and, therefore, could 'contribute nothing to the welfare of this community'.<sup>78</sup>

Despite these comments, as several other MPs observed, some Australian doctors undertook postgraduate work and study in Europe to learn from its advanced medicine.<sup>79</sup> As it happens, investigations undertaken by the NSW Committee of the Australian Association of Scientific Workers a year later confirmed that refugee doctors with German and Austrian qualifications had undergone a 'course of study [that] was practically identical in length and content' to the University's medical course.<sup>80</sup> Further, 'admission to private practice in their own countries could be obtained only, as in [NSW], after one year's residence in hospital', and 'many doctors ... spent a longer time in residence and doing research work ... [at] recognised ... University State hospitals or municipal hospitals'.<sup>81</sup> Even if FitzSimons and the BMA were unfamiliar with European doctors' training, and genuinely queried whether their medical practice was inferior to that of Australian practitioners, they could have recommended assessment of their qualifications and experience, as some MPs did.<sup>82</sup> Nevertheless, FitzSimons conceded, 'we do not propose to provide an open door for the foreign graduate, irrespective of his standard of efficiency'.<sup>83</sup>

The NSW Government and BMA were united in their desire to exclude German Jewish doctors in particular. *The Sun* reported that NSW doctors opposed lifting the ban on registration of German and Austrian doctors for fear 'there will be an influx of Jewish doctors, who have left Germany to escape Nazi persecution, and who may ... have obtained qualifications in Great Britain'.<sup>84</sup> As noted above, the Federal Council attempted to impede registration of German Jewish practitioners with the TQ specifically. Premiers of NSW, Bertram Stevens and Alex Mair, also sought to ensure that these doctors did not practise medicine in NSW. After the Federal Cabinet committed in 1938 to admit 15,000 Jewish immigrants to Australia over three years,<sup>85</sup> these premiers urged the Prime Minister, Robert Menzies, to limit the landing permits that the Commonwealth government granted to medical practitioners and consider 'taking action to prevent any further refugee doctors applying' for them.<sup>86</sup> They maintained that, due to the

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78 New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 August 1938, 817, 817–19 (Herbert FitzSimons).

79 See, eg, *ibid* 17 August 1938, 1120 (Ewan Murray Robson); 18 August 1938, 1148 (James Ross).

80 REB Makinson, 'Alien Doctors: Qualifications for Practice', *The Sydney Morning Herald* (Sydney, 22 December 1939) 8.

81 *Ibid*.

82 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 August 1938, 1142 (Francis Hawkins), 17 August 1938, 1114 (Arthur Tonge), 10 August 1938, 931 (Christopher Kelly).

83 *Ibid* 4 August 1938, 818 (Herbert FitzSimons).

84 'Aliens as Doctors: Retention of Ban Urged', *The Sun* (Sydney, 23 July 1937) 10. See also A Graduate of Sydney (n 77).

85 Andrew Markus, 'Jewish Migration to Australia 1938–49' (1983) 7(13) *Journal of Australian Studies* 18, 19, 21.

86 Letter from Alex Mair to Robert Menzies, 14 September 1939 ('Letter from Mair to Menzies'), archived at National Archives of Australia (n 8) 24; Letter from Bertram Stevens to Robert Menzies, 31 July 1939, archived at National Archives of Australia (n 8) 36–7.

legislative constraints on refugee doctors' registration, many of them would be unemployed and thus a burden on the state.<sup>87</sup> Menzies assured Mair of the 'procedure' the Commonwealth government had been following of denying admission to Australia of refugee doctors who sought to practise medicine, but could not produce evidence that they were eligible for registration here.<sup>88</sup>

*The Courier-Mail* recognised that the Bill was 'designed to make more difficult' the registration of 'foreign doctors, who have been compelled to leave Germany and Austria because of political or racial persecution'.<sup>89</sup> The newspaper claimed that this objective was 'not animated by the intolerance which has driven foreign doctors from their own countries', but rather was intended to 'safeguard' the 'livelihood of doctors now practising in Australia, and the prospects of hundreds of young Australians' studying medicine.<sup>90</sup> It is unclear whether anti-Semitism in particular motivated MPs' and the BMA's interest in excluding refugee doctors. Yet, a bias against non-British doctors and hostility towards Germans probably drove their response in addition to their professed protectionism.

As many of the refugee doctors were Jewish, it is reasonable to question whether opponents of their registration were anti-Semitic.<sup>91</sup> Prejudice against a purported 'Jewish race' grew in 1930s' Australia.<sup>92</sup> Jews were vilified by some publications and fringe political movements,<sup>93</sup> and it was presumed that Eastern European Jews were especially unlikely to assimilate.<sup>94</sup> It is nonetheless possible that refugee doctors would have met an antagonistic reception in Australia whatever their religion or culture, but because Jews comprised a large portion of this cohort, animosity towards them appeared to manifest in anti-Semitic sentiment.<sup>95</sup> A dominant public response towards migrants in Australia at this time was general xenophobia, rather than anti-Semitism in particular.<sup>96</sup> Doctors who were admitted to Australia under the Displaced Persons scheme following World War II experienced similar treatment, though about 2% of them only were Jews.<sup>97</sup> Nevertheless, Australians might have assumed that most of them were Jewish.

Germans were certainly denigrated, as their home country had already fought against the British Empire in one war and was on the cusp of and then engaged in

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87 Ibid.

88 Letter from Robert Menzies to Alex Mair, 11 October 1939, archived at National Archives of Australia (n 8) 10.

89 'Refugee Doctors in Queensland', *The Courier-Mail* (Brisbane, 10 August 1938) 6.

90 Ibid.

91 Weaver, 'Pathways' (n 6) 64; Rutland, 'An Example' (n 14) 237, 256; Blakeney (n 74) 192.

92 Markus (n 85) 20–1; Blakeney (n 74) 53, 55; Suzanne D Rutland, *Edge of the Diaspora: Two Centuries of Jewish Settlement in Australia* (Brandl and Schlesinger, 2<sup>nd</sup> ed, 1997) 197 ('Edge').

93 Rutland, *Edge* (n 92) 197, 199–200; Rubinstein, *Chosen* (n 37) 179.

94 Paul R Bartrop, *Australia and the Holocaust 1933–45* (Australian Scholarly Publishing, 1994) 16; Jon Stratton, 'The Colour of Jews: Jews, Race and the White Australia Policy' (1996) 20(50–1) *Journal of Australian Studies* 51, 59–60.

95 Rubinstein, *Chosen* (n 37) 178; Rutland, *Edge* (n 92) 184.

96 Rubinstein, *Chosen* (n 37) 178; Bartrop (n 94) 15, 17–18.

97 Kunz (n 10) 64; Fallon Mody, 'The Intellectual Boys are the Ones in a Mess: The Unregistered Doctors Association in Victoria, 1951–56' (2015) 17(1) *Health and History* 17, 33–4 ('Intellectual Boys').

another.<sup>98</sup> Notwithstanding the fact that they had fled from persecution, it was assumed that refugee doctors from Germany remained allied to and influenced by it.<sup>99</sup> In 1941, the *MJA* published a letter from Dr TW Lipscomb, a councillor of the BMA's NSW branch, alleging of these doctors, 'refugees they may be from the present Nazi regime, but they are still German nationals, by birth, language and general outlook, and as such anti-British'.<sup>100</sup>

A majority of MPs and the BMA seemingly distinguished refugee doctors from British medical practitioners whom they welcomed. It was no coincidence that the Bill permitted registration of an unlimited number of doctors who were 'natural born British subjects', while just eight doctors who did not fall into that category could obtain registration each year. Writing to *The Sydney Morning Herald* in 1939, Dr George Moncrieff Barron, president of the BMA's NSW branch who became a Board member in 1941,<sup>101</sup> deemed the welfare of only British and Australian doctors deserving of protection, and those practitioners equally so

with increasing numbers of graduates from Australian universities, with hundreds of young Australian doctors returning from active service ... and British doctors desiring to immigrate to Australia, medical practices will be difficult to establish or obtain. Therefore, every effort to safeguard the interests of Australian and British doctors and the interests of their British families should be regarded as worthy of the support of every Australian institution.<sup>102</sup>

This attitude is unsurprising. Many Australians identified as Australian and British, shared racial ambitions to create a white, British-oriented nation, and favoured British immigrants over any others.<sup>103</sup> Notwithstanding differences between British and Australian medical education,<sup>104</sup> British graduates (of courses longer than the TQ) were considered more 'readily assimilable' into Australia's medical profession<sup>105</sup> than European doctors.

Perhaps partly due to the symmetry between the reasoning of FitzSimons and the BMA, several MPs alleged that the BMA had influenced the content of the Bill, including its clauses concerning foreign doctors, and they expressed concern that it protected local doctors' interests at the public's expense.<sup>106</sup> MP Robert

98 Rutland, *Edge* (n 92) 189.

99 Klaus Neumann, *Across the Seas: Australia's Response to Refugees* (Black Inc, 2015) 58; Rutland, *Edge* (n 92) 189.

100 TW Lipscomb, 'Refugee Doctors' (1941) 2(12) *Medical Journal of Australia* 339, 339; WG Armstrong and Robert Dick, 'Epidemiology and Administration' in Director-General of Public Health (ed), *Report on the Influenza Epidemic in New South Wales in 1919* (Department of Public Health (NSW), 1920) 157.

101 NSW Medical Board, 7 May 1941, archived at NSW State Archives (n 21).

102 Moncrieff Barron, 'To the Editor' (n 9) 5.

103 Stephen Alomes, *A Nation at Last? The Changing Character of Australian Nationalism 1880–1988* (Angus and Robertson, 1988) 40; James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (Cambridge University Press, 2007) 12–17; Ruth Balint and Zora Simic, 'Histories of Migrants and Refugees in Australia' (2018) 49(3) *Australian Historical Studies* 378, 379, 381; Michele Langfield, 'To Restore British Migration: Australian Population Debates in the 1930s' (1995) 41(3) *Australian Journal of Politics and History* 408, 411.

104 Pensabene (n 36) 59.

105 Moira Salter, 'Prejudice in the Professions' in FS Stevens (ed), *Racism, The Australian Experience: A Study of Race Prejudice in Australia* (Taplinger Publishing Co, 1972) vol 1 67, 72.

106 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 August 1938, 926 (Christopher Kelly), 17 August 1938, 1112, 1114 (Arthur Tonge).

Heffron, for instance, commented, ‘this bill is essentially a measure of the [BMA]’, which ‘is making desperate endeavours to prevent doctors from overseas coming here to practise, as they might interfere with the incomes being earned by members of that organisation’.<sup>107</sup> The BMA denied its impact on the legislation, and FitzSimons denied that he consulted the BMA.<sup>108</sup> FitzSimons did admit, however, that he relied on advice from the Department of Health’s medical officers,<sup>109</sup> and MP William Davies observed that the Director-General of Public Health (Dr Emanuel Morris) was a BMA member.<sup>110</sup> Moreover, the Board, which included representatives of the BMA, contributed to the Bill’s preparation. Its clauses concerning foreign doctors’ applications for registration were amended after the Board received drafts of them and Wade met with the Special Administrative Officer to discuss them.<sup>111</sup> Wade presumably sought to implement the resolution of a conference of Australian state medical boards and representatives of the profession that he had recently attended, which ‘[affirmed] the necessity for ... complete application in all states of the principle of reciprocity with foreign countries in order to prevent the use of any method of circumventing this principle’.<sup>112</sup>

## 2 *Medical Practitioners Act 1938 (NSW) and Its Application*

The Board and BMA achieved their objective to remove refugee doctors’ opportunity to rely on the TQ to obtain registration in NSW. Under the *1938 Act*, an applicant was only eligible for registration based on medical study undertaken within the British Empire if the course was at least five years’ long and the Board recognised it as being not lower in standard than the Faculty’s course.<sup>113</sup> The intensity of at least the Faculty’s zeal to exclude refugee doctors from the NSW medical profession is illustrated by its support for retaining this provision despite the risk that NSW doctors might lose their reciprocal entitlement to practise medicine in the UK as a result. Australian doctors valued this right because many wished to undertake postgraduate education and training in the UK.<sup>114</sup>

After the passage of the *1938 Act*, the GMC wrote to the Faculty and Board cautioning them that, if this provision commenced operation, the Order in Council that facilitated NSW registered doctors’ entitlement to UK registration could be

107 Ibid 17 August 1938, 1104, 1108 (Robert Heffron).

108 Ibid 4 August 1938, 823 (Herbert FitzSimons).

109 Ibid.

110 Ibid (William Davies); James Gillespie, ‘Emanuel Sydney Morris (1888–1957)’ in *Australian Dictionary of Biography* (Melbourne University Press, 2000) vol 15.

111 NSW Medical Board, 3 November 1937, 5 January 1938, 2 February 1938, archived at NSW State Archives (n 21).

112 Public Record Office of Victoria, series number VPRS 16389, consignment number P0001, Medical Board of Victoria Minutes, 1 September 1937.

113 *1938 Act* (NSW) s 17(1)(b). Further, if the country within the British Empire in which the applicant completed this study did not have reciprocity with NSW, he/she needed to undertake the final three years of the Faculty’s course and pass the exams prescribed by the Senate: proviso. The cap on granting eight registration applications annually to individuals who were not British subjects did not apply to this provision: *1938 Act* (NSW) s 18(6). Nevertheless, few refugee doctors would have been eligible for registration under it.

114 Salter (n 105) 72–3.

revoked.<sup>115</sup> The GMC was conscious that these bodies were principally concerned about the Scottish Board granting qualifications to European graduates.<sup>116</sup> Yet, it was alarmed that this provision would prevent from practising in NSW doctors whom it had registered on the basis of medical courses other than the TQ that were less than five years' long, including British-born graduates of Cambridge and Oxford Universities.<sup>117</sup> The Board wrote to Acting Minister for Health, Athol Richardson, 'asking that such action as may be necessary, even including amending legislation, be taken as will preserve reciprocity of registration with the [UK]'.<sup>118</sup> Wade and Professor John Windeyer – then Dean of the Faculty who was also a fellow of the Senate, presided over the obstetrics and gynaecology section at national BMA meetings, and would become a Board member in September 1939<sup>119</sup> – met with Richardson.<sup>120</sup> Yet the provision was not amended. Moreover, Windeyer belonged to the Professorial Board's standing committee that agreed with and thus decided to submit to the Senate the Faculty's report on the GMC's letter, which defended the provision.<sup>121</sup>

In that report, the Faculty stated that it 'deplores the possibility ... of any disturbance of the happy relations that have existed between the GMC and the University of Sydney', but the *1938 Act* is 'designed to raise the standard of medical education and practice in ... [NSW]'.<sup>122</sup> It emphasised that this statute would overcome the 'anomalous position' that the Board was obliged to register 'aliens who are registered in but excluded from residence in Great Britain' either 'because they have been registered by the [GMC] after 1 year's study in the [UK]' or 'they have satisfied the far more stringent requirements laid down by the [Board]'.<sup>123</sup> As discussed above, under the *1912 Act*, if an applicant completed a medical course of at least five years' duration in a country that lacked reciprocity with NSW, those requirements entailed passing the exam prescribed by the Senate.

Pursuant to the *1938 Act*, even if European doctors passed the final three years' exams of the Faculty's course, and completed a medical course that was at least five years' long in a country outside the British Empire, they were only eligible for registration in NSW on the basis of those attainments if that country had

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115 Letter from Michael Heseltine, Registrar, General Council of Medical Education and Registration of the United Kingdom, 21 April 1939, attached to University of Sydney Faculty of Medicine, 'Report of the Faculty of Medicine to the Senate in Regard to a Letter from the General Council of Medical Education and Registration Concerning Reciprocal Registration', 31 July 1939 ('Report of the Faculty'), archived at University of Sydney Archives, University of Sydney Professorial Board, Minutes, G2/1/6; NSW Medical Board, 10 May 1939, archived at NSW State Archives (n 21); *Medical Act 1886* (UK) ss 11, 17.

116 Letter from Michael Heseltine, 21 April 1939, archived at University of Sydney Archives (n 115).

117 Ibid.

118 NSW Medical Board, 10 May 1939, archived at NSW State Archives (n 21).

119 Ibid 6 September 1939; Rodney P Shearman, 'Windeyer, John Cadell (Jack) (1875–1951)' in *Australian Dictionary of Biography* (Melbourne University Press, 1990) vol 12.

120 University of Sydney Archives, G1/1/23, University of Sydney Senate, Minutes, 5 June 1939.

121 University of Sydney Archives, University of Sydney Professorial Board, Minutes, G2/1/6, 31 July 1939; University of Sydney Faculty of Medicine, archived at University of Sydney Archives (n 115).

122 University of Sydney Faculty of Medicine, archived at University of Sydney Archives (n 115).

123 Ibid.



reciprocity with NSW.<sup>124</sup> The Board issued letters to the University in respect of 16 refugee doctors (though one letter was withdrawn) who obtained their qualifications in countries that did not have reciprocity with NSW.<sup>125</sup> Those letters would have confirmed that the doctors satisfied other preconditions for registration (they had received a degree or diploma certifying to their ability to practise medicine or surgery and were entitled to be registered or practise in the country in which they studied).<sup>126</sup> The Board nonetheless warned at least some of the doctors that, to obtain registration in three years' time, they would need to prove that there was reciprocity between the country in which they completed their medical course of five years or more in duration and NSW,<sup>127</sup> which was tantamount to informing them that embarking on this study was pointless.

The *1938 Act* preserved the University's power to impose barriers to refugee doctors obtaining registration. Even if the Board issued letters to the University indicating that it was appropriate to admit refugee doctors to the final three years of its medical course because they had satisfied other statutory requirements for registration, the University could refuse to do so. Indeed, in 1942, the Faculty decided not to admit more than 12 'alien doctors' to its course annually.<sup>128</sup> The Faculty created further 'conditions' under which it was 'prepared to admit' these refugee doctors to its medical course, namely, that they 'must attend all classes and in general conform to all the by-laws and regulations applicable to our own undergraduates' and, if they were not 'prepared to start their fourth year work on 12 October 1942 ... they will miss a year'.<sup>129</sup> The Commonwealth government was aware that the University was 'definitely opposed to the admission of further foreign medical students'.<sup>130</sup> Professor Harold Dew, then Dean of the Faculty, told the Commonwealth Director-General of Health that the Faculty was 'training so many students' that it was 'impossible for us to take many of these Aliens into the

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124 *1938 Act* (NSW) s 17(1)(c), proviso: according to this provision, reciprocity entailed that the country granted individuals the right to be registered and practise medicine 'by virtue of their being' Sydney University medical graduates 'without further examination or subject to passing further examinations', which, in the Board's opinion, were 'not more onerous' than the exams of the final three years of the Faculty's course.

125 NSW Medical Board, 1 November 1939, 7 February 1940, 6 March 1940, 12 June 1940, 2 October 1940, 3 June 1942, 5 August 1942, 2 September 1942, 7 October 1942, 4 November 1942, archived at NSW State Archives (n 21).

126 National Archives of Australia, series number A1928, control symbol 652/17 section 1, item barcode 143372, Medical Practitioners. Registration in Australia of Persons Who Have Qualified Elsewhere Section 1, Medical Board of NSW, 'Information Prepared for Medical Practitioners Who Have Been Educated in America or on the Continent of Europe and Who Wish to be Registered in NSW as Legally Qualified Medical Practitioners', undated.

127 See, eg, NSW Medical Board, 1 November 1939, archived at NSW State Archives (n 21).

128 *Ibid* 2 December 1942. As a consequence of this decision, the Faculty refused to admit Anna Winkler to its medical course, though the Board had issued a letter to the University indicating that she was qualified for admission to it. See also Letter from Harold Dew to John Cumpston, 24 September 1942 ('Letter from Dew to Cumpston'), archived at National Archives of Australia, series number, A1928, control symbol 652/17/1 section 3, item barcode 143383, Medical Practitioners National Security (Alien Doctors) Regulations 1942.

129 Letter from Dew to Cumpston, archived at National Archives of Australia (n 128).

130 Letter from John McEwen to Minister Plenipotentiary, 25 July 1940, archived at National Archives of Australia (n 13).

fourth year of medicine at one time without seriously jeopardizing the standard of training of our Australian undergraduates'.<sup>131</sup>

In addition, the University ensured that the Board could only register a maximum of eight refugee doctors each year who successfully completed the final three years of its medical course. The University merely granted them a certificate, rather than conferring on them a degree, for doing so.<sup>132</sup> Consequently, they could not apply for registration under the provision of the *1938 Act* that entitled to registration those who held a 'degree ... in medicine or surgery' of an Australian university, and to which the cap on granting registration applications from eight individuals who were 'not natural born British subjects' each year did not apply.<sup>133</sup>

In a concession to several MPs who contended that eminent refugee doctors especially should be permitted to practise medicine in NSW, the *1938 Act* created two additional pathways to registration for European doctors. The limit on registering eight non-British doctors annually applied to both categories and, to be eligible for them, applicants must have completed a medical course of at least five years' duration and obtained a degree or diploma certifying to their ability to practise medicine or surgery.<sup>134</sup> Although many of the refugee doctors would probably have been eligible for registration pursuant to one of these pathways in particular, the Board prevented most of them from obtaining it. A deputation of MPs who attended on FitzSimons after the passage of the *1938 Act* predicted this outcome; it informed him 'that the Medical Board had no intention of registering foreign doctors'.<sup>135</sup>

One of the pathways was open to doctors who had, for three years continuously, held a year-long 'certificate of registration for post-graduate teaching or for research work in medicine or surgery' granted by the Board in response to 'the request of an institution or organisation interested in post-graduate teaching in medicine or surgery'.<sup>136</sup> MPs who recognised the valuable contribution that experienced refugee doctors could make in NSW suggested this provision.<sup>137</sup> FitzSimons nonetheless emphasised his understanding that the certificate would only be granted in exceptional circumstances, 'to allow brilliant men' to teach local

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131 Letter from Dew to Cumpston, archived at National Archives of Australia (n 128).

132 Weaver, 'Pathways' (n 6) 53; Rutland, 'An Example' (n 14) 246. Refugee doctors who completed the exams for these final three years of the Faculty's medical course therefore did not become 'graduates' of the University: Report of the Faculty, archived at University of Sydney Archives (n 115).

133 *1938 Act* (NSW) ss 17(1)(a), 18(6); Letter from NSW Medical Board to Dr Frank McCallum, 9 October 1945, archived at National Archives of Australia, series number A1928, control symbol 652/17/3 Section 5, item barcode, 143392, 'Registration in Australia of Persons Who Have Qualified Elsewhere: *National Security (Alien Doctors) Regulations* NSW Section 5' ('Registration in Australia').

134 Letter from Mair to Menzies, archived at National Archives of Australia (n 86); *1938 Act* (NSW) ss 17(1)(d), 17(2), 18(6).

135 New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 May 1939, 4624 (Arthur Tonge).

136 *1938 Act* (NSW) ss 21(1), 17(1)(d): the number of 'certificates' that the Board could grant annually was unrestricted (though the number of doctors who had held the certificate continuously for three years and could be registered annually was subject to the restriction on registering eight doctors who were 'not natural born British subjects' each year).

137 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 August 1938, 1129–30 (Ewan Robson), 1148 (James Ross and Herbert FitzSimons).

medical graduates, and, before three years elapsed, these doctors would be prohibited from engaging in private practice.<sup>138</sup>

Refugee doctors could obtain registration under the other pathway if the Board recommended to the Minister for Health that they had ‘such special qualifications’ and ‘special experience in the practice of medicine or surgery ... as would justify waiving compliance with the requirements’ for registration that would otherwise apply to them, and the Minister approved of the recommendation.<sup>139</sup> Mutch proposed this provision – which became section 17(2) of the *1938 Act* (‘section 17(2)’) – and other MPs who sought to enable competent refugee doctors to benefit the NSW community supported it.<sup>140</sup> FitzSimons reinforced, however, that this provision, too, would apply exclusively to doctors ‘of outstanding value and denoted world-wide experience’ and not ‘to the ordinary foreigner’.<sup>141</sup> He later recalled that the legislature’s ‘intention’ was simply ‘to limit its use to those who were undoubtedly “Specialists”’.<sup>142</sup> As European doctors received instruction in the specialties and frequently trained to be specialists,<sup>143</sup> many of the refugee doctors would likely have been strong candidates for registration under section 17(2).<sup>144</sup> Ironically, one of the reasons the BMA proffered for opposing registration of refugee doctors was that they were all specialists and Australia needed general practitioners (‘GPs’) who could provide a range of medical services.<sup>145</sup> Nevertheless, between 1939 and 1942, the Board recommended to the Minister just nine of 53 refugee doctors who applied under this provision.<sup>146</sup>

After interviewing 40 of the 41 doctors who initially applied under section 17(2) (one of the doctors did not attend an interview), the Board decided to recommend only five of them.<sup>147</sup> In relation to Dr Richard Kantor, a Viennese dermatologist,<sup>148</sup> the Board contemplated suggesting to the Minister that he bear in mind the fact that its members were ‘evenly divided’ about whether to recommend him and ‘the possible overcrowding of his particular branch of the medical profession’.<sup>149</sup> The Board decided to refrain from making this comment,<sup>150</sup> though not because it recognised that registering one refugee doctor could hardly jeopardise local dermatologists’ livelihoods. In the context where the Board was

138 Ibid 4 August 1938, 818–19 (Herbert FitzSimons).

139 *1938 Act* (NSW) s 17(2)(b).

140 New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 August 1938, 1160 (Thomas Mutch), 26 October 1938, 2280 (Herbert FitzSimons and Thomas Mutch), 2282 (Thomas Mutch), 11 August 1938, 960–1 (James McGirr), 10 August 1938, 931 (Christopher Kelly).

141 Ibid 26 October 1938, 2285 (Herbert FitzSimons).

142 Letter from Herbert FitzSimons to Dr Cotter Harvey, 31 August 1967 (‘Letter from FitzSimons to Harvey’), archived at NSW State Archives, Medical Board of NSW, Doctors’ Files, A5848, Box 501–1, L.11.

143 Kunz (n 10) 39, 60; James Barrett, ‘Medicine in Australia and Refugees’ (1940) 12(1) *Australian Quarterly* 14, 19; Blakeney (n 74) 192.

144 Rutland, ‘An Example’ (n 14) 243.

145 Kunz (n 10) 60.

146 NSW Medical Board, 6 September 1939–4 February 1942, archived at NSW State Archives (n 21).

147 Ibid 6 September 1939, 4 October 1939, 18 October 1939, 25 October 1939, 1 November 1939, 15 November 1939, 22 November 1939.

148 Ibid 6 March 1940; Rutland, ‘An Example’ (n 14) 244.

149 NSW Medical Board, 22 November 1939, archived at NSW State Archives (n 21).

150 Ibid 25 November 1939.

anxious to contradict media criticism of its delays in registering foreign doctors,<sup>151</sup> Wade advised the Board that ‘it was not [its] function to take into consideration or express any opinion upon the overcrowding of the medical profession’.<sup>152</sup>

Notwithstanding this, the Board decided to adopt a narrow interpretation of section 17(2), pursuant to which it reversed its determination to recommend Kantor and one of the other five doctors to the Minister.<sup>153</sup> On Wade’s motion, the Board resolved that, ‘to warrant’ its recommendation, ‘an applicant must possess such outstanding knowledge and experience in the practice of medicine or surgery or of any branch thereof, as would be of special value to the community’.<sup>154</sup> The Board then created another threshold: ‘an applicant should at least have acted in the capacity of visiting medical officer of senior rank at a University Hospital’.<sup>155</sup> At a subsequent conference with the Premier, Attorney-General and Minister for Health, Board members were informed that the legislature ‘did not infer as close a selection of applicants in terms of section 17(2)’ and rather ‘contemplated’ that it would apply merely to ‘an expert in his specialty’.<sup>156</sup> Although the Board reconsidered the 40 applications in light of this explanation, it reaffirmed its decision to recommend only three doctors.<sup>157</sup>

In any event, the reasons the Board had given the Minister for not recommending the 37 applicants under section 17(2) were unrelated to its definitions of ‘special qualifications’ and ‘experience’. Instead, the Board cited ‘the difficulty and at times impossibility of establishing the identity of applicants and the genuineness of their diplomas and claims’ in circumstances where most ‘applicants were subjects of enemy countries’ and none had ‘produced’ a ‘certificate’ from ‘a Committee set up ... by the Commonwealth Government (as to the alien’s bona fides)’.<sup>158</sup> Yet, as the Board members knew that the majority, if not all, of these doctors had fled from persecution, it is doubtful that they feared that they would endanger Australians if registered for the reason that they supported the Nazi regime. It was clear that some refugee doctors were unable to provide substantial documentation to the Board due to the turbulent circumstances in which they left their homes. Arthur Schuller, for example, informed the Board that his original diploma was stolen in transit from Vienna to Melbourne (in this instance, a copy of the doctor’s diploma and ‘numerous other documents’ he produced ‘satisfied the Board as to his identity and qualifications’).<sup>159</sup>

If the Board members had sincere concerns about refugee doctors’ capacity to practise medicine safely, they could have arranged for assessment of their medical knowledge and skills, which they did not do. The Board also queried of the Minister whether, ‘owing to the outbreak of war and being mindful of the action

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151 Ibid 22 November 1939.

152 Ibid 25 November 1939.

153 Ibid 22 November 1939, 25 November 1939.

154 Ibid 25 November 1939.

155 Ibid 12 January 1940.

156 Ibid 18 January 1940.

157 Ibid.

158 Ibid 25 November 1939.

159 Ibid 2 October 1940.

taken during the last war', 'similar legislation may be contemplated by Cabinet'.<sup>160</sup> Cabinet was receptive to this notion. The Minister subsequently advised the Board that Cabinet 'does not approve of the registration as a medical practitioner of any alien of German nationality' and requested that 'the Board make its recommendations in light of this decision'.<sup>161</sup> *The Daily Telegraph* reported that the Board ultimately refused to recommend many of the 40 applicants under section 17(2) due to Cabinet's direction.<sup>162</sup> Nevertheless, the Board had already made its initial recommendations regarding the doctors' applications before it received Cabinet's direction, one of the doctors whom it recommended was German (Arthur Lippmann),<sup>163</sup> and at least a quarter of the applicants whom the Board did not recommend obtained their qualifications from Austria or Hungary, which suggests they may not have been German.<sup>164</sup> Moreover, Attorney-General, Sir Henry Manning, seemingly advised the Board that, despite Cabinet's direction, section 17(2) did not permit the Board to refuse to recommend a doctor on the ground that he/she was German. In response to its receipt of Manning's written opinion regarding his interpretation of this provision, the Board decided 'that all applicants under section 17(2) of the Act be considered on their personal qualifications, irrespective of their nationality'.<sup>165</sup> In addition to the three doctors whom the Board initially recommended, the Board determined to recommend three more to the Minister, one of whom – Erich Friedlaender – was German.<sup>166</sup> (Acting Minister for Health, Hubert Primrose, refused to approve the Board's recommendations of Friedlaender and Lippmann because these doctors were German, but approved its other four recommendations).<sup>167</sup> Cabinet's direction was also not the reason for the Board's subsequent refusal to recommend 10 of 13 further applicants for registration under section 17(2) between 1940 and 1942, as none of those doctors was German.<sup>168</sup>

It seems that the Board's decisions to refuse to recommend refugee doctors who applied under section 17(2) were not based either on its serious evaluation of whether they could competently meet the community's needs for general or specialist medical services. FitzSimons later claimed that most of the doctors whom the Board did not recommend 'were general practitioners'.<sup>169</sup> Yet, in correspondence with the Commonwealth Director-General of Health, the Board's secretary mentioned the specialties of five doctors in the original group of

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160 Ibid 25 November 1939.

161 Ibid 8 January 1940.

162 '4 Alien Doctors to Practise Here', *The Daily Telegraph* (Sydney, 2 February 1940) 2 ('4 Alien Doctors').

163 NSW Medical Board, 25 November 1939, 3 September 1941, archived at NSW State Archives (n 21).

164 Ibid 6 April 1938, 13 May 1939, 4 October 1939, 18 October 1939, 25 October 1939, 15 November 1939, 13 April 1940, 1 May 1940, 12 June 1940, 7 August 1940, 2 July 1941, 7 October 1942.

165 Ibid 25 January 1940.

166 Ibid 25 January 1940, 3 September 1941, 6 March 1940.

167 '4 Alien Doctors' (n 162) 2; Letter from Alex Mair to Edward Hanlon, 22 April 1940, archived at Queensland State Archives, agency ID 1381 Medical Board Queensland, series ID 8805 Policy and Correspondence Files, item ID 282817 Registration Aliens, .

168 NSW Medical Board, 6 March 1940, 12 June 1940, 7 August 1940, 4 December 1940, 5 March 1941, 4 June 1941, 7 January 1942, archived at NSW State Archives (n 21).

169 Letter from FitzSimons to Harvey, archived at NSW State Archives (n 142).

applicants for registration under section 17(2) whom the Board decided not to recommend,<sup>170</sup> and the Board noted in the minutes of its meetings the specialties of seven of the 10 doctors who were among the further applicants whom it also did not recommend.<sup>171</sup> The Board did not alter any of its original decisions in response to requests to reconsider them by several doctors and lawyers acting on some of the doctors' behalf.<sup>172</sup> The Board even informed MP Edward Sanders that it had already 'considered in detail' the application of Emil Huth, a Viennese internal diseases specialist, and no 'good purpose would be served by Mr Sanders' appearance before' it.<sup>173</sup> When Sanders was subsequently part of a deputation of five MPs who appealed to the new Minister of Health, Christopher Kelly, to 'enable skilled refugee doctors to be registered' due to their capacity to contribute 'value to the community', Sanders claimed that Huth 'saved his life after' local 'specialists had failed correctly to diagnose his illness'.<sup>174</sup>

From 1942, the Commonwealth Alien Doctors Board in fact permitted at least 25 refugee doctors to practise medicine in NSW following an assessment of their capability.<sup>175</sup> At least 11 of those doctors – Serge Ross, Hillary Karmalsky, Samuel Haneman, Oscar Kudelka, Hans Landecker, Robert Loebel, Otto Lucas, Alexander Frank, Isidor Knossew, Arthur Revai, and Felix Leeser – had applied unsuccessfully to the Board for registration under section 17(2).<sup>176</sup> On the basis of their performance in written and oral exams (some of them had also, by that time, passed the exams of the final three years of the Faculty's medical course), those doctors were issued temporary licences to work in roles allocated by the NSW State Medical Co-ordination Committee.<sup>177</sup> The licences were issued pursuant to the *National Security (Alien Doctors) Regulations 1942* (Cth), which were introduced to address shortages of doctors to treat the civilian population during the war.<sup>178</sup> In December 1943, Commonwealth and State Health Ministers noted that no complaints had been made about any of the licensed doctors' competence.<sup>179</sup>

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170 Letter from GR Fleming to John Cumpston, 20 October 1942 ('Letter from Fleming to Cumpston'), archived at National Archives of Australia (n 128).

171 NSW Medical Board, 6 March 1940, 12 June 1940, 4 June 1941, archived at NSW State Archives (n 21).

172 See, eg, *ibid* 6 March 1940, 3 April 1940, 1 May 1940, 7 August 1940, 3 September 1941, 4 June 1941, 2 July 1941.

173 *Ibid* 1 May 1940; Letter from Fleming to Cumpston, archived at National Archives of Australia (n 170).

174 'Registration of Refugee Doctors Sought', *The Newcastle Sun* (Newcastle, 28 August 1941) 3.

175 Weaver, 'Glut' (n 7) 32.

176 NSW Medical Board, 18 October 1939, 25 October 1939, 1 November 1939, 22 November 1939, 12 January 1940, 25 January 1940, 6 March 1940, 4 June 1941, 7 January 1942, 3 June 1942, 3 February 1943, archived at NSW State Archives (n 21); Letter from Dr Frank McCallum to Dr John Newman Morris ('Letter from McCallum to Newman Morris'), undated, archived at National Archives of Australia (n 133) 24; Letter from John Cumpston to John Newman Morris and Robert Wade, 28 December 1944, archived at National Archives of Australia, series number A1928, control symbol 652/17/1/section 4, item barcode 143384, Medical Practitioners National Security (Alien Doctors) Regulations 1942.

177 Weaver, 'Pathways' (n 6) 62–3; Letter from McCallum to Newman Morris, archived at National Archives of Australia (n 176); 'Conference of Ministers', archived at National Archives of Australia (n 53).

178 'Conference of Ministers', archived at National Archives of Australia (n 53).

179 *Ibid*.

One correspondent to *The Sydney Morning Herald* assumed that ‘the BMA ... undoubtedly influenced the Government’ to decide ‘not to permit German refugee doctors to practise for the duration of the war’, and queried whether the BMA was ‘so afraid of the competition of a few qualified refugee doctors?’<sup>180</sup> The delegation of MPs who approached Kelly similarly presumed that the BMA was preventing refugee doctors from practising; they argued that ‘the barrier erected against these [refugee doctors] by the B.M.A. should be removed’.<sup>181</sup> Public condemnation by some of the BMA’s hostility towards refugee doctors seemingly encouraged it to attempt to conceal its efforts to exclude them from NSW’s registered medical profession. Moncrieff Barron responded to the claim of the Commonwealth Minister for the Interior that the BMA’s views ‘on the subject of foreign doctors were very narrow-minded’, by pronouncing that the BMA ‘had not considered the question of the registration of refugee doctors’ or ‘expressed any view on the matter’.<sup>182</sup> He further stated that the BMA ‘is not responsible for the registration of doctors’ and ‘has no power to influence their registration’.<sup>183</sup>

Yet, even though the BMA objected that the *1938 Act* only mandated that one Board member needed to be a BMA nominee,<sup>184</sup> the BMA had maintained its representation on the Board. Therefore, it definitely had some impact at least on the Board’s decisions about refugee doctors’ applications for registration. The *1938 Act* required all Board members to be doctors registered in NSW and, in addition to the BMA nominee (who also needed to be a GP who had practised ‘outside the county of Cumberland’ for five years), another member needed to be a nominee of the Senate.<sup>185</sup> This formalised the Board’s previous composition; indeed, FitzSimons expressed his intention to ‘continue’ the Board that was appointed before the passage of the *1938 Act*.<sup>186</sup> In succeeding years, the Board included more than one prominent BMA member, including Wade, Moncrieff Barron, and Windeyer. Other Board members appeared to support the BMA’s position on refugee doctors. For instance, Sir Hugh Poate, who was at this time a Board member (and examiner in the Faculty),<sup>187</sup> later argued that immigration of ‘more overseas doctors’ would lead to ‘overcrowding of the profession’, a ‘condition’ that ‘will result in a lowering, not only of the standard of medical practice, but also of the ethical conduct of many practitioners’.<sup>188</sup>

The BMA’s representatives on the Board might have been especially concerned to prevent registration of refugee doctors under section 17(2). European

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180 Anti-Nazi, ‘To the Editor of the Herald’, *The Sydney Morning Herald* (Sydney, 9 December 1939) 11.

181 ‘Registration of Refugee Doctors Sought’ (n 174) 3. This media attention may have prompted Kelly’s decision a week later to approve the Board’s recommendations of Friedlander and Lippmann: NSW Medical Board, 3 September 1941, archived at NSW State Archives (n 21).

182 ‘Reply by BMA: Alien Doctors’, *The Sydney Morning Herald* (Sydney, 22 June 1939) 13.

183 *Ibid.*

184 New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 August 1938, 927 (Christopher Kelly).

185 *1938 Act* (NSW) ss 5(3)–(4).

186 New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 August 1938, 816 (Herbert FitzSimons).

187 University of Sydney Archives, G1/1/22, University of Sydney Senate, Minutes, 5 July 1937.

188 Hugh RG Poate, ‘The Capacity of the Medical Profession in Australia to Absorb New Members’ (1953) 2(16) *Medical Journal of Australia* 616, 621.

specialists could compete with local doctors who worked to some extent in a specialty, but needed also to retain a general practice for income.<sup>189</sup> In addition, the potential for registration of these practitioners might have been perceived as an affront to Australian doctors who aspired to specialise, but lacked the means to pursue overseas postgraduate study and obtain honorary hospital work, which were prerequisites to specialisation.<sup>190</sup> Indeed, given the difficulty of developing and relying on a specialist practice, in 1935, the BMA's NSW branch informed medical graduates that the majority of them would probably work in general practice.<sup>191</sup> The BMA may also have sought to limit the number of specialists generally. It supported GPs' continued practise of obstetrics and performance of minor surgical operations (which were excluded from the services provided by friendly societies' contracts, so they could charge fees for service in respect of them) in the face of specialists' pursuit of this work, too.<sup>192</sup>

### C *Medical Practitioners (Amendment) Act 1939 (NSW) and Its Application*

The *Medical Practitioners (Amendment) Act 1939 (NSW)* ('1939 Act') amended, and came into operation on the same date as, the *1938 Act*.<sup>193</sup> It seems that its provisions applying to refugee doctors were another concession to those in the community, press and legislature who believed that they should be able to practise medicine in NSW. Yet, the BMA, Board and some MPs sought to ensure that refugee doctors could not benefit from a further pathway to registration created by this legislation.

As amended by the *1939 Act*, the *1938 Act* permitted the Board to register foreign doctors whom the Faculty had admitted to the final three years of its course before, and who passed its exams after, the *1938 Act* commenced.<sup>194</sup> Those doctors would have been entitled to registration under the *1912 Act*, but not under the *1938 Act* because the countries in which they completed their medical courses of at least five years' duration did not have reciprocity with NSW.<sup>195</sup> According to Richardson, before 4 August 1939, the Board had issued letters to the University in respect of 18 doctors, recommending it admit them to the Faculty's medical course.<sup>196</sup> Nevertheless, the Board's minutes of its meetings indicate that it deemed 28 refugee doctors qualified to sit for the Faculty's exams.<sup>197</sup> It appears that the

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189 Gillespie, *The Price of Health* (n 59) 20–1.

190 *Ibid* 6, 16, 18.

191 *Ibid* 20.

192 *Ibid* 21–2; Kunz (n 10) 35.

193 Alphabetical and Chronological Tables (n 49) 614.

194 *1938 Act* (NSW) s 17A(1), as inserted by *Medical Practitioners (Amendment) Act 1939* (NSW) s 2(b) ('1939 Act'). The cap on granting registration applications from eight individuals who were 'not natural born British subjects' annually did not apply to individuals who fell within this category: *1938 Act* (NSW) s 17A(2), as inserted by *1939 Act* (NSW) s 2.

195 New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 May 1939, 4622 (Athol Richardson).

196 *Ibid*.

197 NSW Medical Board, 3 March 1937, 5 May 1937, 5 January 1938, 2 February 1938, 6 April 1938, 1 June 1938, 3 August 1938, 7 September 1938, 5 October 1938, 1 November 1938, 7 December 1938, 11



Board ultimately registered just seven of those doctors,<sup>198</sup> though not all of them may have completed the course.<sup>199</sup> It was costly and many doctors would have had difficulty undertaking paid employment while studying.<sup>200</sup>

An additional category of registration was open to refugee doctors under the *1938 Act*, as amended, provided they had completed a medical course of at least five years' duration, received a degree or diploma certifying to their ability to practise medicine, and were entitled to be registered or practise as a doctor in any country.<sup>201</sup> The Board could issue a 12-month 'certificate of regional registration' to such a doctor to practise in a region in which, the Governor considered, 'residents' were 'not adequately provided for in respect of medical and/or surgical services', if the Board was satisfied that he/she had the requisite 'experience' to provide those services 'for the inhabitants'.<sup>202</sup>

Regional registration was introduced to address shortages of doctors in country areas.<sup>203</sup> Nevertheless, some MPs maintained that granting it to refugee doctors would be 'to the detriment of young Australian doctors', who would practise in those locations if the government provided sufficient compensation for doing so.<sup>204</sup> This view was consistent with the BMA's argument that the only reason Australian doctors were not practising in country areas was the difficulty of developing a lucrative practice there.<sup>205</sup> Further, the BMA described appointing refugee doctors to work in regional areas as 'objectionable' because, it claimed, this 'would lead to an ever-expanding registration of foreigners by a back-door route'.<sup>206</sup> According to *The Herald*, the BMA also alleged that permitting refugee doctors to practise in 'areas from which Australian doctors had gone on active service ... meant "let the Australian give his ... livelihood, and maybe his life, and let a foreigner ... deprive him of his means of subsistence should he return"'.<sup>207</sup>

The NSW Government and the Board shared the BMA's desire to limit regional registration of refugee doctors. Mair informed the Prime Minister:

Before proclaiming any ... 'regions', my Government has decided to increase the rates of subsidies paid to subsidised doctors with the object of inducing duly qualified medical practitioners resident in [NSW] to accept the positions offering before making them available to refugee doctors.<sup>208</sup>

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January 1939, 8 February 1939, 5 April 1939, 3 May 1939, 7 June 1939, 5 July 1939, 2 August 1939, archived at NSW State Archives (n 21).

198 Ibid 13 December 1939, 1 October 1941, 7 January 1942.

199 Rutland, 'An Example' (n 14) 249.

200 Suzanne D Rutland, *Take Heart Again: The Story of a Fellowship of Jewish Doctors* (Fellowship of Jewish Doctors of New South Wales, 1983) 23, 31; Esprit De Corps, 'Refugee Doctors', *The Age* (Melbourne, 30 October 1939) 8; Kunz (n 10) 50–1.

201 *1938 Act* (NSW) s 21A, inserted by *1939 Act* (NSW) s 3(a).

202 Ibid.

203 New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 May 1939, 4625 (John Tully).

204 Ibid; see also New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 May 1939, 4629 (Robert Heffron).

205 'Doctors in Country: Objection to Foreigners', *The Herald* (Melbourne, 5 December 1939) 10.

206 Ibid.

207 Ibid.

208 Letter from Mair to Menzies, archived at National Archives of Australia (n 86).

Moncrieff Barron contradicted reports that the BMA had influenced the NSW Government's decision and claimed that the BMA 'has no objection to alien graduates being appointed to sparsely-populated areas, should no local graduates be available'.<sup>209</sup> Yet, as some MPs observed, increasing the government subsidy for doctors in those areas would ensure that 'all areas in the country will have been provided with medical services' and 'remove one of the principal arguments for the admittance of alien doctors to practise'.<sup>210</sup> Moreover, when the Acting Minister for Health sought the Board's 'views' about 'the appointment of foreign medical practitioners to country districts' before Cabinet considered this 'question', the Board (which included BMA representatives) recommended that 'preference be given to British born subjects'.<sup>211</sup>

In drafting the *1939 Act*, the Government drew on two further suggestions of the Board that could potentially also have reduced the number of refugee doctors who obtained regional registration. The Board proposed that 'a guarantee be required from any foreign practitioner that he will remain for a minimum period of five years in the locality to which he has been allocated'.<sup>212</sup> Under the *1938 Act* (as amended), a doctor who held a certificate of regional registration for periods aggregating five years was entitled to registration to practise anywhere in NSW.<sup>213</sup> Yet a requirement to practise medicine exclusively in an undesirable location for such a long period of time might have discouraged refugee doctors from applying for regional registration. It was also on the Board's recommendation that the *1939 Act* empowered it to require applicants for regional registration to pass an oral test to prove their experience in medicine and surgery.<sup>214</sup> The Board could thus refuse to grant regional registration to refugee doctors whom it determined had failed its assessment.

The Board received some criticism in the media for delaying especially in making "'regional" appointments' of refugee doctors, but the Board asked the Minister to issue a statement 'rectifying the misapprehension'.<sup>215</sup> It seems that, in fact, there were few, if any, applications from refugee doctors for regional registration to process at this time, at least partly due to the efforts of the Board and Cabinet.<sup>216</sup> Even if refugee doctors had applied for such registration, most would have been unlikely to obtain it. *The Sun* noted that, 'when only £650 a year

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209 G Moncrieff Barron, 'Cabinet and Refugee Doctors: Attitude of BMA', *The Sydney Morning Herald* (Sydney, 8 December 1939) 10.

210 'Alien Doctors' (n 12).

211 NSW Medical Board, 5 May 1939 archived at NSW State Archives (n 21).

212 Ibid.

213 *1938 Act* (NSW) s 21A(14), as inserted by *1939 Act* (NSW) s 3(a); *1938 Act* (NSW) s 17(1)(e), as inserted by *1939 Act* (NSW) s 3(b); New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 May 1939, 4623 (Athol Richardson).

214 NSW Medical Board, 5 May 1939, 10 May 1939, archived at NSW State Archives (n 21); *1938 Act* (NSW) s 21A(2), as inserted by *1939 Act* (NSW) s 3(a).

215 NSW Medical Board, 22 November 1939, archived at NSW State Archives (n 21).

216 Ibid: the only reference to section 21A of the *1938 Act* in the minutes of the Board's meetings during this period is a note of the Board's decision to inform the Minister that it considered that Dr Felix Leeser (who had applied unsuccessfully for registration under section 17(2) of the *1938 Act*) 'would be suitable for appointment as a radiologist to a hospital in a suitable proclaimed "region" in terms of the *Medical Practitioners (Amendment) Act 1939*'.

subsidy was offered, no Australians applied for appointment' to practise medicine in regional areas, but since the subsidy was increased to £1,000, 'so many applications have been received from Australians for appointment as subsidised doctors in NSW that it is doubtful whether any vacancies will be left for foreign refugee doctors'.<sup>217</sup> A memorandum from the conference of Commonwealth and State Ministers for Health in late 1943 noted that the 'system of "regional registration" of alien doctors ... has not been implemented in NSW'.<sup>218</sup>

### III LESSONS FROM THE PAST

Where those granted asylum in Australia are medical practitioners who have obtained their qualifications overseas, there are persuasive moral, economic and public health reasons for facilitating their practise of their profession, provided they can do so competently and safely. Many would consider that, not only is it ethically responsible to give doctors who have fled from oppression the opportunity to begin a new life, but it enables them to support themselves financially and provide valuable medical services to the community, including to other immigrants who share their cultural background and language.<sup>219</sup>

Nevertheless, the past demonstrates that, especially during periods of economic insecurity and conflict, forces such as protectionism and prejudice can lead to the preclusion of competent OTDs from practising medicine if the legal regime governing doctors' registration permits them to prevail. In particular, this could occur if registration decisions can legally be based on matters other than applicants' competence to practise medicine and public demand for medical services, and there are no legal impediments to or remedies for discrimination in registration and accreditation processes. We can learn cautionary lessons from refugee doctors' experiences in NSW in the 1930s and 1940s, so that factors that are unrelated to the professional capability of OTDs who receive refuge in Australia do not intrude into decision-making about whether they can practise medicine here. In addition, this history may illuminate whether changes to the law since that period could help to prevent the repetition of past discrimination.

The Australian Medical Association ('AMA'), into which the BMA's Australian state branches transmuted in 1962,<sup>220</sup> has recently expressed support for asylum seekers.<sup>221</sup> In 2016, then AMA president, Professor Brian Owler, specifically acknowledged the contribution to Australian society of OTDs who have been granted refuge here.<sup>222</sup> This position diverges markedly from that of the

217 'Subsidised Doctors: Refugees May Miss Out', *The Sun* (Sydney, 2 January 1940) 2.

218 'Conference of Ministers', archived at National Archives of Australia (n 53).

219 George Palmer and Stephanie Short, *Health Care and Public Policy: An Australian Analysis* (Palgrave Macmillan, 5<sup>th</sup> ed, 2014) 297.

220 Pensabene (n 36) 168.

221 See, eg, 'Key Health Issues for the 2019 Federal Election', *Australian Medical Association* (Web Page, 11 April 2019) <<https://ama.com.au/article/key-health-issues-2019-federal-election>>.

222 Brian Owler, 'Speech to AMA Forum on Health of Asylum Seekers', *Australian Medical Association* (Web Page, 21 February 2016) <<https://ama.com.au/media/ama-speech-prof-owler-ama-asylum-seeker-health-forum>>.

past BMA. Suzanne Rutland observed that, in the 1930s and 1940s, the medical profession ‘was one of the strongest pressure groups to oppose both the entrance of refugee doctors to Australia and their right to practice following their arrival’.<sup>223</sup> In NSW, BMA representatives prevented refugee doctors from obtaining registration to practise medicine through their roles as members of the Board. In 1938, Mutch predicted that the involvement of these advocates for the medical profession in the medical registration authority could compromise its impartiality. He noted, ‘conflict between the interests of the [BMA] and the responsibilities of the Board to the Government will inevitably arise’, and a BMA nominee appointed to the Board will be ‘torn between his desire to do justice to the position that he occupies as a doctor on the Board and to that which he holds as a representative of the [BMA]’.<sup>224</sup>

Notwithstanding the AMA’s present attitude to asylum seekers, history teaches us that it is essential that decision-making regarding OTDs’ registration applications focuses on maintaining professional standards and meeting the public’s need for medical services. It is vital that medical boards have broad latitude to determine registration matters. We can nonetheless learn from the past to be vigilant for the use of such discretion to deny registration to capable OTDs. This could occur if registration authorities pursue interests of doctors’ representative bodies that are unrelated to facilitating the provision of safe medical services.

Importantly, changes to the statutory composition and objectives of medical registration bodies since the 1930s and 1940s may diminish the influence of such concerns on them and their capacity to act on them if they are so inclined. In recent years, external and lay involvement in medical registration authorities has increased.<sup>225</sup> This shift has reduced the medical profession’s previous autonomy to self-regulate and, with it, perceptions that registration authorities protected certain doctors unduly and their processes were neither transparent nor accountable to the public.<sup>226</sup> Those who register doctors may be more insulated from the influence of lobby groups for the medical profession today than in the past due to the move in

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223 Rutland, ‘An Example’ (n 14) 237.

224 New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 August 1938, 1158 (Thomas Mutch).

225 Ian Freckelton and Belinda Bennett, ‘Regulation of Health Practitioners’ in Ian Freckelton and Kerry Anne Petersen (eds), *Tensions and Traumas in Health Law* (Federation Press, 2017) 692, 692.

226 Ibid; David Thomas, ‘The Co-regulation of Medical Discipline: Challenging Medical Peer Review’ (2004) 11(3) *Journal of Law and Medicine* 382, 382–5, 389. For an examination of the contribution of the medical profession’s past self-regulation, including its power over licensing of doctors, to the development of ‘medical dominance’, see Evan Willis, *Medical Dominance: The Division of Labour in Australian Health Care* (Allen & Unwin, 1989) 2, 29–30, 69, 202–3, 206, 209. The Australian Medical Association has, however, maintained its involvement in shaping Australian health policy generally, including through its representation on ‘government committees, advisory boards and inquiries into aspects of health care’, and lobbying of and negotiating with politicians, the electorate and the medical profession: see, eg, Diane Mackay, ‘Politics of Reaction’ in Heather Gardner (ed), *The Politics of Health: The Australian Experience* (Churchill Livingstone, 2<sup>nd</sup> ed, 1995) 343, 357–62, 368; Palmer and Short (n 219) 25, 27, 66–7, 75; Eileen Willis, ‘Interest Groups and the Market Model’ in Heather Gardner and Simon Barraclough (eds), *Health Policy in Australia* (Oxford University Press, 2<sup>nd</sup> ed, 2002) 179, 179, 183–5.

2010 from a state-based registration system to the National Registration and Accreditation Scheme ('NRAS'). At present, the *Health Practitioner Regulation National Law* ('National Law'), as enacted in each Australian state and territory, provides for registration of doctors by a national Medical Board of Australia ('MBA').<sup>227</sup> The Council of Australian Governments Health Council (constituted by state, territory and federal government health ministers) appoints the MBA, a maximum of two-thirds of the MBA can comprise registered doctors, and at least two individuals must be appointed as its 'community members'.<sup>228</sup> Two 'objectives' of the NRAS, which are stipulated in the *National Law*, indicate that the MBA's decision-making about registration applications must concentrate on making sure that public demand for safe medical services is satisfied. Those aims are 'to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered', and 'to facilitate access to services provided by health practitioners in accordance with the public interest'.<sup>229</sup>

History also demonstrates that it is crucial that legislators confine OTDs' eligibility for medical registration to their clinical and behavioural competence. Pursuant to NSW's *1912 Act* and *1938 Act*, refugee doctors' eligibility for registration could depend on Australia's relations with the countries in which those doctors had trained and whether the latter offered reciprocal registration of Australian medical graduates. These arbitrary matters did not confirm applicants' ability to practise medicine safely. In a significant change from the past that may prevent discrimination against OTDs' registration applications on grounds that are unrelated to their professional capability, the MBA is currently not required to take such factors into account and must base its determination of OTDs' eligibility for registration at least partly on an evaluation of their qualifications, training and abilities.<sup>230</sup>

From the past, we can learn, too, the importance of legislators requiring comprehensive and impartial assessment of the qualifications, experience and skills of OTDs who apply for registration. This can ensure that OTDs' capacity to practise medicine safely is properly evaluated and, where necessary, they are given opportunities to improve their competencies, though not required to undertake superfluous retraining. The *1912 Act* and *1938 Act* did not direct the Board to arrange for such assessment of refugee doctors. Section 17(2) of the *1938 Act*

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227 *Health Practitioner Regulation National Law Act 2009* (Qld) sch ss 31(1), 35(1) ('National Law'). Queensland passed the substantive legislation establishing the National Registration and Accreditation Scheme ('NRAS'), and other states and territories adopted, in some cases modified, and applied the *National Law* as a law of their jurisdictions. Both NSW and Queensland are now co-regulatory jurisdictions. In NSW today, the Health Care Complaints Commission and Medical Council of NSW handle matters relating to doctors' health, performance and conduct, but the MBA (not those bodies) deals with matters pertaining to doctors' registration. For background to the passage of the *National Law*, and the creation and implementation of the NRAS, see Gabrielle Wolf, 'Regulating Health Professionals' in Anne-Maree Farrell et al (eds), *Health Law: Frameworks and Context* (Cambridge University Press, 2017) 73.

228 For the definition of 'Ministerial Council': *National Law 2009* (Qld) ss 5, 33–4.

229 *National Law 2009* (Qld) ss 3(2)(a), (e).

230 *Ibid* ss 52–4, 57–9.

empowered the Board to recommend registration of applicants due to their ‘special qualifications’ and ‘experience’, but this statute did not specify any process for evaluating them. Although many Australian doctors were unfamiliar with the nature of refugee doctors’ work experience,<sup>231</sup> the Board made decisions regarding refugee doctors’ eligibility for this category of registration based merely on documents they submitted and short interviews. In addition, the University prevented some refugee doctors whom the Board determined satisfied other preconditions for registration from undertaking further study, thus precluding them from becoming eligible for registration. Further, the Faculty required refugee doctors whom it did admit to its medical course to attend all classes and complete exams for the final three years of the course without first ascertaining whether it was necessary, in light of their skills and experience, for them to undertake this education.

This history may underscore the significance of changes that have been made to the evaluation of OTDs’ professional competencies since the 1930s and 1940s. Currently, OTDs who seek registration need not enrol in an Australian medical course without initially undergoing a thorough assessment, which may be conducted independently of the MBA. To decide whether applicants are eligible for registration, the MBA can be guided by the advice either of an external accreditation authority or a committee it establishes, which assesses OTDs’ qualifications, knowledge, clinical skills and professional attributes.<sup>232</sup> Further protections against biased or cursory assessment of OTDs’ professional capability today include the following. The MBA is required to act in accordance with the rules of natural justice.<sup>233</sup> In addition to the above-mentioned statutory objective of the NRAS to ensure that only those with appropriate training and qualifications are registered, another aim of the scheme stipulated in the *National Law* is ‘to facilitate the rigorous and responsive assessment of overseas-trained health practitioners’.<sup>234</sup> This legislation also provides that a ‘guiding principle’ of the NRAS is that it must ‘operate in a transparent, accountable ... and fair way’.<sup>235</sup> Further, an applicant for registration can appeal the MBA’s decision to refuse to grant the application to a state or territory civil and administrative tribunal.<sup>236</sup>

Other recent changes to Australian law may constitute additional safeguards against a repetition of past discrimination in registration processes against OTDs

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231 Mody, ‘Racial Prejudice’ (n 67) 27.

232 *National Law 2009* (Qld) ss 35(1)(e), 42(b)–(e), 43(1), 53, 58. The MBA presently relies on the AMC to verify OTDs’ qualifications and assess them and the authorities that have examined them and accredited their programs of study: ‘International Medical Graduates with the Australian Medical Council Certificate’, *Medical Board of Australia* (Web Page, 27 August 2018) <<https://www.medicalboard.gov.au/Registration/Types/General-Registration/imgs-with-AMC.aspx>>; ‘The AMC Purpose and Constitution’, *Australian Medical Council Limited* (Web Page, 2018) <<http://www.amc.org.au/about/about-2/about/>>.

233 JRS Forbes, *Justice in Tribunals* (Federation Press, 4<sup>th</sup> ed, 2014) 2.

234 *National Law 2009* (Qld) ss 3(2)(a), (d).

235 *Ibid* s 3(3)(a).

236 *Ibid* s 199(1)(a). It is notable, however, that the NSW Medical Board discriminated against refugee doctors who applied for registration in the 1930s and 1940s, though the right to appeal against registration decisions existed then: *1938 Act* (NSW) s 19. This was also the case in Victoria: see Wolf, ‘Moritz Meyer’ (n 14).

who receive asylum in Australia. For instance, doctors can now complain about the MBA's registration decisions to a National Health Practitioner Ombudsman and Privacy Commissioner, who can suggest to the MBA that it reconsider them.<sup>237</sup> Especially significant are anti-discrimination laws, introduced in their current form from the 1970s, which prohibit discrimination on the basis of, inter alia, race (defined as including 'colour, descent or national or ethnic origin') in activities that are connected with work, such as the qualification and authorisation of people to practise professions.<sup>238</sup>

#### IV CONCLUSION

Eight decades ago, the plight of refugee doctors who escaped from Nazi Europe and sought to practise their profession in Australia generated fervent debate.<sup>239</sup> Yet, those who wished to exclude refugee doctors from the registered medical profession in NSW in particular achieved their objective to a significant extent.<sup>240</sup> Prominent members of bodies that comprised the Australian medical world's 'triangular power structure' (as Kunz observed) – doctors who registered, represented and educated the medical profession – as well as MPs, attempted and collaborated to deny registration to practise medicine to refugee doctors between 1937 and 1942. We can learn valuable lessons from this history to ensure that capable OTDs to whom Australia grants asylum have opportunities to support themselves and benefit the community by using their medical training and skills.

The past especially teaches us to be wary of aspects of the legal regime governing regulation of the medical profession that could permit protectionism and prejudice to influence registration and accreditation processes. As evidenced by Australia in the 1930s and 1940s, such forces typically drive opposition to immigration and immigrants' right to work in their new homeland during downturns in the economy, political turmoil and war. The number of doctors among the asylum seekers to whom Australia grants refuge is unlikely to be sufficiently high to represent a significant threat to local doctors' livelihoods.

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237 'Make a Complaint', *National Health Practitioner Ombudsman and Privacy Commissioner* (Web Page, 1 February 2019) <<https://nhpopc.gov.au/make-a-complaint/>>; 'Annual Report 2018–19', *National Health Practitioner Ombudsman and Privacy Commissioner* (September 2019) 7.

238 See, eg, Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) 5, 41, 566, 798, 931; *Racial Discrimination Act 1975* (Cth) s 9(1); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1. An OTD who experiences discrimination in seeking to practise medicine could make a complaint to the relevant statutory agency that is required to investigate it. If alternative dispute resolution procedures fail to resolve the matter, it might be referred to a court or tribunal, which is empowered to order mandatory injunctions, for instance, to compel the impartial assessment and registration of an OTD if appropriate.

239 'Conference of Ministers', archived at National Archives of Australia (n 53).

240 Some refugee doctors did attempt to practise medicine in NSW without registration, but often requalified at the University owing to difficulties in practising medicine without engaging in activities that were prohibited to unregistered persons, such as issuing death and sick certificates, prescribing medication, and working in hospitals: *1912 Act* (NSW) ss 11–12; *1938 Act* (NSW) ss 40–3; Rutland, 'An Example' (n 14) 245.

Nevertheless, this was also the case in the past, but did not preclude refugee doctors' experience of discrimination. Recent changes to the law may prevent a recurrence of this history. Ideally, the law in future will continue to guarantee that the primary determinant of the right to practise medicine of OTDs who receive asylum in Australia is an assurance that they can do so competently and safely.