

DENTAL PRACTICE BOARD OF VICTORIA

RE: Mr Dayle Hutchinson

[2005] DPBV 2

PANEL:

Mr Victor Harcourt (Chair)
Dr Tony Robertson
Mr Craig McCracken

DATE OF HEARING: 2 May 2005

DATE OF DECISION: 2 May 2005

FINDINGS

The Panel, having considered the evidence and submissions placed before it, and taking into account the admissions, finds the following allegations in the Notice of Formal Hearing under section 45 of the *Dental Practice Act 1999* dated 1 February 2005 ("the Notice") to be established:

- 1 At all material times Mr Hutchinson has been registered as a dental care provider in Victoria under the *Dental Practice Act 1999* ("the Act"), having been registered as a dental prosthetist under the Act since 1 July 2000.
- 2 For many years prior to that, Mr Hutchinson had been registered as an advanced dental technician under the *Dental Technicians Act 1972*.
- 3 During July 2000 Mr Hutchinson made an intraoral snoring therapy appliance ("I.S.T. appliance") for his patient, Mr A, and supplied (and provided) it to him.
- 4 In the process of doing so, Mr Hutchinson took impressions of Mr A's dentition for the purposes of making the I.S.T. appliance.
- 5 Mr Hutchinson did these things without the written prescription of a dentist and without acting under the supervision of a dentist.
- 6 In practising dentistry in the manner described in paragraphs 3 and 4, Mr Hutchinson provided dental care to Mr A that he was not registered to provide, Mr Hutchinson having been registered under section 16(3)(b) of the Act in the division of dental prosthetist.
- 7 Pursuant to section 6(3)(a) of the Act, Mr Hutchinson's registration as a dental prosthetist was subject to a condition that he must only provide dental care in the division for which he was registered, namely the division of dental prosthetist.
- 8 Mr Hutchinson accordingly breached the condition of his registration in section 6(3)(a) of the Act.
- 9 In all these respects, Mr Hutchinson's conduct consisted of unprofessional conduct as defined in section 3 of the Act, with particular reference to sub-paragraphs (a), (b), (h) and (j) of that definition, and such unprofessional conduct was of a serious nature.
- 10 Mr Hutchinson failed to maintain any, or appropriate, dental records of his treatment of Mr A in July 2000.
- 11 Mr Hutchinson's failure to maintain any dental records of his treatment of Mr A constituted unprofessional conduct as defined in section 3 of the Act and such unprofessional conduct was of a serious nature.

DETERMINATION

Having considered the matter and having given due weight to the submissions placed before the Panel, the Panel considers it appropriate under section 47(2) of the *Dental Practice Act 1999* to impose the following determinations:

- 1 Mr Hutchinson is fined \$3,000.00 to be paid by 3 June 2005.
- 2 If Mr Hutchinson fails to pay the fine on or before 3 June 2005, his registration as a dental care provider is suspended from the date of non-compliance until the date of compliance.
- 3 The Panel reprimands Mr Hutchinson for his conduct and cautions against a repetition of it.

REASONS

- 1 On 2 May 2005, the Dental Practice Board of Victoria ("the Board") in a panel of three members ("the Panel") convened to conduct a formal hearing pursuant to the *Dental Practice Act 1999* (Vic) ("the Act") into the conduct of the dental care provider, Mr Dayle Hutchinson. Mr Hutchinson was at all material times registered as a dental prosthetist.

Allegations

- 2 The formal hearing concerned allegations placed before Mr Hutchinson in a Notice of Formal Hearing dated 1 February 2005 which stated:
 - "a) At all material times, you have been registered as a dental care provider in Victoria under the *Dental Practice Act 1999* ("the Act"), having been registered as a dental prosthetist under the Act since 1 July 2000.
 - b) For many years before that, you had been registered as an advanced dental technician under the *Dental Technicians Act 1972*.

Introduction

- c) During July 2000, you made an Intraoral Snoring Therapy appliance (I.S.T. appliance) for your patient, Mr A, and supplied (and provided) it to him.
- d) In the process of doing so, you took impressions of Mr A's dentition for the purposes of making the I.S.T appliance.
- e) You did all these things without the written prescription of a dentist and without acting under the supervision of a dentist.
- f) Section 28(1) of the *Dental Technicians Act 1972* provided that:-

"Subject to subsection (3) an Advanced Dental Technician may perform any work which under this Act a Dental Technician is authorised to perform and in addition may..."
- g) Section 14 of the *Dental Technicians Act 1972* provided that:-

"A Dental Technician may -

- a) in accordance with the written prescription of a dentist or under the supervision of a dentist make or repair any...appliance for use upon or in connection with the teeth, jaw or associated structure or tissue or in the treatment of any condition thereof".
- h) Accordingly, under Sections 14 and 28 of the *Dental Technicians Act 1972*, you, as an advanced dental technician, were only permitted to make an I.S.T. appliance either in accordance with the written prescription of a dentist or under the supervision of a dentist but not otherwise, and were not permitted in any circumstances to fit or supply an I.S.T. appliance to any patient.
- i) Further, under Section 28 of the *Dental Technicians Act 1972*, you were permitted to take impressions, but only for the purposes authorised by Section 28 of the *Dental Technicians Act 1972* and not otherwise.
- j) The *Dental Technicians Act 1972* was repealed and replaced by the *Dental Practice Act 1999* with effect from 1 July 2000.
- k) Pursuant to a series of resolutions of the Dental Practice Board of Victoria on 27th June, 1st July 2000 and 6th July 2000, the Dental Practice Board of Victoria adopted various statutes and policies as Interim Codes of Practice of the Dental Practice Board of Victoria, and these included the provisions of Section 28 of the *Dental Technicians Act 1972*.

Breach of Interim Code of Practice/Breach of Condition of your Registration

- l) Your conduct during July 2000 described in paragraphs (c) to (e) above constituted a breach of Section 28(1) of the *Dental Technicians Act 1972*, and accordingly constitutes a breach of the Interim Code of Practice adopted by this Board.
- m) Further, in practising dentistry in the manner described in paragraphs (c) to (d), you provided dental care to Mr A that you were not registered to provide, you having been registered under Section 16(3)(b) of the Act in the division of dental prosthetists.
- n) Pursuant to Section 6(3)(a) of the Act, your registration as a dental prosthetist was subject to a condition that you must only provide dental care in the division for which you were registered, namely the division of dental prosthetists.
- o) By virtue of the Interim Code of Practice adopted by this Board, as a dental prosthetist, you were only authorised to perform the work set out in Sections 14 and 28 of the *Dental Technicians Act 1972*, and no other work constituting "dentistry" as defined in the *Dental Practice Act 1999*.
- p) You have accordingly breached the condition of your registration in Section 6(3)(a) of the Act.

- q) By virtue of your registration under this Act and your position as an executive member of the Prosthetists Association, you well knew at the relevant time that you were not permitted or allowed at law to make the I.S.T. appliance for Mr A without the written prescription of a dentist or without acting under the supervision of a dentist, or to supply (or provide) the I.S.T appliance to Mr A.
- r) In all these respects, your conduct consisted of unprofessional conduct as defined in Section 3 of the Act, with particular reference to subparagraphs (a), (b), (h) and (j) of that definition.
- s) Such unprofessional conduct was of a serious nature.

Lack of Records

- t) You failed to maintain any, or appropriate, dental records of your treatment of Mr A (in July 2000).
- u) Your failure to maintain any dental records of your treatment of this patient constituted unprofessional conduct as defined in Section 3 of the Act.
- v) Such unprofessional conduct was of a serious nature.

Failure to Obtain Consent/Failure to Refer

- w) You provided the dental treatment summarised in paragraphs (c) and (e) above, to Mr A during July 2000.
- x) Prior to commencing that dental treatment, you failed to provide Mr A with all necessary information about the treatment options, the likely outcomes, advantages, disadvantages, risks and possible complications of the dental treatment proposed.
- y) Further, you failed to inform Mr A that you were not registered, qualified or trained to provide this treatment.
- z) You accordingly failed to ensure that your patient had all the necessary information and details available to him concerning such treatment, before you sought his consent to you providing the dental treatment.
- aa) You accordingly failed to obtain the prior consent (fully and appropriately informed) of Mr A to that dental treatment being performed.
- bb) Further, you failed to refer the patient to a dentist or a medical practitioner before commencing such treatment and implementing your treatment plan, in circumstances where it was necessary and appropriate for you to do so.
- cc) Accordingly, you have engaged in unprofessional conduct as defined in Section 3 of the Act.
- dd) Such unprofessional conduct was of a serious nature.”

At the commencement of the hearing the Panel was informed that allegations f, g, h, i, j, k, l and o were abandoned, and allegations a, b, c, d, e, m, n, p, q, r, s, t, u, v and w were admitted. This left in contention allegations (v), and (x)-(dd). As will become apparent, the Panel found allegation v established, and that allegations (w)-(dd) need not be the subject of a specific finding as they were encompassed in the admissions made by Mr Hutchinson in respect of allegations c, d, e, m, n, p, q, r & s.

Background

3 This matter came before the Board following a written complaint made by Mr A about an anti-snoring device made for him by Mr Dayle Hutchinson. Mr A claimed that he suffered from severe, ongoing dental, facial and chest pain, stress, hypertension and high levels of anxiety as a direct result of wearing an I.S.T. appliance by Prof.Hinz, an anti-snoring device.

4 Mr A stated in his complaint that he suffered from sleep apnoea, as did his father. Mr A claimed that Mr Hutchinson made the device for Mr A senior and, as a consequence, he approached Mr Hutchinson through his father.

5 Mr A's complaint set out the circumstances of the procedure as follows:

“3. I paid Mr Hutchinson \$600 [this was changed to \$300 at hearing] to take impressions of my teeth at his Ballarat dental practice. He later constructed this oral mouth splint device and mailed it, and an adjusting tool, to my then address in Albury/Wodonga. I conducted final fitting and adjustment of the device at my home. The device features screw adjustable bars that allow the forward pronation of the jaw to be extensively adjusted. Get this wrong...and as I now know...you will suffer the consequences.

4. I then wore it every night for an extended period - not realising the damage it was causing to my dental and overall health.

5. I received no warning documentation from either the product manufacturer (Schou-Dental of Germany), the Australian distributor (Halas Dental) or from Mr Hutchinson about the potential risks of this device. Nor were other expert parties involved in the processes that allowed me to obtain and use the device. I was given no ongoing management plan for the use and monitoring of the device. I basically had very little idea of the dangers this device could lead to.”

6 Mr A then alleged in his complaint that the device had pulled his lower jaw forward and severely altered his occlusion and the position of his upper and lower front teeth. As a consequence, he now stated that he suffers from “relentless pain throughout my upper and lower jaw and dental region”.

7 Finally, Mr A explained that he was motivated to lodge the complaint with this Board after reading, on the internet, a statement issued by the Dental Board of Queensland dated September 2002 concerning anti-snoring devices. In summary, the Dental Board of Queensland gave notice that it was satisfied the provision of a mandibular advancement splint by any person other than a dentist was the illegal practise of dentistry. It strongly advised that it is for a dentist or medical practitioner to prescribe or refer a patient for an anti-snoring device to a dental technician or dental prosthetist.

8 In his response to the complaint Mr Hutchinson admitted that he took impressions of Mr A's teeth, made the intraoral snoring therapy appliance and provided it to Mr A. By letter dated

12 May 2004, Mr Hutchinson further explained that he did so as a favour to Mr A senior who was a long time friend and professional colleague. Mr Hutchinson denied having made such a device for Mr A senior, receiving any money save for \$300.00 reimbursement for the cost of materials or diagnosing or attempting to treat Mr A for his sleep apnoea.

9 While Mr Hutchinson had constructed the appliance, he had previously done so on prescription for dentist clients. Mr Hutchinson described his response to the request by Mr A senior as follows:

“1. ... Mr A senior asked could I possibly make an I.S.T. appliance for his son Mr A. I pointed out that I could not prescribe or fit such an appliance as I was not Qualified to do so but as a favour to Mr A senior I would see if I could arrange for Mr A to see a dentist to have such an appliance fitted.

2. As Mr A was moving to NSW within a fortnight, and as he insisted he could only present for an appointment on a Saturday morning it proved extremely difficult to arrange an appointment with a dentist prior to his leaving.

3. I felt obligated by a 20 year relationship with his father to assist him. Given Mr A’s time constraints, and not being able to secure an appointment with a dentist on the only Saturday he would be in Ballarat, Impressions were taken and at this point I made it clear to Mr A that the finished appliance had to be fitted and adjusted and by a dentist. It was therefore with considerable concern I have learnt of Mr A’s failure to ensure that occurred.

4. The appliance was posted to Mr A on a clear understanding that he was to contact a dentist who would review the appliance and fit and adjust the appliance following specialist consultation.

No instructions were sent with the appliance, as it was not intended to be fitted by Mr A. It was intended that he find a dentist familiar with the I.S.T. appliance.”

10 Mr Hutchinson also explained that Mr A admitted adjusting the appliance himself by placing it in boiling water which distorted the appliance. Mr A further admitted to Mr Hutchinson that the appliance was too uncomfortable and that he had a dentist re-make the appliance after which he continued to wear it.

11 The Board also received two letters from Mr A senior who explained his own background in using the intraoral snoring therapy appliance which was made by someone other than Mr Hutchinson. Mr A senior did speak to Mr Hutchinson, on behalf of his son, to inquire whether the appliance could be made by him. He was informed by Mr Hutchinson that he did not have the “accreditation” to make such a device, but he would do so as a friend provided Mr A had it fitted by a dentist. The circumstances were then such that the device had to be sent by mail to Mr A. Mr A senior also explained that he reiterated to his son the need for the appliance to be fitted by a dentist to which the complainant responded that there was no need for this expense as “...he had worked out how to adjust the splint himself”. Mr A senior confirmed that the complainant had placed the device in hot water and that he had to have it remade by a dentist.

12 The Brief provided to the Panel evidenced that Mr Hutchinson had been registered as an advanced dental technician under the *Dental Technicians Act 1972* and, following its repeal and replacement by the *Dental Practice Act 1999*, as a dental prosthetist. The Brief also

evidenced, and it was ultimately accepted that a dental prosthetist could only provide to a patient an intraoral snoring therapy appliance either in accordance with the written prescription of a dentist or under the supervision of a dentist but not otherwise.

13 The Brief contained material concerning certain resolutions of the Board made on 27 June, 2 July and 6 July 2000, by which it adopted various statutes and policies as Interim Codes of Practice, which included section 28 of the *Dental Technicians Act 1972*. The abandonment of allegations (f)-(l) made it unnecessary to consider this material further.

14 The Brief also included a Code of Practice issued by the Dental Practice Board of Victoria entitled the Practise of Dentistry by Dental Prosthetists issued 12 June 2002. The purpose of the Code was to define the practise of dentistry by dental prosthetists. Relevantly, it stated as follows:

- “1. A dental prosthetist may work as an independent practitioner in making, fitting, supplying, repairing or taking impressions for:
 - (a) removable dentures;
 - (b) flexible, removable mouthguards of a type used by persons engaged in sporting activities.
2. Before taking any impression or fitting any removable dental appliance a dental prosthetist must take reasonable steps to ensure that the patient’s mouth is fit for the purpose, and free of disease, disorder or abnormality.
3. Apart from the use of tissue conditioners and soft lining materials, a dental prosthetist must not adjust, modify or treat the natural dentition, bone, soft tissue or dental restoration.
4. A dental prosthetist may take impressions for, make, fit or supply removable implant-retained full overdentures on a pre-existing implant and abutment structures in co-operation with and to the prescription of a dentist but may not:
 - (a) remove or replace any implant or abutment component; or
 - (b) otherwise deal directly with the public in taking impressions for, making, fitting or supplying any implant-retained prosthesis.”

Given that the conduct of Mr Hutchinson took place in July 2000, it was accepted that this June 2002 Code was not relevant to the allegations made.

15 Specific to the issue of the making of the appliance, the brief for the Panel included the following four papers:

- “Guidelines for the Use of Dental Appliances to Treat Snoring and Obstructive Sleep Apnoea” (March 1998), Thoracic Society of Australia and New Zealand, Australian Dental Association, Australasian Sleep Association;
- “Treating Sleep Disordered Breathing: Position Statement and Practice Guidelines Regarding Oral Appliances for the Treatment of Snoring and Obstructive Sleep Apnoea”, ADAVB Newsletter, (May 2000), Dr J A Gerschman;

- “Policy Statement: Use of Dental Appliances to Treat Sleep Disorders” (November 2004), Australian Dental Association Inc;
- “Practice Parameters for the Treatment of Snoring and Obstructive Sleep Apnea with Oral Appliances”, Sleep (1995), M Thorpy and others.

16 The March 1998 Guidelines highlighted the concerns of the three organisations regarding the use of intraoral snoring therapy appliances and stated:

“Both medical and dental expertise are required in the management of patients who are candidates for mandibular repositioning therapy. Medical expertise is needed to determine whether it is indicated and to ensure that, once prescribed, the therapy is and remains effective. Dental expertise is needed to assess suitability of the treatment from the dental viewpoint, supervision of its construction and fitting, and dental follow up to ensure that side effects or complications are promptly recognised and treated. A team approach is strongly encouraged.”

17 The March 1998 Guidelines noted that the three organisations considered that appropriate standards of practice needed to be maintained in this area and such standards were succinctly expressed in the fourth position paper noted above published by the American Sleep Disorders Association entitled Practice Parameters for the Treatment of Snoring and Obstructive Sleep Apnea with Oral Appliances. The article by Dr Gerschman also highlighted the Practice Parameters and stated the following:

“In essence the following issues related to these guidelines should be adhered to by practitioners wishing to manage sleep disordered breathing.

1. A medical evaluation by a respiratory sleep physician (and/or ENT evaluation) should precede any dental intervention. A sleep study utilising polysomnography to classify and quantify the degree and type of obstruction and other important medical measurements will distinguish snoring from more serious obstructive sleep apnoea, and central apnoea. ...
2. Oral appliances should be fabricated, fitted and adjusted by qualified clinicians (private practitioners or registered specialists) who are trained and experienced in the expert assessment and management of temporomandibular disorders, dental occlusion and associated oral structures and the overall care of oral health. Presently such training is not readily available or accessible in Australia, but training programmes are proposed in the future.
3. The risks, consequences and benefits of OA for the patient are evolving as OA are compared and contrasted with other available treatment in ongoing scientific studies.”

18 The Policy Statement issued by the ADA endorsed the standards set out in the Practice Parameters paper. Its policy reflected the statement cited above from the March 1998 Guidelines but the ADA also stated the following:

“Dentists are the only dental care providers who are qualified to diagnose and manage dental appliance therapy for sleep disorders.”

- 19 The Practice Parameters paper set out recommendations for the appropriate use of oral appliances for the treatment of obstructive sleep apnoea, the relevant parts of which have been referred to above. It is clearly a document to which practitioners in this area need to have regard.
- 20 Finally, the Panel's brief included documents concerning the standards for dental records which need to be kept by dental care providers.

The Evidence

- 21 As noted at paragraph 2, at the commencement of the hearing, the Panel was informed that allegations a, b, c, d, e, m, n, p, q, r, s, t, u, v and w were admitted, and that with the abandonment of certain allegations, those matters left in contention were allegations (v) and (x)-(dd). Mr Chris Blanden, counsel for Mr Hutchinson, stated in his opening address that in the context of the admissions, Mr Hutchinson's evidence will go to the circumstances of the provision of the I.S.T. appliance. He foreshadowed that Mr Hutchinson's evidence was that he provided the I.S.T. appliance in the circumstances set out in his and Mr A senior's correspondence, that he did not advise Mr A regarding the use of the device or the fitting/adjustment of it and that there was an agreement that the device would be supplied only on the basis that Mr A would see a dentist to have the device fitted and adjusted. Mr Hutchinson's position was that, without the agreement, he would not have made the device but admits, at all times, that it was wrong to make the device even under these circumstances without the prescription of a dentist.
- 22 In relation to the contested allegations, Mr Blanden submitted that while it was admitted Mr Hutchinson failed to maintain any or appropriate dental records, and this was unprofessional conduct, the issue in contention was whether it was of a serious nature or not. In relation to allegations (x)-(dd), Mr Blanden submitted that the failure to obtain consent/failure to refer went to the question of the agreement with Mr A regarding the provision of the I.S.T. appliance, and the circumstances in which it took place.

Evidence of Mr A

- 23 The first witness to give evidence was the complainant, Mr A. His evidence was to the effect that he grew up in Ballarat but, as at July 2000, he was living in Albury. He subsequently moved to Sydney shortly after the Sydney Olympics. Based upon his bank records, he concluded that the treatment he received from Mr Hutchinson took place on 15 July 2000 and that the amount he paid to Mr Hutchinson was probably \$300 as stated by Mr Hutchinson in his correspondence. Mr A, in his letter of complaint, had stated the amount paid was \$600 but in evidence he was prepared to accept that it was more likely to be \$300.
- 24 Mr A's evidence concerning how he came to contact Mr Hutchinson was generally consistent with his complaint form, and the correspondence from Mr Hutchinson and Mr A senior. It would appear that Mr A had been diagnosed with mild sleep apnoea. At that time, Mr A was using a rubber mouth appliance to deal with his snoring. He had apparently seen it advertised in the Sydney Morning Herald, used it and, following the diagnosis of mild sleep apnoea, his medical practitioner had advised him to continue using the appliance. Mr A was satisfied with it as it appeared to assist him. Mr A senior had also been diagnosed with sleep apnoea and had a continuous positive airway pressure machine. At some point in time, Mr A senior used an I.S.T. appliance which Mr A saw. Mr A expressed his desire to obtain such an appliance as it appeared to be more permanent than the rubber device he was using, which needed to be replaced on a regular basis. Mr A spoke with his father who subsequently arranged an appointment for Mr A with Mr Hutchinson. This was arranged on a Saturday morning because Mr A was then living in Albury and it coincided with a visit to Ballarat for a family function. While Mr A had a dentist in Albury, he did not approach him for the prescription of the I.S.T. appliance.

- 25 Mr Hutchinson saw Mr A for approximately 60 to 90 minutes during which he took an impression and discussed the I.S.T. appliance. Mr A readily admitted that it was agreed Mr Hutchinson would mail the device to Mr A in Albury, and that Mr A should see a dentist in his home town for fitting and adjustment. He also admitted that he asked Mr Hutchinson about the effects of the device and the advice he received was that it could effect changes to the mouth if not fitted properly. Although Mr A did not recall any questions regarding his sleep apnoea, he conceded that he would have mentioned that he had been diagnosed with mild sleep apnoea by a medical practitioner.
- 26 When the I.S.T. appliance arrived, it was in a black box and had no instructions or warnings contained in it. Mr A used the appliance that evening. His evidence was that while he did not make a conscious decision not to see a dentist to have it properly fitted and adjusted, he worked out how to do this himself and adjusted it by trial and error. He believes he may have adjusted it two or three times and used it for a period of approximately twelve months. Mr A also gave evidence that at a point in time he washed the device in water which was too hot, and distorted it such that he could no longer use it. That was when he saw a dentist and had the appliance remade.
- 27 When questioned further, Mr A stated that Mr Hutchinson mentioned devices like the I.S.T. appliance being supplied could cause difficulties to the jaw. He went on however to say that he could not recall any further information being provided and specifically that Mr Hutchinson did not mention anything regarding the possibility of the position of the teeth being put out. Mr A's evidence was that if he had been told this, he probably would not have used the device.
- 28 Under cross examination from Mr Blanden, Mr A acknowledged that the agreement with Mr Hutchinson was that he would take the I.S.T. appliance to a dentist to have it fitted and adjusted. Therefore, when he received the appliance, it was no surprise that there were no written instructions about how to fit and adjust the device, as well as there having been no verbal instructions. This was because the agreement was to see a dentist because if the appliance was not fitted and adjusted correctly, there could be problems with the mouth. He acknowledged that when he saw Mr Hutchinson, he was clear that the need to see a dentist was linked to the dangers posed by the incorrect fitting and adjustment of the device.
- 29 Mr A also conceded that it was his choice to use the I.S.T. appliance knowing that Mr Hutchinson advised him not to do this without seeing a dentist to fit and adjust it. Mr A gave evidence that he knew at the time the appliance could benefit him with his sleep apnoea but if he had been fully aware of the harm he would have been much more cautious in the use of the device and the fitting and adjustment of it. Specifically, he would have seen a dentist. He did however note that he did not follow Mr Hutchinson's advice and that was his mistake. He conceded that if he had seen a dentist as agreed, Mr A would not, in all probability, have suffered the harm which he has from the use of the incorrectly fitted and adjusted appliance.

Evidence of Dr Roseman

- 30 The Board's investigative officer, Dr Roseman, gave evidence regarding his own expertise as a dental care provider in the treatment of sleep disorders. In his own words, Dr Roseman described his expertise in this area, at least as at 2002, as being as good as anyone's in Melbourne. Dr Roseman discussed the four papers which are referred to in paragraph 15 above. He described his own practices in this area when he was treating patients. It would commence with a referral from or to a sleep physician for diagnosis. If sleep apnoea were diagnosed, then Dr Roseman would take x-rays and produce relevant models. Out of the then approximately 40 devices which were available, Dr Roseman would choose one that was appropriate for the patient, having regard to all the circumstances. The device would then be made by a dental prosthetist and Dr Roseman would insert it and see the patient again within a week. Thereafter the patient would be recalled on a monthly and then a six-

monthly basis. During this period, Dr Roseman would adjust the I.S.T. appliance. The patient would also be given instructions to allow them to adjust the appliance.

- 31 Dr Roseman noted that if a patient presented with an I.S.T. appliance, this would be less than ideal but possible. As a dental care provider, Dr Roseman would have to research the device, form his own opinion about the appropriateness or otherwise of the device, and after consultation with the patient, work with that device.
- 32 Dr Roseman gave evidence that dentists were not competent to diagnose sleep apnoea. There were significant consequences of not treating the sleep apnoea properly, including cardio-vascular and/or respiratory disease. There are also consequences for the mouth and jaw.
- 33 Dr Roseman gave evidence concerning the records kept by Mr Hutchinson which were non-existent. Under cross examination, Dr Roseman was asked if everything had occurred as it should, would the notes made by Mr Hutchinson simply have been a name and address on a patient care record and the device supplier/invoice. Dr Roseman agreed.
- 34 It is appropriate to note here that Mr Hutchinson did more than act as a mere dental technician in the manufacture and supply of the I.S.T. appliance. He made an impression of Mr A's teeth. This in itself would require further records than simply the name and address of the patient and the device supplied.

Evidence of Dayle Hutchinson

- 35 At the conclusion of the evidence called by counsel assisting, Mr Blanden called Mr Hutchinson. He gave evidence concerning his work history. He had worked in the same rooms in Ballarat for 18 years, in conjunction with another dental prosthetist. He had never had a complaint before the Board previously and he knew Mr A senior since approximately 1980. Mr A senior contacted him regarding the manufacture and supply of an I.S.T. appliance for his son.
- 36 Mr Hutchinson was asked if he was familiar with the I.S.T. appliance which Mr A senior had and he stated he was. When asked if he could make one for Mr A, Mr Hutchinson initially said no, because it was outside his scope of registration. To assist Mr A senior, Mr Hutchinson said he would seek to arrange a dentist to see Mr A first but he was advised that Mr A could only attend on a Saturday morning because he lived in Albury.
- 37 Mr Hutchinson could not arrange the dentist appointment and because he felt under some pressure to assist a friend, he offered to see Mr A, take the impression, make the I.S.T. appliance, and mail it out to him but only on the proviso that a dentist be consulted to fit and adjust the appliance. Mr Hutchinson conceded that he was aware then this was outside his scope of registration but he was doing it as a favour to a friend.
- 38 Mr Hutchinson saw Mr A on 15 July. At that time, Mr A informed Mr Hutchinson that he had been diagnosed with sleep apnoea, he had used a rubber mouth appliance, his father had good results from using the I.S.T. appliance and that he wanted one. In Mr Hutchinson's opinion, Mr A was pretty informed about his condition and what he was requiring. They had a general discussion. Mr Hutchinson stated that he told Mr A that whatever went into the mouth could have unintended consequences before saying that he needed to see a dentist to have the I.S.T. appliance fitted and adjusted, and also for monitoring.
- 39 Mr Hutchinson informed Mr A that this was outside his field of registration, but because he was doing the mechanics of the I.S.T. appliance, Mr A would need to see a dentist. Mr A agreed and Mr Hutchinson was happy that Mr A understood the reasons why.
- 40 Mr Hutchinson gave evidence that at no stage did he give instructions, either oral or in writing, regarding the fitting or adjustment of the I.S.T. appliance. If there was any doubt

about Mr A seeing a dentist, that he would not have given him the appliance. Mr Hutchinson contacted Mr A senior to advise that he had posted the I.S.T. appliance and reiterated the need for Mr A to see a dentist. He did not however contact Mr A directly at that time.

- 41 Mr Hutchinson explained his failure to keep records on the basis that it was an informal agreement with a friend and it was akin to getting instructions from a dentist to make the I.S.T. appliance. With the benefit of hindsight, Mr Hutchinson readily acknowledged that his decision making was poor and indeed described it as “shocking”.
- 42 During the course of his evidence, Mr Hutchinson expressed insight into the wrongful nature of his conduct, the poor decision making and that it would not occur again.
- 43 Notwithstanding this, under cross examination from Mr Monahan, Mr Hutchinson admitted that he knew at the time it was the wrong thing to do but made a conscious decision to take the risk to assist a friend. He was aware at that time that a dentist should have initiated the procedure especially as he did not have the training to diagnose the need for an I.S.T. appliance or in the fitting and adjusting of it. Mr Hutchinson also acknowledged that he did not make an arrangement with Mr A in the event that the I.S.T. appliance was the wrong one and said that, in his own mind, he took on the responsibility if another I.S.T. appliance was required or a refund was needed. Mr Hutchinson accepted that his behaviour was partly responsible for the situation Mr A found himself in because he did not require him to see a dentist first.

Reasons

- 44 The facts of this matter are, on the basis of the evidence, largely uncontroversial and, by virtue of the admissions made by Mr Hutchinson and accepted by this Panel, unnecessary to decide where there is a conflict. It is clear that Mr Hutchinson supplied an intraoral snoring therapy appliance in circumstances where he should not have. It is also clear that Mr Hutchinson did so consciously aware that it was outside his scope of registration and that he did so taking the risk that it may be discovered. The Panel was satisfied that Mr Hutchinson did not do this as part of a wider scheme to supply I.S.T. appliances for commercial benefit without prescription.
- 45 On the evidence Mr Hutchinson made a very poor decision to knowingly breach professional standards to assist a friend’s son. It was not contended nor does the Panel say that it was outside the expertise of Mr Hutchinson to either take an impression, or to make the intraoral snoring therapy appliance. If he had done so under the prescription of a dentist, Mr Hutchinson would have been well able to make and supply the appliance. He is also able to, in appropriate circumstances, make impressions.
- 46 The papers in the Brief, and the evidence of Dr Roseman, make clear the practice standards which support the necessity for the appliance to be made under the prescription of a dentist and to be fitted and adjusted by a dentist. Mr A’s own experience reinforces why this is the case.
- 47 In relation to Mr A, it was clear from the evidence that he had an understanding of the risks of using an incorrectly fitted or adjusted I.S.T. appliance. He was clear in his understanding that Mr Hutchinson supplied the appliance on the basis that he agreed to see a dentist to have it fitted and adjusted and the reason why. Mr A was also informed that it was outside the scope of Mr Hutchinson’s registration to supply the appliance in the circumstances. Despite this, Mr A took on that risk when he made the decision to use the appliance and to fit and adjust it himself, without seeing a dentist. The reason for this decision was not entirely clear to the Panel.
- 48 To his credit, Mr Hutchinson admitted the relevant allegations and that his conduct was unprofessional conduct of a serious nature in supplying the appliance to Mr A. The Notice of Formal Hearing contained allegations that Mr Hutchinson had engaged in unprofessional

conduct of a serious nature in failing to inform Mr A that Mr Hutchinson was not registered, qualified or trained to provide the I.S.T. appliance. Mr Hutchinson's evidence was to the effect that he had. Unfortunately, this question was not put to Mr A by Mr Hutchinson's counsel. Mr Hutchinson also gave evidence that he said the same thing to Mr A senior. This evidence was not tested further because Mr A senior was not present to give evidence. The Panel does however accept the evidence of Mr Hutchinson in relation to this disclosure.

- 49 It also alleged that Mr Hutchinson had failed to ensure Mr A had all necessary information and details available to him concerning the treatment and that Mr A's consent had not therefore been obtained. It was further alleged that Mr Hutchinson had failed to refer Mr A to a dentist or a medical practitioner. In this regard, the evidence was that Mr A explained to Mr Hutchinson that he had been diagnosed with mild sleep apnoea and that he had seen a medical practitioner in respect of this. It was also accepted by Mr A that he had been told by Mr Hutchinson to see a dentist to fit and adjust the appliance, albeit not prior to providing the appliance.
- 50 In the Panel's opinion, it was not necessary to make any findings in respect of allegations (x)-(dd) because, in effect, these matters were part and parcel of the admitted unprofessional conduct of a serious nature, being the supply of the intraoral snoring therapy appliance. It was difficult, in this situation, to imagine any circumstance under which it could be said that Mr Hutchinson could obtain proper consent of Mr A to the supply of an I.S.T. appliance where it was clearly outside the scope of Mr Hutchinson's registration. The Panel was also concerned that it was being invited to establish acceptable standards for a practitioner to follow when engaging in unprofessional conduct. As a matter of policy, this is undesirable and not necessary in the present case. If anything, questions concerning the nature and extent of the information provided by Mr Hutchinson are more relevant to the determination than founding a separate head of unprofessional conduct.
- 51 Having disposed of allegations (x)-(dd), the only allegation left in contention was whether Mr Hutchinson's failure to maintain any or appropriate dental records was unprofessional conduct of a serious nature. It is important to note that Mr Hutchinson admitted that he failed to maintain any or appropriate dental records and that this was unprofessional conduct. During the course of evidence, Mr Hutchinson produced a patient care record on which it was noted Mr A's name and his address care of his father. In all the circumstances, the Panel could not consider this to be an appropriate record even on the widest interpretation. In any event, Mr Hutchinson's records required some greater detail than the name, address, device supplied and invoice amount given that he had taken an impression of Mr A's mouth. Mr Hutchinson's complete failure to make an appropriate dental record could only be viewed as unprofessional conduct of a serious nature. The Board has seen many examples of inappropriate record keeping and has characterised as unprofessional conduct not of a serious nature those situations where the record has been incomplete. The abject failure to maintain any record of the treatment provided by Mr Hutchinson must appropriately be considered, in the Panel's view, as unprofessional conduct of a serious nature. To find otherwise, would diminish the responsibility and importance of keeping appropriate records, and the seriousness of Mr Hutchinson's breach.
- 52 For these reasons, the Panel made the findings set out in this decision. Various submissions were made concerning the appropriate determination and character evidence called in favour of Mr Hutchinson. The Panel was ultimately concerned that Mr Hutchinson had knowingly engaged in a breach of the standards required of him as a dental prosthetist. The Panel took into account the circumstances in which this took place, including that it did not occur in circumstances of personal gain or as part of a wider scheme for commercial benefit, and the admissions made by Mr Hutchinson. The Panel also placed weight upon the fact that Mr Hutchinson impressed upon Mr A the need to see a dentist and the reasons to have the I.S.T. appliance fitted and adjusted by a dentist. Mr A understood what it was that Mr Hutchinson was advising him, but the evidence was clear that his understanding about the implications of failing to see a dentist were not and in the circumstances could not be

properly understood by him. While Mr A made the mistake of not seeing a dentist, he did so while in a position of imperfect knowledge.

- 53 The Panel accepted that it was highly unlikely Mr Hutchinson would reoffend but was concerned that the explanation Mr Hutchinson gave for feeling pressured to help a friend was not entirely understandable. To be blunt, given the implications for Mr Hutchinson's registration and for the patient, his decision to supply the I.S.T. appliance seemed to have been made more lightly than this Panel would otherwise expect given the gravity of the situation.
- 54 In those circumstances, the Panel was of the view that while a suspension or cancellation of registration was not justified, a substantial fine was. Dental care providers and Mr Hutchinson must understand that such conduct is not acceptable either to the public or the Board.
- 55 The Panel also considered that a reprimand was in order. It is no light matter to reprimand a health professional for their unprofessional conduct. In Mr Hutchinson's case, the reprimand is particularly apt given the conscientious decision he made to act outside of his scope of registration. Mr Hutchinson must be vigilant to ensure that not only does he understand the obligations and responsibilities which fall upon him, but that he not be persuaded to depart from those standards of professional conduct which are expected of him, by third parties who clearly would not appreciate the importance of maintaining those standards.

DATED: 17 May 2005

**Victor Harcourt
Chair**