A TALE OF TWO DOCTORS: A COMPARISON OF THE DEKKER AND NITSCHKE CASES

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The value of standardization depends upon the possibility of comparison.

Ernst Christopher Meyer, PhD

Abstract

This paper compares high profile case studies of two medical practitioners in the Australian jurisdiction. The authors set out key moments in a twelve year timeframe from 2002 to 2014 and seek to contrast the treatment by The Medical Board of Australia of the two practitioners in order to re-Pose the question of what constitutes improper and/or infamous conduct for medical practitioners. Indeed the authors note the move towards new terms such as professional misconduct and unprofessional conduct and ask whether such moves have been caused, in part, by the apparent difficulties with the former terms.

1 - DR LEILA DEKKER

The tale of Dr Leila Dekker began on 27 April 2002. At around 6pm that evening the then 55 year-old radiologist was driving, with a passenger, near Roebourne in regional north Western Australia.4

After another driver, in a Land Rover, narrowly missed her car and rolled into a ditch Dekker did not stop to assist despite hearing the subsequent crash.5 It was dark, and as Dekker did not have a mobile phone, first aid equipment or a torch with her, she instead drove to the nearest police station and reported the incident.6

A passenger in the Land Rover was thrown out of the vehicle, suffered severe injuries and died at the scene.7

For Dekker what would then follow would be a litany of court cases for the next twelve years.

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1 This version of the paper was presented by Hon Nick Goiran MLC at the Britain Pacific Medical & Legal Conference at The University of London on 5 January 2015.
2 LLB, B Com. Member of the Parliament of Western Australia representing the South Metropolitan Region. Chairman of the Joint Standing Committee on the Corruption and Crime Commission since 18 June 2009.
3 BA, MHumRights.
4 Medical Board of Australia and Dekker [2013] WASAT 182 at 7
5 Ibid
6 Medical Board of Australia and Dekker [2013] WASAT 182 at 8
7 Dekker v The State of Western Australia [2009] WASCA 72 at 3
1.1 State of Western Australia v Leila Marie Dekker, District Court of WA, December 2005

More than three and a half years after the accident, Dekker appeared as the defendant in a District Court of Western Australia trial held at Karratha\(^8\).

The prosecution’s opening statement and closing argument was based on the testimony of the other driver who alleged that Dekker pulled out in front of him and the evasive action he took resulted in him running off the road and rolling over.

Dekker testified that she was stopped at the intersection and pulled out to avoid a collision when the oncoming vehicle was on the wrong side of the road and was headed to broadside her car. Dekker’s passenger also testified accordingly.

Notwithstanding the corroborating evidence of Dekker’s passenger, Dekker was convicted by a jury of dangerous driving causing death, fined $10,000 and disqualified from driving for two years.

1.2 Complaint by Medical Board of Western Australia, July 2006

In July 2006 the Medical Board of Western Australia filed a complaint against Dekker in the Western Australian State Administrative Tribunal under section 13(2) of the Medical Act 1894\(^9\) (WA) based on her being a medical practitioner convicted of a criminal offence.

S 13(2) of the Medical Act read:

Where it appears to the Board that a medical practitioner or a person who is a member of a body corporate that is registered as a medical practitioner under this Act has been convicted of an offence in this State or elsewhere that in the opinion of the Board renders that person, or would, if that person were a medical practitioner, render that person, unfit to practise as a medical practitioner the Board may allege to the State Administrative Tribunal that disciplinary action should be taken against the medical practitioner for that reason.

1.3 WAPOL v Leila Marie Dekker, Magistrates Court of WA, February 2008

Almost six years after the accident, Dekker was tried in the Magistrates Court at Roebourne on a separate charge of dangerous driving causing bodily harm arising from the injuries sustained by the other driver.

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\(^8\) Karratha is large city in regional north Western Australia approximately 39 kms from Roebourne.

\(^9\) This Act was subsequently repealed by the Medical Practitioners Act 2008 s. 160(1) (No. 22 of 2008) as at 1 Dec 2008 (see s. 2 and Gazette 25 Nov 2008 p. 4989).
This time, however, Dekker’s defense was bolstered by Mr Robert Davey, widely regarded as Western Australia’s foremost expert in traffic crash examination and reconstruction. Davey testified that photos taken of tyre marks on the road showed that the oncoming vehicle had reached ‘critical speed’ and was ‘out of control’ some distance before the tyre marks depicted on a drawing introduced as evidence during Dekker’s District Court trial. Troy Pillage, a police major crash investigator testified in agreement with Davey’s conclusion.

On this occasion Dekker was acquitted.

### 1.4 Dekker v The State of Western Australia, Court of Appeal (WA), April 2009

Although Dekker instructed her lawyer to file an appeal immediately after her District Court conviction, it was not done.\(^{10}\) Subsequently, Dekker changed lawyers several times and discussed filing an appeal with them also.

Dekker’s new lawyer filed a notice of appeal for her 2005 conviction in June 2008 accompanied by an application for extension of time within which she could appeal. Dekker’s appeal claimed her conviction was a miscarriage of justice based on new evidence discovered after her trial and favorable evidence that was not disclosed by the prosecution. Her alleged “new evidence”\(^ {11}\) consisted of affidavits by Robert Davey, her trial counsel, and the trial prosecutor.

In a majority decision, the Court of Appeal granted Dekker leave to appeal and quashed Dekker’s conviction with Miller JA stating that:

> "In the present case, the evidence was insufficient to justify a conviction. That is because the evidence revealed a set of circumstances different from those which were advanced by the prosecutor at trial."\(^ {12}\)

The Court also determined against a retrial and ordered remittance of what Dekker had paid on her $10,000 fine within 28 days.

If Dekker was understandably relieved by this substantial victory in the Court of Appeal, such relief would prove temporary.

### 1.5 Medical Board of Australia and Dekker, November 2013

Following the Court of Appeal’s quashing of Dekker’s conviction, the Medical Board amended their complaint to the Tribunal alleging Dekker committed ‘infamous or

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\(^{10}\) H Sherrer, Leila M. Dekker Found Guilty Of Improper Medical Conduct After Her Acquittal In Two Criminal Prosecutions (Feb 2014) Justice Denied <http://justicedenied.org/wordpress/archives/2693>

\(^{11}\) Readers interested in why this evidence was deemed neither fresh nor new, should refer to the detailed reasons of Miller JA in Dekker v The State of Western Australia [2009] WASCA 72 at 136-158.

\(^{12}\) Ibid at 179
improper conduct in a professional respect’ in violation of the then Medical Act section 13(1)(a).

Section 13(1) read:

Where it appears to the Board that a medical practitioner, not being a body corporate, may be —
(a) guilty of infamous or improper conduct in a professional respect;
(b) affected by a dependence on alcohol or addiction to any deleterious drug;
(c) guilty of gross carelessness or incompetency;
(d) guilty of not complying with or contravening a condition or restriction imposed by the Board with respect to the practice of medicine by that medical practitioner; or
(e) suffering from physical or mental illness to such an extent that his or her ability to practise as a medical practitioner is or is likely to be affected, the Board may allege to the State Administrative Tribunal that disciplinary action should be taken against the medical practitioner for that reason.

More than eleven years after the accident which gave rise to the complaint the State Administrative Tribunal of Western Australia found Dekker guilty of improper conduct. Judge D R Parry concluded:

Although the practitioner's conduct did not occur in medical practice, there is a sufficiently close link or nexus between her conduct and the profession of medicine for the conduct to be 'in a professional respect'. The practitioner is therefore guilty of 'improper conduct in a professional respect' within the meaning of s 13(1)(a) of the Medical Act.\textsuperscript{13}

The Tribunal determined that Dekker’s failure to stop, make an assessment and render assistance when she was physically able and had the knowledge and skills to do so, would “reasonably be regarded as improper by medical practitioners of good repute and competency”. The Tribunal observed that had Dr Dekker not promptly reported the event to the police, her conduct would have constituted infamous conduct.

In the Tribunal’s view, “saving human life and healing sick and injured people is a core purpose and ethic of the medical profession”.\textsuperscript{14}

The Tribunal determined to hold a further hearing to consider the appropriate penalty and any orders as to costs.

\textsuperscript{13} Medical Board of Australia and Dekker [2013] WASAT 182 at 46
\textsuperscript{14} Ibid at 39
1.6 Dekker v Medical Board of Australia, November 2014

This time there would be no delay by Dekker in lodging an appeal. Her main contention was to appeal the Tribunal’s improper conduct finding on grounds including that there was no evidence of a specific professional duty.

The Court of Appeal unanimously found there was no clear evidence Dekker's decision would have been considered improper, according to the professional standards required of reputable and competent doctors.

In their joint judgment delivered on 21 November 2014, Martin CJ and Newnes and Murphy JJA concluded that:

*It appears, on the proper construction of the reasons, that the Tribunal has formulated and relied upon a specific professional duty without regard to whether it was generally accepted by members of the medical profession of good repute and competency in 2002. This, in itself, is an error of law.*

The Court found the Tribunal had erred in finding that Dekker should have stopped to help, when there were no clear guidelines at the time that dictated the responsibilities of a doctor towards someone who was not their patient at the scene of such an accident, and no experts had been called to prove she had not acted in a manner expected from her profession.

The Court set aside the Tribunal’s decision and further dismissed the Medical Board’s application for want of evidence.

Most importantly for Dekker, the Court determined that due, in part, to the length of time since the accident the matter ought not be remitted back to the tribunal.

2 - DR PHILIP NITSCHKE

In 1996 Dr Philip Nitschke shot to fame as the first doctor in the world to administer a legal, lethal “voluntary” injection. This was done under the short-lived *Rights of the Terminally Ill Act 1995 (NT)* during which four of Nitschke’s terminally ill patients used this law to end their lives.

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15 Dekker v Medical Board of Australia [2014] WASCA 216 at 82
17 Passed by the Northern Territory Legislative Assembly on 25 May 1995 under the stewardship of Marshall Perron, and entering into law on 1 July 1996, the Act allowed terminally ill patients to commit medically assisted suicide.
Following the overturning of the *Rights of the Terminally Ill Act 1995* in March 1997, Nitschke founded the Voluntary Euthanasia Research Foundation (now Exit International) which is dedicated to championing euthanasia.

*I do not believe that telling people that they have a right to life while denying them the means, manner, or information necessary for them to give this life away has any ethical consistency... And someone needs to provide this knowledge, training, or recourse necessary to anyone who wants it, including the depressed, the elderly bereaved, the troubled teen.... if suicide is legal, then advising, counselling, or assisting people to carry out this legal act should also be legal.*

Aiding and abetting suicide or counselling someone to commit suicide is a crime in Australia.

For the purposes of comparing the Dekker and Nitschke case studies, we now consider reported events during the same twelve year period between 2002 and 2014.

### 2.1 May 2002

Using Nembutal, the drug Nitschke says he “promotes”, 70-year-old Gold Coast widow Nancy Crick killed herself in May 2002. Nitschke had been her doctor, publicised her case, told her how to kill herself and helped arrange for her to die surrounded by 21 euthanasia activists.

An autopsy later revealed Crick had no trace left of cancer - a fact of which her son said she was not aware.

Nitschke said whether or not she had cancer was “irrelevant”.

### 2.2 July 2002

In July 2002, Nitschke announced the production of plastic bags with drawstrings which people could put over their heads to euthanize themselves.

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20 Section 288 (3) of the Criminal Code (Western Australia) provides that “Any person who aids another in killing himself is guilty of a crime and is liable to imprisonment for life.”
22 Ibid
2.3 November 2002

In November 2002, after attending three workshops with Nitschke, Syd and Marjorie Croft, a healthy couple in their late 80s, took a fatal drug overdose at a retirement village at Bundaberg in south-east Queensland.25

2.4 Later in November 2002

Two weeks after the death of the Crofts, Lisette Nigot took a fatal overdose in her Perth home. Nigot was not ill or in pain – she was 79 and just did not want to live to 80.26 Ms Nigot, who is believed to have appeared in one of Nitschke’s how-to-suicide videos, left a suicide note describing Nitschke as her inspiration, thanking him for his support, and describing him as a crusader working for a worthwhile humane cause.

Nitschke released the note himself.27

2.5 December 2002

Nitschke launched, in December 2002, a $100 DIY suicide machine (COGEN) enabling people to take their own lives by breathing in pure carbon monoxide. A supposedly simple device which could be built at home, COGEN mixed acids together to form lethal carbon monoxide.

"The only side effect is sudden death," said Nitschke. "Once you start this, there’s no turning back."28 He was further reported at the time as saying that it would be difficult for governments to stop the distribution of the machine as it would be sold for other uses.29

2.6 December 2002

Ruth30, a Sydney woman in her 80s who described Nitschke as a friend, ended her life. Ruth was not terminally ill or depressed.31

27  Ibid
29  Ibid
30  Full name cannot be revealed for legal reasons.
2.7 January 2003

Nitschke had his prototype death machine, COGEN, confiscated at Sydney Airport along with a set of drawstring plastic "exit bags" as he boarded a flight to the US, in December 2003, to conduct a seminar hosted by the Hemlock Society, a US-based pro-euthanasia group that gave Nitschke $20,000 towards the machine.  

2.8 June 2004

A documentary, Mademoiselle and the Doctor, premiered at the Sydney Film Festival in June 2004. The film was based on the 2002 deaths of Lisette Nigot and Nancy Crick following advice from Nitschke. Featuring archive footage of Crick, the film also featured Nitschke himself.

Nitschke attended the premiere, taking questions afterward.

*My philosophical position is... mature, rational people over a certain age - which remains undefined - should have access to the ways and means of a peaceful death. And that's all people, not just sick people.*

2.9 June 2004

In June 2004, Nitschke and a team of advisers formulated a recipe for a home-made pill which can provide a so-called peaceful, reliable and legal death.

Nitschke stated that the pill has "a big future and not only for the seriously ill but for all rational, elderly members of our community":

*No government will be able to bring itself to ban these substances, so I think the process is safe. And if people can do it all themselves, with no help, there is no breach of the law.... The emphasis has gone into making a process which is straightforward enough that any competent person with reasonable ability and an average kitchen could easily manufacture it themselves. That is not a crime [but] if I go and make it and give it to someone, I will be assisting their suicide and I will be in prison for the rest of my life.*
2.10 November 2005

In November 2005, Nitschke demonstrated quick and easy ways to commit suicide at a conference in Brisbane, showing a series of step-by-step techniques to 250 attendees at Exit International's Peaceful Pill seminar.\textsuperscript{38}

Nitschke's suicide demonstrations to a mostly-elderly audience employed "readily available equipment which could be used with the minimal amount of engineering."\textsuperscript{39}

The session highlighted the latest device being promoted by Nitschke's group, Exit International: the Aussie Exit Bag. Nitschke said delegate bags given to all conference goers had been especially designed to use with "helium gas cylinders lying around the place" for a quick death.

2.11 2006

In 2006, Exit International published the Peaceful Pill Handbook, co-authored by Nitschke.\textsuperscript{40}

The Peaceful Pill Handbook enables readers to compare for themselves the benefits of various options such as Nembutal, Helium and the Exit Bag, prescription drugs, carbon monoxide, cyanide and the DIY peaceful pill.

The Handbook’s contents included:
1. End of Life Considerations
2. Suicide and the Law
3. The Peaceful Pill
4. The Exit RP Test
5. Hypoxic Death & Exit Bag
6. Carbon Monoxide
7. Cyanide
8. Introduction to Drugs
9. Drug Options: Morphine
10. Drug Options: Propoxyphene
11. Drug Options: Nembutal
12. The Peanut Project
13. Overseas Options
14. After it’s All Over
15. Concluding Comments

\textsuperscript{38} AAP, Dr Death demonstrates suicide techniques (November 2005) The Age
\textsuperscript{39} Ibid
The *Peaceful Pill Handbook* was banned by the Australian Federal Government in February 2007.\(^{41}\)

Exit International conducts workshops on how to bypass the Australian Government’s internet filter to order and download the *Peaceful Pill Handbook* and continue to revise and sell new editions at its website, on Amazon and for Kindle.\(^{42}\)

### 2.12 March 2006

In March 2006, Graeme Wylie, a 71 year-old former pilot with advanced Alzheimer’s disease, died from Nembutal at his northern Sydney home.

During the six-week trial in May 2008 regarding Wylie’s death, Nitschke told the Sydney jury he met Caren Jenning, Wylie’s long-term family friend, through Exit International.\(^{43}\) She had been involved in a documentary film about the group’s work and was appointed Exit’s Sydney coordinator in 2004. He said he had also met Wylie’s partner, Shirley Justins, twice.

The women said Wylie wanted to end his own life, but the jury found he lacked the capacity to decide due to his Alzheimer’s disease.

Jenning, 75, was convicted as an accessory to Wylie’s manslaughter for illegally importing the Nembutal from Mexico.

Justins was convicted of manslaughter for administering the drug.

Justice Roderick Howie granted Nitschke a certificate preventing any of his answers being used to press charges against him in NSW.

Nitschke damned the verdict against Jenning and Justins as "disgusting", and his backers raised $100,000 for the defence.\(^{44}\)

Petrified of going to jail, Jenning took her life with the same drug she illegally obtained for Wylie.\(^{45}\)

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\(^{41}\) Ibid

\(^{42}\) S Steele, D Worswick, *Destination death: A review of Australian legal regulation around international travel to end life* (Thomson Reuters, 2013) 21 JLM 415


2.13 February 2008

In February 2008, Nitschke was arrested at Auckland Airport and released after three hours in custody. Police confiscated his books and props he was going to use in a series of workshops on euthanasia in New Zealand.

Nitschke said he intended to show the book to New Zealand’s chief censor, Bill Hastings, to try to convince him to approve its circulation in the country. Nitschke said the workshops he was due to hold would go ahead “but they will be a bit sterile as some of my props have been taken away.”

2.14 April 2008

In April 2008, Western Australian mother of four Erin Berg flew to Mexico to buy Nembutal after reading Nitschke’s book *Killing Me Softly*. She died in hospital after 10 days in a coma.

2.15 May 2009

In May 2009, after being allowed to enter Britain after being held for nine hours by immigration officials at Heathrow Airport, Nitschke brought the first of his suicide workshops to the UK, demonstrating his DIY suicide kit including an ‘exit bag’ and ‘peaceful pills’ at a meeting in Bournemouth, largely populated by elderly people.

He discussed drugs, inert gases and euthanasia clinics, as well as legal loopholes that allow doctors or vets to legally assist suicide. A video called ‘Do It Yourself with Betty’ was played, which showed a pensioner constructing a plastic bag to be used for suicide. The video stated: ‘We have chosen a large-sized oven bag because it fits all heads.’

2.16 June 2009

In June 2009, Nitschke unveiled a new euthanasia aid in the form of a kit for testing the potency of the prohibited euthanasia drug Nembutal. Developed by Exit Australia, the kit had already been launched in the United Kingdom.

According to Nitschke, people go to great lengths to obtain the drug and the kit will give them peace of mind "so that if they take it in the way that it’s suggested they will, not might, have a peaceful and reliable death."  

2.17 2010

In 2010, a report from the Victorian Institute of Forensic Medicine researched 51 people who died from Nembutal in Australia. The report found that young people and depressed people were more likely to die by Nembutal than terminally ill people in Australia.51 Of the 38 known deaths that were investigated by a coroner, only 11 had a significant physical illness or chronic pain. The remaining 27 cases showed no signs of physical problems.

In February 2010 Nitschke stated in response to the Victorian Institute of Forensic Medicine report that:

*There will be some casualties ... but this has to be balanced with the growing pool of older people who feel immense well-being from having access to this information.*  

2.18 2011

In 2011, an inquiry into Dr Nitschke’s application to import the euthanasia drug Nembutal through the Department of Health and Ageing’s Therapeutic Goods Administration Special Access Scheme53 was launched by the Australian Medical Board.54

2.19 April 2011

In April 2011, members of Exit International, Don and Iris Flounders took a dose of Nembutal and were found dead in their home. Both in their 80s, Don had mesothelioma while Iris was healthy but wanted to die with her husband. The

51 A Schadenberg, “Nitschke continues to sell suicide over the internet” (September 2013) NRL News Today <http://www.nationalrighttolifenews.org/news/2013/09/nitschke-continues-to-sell-suicide-over-the-internet/#VJ1jMkDAeA>
52 D Penberthy, “There will be casualties”: Euthanasia/Assisted Suicide advocate Philip Nitschke says (June 2013) Sunday Herald Sun <http://www.nationalrighttolifenews.org/news/2013/06/there-will-be-casualties-euthanasiaassisted-suicide-advocate-philip-nitschke-says/#VIAgi9CQ-70>
53 This scheme permits medical practitioners to apply to import drugs for use on terminally ill patients under strict conditions.
Victorian couple made a video on 19 April to make their story public and to outline their decision to end their lives together.\(^{55}\)

Following Mr Flounders's diagnosis in 2007, the couple had travelled to Mexico in 2008 to buy Nembutal from a vet clinic there. "Don decided to go overseas to gain the drug and I gave him advice on what he should do" said Nitschke.\(^{56}\)

Five days after they returned, their home was raided by the Australian Federal Police, who searched unsuccessfully for the lethal stash.\(^{57}\)

In May 2011, Nitschke challenged police to charge him over his involvement in the elderly couple's suicide pact saying:

*Unless the police are going to run some line that telling someone how they can go to Mexico constitutes assisting, that would be a difficult and interesting case that I'd like them to try on.*\(^{58}\)

**2.20 September 2012**

In September 2012, Nitschke faced a second investigation by the Australian Medical Board into his suitability to practise medicine and his role in promoting and importing nitrogen cylinders that can be used for euthanasia.\(^{59}\)

**2.21 November 2013**

In November 2013, Nitschke opened a clinic in suburban Adelaide which offered consultations and testing of euthanasia drugs, provided euthanasia advice and information, and distributed nitrogen kits.\(^{60}\) He said the clinic's reach extended well

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\(^{55}\) B O'Connell, *Nitschke: try me over suicide pact* (May 2011) Sunday Herald Sun
\(^{56}\) Euthanasia planner slams AFP's 'heavy-handed' approach (March 2008) ABC NEWS
\(^{58}\) Ibid
\(^{59}\) P Stewart, *Euthanasia campaigner faces another challenge* (September 2012) ABC NEWS
\(^{60}\) *Aust first euthanasia clinic in Adelaide* (November 2013) news.com.au
beyond South Australia, with online consultations occurring regularly with clients in other states.  

Police in New South Wales and Queensland contacted Nitschke after the nitrogen cylinders of his company, Max Dog Brewing, were found next to bodies in both states.  

Nitschke said he had had many enquiries from police over the years:  

*Police will ring up and say they’ve found a copy of the [Peaceful Pill Handbook] book and wanting to know whether we were involved in that person’s death.*  

### 2.22 May 2014  

Facing charges over his wife’s death, 45 year-old Perth man Nigel Brayley ended his life by taking Nembutal in May 2014.  Brayley had spoken with Nitschke at one of his workshops, bought The Peaceful Pill eHandbook and swapped emails with him.  

### 2.23 July 2014  

In July 2014, the Medical Board of Australia voted to use emergency powers to immediately suspend Nitschke after he admitted to supporting Brayley’s suicide despite knowing he was not terminally ill.  

The Board said it took action to “keep the public safe”.  

Nitschke said it was "clearly stupid" to claim he is a risk to public safety:  

*That’s about the most ludicrous thing they’ve said, that... telling me I’m no longer a practising doctor is going to somehow or other change things.... We’ve still got heavily booked workshops all over Australia. People will be coming in their hundreds - I would estimate thousands now - wanting to know how they can end their lives... Whether they remove my medical licence or not is not likely to change that one bit,  

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62 Ibid  
63 Ibid  
and the idea there’ll be more people somehow or other being influenced to end their lives I think is quite stupid.67

2.24 September 2014

In September 2014, it was reported that Nitschke was being investigated by police in every Australian state over his possible role in nearly 20 deaths in the previous three years, all of them apparently suicides.68

One investigation by Victoria Police concerned the death of a 55-year-old Geelong man who allegedly killed himself using a DIY kit bought through a company affiliated with Exit International.

All of the deaths being investigated involved the use of the two suicide methods promoted by Nitschke – Nembutal or a nitrogen inhalant device.

2.25 November 2014

In November 2014, Nitschke appealed in the Northern Territory Civil and Administrative Tribunal against the decision by the Medical Board of Australia to suspend his registration.

3 – CONCLUSION

In the same twelve year period in which Dekker suffered a trail of both criminal and medical prosecutions for not rendering assistance following a rural night car accident, Nitschke was not prosecuted once despite consistently flouting the law and leaving a trail of dead in his wake.

While the authors note that there is a fundamental difference between the relationship between Dekker and the occupants of the Land Rover and the relationship between Nitschke and those who had communicated with him, the comparison of these two cases raises the question of what constitutes improper and/or infamous conduct for medical practitioners in Australia.

Notably during the twelve year Dekker case the Medical Act 1894 was repealed by the Parliament of Western Australia passing the Medical Practitioners Act 2008 which, amongst other things, sought to distinguish disciplinary matters from competency matters and impairment matters.

67 Euthanasia advocate Philip Nitschke suspended by the Medical Board of Australia, Op Cit
Relevantly, section 76 of the Medical Practitioners Act 2008 still referred to practitioners acting “improperly”, being “convicted” and engaging in conduct “that falls short of the standard [expected]”.

Section 76 (1) read as follows:

The following are disciplinary matters —
(a) that a person has contravened a condition applying to that person’s registration or the practice of medicine by that person;
(b) that a person in the course of his or her practise as a medical practitioner —
(i) acted carelessly;
(ii) acted incompetently;
(iii) acted improperly;
(iv) breached this Act;
(v) failed to comply with an undertaking given to the Board under this Act;
(vi) provided services that were excessive, unnecessary or not reasonably necessary for the recipient’s wellbeing;
(c) that a person has been convicted of an offence the nature of which renders the person unfit to practise as a medical practitioner;
(d) that a person has engaged in conduct in a professional respect that falls short of the standard —
(i) that a member of the public is entitled to expect of a medical practitioner; or
(ii) that a member of the medical profession would reasonably expect of a medical practitioner;
(e) that a person has engaged in sexual misconduct.

This Act in turn was repealed shortly thereafter by the Health Practitioner Regulation National Law (WA) Act 2010 which prefers the terms "professional misconduct" and "unprofessional conduct". These terms are defined in section 5 as follows:

professional misconduct, of a registered health practitioner, includes —
(a) unprofessional conduct by the practitioner that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and
(b) more than one instance of unprofessional conduct that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and
(c) conduct of the practitioner, whether occurring in connection with the practice of the health practitioner’s profession or not, that is inconsistent with the practitioner being a fit and proper person to hold registration in the profession;

unprofessional conduct, of a registered health practitioner, means professional conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner by the public or the practitioner’s professional peers, and includes —
(a) a contravention by the practitioner of this Law, whether or not the practitioner has been prosecuted for, or convicted of, an offence in relation to the contravention; and

(b) a contravention by the practitioner of —
(i) a condition to which the practitioner’s registration was subject; or
(ii) an undertaking given by the practitioner to the National Board that registers the practitioner; and

(c) the conviction of the practitioner for an offence under another Act, the nature of which may affect the practitioner’s suitability to continue to practise the profession; and

(d) providing a person with health services of a kind that are excessive, unnecessary or otherwise not reasonably required for the person’s well-being; and

(e) influencing, or attempting to influence, the conduct of another registered health practitioner in a way that may compromise patient care; and

(f) accepting a benefit as inducement, consideration or reward for referring another person to a health service provider or recommending another person use or consult with a health service provider; and

(g) offering or giving a person a benefit, consideration or reward in return for the person referring another person to the practitioner or recommending to another person that the person use a health service provided by the practitioner; and

(h) referring a person to, or recommending that a person use or consult, another health service provider, health service or health product if the practitioner has a pecuniary interest in giving that referral or recommendation, unless the practitioner discloses the nature of that interest to the person before or at the time of giving the referral or recommendation;

Whether these defined terms improve upon the historical terms remains to be seen.

Meanwhile, Nitschke may yet be freed of his one penalisation. In a possible twist to the tale of these two case studies, the Western Australian Court of Appeals decision to overturn the State Administrative Tribunal’s ruling in Dekker is now being cited as precedent by Nitschke in his appeal.69