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Kirby v Dental Council of NSW [2018] NSWSC 1869**– significant implications

This case explored allegations of apprehended bias against the Dental Council's delegates conducting s.150 proceedings in circumstances where as Council members they had participated in earlier Council meetings managing the complaint regarding the same practitioner. Also considered in the case, is whether s.150J of the *Health Practitioner Regulation National Law (NSW)* (the National Law) prescribes a procedure for conducting proceedings under s.150 of the National Law.

Decision

On 6 December 2018 the Supreme Court dismissed Dr David William Kirby's application seeking to set aside a decision of the Tribunal. Orders were also made that he pay the Council's costs.

The Tribunal decision in 2017 had dismissed Dr Kirby's appeals against two decisions made by delegates of the Council; a s.150 decision to suspend Dr Kirby's registration and a s.150A decision which lifted the suspension and imposed conditions on his registration.

Analysis

Did the delegates bring an open mind to the s.150 proceedings?

The delegates of the Council in this matter were Council members who had in that capacity been involved in the Council's decision to refer Dr Kirby to s.150 proceedings. Dr Kirby argued that in these circumstances there was an obligation on the delegates to disclose their prior involvement in the management of the initial complaint against him. Dr Kirby argued that the delegates' decisions to suspend his registration and to subsequently impose conditions were infected with apprehended bias because they were the "moving force" in the decision to refer him to the s.150 proceedings and that caused them to have a "disqualifying interest"[1]. In this context, Dr Kirby relied on Powell JA in *Carver v Law Society of NSW* (1998) 43 NSWLR 71 and argued that *McGovern v Ku-ring-gai Council* [2008] NSWCA 209 does not supersede *Carver*.

The Court held that the legislative framework of the National Law outlines what is required of the decision maker. Section 150 imposes a positive duty on the Council to take action if satisfied it is appropriate to do so for the protection of the health or safety of any person or persons or otherwise in the public interest. This duty may be exercised by the Council or its delegates.

The Court viewed the delegates' role as reasonably objective. In their role as administrative decision makers the delegates were required to consider the allegations made, decide whether further investigation is required and what actions if any the Council might take. The

** This decision has been appealed to the NSW Court of Appeal. This case note will be updated following the determination of that appeal.

[1] Kirby v Dental Council of NSW [2018] NSWSC 1869 at [63]

delegates properly exercised the Council's functions[2] without any particular outcome in mind whilst open to persuasion.

The Court stated at [69] that in both pre-judgement and conflict of interest cases the test is to consider "the degree of the closure of the decision maker's mind". In support of the Council's submissions, Barrett AJ stated that the circumstances in *McGovern* were "instructive for present purposes"[3]. *McGovern* concerned participation by councillors in a council decision regarding a development application. This followed their prior involvement in discussions about the merits of the proposal within that development application. In that case the perceived conflict of interest stemmed largely from the role and function of the councillors.

In drawing on the similarities of that case Barrett AJ agreed with the Tribunal's conclusion that Dr Kirby was not denied procedural fairness.

Do s.150J powers apply to s.150 proceedings?

Dr Kirby argued that where a Council decides that it is appropriate to conduct a s.150 proceeding it must compel the practitioner to attend in accordance with s.150J of the National Law.

The Court held that the purpose of s.150J is not to compel a practitioner to participate in s.150 proceedings. Section 150 does not specify any particular processes because the intent of such proceedings is to facilitate urgent action if there's a need to deal immediately with risks to public health and safety. This means that the general principles of procedural fairness apply to s.150 proceedings and the choice to attend, remain absent, abide by the outcome or challenge it, is left up to the practitioner.

Significance

The decision in this matter confirms that the ordinary way in which Councils manage complaints and conduct their s.150 statutory functions affords procedural fairness to practitioners. That is, that the prior involvement of a Council member in the management of a matter does not in and of itself give rise to apprehended bias or denial of procedural fairness.

Further, the Court held that given the urgent nature of these proceedings it is reasonable to refer to the common law rules of procedural fairness. The Court rejected the view that s.150J is purposed to compel participation in s.150 proceedings and held that the Council must proceed to take action if satisfied it is appropriate even in the absence of the practitioner.

The full text of the decision can be found at:
https://www.caselaw.nsw.gov.au/decision/5c074ba2e4b0b9ab40211ab7

[2] Lindsay v NSW Medical Board [2008] NSWSC 40 at [59]
[3] *Op cit Kirby* at [66]