



Health Professional Councils Authority

Level 6 North Wing 477 Pitt Street Sydney NSW 2000

Locked Bag 20 Haymarket NSW 1238

Phone: 1300 197 177 Fax: (02) 9281 2030

Email: mail@hpca.nsw.gov.au Online: www.hpca.nsw.gov.au

Bova v Pharmacy Council of NSW [2014] NSWCATOD 40 – significant implications

In a recent interlocutory decision, Her Honour ADCJ Jennifer Boland AM considered a practitioner's application seeking access to Council members' email deliberations during proceedings under section 150 of the National Law (NSW). The Council resisted disclosure of the deliberations and an application was made by the practitioner to NCAT. In NCAT the question of access involved the ventilation of a number of arguments, which cover a range of processes and principles relevant to all Health Professional Councils.

Background

The practitioner had conditions imposed on his registration under section 150 (1)(b). He subsequently appealed to NCAT against that outcome. As part of the preparation of his appeal case a summons was issued which called for a range of documents, including the Council member's email deliberations during the section 150 process. That part of the summons was resisted by the Council.

The practitioner argued that it was necessary to have access to the members' emails to conduct his appeal under section 159 and to understand what the Council had considered in deciding to impose the conditions.

Because Council opposed the access to the emails the onus was on the Council to prove that access should not be given.

Are Council member email deliberations relevant to an appeal under section 159 against section 150 action?

The substantive argument required an analysis of the nature of the appeal under section 159 to ascertain whether the email deliberations were relevant to the appeal. Section 159 appeals can be made against a range of Council decisions, including an appeal against the exercise of Council's power following an Inquiry, a refusal by Council to alter or remove conditions imposed by Council concerning conduct or health matters, so the determination about the nature of this appeal has application beyond this decision.

Various authorities were considered by Her Honour in analysing the nature of the appeal. The majority of NSW decisions in this area refer the appeal as de novo, meaning to be heard anew, but there are also authorities which indicate that it may be a variation or a statutory hybrid appeal. Regardless of the terminology one uses, Her Honour focussed on the language of section 159(3) and determined:

"...what the statute requires is a reconsideration of the matter, that is, is the Tribunal satisfied at the date it hears the appeal that it is appropriate to suspend the practitioner's registration or place conditions on his registration for the protection of the health and safety of the public."

The substantive issue was decided in the negative i.e. that the **Council member deliberations were not relevant to the appeal because of the nature of the appeal under section 159(3) being a reconsideration of the issue.**

The Tribunal makes its determination under section 159 *as at the date of the appeal* hearing rather than when Council made the original decision. Her Honour found that Council members' email deliberations were not relevant to the Tribunal's reconsideration of the matter under section 159.

Did the summons have a legitimate forensic purpose?

Her Honour also considered the other arguments of Council for resisting the summons, including its lack of a **legitimate forensic purpose**. In doing so, Her Honour gave some guidance as to how to determine whether a summons (or subpoena) has a legitimate forensic purpose. This is important because if a summons does not have a legitimate forensic purpose, it can be resisted/challenged by Council.

Once the legitimate forensic purpose of a summons or subpoena is challenged, as it was in this case, the onus is on the party that issues the summons to satisfy the Tribunal that:

- a. The purpose for seeking the documents is relevant to the issues in the particular case or in other words that there are "concrete grounds" or that it is "on the cards" that the information sought will materially assist his/her case, and
- b. That compliance with the summons is not seriously or unfairly burdensome or prejudicial to the other party.

Her Honour found that in terms of a. above the email deliberations were not relevant to the practitioner's appeal:

The Council's deliberations, which could have been oral, were in this case, for convenience to obtain a speedy decision, contained in the email communications. Those deliberations, contained in the email communications, were not matters before the Council. Access to the material on which the Council reached its decision to impose conditions under s 150, save and except, the legal advice provided to the Council, is not, as far as I am aware, disputed..... But the email communications do not appear to me to satisfy the test of adjectival relevance to the issues to be determined at the appeal.

In this case Her Honour was also of the view that as regards b. above, there would be prejudice to the Council and it would be oppressive if access to email communications between Council members were granted. Access to such communications could undermine robust discussions amongst Council members in reaching a decision as to whether it was appropriate to take action under section 150. Her Honour also viewed access to such communications as counterproductive to the objectives of the National Law (NSW) as stated in section 3A:

..... and I agree, the production of deliberations, as distinct from the matters before the Council, would be oppressive. It is likely the availability of such deliberations could undermine full and frank exchanges between council members before a proper decision is reached. Such a constraint may undermine the objective and principle of the National Law set out in s 3A.

Overall, seeking access to the Council members' deliberations to determine how Council arrived at its decision was seen by Her Honour as "fishing" rather than having a legitimate forensic purpose:

I find here is an element of "fishing" in seeking access to the deliberative processes of the Council in the email communications rather than a legitimate forensic purpose....

An important implication from the above passages (see paragraphs 40 – 45) is Her Honour's implicit recognition that email communication is, at least in s.150 proceedings, an appropriate and acceptable means for a Council to conduct its business.

Characterisation of Council

Another ground on which the summons was resisted was on the basis of privilege based on section 129 of the Evidence Act. It was argued that the email communications between

Council members were in the nature of a judgment and so protected from disclosure. Her Honour found that the section was not applicable because the Council was not acting as a Court or Tribunal and it was not obliged to produce reasons or to apply the rules of evidence to determine issues in dispute. The Council was an administrative body and it could not act independently of executive or administrative oversight.

Care must be taken to not read this part of the judgement out of context and to thereby infer that Her Honour considers there to be no requirement for a Council to give reasons for a s.150 decision. Her Honour's purpose in pointing out the lack of an obligation to produce reasons is as part of her consideration of the question of whether the Council is a Court or Tribunal, and her conclusion that it is not. The passage does not indicate that Her Honour considers Councils to be exempt from the Common Law requirement that administrative decision makers provide reasons for their decisions and abide by the rules of procedural fairness.

A further argument claiming public interest immunity was not substantive and lacked an evidential basis; nevertheless, Her Honour did helpfully set out the relevant principles:

- a. the characterisation of the information must be State papers or matters of State, and
- b. The disclosure of such document would prejudice the proper functioning of government.

It was noted that there was no evidence before Her Honour to indicate that the Council is an instrument of the Crown.

Conclusion

This case is important because it sheds light on the nature of section 159 appeals, the principles for a legitimate forensic purpose for a summons or subpoena and the characterisation of the Council as a decision maker. The full text of the decision is available at <http://www.caselaw.nsw.gov.au/action/PJUDG?jgmid=171107>