



## Health Professional Councils Authority

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Our Ref: HP16/7896

### HPCA LEGAL CASE NOTE:

#### **Daryll KNOWLES v Pharmacy Council of New South Wales [2016] NSWSC 7 (21 January 2016)**

##### **Background**

This case involved an argument about the extent of the procedural fairness to be given to a pharmacist, in the context of impending urgent interim action proceedings by the Pharmacy Council.

An investigation report prepared by the Pharmaceutical Regulatory Unit of NSW Health was forwarded to the Council in mid-December 2015. The Council considered that the report raised issues that required it to consider taking action under section 150 of the *Health Practitioner Regulation National Law (NSW)* [National Law (NSW)], alerted the pharmacist and on 16 December 2015 invited him to make written submissions by 7 January 2016. The intervening Christmas and New Year holiday period contributed to the complexity of this matter.

On 24 December 2015 the pharmacist requested an extension of time for the making of submissions. When that request was denied, a summons was filed in the Supreme Court on 6 January 2016 seeking an injunction to restrain the Council from considering the matter under section 150. By consent, further time for making submissions was given with the deadline extended to 19 January 2016. On 18 January 2016 the pharmacist made preliminary submissions to the Council but sought a further extension of time on the basis that he had been unable to obtain further information from NSW Health about the report. When the second request for an extension of time was denied, the pharmacist's legal representatives had the summons relisted as a matter of urgency and it was heard on the day before the Council was scheduled to consider the report and submissions under section 150.

The amended summons sought an order restraining or prohibiting the Council from further considering or proceeding to determine the matter under section 150 of the National Law (NSW), until the pharmacist had obtained the information he had sought from NSW Health. The summons was grounded in the supervisory jurisdiction of the Supreme Court under section 69 of the *Supreme Court Act* and an alleged denial of procedural fairness. It was argued that the pharmacist had not been given a reasonable opportunity to respond to the

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allegations in the investigation report, and investigate the sources of information for those allegations.

### **Analysis**

The pharmacist was unsuccessful, the amended summons was dismissed and a costs order was made against him. The decision of His Honour Judge Lindsay gives insights into the role of procedural fairness in section 150 matters. In this case the rules of procedural fairness were seen to be: “....*capable of flexible adaptation to the imperatives of a need for urgent decision-making...*” and as “....*an aid (not necessarily an impediment) to the making of sound decisions.*” His Honour also alluded to instances where the rules of procedural fairness might need to be modified or dispensed with because their strict application would frustrate the ability of the decision maker to exercise its jurisdiction – although that was not the case in this particular matter.

The decision focussed on the imperative language of section 150 of the National Law (NSW). Under that section the Council contemplates public interest considerations and risk to public health and safety to determine if it is *appropriate* to take interim action under section 150, to impose conditions on a practitioner’s registration, or to suspend the registration of a practitioner. In circumstances where the Council finds that it is appropriate to take action, section 150(1) provides that it must take action.

### **Conclusion**

The Supreme Court did not intervene to stop the Council from exercising its statutory functions under section 150 because there was no evidence that the Council would not accord the practitioner procedural fairness in its decision making. The imperative nature of section 150 obligations for the Council and the interim nature of any action taken, meant that the principles of procedural fairness had to adjust to the circumstances of the case. Here the pharmacist had supplied preliminary submissions and put the Council on notice about the issues associated with obtaining further information. Procedural fairness did not require that the statutory processes be delayed whilst the source material was obtained from a third party and considered so that more fulsome submissions could be made by the pharmacist.

The full text of the decision can be obtained by using the link below:

<http://www.austlii.edu.au/au/cases/nsw/NSWSC/2016/7.html>

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