



## New South Wales Medical Tribunal

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| <b>CITATION :</b>             | <b>Woolcock v Medical Board [2009] NSWMT 3</b>  |
| <b>TRIBUNAL:</b>              | <b>Medical Tribunal</b>   |
| <b>PARTIES :</b>              | Dr James WOOLCOCK<br>NSW Medical Board  |
| <b>FILE NUMBER(S) :</b>       | 40009 of 2009   |
| <b>CORAM:</b>                 | Murrell, SC DCJ   |
| <b>CATCHWORDS:</b>            | Service of fresh evidence in a s 95 appeal - nature of inquiry under s 66 - nature of appeal under s 95 - jurisdiction under s 154(1).            |
| <b>LEGISLATION CITED:</b>     | Medical Practice Act 1992 ss 66, 86, 87, 95, 98 and 154,  |
| <b>CASES CITED:</b>           | Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission [2000] HCA 47;<br>Lindsay v NSW Medical Board [2008] NSWSC 40 |
| <b>DATES OF HEARING:</b>      | 16/9/09   |
| <b>DATE OF JUDGMENT:</b>      | 24 September 2009   |
| <b>LEGAL REPRESENTATIVES:</b> | Mr M Lynch for the Applicant<br>Ms D Ward for the Respondent  |
| <b>ORDERS:</b>                |   |

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### JUDGMENT:

1 Pursuant to s 66 of the *Medical Practice Act* 1992, on 9 January 2009 the Medical Board imposed conditions on Dr Woolcock's practice of medicine. The Board had formed the opinion that the doctor was impaired because of his use of alcohol. Under s 95 (1)(b), the doctor lodged an appeal to the Medical Tribunal against the conditions imposed by the Board. The Board then served the doctor with the material that it proposes to place before the appeal Tribunal, including statements that were not considered at the original inquiry.

2 Meanwhile, having formed the opinion that the doctor suffered from an impairment, as required by s 66C, the Board consulted with the Health Care Complaints Commission. Neither the Board nor the Commission considered that the matter should be dealt with as a complaint. Consequently, pursuant to s 66C (6), the matter was referred to an Impaired Registrants Panel. A Panel was convened. The Panel inquiry is listed for 18 November 2009.

3 The immediate question is whether, on the s 95 appeal, the Tribunal can consider the new material served by the Board. This question raises the underlying issue of the nature of a s 95 appeal.

4 A Deputy Chairperson's power to decide a question of law or procedure is found within s 154 (1) of the Act. It is arguable that the Deputy Chairperson who is appointed to preside over the proceedings generally should decide a preliminary procedural matter. However, neither party took this point and both parties agree to be bound by my decision.

5 There are three general categories of appeal: *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47 (per Gleeson CJ, Gaudron and Hayne JJ at [12] - [13]). First, in a case of a strict appeal, the appellate tribunal is limited to determining whether the decision made at the first instance was correct on the evidence and the law as it stood when the decision was made. In such cases, the appellate tribunal cannot receive further evidence. Its powers are limited to setting aside the decision under appeal and, if appropriate, substituting the correct decision. Second, in the case of an appeal by way of rehearing, the appellate tribunal can choose to receive additional evidence and its powers are not restricted to making the decision that should have been made in the first place. Finally, in the case of a hearing de novo, the matter is heard anew and a decision is given on the evidence presented at the hearing. However, the concept of an "appeal" encompasses a range of processes. In a minority judgment in *Coal and Allied Operations* at [69], Kirby J stated:

*"In every case where the issue is that of the duty and function of an appellate court or tribunal, the only safe starting point is a careful examination of the language and context of the statutory provisions as affording the appellate right, together with a consideration of the powers enjoyed by, and duties imposed on, the body to which the appeal lies."*

### Section 66 and the Legislative Scheme

6 The object of the *Medical Practice Act* 1992 is to protect the health and safety of the public and, in the exercise of functions under the Act, the protection of the health and safety of the public is to be the paramount consideration: s 2A (1) and (3).

7 Section 66 is to be found within the Part 4 Division 5 of the Act. Part 4 deals with complaints about medical practitioners. Division 5 is entitled "Powers of the Board for the Protection of the Public".

8 Section 66 (1) of the Act provides:

- (1) The Board must, if at any time it is satisfied that it is appropriate to do so for the protection of the health or safety of any person or persons (whether or not a particular person or persons) or if satisfied that the action is otherwise in the public interest:
- (a) by order, suspend a registered medical practitioner from practising medicine for such period (not exceeding 8 weeks) as is specified in the order, or
  - (b) impose on a registered medical practitioner's registration such conditions relating to the practitioner's practising medicine as the Board considers appropriate.
- (emphasis added).

Prior to June 2008, the Board's power to take action under s 66(1) was confined to cases in which it was satisfied "that such action is necessary for the purpose of protecting the life or physical or mental health of any person".

9 A doctor who is dissatisfied with a decision made under s 66 may apply for review of the decision: s 66AB. On the review, the Board must consider any relevant new material, including material submitted by the doctor: s 66AB (2)(b).

10 Following a Board decision to take action under s 66, the matter proceeds down one of three paths. If the Board has taken action on the basis of a doctor's impairment, the Board must consult with the Commission, after which the matter is either dealt with as a complaint or referred to the Impaired Registrants Panel to be dealt with under Part 5 of the Act: s 66C. If the Board has taken

action on the basis of doctor incompetence, with the Commission's concurrence the matter can be referred for performance assessment under Part 5A: s 66 (4). In any other case, the matter must be referred to the Commission "for investigation" to be dealt with as a complaint under Part 4 of the Act: s 66B (1) and (3). The matter must be referred to the Commission as soon as practicable and, in any event, within seven days of the Board taking action under s 66: sections 66B (1).

11 Section 95 (1) provides:

- (1) A person may appeal to the Tribunal:
    - (a) against a suspension or extension of a suspension by the Board under Part 4, or
    - (a) against conditions imposed by the Board on the person's registration under Part 4 or Part 5 or any alteration of those conditions by the Board, or
- ...

12 Section 95A (1) provides:

- (1) Without affecting any right of appeal under section 95, a registered medical practitioner who is the subject of action taken by the Board under section 66, 66A or 66AB may appeal with respect to a point of law to the Chairperson of the Tribunal or a Deputy Chairperson nominated by the Chairperson.
- ...

The terms of ss 95 and 95A can be contrasted with those of ss 87 and 98A.

13 Section 87 confers a right of appeal to the Tribunal against a decision of a Professional Standards Committee. Committees deal with less serious complaints and have no power to suspend or de-register. In relation to an appeal to the Tribunal against a decision of a Committee, s 87 (4) provides:

- (4) The appeal is to be dealt with by way of rehearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the inquiry, may be given.

14 Sections 87 and 95 were introduced when the Act commenced, and there has been no relevant amendment to either section.

15 Section 98A provides a right of appeal to the Tribunal against a decision of a Performance Review Panel. Such Panels deal with less serious issues of professional performance. Under Part 5A they may take action such as ordering a doctor to complete an education course: s 86N. Relevantly, s 98A (4) is identical to s 87(4).

16 Neither s 95 nor s 95A contains a provision in relation to fresh evidence such as that contained in s 87(4) or s 98A (4).

17 In *Lindsay v NSW Medical Board* [2008] NSWSC 40, Hall J described the place of s 66(1) within the scheme of the Act as follows:

*"[142] It is apparent from the statutory scheme that the Board (or its delegates) acting under s 66(1) may be required to act upon limited or incomplete information. This is*

*reflected in the terms of s 66 B (1) of the Act, in that the Board is required by that section, as soon as practicable after taking any action under s 66, and in any event within seven days after taking that action, to "refer the matter to the Commission for investigation". This provision is consistent with the notion that earlier discussed as to the nature of an enquiry for the purposes of s 66(1). The matters of complaint will, after the making of an order under s 66, be the subject of investigation with a view to establishing matters and evidence establishing the merits of them or otherwise."*

### **The Nature of a Section 95 Appeal**

18 Section 66 action is a temporary or emergency measure, designed to protect public health and safety pending full investigation of possible risks to health or safety. Section 66(1) action is in the nature of an ex parte interlocutory order. Consistent with s 66 (1) fulfilling a short term and emergency function, the threshold for s 66 (1) action is low: the Board need not be satisfied that action is "necessary", only that it is "appropriate". Having taken temporary action, the Board may decide that its action was, after all, inappropriate, and may unilaterally discontinue the action : s 66A. Alternatively, through the process of a review in which fresh evidence is considered, the affected practitioner may seek to persuade the Board to reverse it's action: s 66AB. The facts that s 66(1) action is temporary, ex parte and taken on the basis of limited information suggest that any appeal from such action would have a narrow scope.

19 Ultimately, all matters that remain the subject of s 66(1) action by the Board will be dealt with by an Impaired Registrants Panel (whose powers are restricted to counselling, resolving matters by agreement and making recommendations: s 80 (2)), a Performance Review Panel (whose decisions are subject to a section 98A (4) appeal), a Professional Standards Committee (whose decisions are subject to a section 87 (4) appeal) or the Tribunal. The subject matter of a s 66(1) action is the subject of subsequent full investigation and inquiry, and that the result of that inquiry is appellable. Consequently, any broad ranging appeal against s 66(1) action would pre-empt and/or duplicate the subsequent process.

20 The legislature has expressly provided that appeals under sections 87 and 98A are by way of a rehearing in which fresh evidence may be received, but there is no equivalent provision in s 95. This omission supports the view that a s 95 appeal is not a rehearing in which fresh evidence may be received. As s 95A provides a right of appeal against s 66 (1) with respect to a point of law, it would seem that a s 95 appeal is a rehearing on the merits in which the evidence is confined to the material that was before the Board.

21 The fresh material served by the Board cannot be considered on the appeal.

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