

Minter Ellison Health News

25 February 2010

Case law Commonwealth

C Incorporated v Australian Crime Commission

The Full Court of the Australian Federal Court examined the way that administrative law interacts with the principle of patient confidentiality when a government agency requires information from individual medical records.

To assist the Northern Territory Emergency Response (the NT Intervention), the Australian Crime Commission (ACC) ordered an Aboriginal community-controlled primary health services provider (HSP) to disclose the identities:

- of adult patients treated in relation to domestic violence,
- of children under 16 who had sexually transmitted infections (STIs), pregnancies or who sought contraception, and
- of children treated in relation to child abuse.

The HSP objected to the order on policy grounds that ranged from the expense of employing extra staff to extract information from patient records through to an assessment that some indigenous people would be less likely to seek treatment for STIs if they could not be confident in the absolute confidentiality of their medical records. Expert opinion was obtained to the effect that the breach of trust that complying with the order would represent in the minds of some aboriginal people would be likely to contribute to additional deaths from gonococcal infection.

The HSP adopted the pseudonym 'C Incorporated' to protect its anonymity whilst challenging the validity of the order under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act).

At trial, it was found that the order was invalid to the extent that it compelled the disclosure of information about child patients because the ACC examiner who made the order had failed to accord the child patients procedural fairness. The view was taken that international human rights law that has not been adopted as part of Australian law nevertheless creates a legitimate expectation that children's best interests would be taken into account as a primary consideration in any administrative decision concerning them.

The trial judge reviewed not only the formal written reasons that were provided for the making of the order, but notably also the subsequent testimony of the decision maker responsible for the order about what matters were in his mind at the time the order was made. On appeal, the Full Court disagreed with this aspect of the trial judge's approach by holding that the primary, and possibly the only, recourse to determine whether an administrative decision maker has had regard to the interests of patients must be the formal statement of reasons prepared under the legislation that authorises the decision.

The trial judge found that the children's best interests had not been taken into account in the making of the order to the extent that their best interests in remaining patients of the HSP and receiving STI treatment would be affected by the perceived deterrent effect of allowing their personal details to be passed on for law enforcement purposes. The trial judge struck out the order as it applied to the disclosure of information about child patients but upheld it as it applied to the disclosure of information about adult patients.

The HSP appealed to the Full Court to have the order set aside entirely. The ACC cross-appealed against the decision judge to allow the HSP to withhold information about child patients.

The HSP argued that the decision maker was obliged to make additional enquiries about the potential detriment to be suffered by the patients from the issue of the order, and that without those inquiries it was either impossible to find that proper consideration had been given to a relevant matter in the decision or that it was unreasonable to make the decision without the further inquiries. The Full Court held that the level of consideration that the ADJR Act requires to be given to a decision for that decision to be valid does not depend upon decision makers instituting further enquiries beyond the information provided to them when it can be established that all relevant considerations have in fact been taken into account. The Court went on to look at the formal statement of reasons prepared by the decision maker. This statement incorporated by reference a letter of legal advice provided to the ACC that commented on the issue of the best interest of patients as particularised in terms of public health concerns. On this basis, the Court found that the relevant consideration of the best interests of patients had in fact been considered when the decision was made, and further enquiries were therefore not required in this case. The appeal was dismissed for this reason.

Because of the comment in the letter of legal advice, the Court found that the decision maker actually had considered the interests of child patients to the extent that was required for the order to be valid. In particular, the Court was influenced by the fact that the background of the order was the NT Intervention, the very purpose of which was the amelioration of sexual abuse and other violence directed against children. The Court was critical of the trial judge's reliance on international law, and found instead that the obligation to consider the best interests of indigenous children when making decisions about them arose by clear implication from the context of the NT Intervention itself. The cross appeal was allowed, and so despite a sustained effort in the courts, the HSP is now required to comply with the ACC order in its entirety and disclose all of the confidential information that the ACC required.

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Flaherty v Secretary, Department of Health and Ageing

This decision concerns the transfer of a pharmacy business to a new pharmacist from a pharmacist whose right to practice was suspended.

A new pharmacist sought to take over the pharmacy business, which in practical terms entails a transfer of approval to supply drugs under the Pharmaceutical Benefits Scheme (PBS). This power is conferred on the Secretary of the Department of Health and Ageing under the *National Health Act 1953* (Cth) (the NH Act). The Secretary's power to grant approvals to supply drugs under the PBS has been delegated to the Chief Executive Officer of Medicare Australia, who may seek recommendations from the Australian Community Pharmacy Authority (ACPA). Medicare has developed a practice of deactivating approvals as an alternative to cancelling them, although this deactivated status is not provided for in the legislation.

After a period of deactivated status, a decision was made to cancel the PBS approval on 20 April 2009. On 1 April, however, a new pharmacist had made a written offer to 'purchase the [PBS] approval number' and the other assets of the business for a substantial sum, and Medicare was notified of this written offer. The offer did not, however, reach the pharmacist who owned the practice until after the PBS approval was cancelled.

Medicare was requested to return the PBS approval number from cancelled status to deactivated status to facilitate the transfer of the practice. It was submitted that this would represent procedural fairness and was clearly in the community interest because the pharmacy served a country town.

On 26 May 2009, Medicare decided to reinstate the approval with deactivated status and a series of extensions of the 'deactivated status' was granted because of the problems with securing the lease on the business premises.

Another pharmacist who was a potential business competitor of the pharmacist to whom the PBS approval number was to be transferred challenged the decision to allow the PBS approval number to be cancelled and then subsequently un-cancelled by seeking review under sections five and six of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act).

Medicare defended its actions on the grounds that (1) the cancellation on 20 April 2009 was not actually a valid cancellation because the pharmacist had been denied procedural fairness by reason of the difficulty communicating with her in prison (the imprisonment related to driving offences) and (2) that in any event, Medicare has the power to un-cancel a PBS approval number as a matter of statutory interpretation.

The court accepted that there had been a denial of procedural fairness in the circumstances and that there was no defect in the decision that recognised this denial under the ADJR Act, so the decision to cancel was of no legal effect. Although it was unnecessary to decide the point, the court considered that the cancellation power could not be exercised under the NH Act in a way that would allow validly cancelled PBS approval numbers to ever be un-cancelled.

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News

Biotechnology

Narhex Life Sciences collapses

Narhex Life Sciences Limited has been placed in administration after a long battle for survival, three months after the death of its Executive Chairman.

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Soust guilty of Select market manipulation

The Federal Court has found that former Select Vaccines Managing Director and CEO Dr Martin Soust engaged in market manipulation and false trading in the company's shares last year.

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E-Health

Long road to e-health record rollout

An updated business case for a national e-health record rollout is being prepared for the Council of Australian Governments, but there is no guarantee the project will be considered this year.

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Software firms ill-informed on health ID plan

Software makers are yet to see full technical specifications for the healthcare identifier regime that is due to start on July 1 2010, provided that the enabling legislation introduced to Parliament by Health Minister Nicola Roxon is passed.

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Health Insurance

NIB nabs better half year

Better underwriting margins and the recovery in financial markets have helped private health insurer NIB to a significantly improved half-year net profit result of \$43 million.

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Skin cancer death leads to WorkCover Queensland payout

A record payout by WorkCover Queensland has been made to the young family of a construction worker who died at 43 from skin cancer.

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Health funds accused of profiteering

Health funds say increased consumer use of health services is sending their costs skyrocketing but they are under pressure from Federal Health Minister Nicola Roxon, who has suggested they are profiteering.

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Hospitals

Hospitals failing to see emergency patients on time

Prince of Wales hospital is reportedly one of the worst in NSW when it comes to seeing emergency patients on time, with more than half of those categorised as having a potentially life-threatening condition waiting too long.

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Pharmaceuticals

Drug company 'knew of diabetes pill risk'

Australian authorities are closely monitoring a common diabetes drug after allegations its manufacturer, GlaxoSmithKline, knew of heart attack risks years before evidence of a link became public.

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Pharmacists seek right to prescribe

The Pharmaceutical Society of Australia is pushing to allow chemists to prescribe drugs, arguing the reform is necessary to relieve hard-pressed GPs.

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Swine flu outbreak boosts Biota

Biota Holdings Limited has reported a surge in performance, with first-half year net profit up from \$7.2 million to \$33.5 million. The company expects a record 2010 financial year result, based largely on Relenza royalties and key project expansions. Total revenue for Relenza increased by 84% to \$61.7 million.

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CSL in the pink as vaccine sales rocket

CSL Limited has reported a 23 per cent lift in first half profit and continues to expect a rise in annual earnings, as demand for plasma therapies continues to grow.

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Pan founder back in court

Pan Pharmaceuticals founder Jim Selim is expected to give evidence in a \$120 million class action against the Federal Government and officers of the Therapeutic Goods Administration for their handling of the health scare that led to his company's collapse.

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Preventative Health

Fast foods down for calorie count in Vic

Fast food outlets in Victoria may have to offer a calorie count on their products under a State Government plan to fight diabetes.

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New Zealand

\$4m for diabetes research

The Government is handing biotech entrepreneur Living Cell Technologies more than \$4 million to boost its work on transplanting pig tissues into people with type-1 diabetes.

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Low immunisation rates cause concern

New Zealand's poor immunisation rates are endangering children's lives, the chairman of a parliamentary inquiry into national immunisation levels says.

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Red tape to be unwound from toothpastes, shampoos

Regulations that classify toothpastes, anti-dandruff shampoos and mouthwashes as medical products will be 'tweaked' in a move that could see greater variety on supermarket shelves (in New Zealand).

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Further Information

Brisbane

Shane Evans

T +61 (0)7 3119 6450

Melbourne

Jacinda de Witts

T +61 (0)3 8608 2276

New Zealand

Paul Radich

T +64 (0)4 498 5019

Sydney

Lynne Peach

T +61 (0)2 9921 4800

Adelaide

Chris Sweet

T +61 (0)8 8233 5406

Canberra

Paul McGinness

T +61 (0)2 6225 3257

Perth

Deborah Templeman

T +61 (0)8 9429 7510

To email Australian lawyers use firstname.lastname@minterellison.com

To email New Zealand lawyers use firstname.lastname@minterellison.co.nz

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