CASE NOTE
LEE v MASKELL-KNIGHT

Lex Holcombe and Sally Nelson*

This Full Federal Court case of *Lee v Maskell-Knight*[1] dealt with a decision of a statutory office holder under the *Health Insurance Act 1973* (Cth) (the Act) that certain action should be taken in relation to a medical practitioner. The decision would be largely unremarkable if it were not for Finkelstein J's dissenting judgement.

The decision was the final process under the Professional Services Review Scheme in Part VAA of the Act. Following an investigation, the Professional Services Review Committee made a finding that Dr Lee had engaged in 'inappropriate practice' as defined in section 82 of the Act. That finding and supporting reasons were then passed to the statutory office holder, the Determining Officer, appointed under then section 106Q of the Act to decide whether certain action should be taken in relation to Dr Lee.

The Act envisaged a two stage process for the determination of the decision by the Determining Officer. Firstly, the Determining Officer would form a preliminary view of the decision that he/she would make, and secondly that office holder would make a final decision after considering any submission received from the practitioner – a very common statutory and administrative process.

In this case, the forming of a preliminary view, and the final decision, were made by two separate individuals. At the time of the making of the final Determination, the officer who normally occupied the position of Determining Officer was away and another officer was acting in that position.

The medical practitioner applied for review of the decision on the ground that, inter alia, the final determination made was invalid because the Act required that the final determination be made by the same person who made the draft determination.

Decision

In holding the decision to be valid, the majority (Hill and Marshall JJ) stated that the question of whether the Act requires both the power to make a draft determination and the power to make a final determination to be exercised by the same person depends upon the nature of the power and all the circumstances of the case. In considering the circumstances of the case regard may properly be had to the practicalities of administration[2].

The majority conceded there was some support for the view that the legislation envisaged the whole process would be performed by only one person. The legislation could be said to provide for a process beginning at the draft determination and proceeding through a decision where the Determining Officer reconsiders the draft determination in light of any submissions made by the medical practitioner. However, the majority emphasised the administrative impracticalities of such an approach. In particular, the majority found the specific time limits specified in the legislation in relation to the decision-making process appear to have been

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calculated on the premise that there would be no break in the process, such as for a change in the office of Determining Officer[3].

The majority also found that the Act contemplated that the instrument of appointment of a Determining Officer might refer not to a person by name, but to a person as the holder 'for the time being of a particular office or appointment'[4]. The majority were of the opinion that this suggested there would be likely to be changes in the identity of the Determining Officer.

In dissent, Finkelstein J found that the decision was invalid because the nature of the discretion required the same decision-maker to make both the preliminary and final determination.

In reaching this conclusion, Finkelstein J stated that the second Determining Officer, in making the final determination, would either have to reach a preliminary decision of his own (taking into account the initial Determining Officer's report), or step in the shoes of the initial Determining Officer and treat the preliminary decision as his own. In either case, Finkelstein J stated there would be the risk that the second Determining Officer would take a different view of the facts from the initial Determining Officer, or would be in a situation where he or she cannot identify and give precisely the same weight to the same factors which were on the mind of the first Determining Officer, or form the same judgment as that which led the initial Determining Officer to make his or her preliminary determination.

Finkelstein J stated that in his opinion the Parliament did not intend to establish two different regimes for making the determination depending on whether there is one or two Determining Officers. As a consequence, Finkelstein J was of the opinion that in the rare cases where the same Determining Officer cannot be involved in the whole process, the process must begin afresh[5].

Commentary

The arguments put forward by Finkelstein J do carry some force. The draft determination would have been formulated by the then Determining Officer based on his or her reading of the findings of the Committee and consideration of the reasons. The view that he or she formed at that time would be predicated on a response to the information then provided. The second Determining Officer would have referred to the same material but would also have available the practitioner's response to the draft determination.

As Finklestein J noted, reasonable people may form different views on exactly the same information. He cited the High Court case of *Norbis v Norbis*[6] in which the Court undertook an analysis of the discretion afforded to an appeal Court in effectively reviewing the decision of an inferior Court. In discussing the assessment of the evidence by a Judge, Mason and Deane JJ said '[B]ecause these assessments call for value judgements in respect of which there is room for reasonable differences of opinion, no opinion being uniquely right, the making of the order involves the exercise of a judicial discretion.'[7]

What if the second Determining Officer did not agree with the sanctions set out in the draft determination by the first Determining Officer? The draft determination sets out the very basis on which the practitioner is to respond and therefore may impermissibly circumscribe the role of the second Determining Officer. The draft determination and the response by the practitioner to that draft predetermine the scope of the final Determination. What if the second Determining Officer, given free licence, would have set out different sanctions in the draft determination? Does the fact that he or she did not have that opportunity by itself give rise to concerns about natural justice and a practitioner's opportunity to meet the real case they are to be assessed upon. That is, the particular view or opinion in the mind of the person who will be actually making the decision which will impact adversely on their rights.

The reasoning of Hill and Marshall JJ leads to a pragmatic result in this case. However, they leave the question open, noting that whether an Act requires the same person to perform both steps of a process will 'depend on the nature of the power and all the circumstances of the case'.[8] One of the considerations in determining whether the Act requires the same person is the 'practicalities of administration'.[9]

Where a two step process is not prescribed in legislation but the decision-maker is affording a person a right to respond to an adverse view prior to making a decision under legislation, the situation may be slightly different. In this circumstance, there is no statutory timeframe or statutory recognition of the entity that is to form the initial view. Public policy, administrative convenience, significance and consequences of the decision, impact on third parties, type of review rights, whether the legislation is protective, and policies and practices of the agency may all be factors which are relevant in the consideration of whether the same person should be involved in both steps of the process.

The considerations may be slightly different if the decision-making entity was a committee and the membership of the committee changed during the process.

Practical implications

Where legislation provides for a decision which involves several stages, *Lee v Maskell-Knight* supports the stages to be undertaken by different people in cases where it is not administratively practical to have the same individual undertake the whole process.

An example of where it would not be administratively practical to have one individual involved in every stage of the decision-making process might include situations where legislation prescribes time limits for the decision. In such a case, the compliance with the time periods may be essential and the implication arises that if the same person is not available to make the final decision then either the process has to start again or the final decision must be made by a new decision-maker. Considerations on whether the process should start again may be, once again, overall statutory time limits, public policy issues or practical matters.

Although Finklestein J was in the minority, there is logic in his position, and even the majority emphasised that whether or not there can be a change in persons making preliminary and final decisions will depend on the nature of the power and the circumstances

To avoid risk, agencies should try to ensure that the same individual is involved in all parts of the decision-making process. Where a decision-maker must be substituted, agencies should consider beginning the process afresh if it is practical and time and resources allow. If it is impractical to begin the process afresh, agencies should fully document the reason why the same person cannot make the decision and also why it is impractical to start the process afresh.

Endnotes

1 [2004] FCAFC 2 (7 April 2004).
2 At 38.
3 At 36.
4 At 31.
5 At 122.
6 (1986) 161 CLR 513.
7 At 518.
8 At 38.
9 Id.