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| Case Name: | Burton v Osteopathy Council of New South Wales |
| Medium Neutral Citation: | [2015] NSWCATOD 150 |
| Hearing Date(s): | 13 and 14 July 2015 |
| Date of Orders: | 18 December 2015 |
| Decision Date: | 18 December 2015 |
| Jurisdiction: | Occupational Division |
| Before: | R Titterton - Senior Member Dr T Stewart - Professional Member Dr P Thomas - Professional Member S Lovrovich - General Member |
| Decision: | The appeal is dismissed |
| Catchwords: | Health Practitioner Regulation National Law - Suspension of health practitioner pursuant to s 150 of the National Law – Appeal pursuant to s 159 of the National Law – Nature of an appeal pursuant to s 159 |
| Legislation Cited: | Civil and Administrative Tribunal Act 2013 Health Care Complaints Act 1993 Health Practitioner Regulation National Law (NSW) No 86a Medical Practice Act 1992 |
| Cases Cited: | Bova v Pharmacy Council of NSW [2014] NSWCATOD 40 Briginshaw v Briginshaw (1983) 6 CLR 336 Cahill v Kenna [2014] NSWSC 1763 Forster v Hunter New England Area Health Service [2010] NSWCA 106 HCCC v Smith [2015] MSWCATOD 85 Kozanglou v Pharmacy Board of Australia [2012] VSCA 295 Lindsay v Medical Board of NSW [2008] NSWSC 40 Reid v Medical Council of NSW [2014] NSWCATOD 152 Smith v the Nursing and Midwifery Board of Australia [2013] NSWNMT 10 Sudath v HCCC [2012] NSWCA 171 Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd [2009] NSWSC 49 WD v Medical Board of Australia [2013] QCAT 614 |
| Category: | Principal judgment |
| Parties: | Dr Alec Burton (Appellant) Osteopathy Council of NSW (Respondent) |
| Representation: | Counsel:   Mr Hunt (Respondent)   Solicitors:   Mr Atkin (Applicant) |
| File Number(s): | 1520058 |
| Publication Restriction: | Pursuant to Schedule 5D cl 7 of the Health Practitioner Regulation National Law publication of the name of the patient the author of the complaint the subject of the Council’s investigation is prohibited. |

reasons for decision

Introduction

1. The appellant Dr Alec Burton appeals in respect of the decision of 3 March 2015 of the respondent, the Osteopathy Council of NSW (the Council), to suspend Dr Burton’s registration as an osteopath pursuant to s 150 of the *Health Practitioner Regulation National Law (NSW) No 86a* (National Law).
2. The appeal is brought pursuant to ss 159 and 159B of the National Law.
3. For the reasons that follow, the Tribunal has decided to dismiss the appeal, and to confirm the suspension of Dr Burton’s registration as an osteopath.

Background

1. Dr Burton, who is 85 years old, is registered with the Australian Health Practitioner Regulation Agency (APHRA) as both an osteopath and chiropractor. In February 2014 a complaint was lodged by a patient, to whom we will refer to as Patient A, with the Health Care Complaints Commission (HCCC) concerning a prolonged water-only fasting program that the patient undertook under Dr Burton’s guidance.
2. As part of its investigation into that complaint, the Council requested that Dr Burton attend an interview on 20 October 2014, in order for it to gain an insight into the nature of the osteopathic treatment he provided. At that interview, the members of the Council found his description of the manual therapies he allegedly provided to be vague and and unpersuasive. It considered him to be “an extremely dangerous practitioner” who was placing the public “at great risk”. The Council ordered that Dr Burton undertake a performance assessment in accordance with the National Law.
3. The performance assessment was conducted on 3 December 2014 by Dr Sandra Grace. Dr Grace considered that the observed conduct of Dr Burton during three osteopathic consultations to be significantly below the standard reasonably expected for an osteopath of Dr Burton’s qualifications and years of experience. The Council subsequently conducted an interview with Dr Burton on 23 February 2015.
4. For the reasons appearing in the Council’s decision of 3 March 2015, the Council was satisfied that Dr Burton’s professional performance appeared to be so unsatisfactory that suspension of his registration pursuant to s 150(1) of the National Law was the only appropriate course to take for the protection of the public.

Grounds of Appeal

1. By external appeal form filed 30 March 2015, Dr Burton appealed against the Council’s decision of 3 March 2015 on the following bases:
2. A full reconsideration of the matter by the Tribunal on its merits.
3. Additionally/alternatively upon the point of law that the decision was not authorised under s 150 of the National Law and was void at law because, among other matters:
4. The Council acted upon the direction or urging of the Health Care Complaints Commissioner and in so doing the Council took into account irrelevant matters in the exercise of its power under s 150 of the National Law;
5. The Council was not satisfied that it was appropriate to make the decision for the protection of the health of the safety of any persons because it was in the public interest.

Objections to documents

1. At the hearing the appellant was represented by Mr Atkin, Solicitor, the respondent Council by Mr Hunt of counsel. Only the Council filed documents prior to the hearing, and various objections were made, and ruled upon, during the course the hearing, which was conducted on 13 and 14 July 2015. The Tribunal indicated at the time that it would give the reasons for its rulings in these reasons.
2. Prior to the hearing, the Council had filed, relevantly:
3. The Council’s reasons for decision of 3 March 2015 (Document 2).
4. The Performance Assessment Report of Dr Grace dated 3 December 2014 (Document 3(a)).
5. The handwritten notes of Dr Grace dated 3 December 2014 (Document 3(b)).
6. Dr Burton’s written submissions dated 16 February 2015 (Document 3(c)).
7. Dr Burton’s continuing Professional Education records dated 23 February 2015 (Document 3(d)).
8. A Council interview with Dr Burton dated 23 February 2015 (Document 4)).
9. Various Osteopathy Board of Australia Codes and Guidelines (Ex 5, (a) to (d)).
10. Various Extracts from the National Law (Documents 6 to 8).
11. A document titled “HCCC Contact Priors” dated 30 April 2015, being a spread sheet setting out complaints made about and actions taken in respect of Dr Burton in the period 2003 to 2015 (Document 9)
12. The appellant objected to the tender of:
13. Document 2, on the basis of relevance and hearsay.
14. Documents 3(a) and (b), on the basis of Dr Grace’s expertise and lack of independence.
15. Document 4, on the basis of relevance, hearsay, prejudice (relying on s 135 of the *Evidence Act 1995*).
16. Document 5, on the basis of relevance.
17. Document 9, on the basis of hearsay.
18. The following additional materials were tendered at the hearing:
19. A biography of Ms Anne Cooper (Document 10).
20. An email from the Council to Dr Grace dated 26 November 2014 (Document 11)).
21. A statement of Mr Michael Jaques, Executive Officer of the Council, dated 14 July 2015 (Document 12).
22. Dr Grace’s resume (Document 13).
23. An email from Dr Grace to the Council dated 15 December 2014, attaching Dr Burton’s record of patients seen on 3 December 2014 (Document 14).
24. A letter from Dr Burton’s solicitors to the Council dated 25 June 2015 (Document 15).
25. An email from Council to Dr Burton’s solicitors to the Council dated 26 June 2015 (Document 16).
26. Dr Burton also objected to the tender of the statement of Mr Jaques. This statement relevantly provided the provenance to Document 9. He submitted that the appeal should be approached on the basis that his conduct warranting suspension was limited to the contents of the Performance Reports of Dr Grace. Dr Burton submitted that Mr Jaques’ statement was not relevant, and unfairly widened the case made against him.

Nature of the appeal

1. Many of the specific objections taken by the appellant and set out above, on overriding objection to the Tribunal receiving the documents was based on the nature or character of an appeal pursuant to s 159 of the National Law, in particular whether it was an appeal *de novo*.
2. Section 159(3) of the national law provides that “The appeal is to be dealt with by reconsideration of the matter by the Tribunal and fresh evidence, or evidence in addition to or in substitution for the evidence that was before the Council when it considered the matter, may be given”.
3. In support of this submission, Dr Burton relied on *Reid* *v Medical Council of* NSW [2014] NSWCATOD 152. In that decision the Tribunal proceeded on the basis that the appeal brought under s 159 “involves a hearing de novo”: see [1] and [107].
4. The Council submitted that the Tribunal, “standing in the shoes of the Council in reconsidering the matter pursuant to s 159” is permitted to consider the evidence before the Council “and other relevant and admissible evidence before it; [and] to contend otherwise is a nonsense”. The Council submitted that if Dr Burton’s position were adopted, it would vitiate a proper consideration of all relevant material both by the Council at first instance and by the Tribunal on review. In this respect the Council relied on *Bova v Pharmacy Council of NSW* [2014] NSWCATOD 40.
5. In *Bova*, the Tribunal considered an application for interlocutory orders. The practitioner had sought access to the email communications exchanged between members of the Council that constituted the relevant meeting. In that application, the Council resisted access to the email communications on a number of bases. Its primary argument was that, because an appeal under s 159 is an appeal de novo, the Tribunal would be considering "afresh" or "anew" the evidence relevant to whether there is a risk to the health and safety of the public associated with the practitioner's ongoing practice as a pharmacist. The respondent submitted that, as the Tribunal would be considering whether or not under s 150 of the National Law it was appropriate to impose conditions for the health and safety of the public, it was irrelevant what discussions are revealed by the email communications between the Council members. It submitted that what was relevant was the material that was before the Council including the report, and any fresh or further material adduced at the hearing of the appeal.
6. In *Bova*,the Tribunal noted that s 159 had not been the subject of appellate authority. After a detailed and careful analysis of relevant or analogous authorities (at [22] to [28]), her Honour Acting Judge Boland concluded:

29. I accept the majority of decisions to date on the interpretation of the NSW appeal provisions of the National Law regard the appeal rights as ones which provide for an appeal de novo. However, none of the NSW decisions discussed had the benefit of the observations of the Court of Appeal in Kozanoglu, albeit that discussion took place in the context of a different type of appeal under s 199 of the National Law as in force in Victoria, but not applicable in NSW.

30. It may be that an appeal under s 159 is not an appeal de novo in the strict sense of the definition of such an appeal (I note Osborn Concise Legal Dictionary defines "de novo" as "Anew") but a statutory hybrid or variant as described by the High Court in Dwyer. But two things are clear: the statute mandates the Tribunal engage in a "reconsideration of the matter", and in that deliberative process, it may receive fresh evidence, or evidence in addition to or substitution for the evidence which was before the Council when it considered the matter.

1. *Kozanglou v Pharmacy Board of Australia* [2012] VSCA 295 was a decision of the Court of Appeal of Victoria. As her Honour notes, the Court of Appeal considered the nature of an appeal pursuant to s 199(1)(e) of the National Law in force in Victoria. Section 199 relevantly provided that a person who was the subject of an appellable decision (as defined) may appeal against the decision to the appropriate responsible tribunal for the appellable decision. The Court of Appeal noted at [33] that the National Law did not provide any clear indication of the nature of of an appeal under s 199. After a lengthy consideration, the Court of Appeal concluded:

106 Turning to a consideration of the relevant legislation in this case, it would be unlikely that the legislature, in enacting the National Law, contemplated that an appeal from a decision to take immediate action would involve a rehearing de novo, in the fullest sense of that term. The [Immediate Action Committee (IAC)] (as delegate of the Board) is expected to act, as the name of the ‘immediate action’ regime suggests, immediately. That suggests a temporal limitation, and also a certain standard of speediness on the Board’s part. There must be a certain point in time to which the decision to act is ‘immediate’. It is the circumstances existing at that time that are relevant, and the belief spoken of in s 156 must be formed on the basis of those circumstances.

107 While the purpose of the immediate action provisions is the protection of the public – which would ordinarily strongly argue in favour of the relevant tribunal taking into account the most up to date material – only interim protection is envisaged. The practitioner’s suitability to practise is then revisited, on all the material, before the panel or responsible tribunal.

108 There is some attraction in the notion that the appeal should be viewed as a rehearing on the evidence before the original decision-maker, and nothing more. On the other hand, the better view seems to be, as we have previously indicated, that the decision should be considered in the light of not only that evidence, but also any additional evidence that bears directly upon the position as it was when the original decision was made.

109 The reason is simple. As we have indicated at paras [106]-[107], the IAC is expected to act immediately. Necessarily, therefore, the material contained in a notification is likely to be incomplete. It may contain assertions that cannot, upon mature reflection, be justified. Likewise, there may be deficiencies, or gaps, in the material provided which, given a little extra time, can easily be remedied.

110 A further reason why VCAT should be permitted to receive further material when reviewing an IAC decision is because it would be contrary to the objects of the National Law, and the rights which it expressly confers upon an affected party, to prevent that party from adducing exculpatory material, on appeal, which sheds a different light upon the allegations made in the notification. Of course, if evidence of that kind can be adduced on behalf an affected party, so too, it must follow, can evidence that points in a different direction.

1. After consideration of further authorities, the Court concluded at [119]:

… The appeal to a responsible tribunal under the National Law is neither an appeal in the strict sense, nor a rehearing de novo. It is rather a hybrid, whereby the material to be considered is confined to that placed before the initial decision-maker, but with the opportunity available to both parties to present additional evidence which bears directly upon that decision as originally taken. It is not ‘open slather’, but nor is it an appeal confined to error.

1. The Council’s counsel Mr Hunt conceded that this was an unsettled area, and submitted that it was not necessary for the Tribunal to decide between *Bova* and *Reid* as to the nature of an appeal pursuant to s 159 of the National Law. While he submitted the better view was that, whatever the nature of an appeal pursuant to s 159, it was at type of statutory hybrid, and it was clear that the Tribunal may receive fresh evidence, or evidence in addition to or substitution for the evidence which was before the Council, when it considers the appeal: s 159(3); *Bova* at [30].
2. The Council also relied on *Lindsay v Medical Board of NSW* [2008] NSWSC 40. That decision considered s 66 of the now repealed *Medical Practice Act 1992* which relevantly provided:

(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.

1. The respondent submits that the following matters set out in pars [77]ff are, in principle, applicable in these proceedings:
2. The decision process may necessarily not involve the Board or its delegates in a detailed examination of factual matters subjacent to a complaint or complaints.
3. An examination of that kind may appropriately be undertaken in proceedings before the Tribunal, and the Tribunal may exercise any power or combination of powers conferred on it.
4. A Tribunal in proceedings before it is not bound to observe the rules of law governing the admission of evidence, but may inform itself of any matter in such manner as it thinks fit.
5. The material relied upon the purpose of determining whether action should be taken may include material that would not conventionally be considered as strictly evidentiary in nature, eg, complaints and allegations.
6. The respondent submits that *Lindsay* was referred to with approval in *WD v Medical Board of Australia* [2013] QCAT 614 at [8], which paragraph set out the proper approach to be taken in what might be described as “immediate action matters”. Those principles were:

1, an immediate action order does not entail a detailed enquiry;

2. it requires action on an urgent basis because of the need to protect public health and safety;

3. the taking of immediate action does not require proof of the conduct; but rather whether there is a reasonable belief that the registrant poses a serious risk;

4. an immediate action order might be based on material that would not conventionally be considered as strictly evidentiary in nature, for example, complaints and allegations;

5. the mere fact and seriousness of the charges, supported by the untested statements of witnesses, in a particular case, might well be sufficient to create the necessary reasonable belief as to the existence of risk;

6. the material available should be carefully scrutinised in order to determine the weight to be attached to it;

7. a complaint that is trivial or misconceived on its face will clearly not be given weight;

8. the nature of the allegations will be highly relevant to the issue of whether the order is justified.

1. Mr Hunt submitted that QCAT had regard to *Lindsay* and other authorities from other States considering analogue predecessors to s 150. He submitted that the eight characteristics set out above in *WD* (and the other authorities), were relevant to s 150 proceedings.

Consideration

1. The Tribunal accepts the respondent’s submissions. It notes that the reasons in *Reid* do not suggest thatthere was any argument about the nature of a s 150 appeal by that Tribunal. It appears that the matter proceeded on an accepted basis that an appeal pursuant to s 150 of the National Law was an appeal de novo. With the greatest of respect to the Tribunal as constituted in *Reid*, the discussion in *Bova* at [22] to [30], does not appear to have been referred to it, or considered by it.
2. The respondent also submitted that it could hardly be correct that Dr Burton, who is the appellant bringing the appeal, could prevent the Tribunal from considering the evidence which was before the Council whose decision was the very subject of his appeal. The Tribunal considers that there is substance in this submission.
3. Accordingly, save for any other objections which are dealt with below, as the Tribunal may receive fresh evidence, and evidence in addition to or substitution for the evidence which was before the Council when it considered the matter, all the documents sought to be tendered by the Council were admitted at the hearing.

Other objections to the documents

1. The other bases on which objections to the tender of documents were relevance, hearsay, prejudice or a combination of those bases. In the case of documents 3(a) and (b) objection was taken on the bases of Dr Grace’s expertise and lack of objectivity and independence.
2. It is appropriate to note at this point the following relevant principles applicable in the Tribunal:
3. The Tribunal is not bound by the rules of evidence: see Sch 5D of cl 2 of the National Law and s 38(2) of the C*ivil and Administrative Tribunal Act 2013.*
4. While the Tribunal may inform itself in any way “it thinks fit”, it should base its decision upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined: *Sudath v HCCC* [2012] NSWCA 171 at [75]. See too *Smith v the Nursing and Midwifery Board of Australia* [2013] NSWNMT 10 where the Nursing and Midwifery Tribunal of NSW stated:

18.   Having made that observation [that the Tribunal may conduct proceedings as it thinks fit] , it is timely to recall the caution suggested by Evatt J in *R v The War Pensions Entitlement Appeals Tribunal; Ex parte Bott* [[1933] HCA 30](http://www.austlii.edu.au/au/cases/cth/HCA/1933/30.html); [(1933) 50 CLR 228.](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281933%29%2050%20CLR%20228) His Honour stated at 256:

But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice."

19.   As is observed by Aronson and Groves in *Judicial Review of Administrative Action* (5th Ed) at 581:

Provisions which free a tribunal or other body from the rules of evidence are best regarded as facultative. They are intended to provide procedural flexibility but not to displace logic or reasons. A decision-maker freed from the rules of evidence must therefore still consider the whether the material it can consider should in fact be considered. The litmus test is usually whether the material is rationally probative. It follows that provisions which free tribunals from the rules of evidence do not allow decision-makers to “draw inferences or jump to conclusions, which the available material did not adequately support”.

1. The onus of proof is the civil standard, as explained in *Briginshaw v Briginshaw* [(1983) 6 CLR 336](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281983%29%206%20CLR%20336) and other authorities including *Forster v Hunter New England Area Health Service* [[2010] NSWCA 106).](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2010/106.html) See the recent discussion of the authorities in *HCCC v Smith* [2015] MSWCATOD 85 at [131] to [134].
2. The paramount consideration in proceedings such as this is to protect the public: s 3A.
3. Given those principles, the Tribunal considers that, in relation to all documents, save for documents 3(a) and 3(b), the objections to the documents based on relevance, hearsay, prejudice or a combination of those bases should all be rejected. The Tribunal considers below the objections to Dr Grace’s documents and oral evidence.
4. The Tribunal will now briefly summarise the critical documents and evidence before it.

The decision of the Council of 23 February 2015

1. It is appropriate to summarise the decision of the Council of 23 February 2015. In summary, the decision states:
2. At a consultative meeting on 29 August 2014 the Health Care Complaints Commission referred a complaint to the Council regarding Dr Burton’s billing and record keeping of a Patient A while she was a live-in patient at his Arcadia Health Centre.
3. Council resolved to invite Dr Burton to attend an interview to discuss the compliant.
4. Dr Burton did so, and then participated in a performance assessment which concluded that his knowledge, skills and judgement were below the requisite standard.
5. The Council subsequently suspended Dr Burton’s registration pursuant to s 150 of the National Law for the protection of the health or safety of a person/s or in the public interest.
6. At the interview on 20 October 2014 the members found Dr Burton’s description of the manual therapies he allegedly provided to be vague and, when pressed for a more detailed description of different techniques and their associated benefits, the Council found his answers were similarly unpersuasive. Accordingly, the Council ordered that Dr Burton undertake a performance assessment.
7. That performance assessment was conducted at the Central Sydney Osteopathy at Stanmore on 3 December 2014 under the supervision of Dr Sandra Grace. Three osteopathic consultations, conducted with the patients’ consent, were designed to evaluate Dr Burton’s competence in terms of “osteopathic knowledge, clinical skills and professional attitudes for the safe and effective independent practice of osteopathy in the Australian Community”.
8. Dr Grace considered the observed conduct was significantly under the standard of that reasonably to be expected for an osteopath of Dr Burton’s qualifications and experience. Her criticism was strong in several areas: inadequate assessments to enable clinical reasoning and judgement, failure to obtained informed consent, failure to negotiate a treatment plan, and inadequate record keeping, as well as the following areas of concern: inadequate case history taking; failure to rule out “red flags”; failure to develop differential diagnoses; failure to establish working diagnoses; inadequate osteopathic treatments; inadequate patient handling and a failure to deliver any osteopathic care within each of the three assessments.
9. In addition, Dr Burton’s record of continuing professional development (CPD) which he supplied to the Council, did not demonstrate compliance with the National Board’s registration standards for 2012, 2013 and 2014.
10. The Council concluded that Dr Burton’s reportedly inadequate performance and assessment and subsequently at the proceedings before the Council rendered the council unable to have any confidence in Dr Burton’s knowledge and ability as an osteopath. The Council found that it could not be assured that Dr Burton offered safe and competent care in his practice, or that that safety of members of the public who sought his care could be assured.

Further objections to documents 3(a) and 3 (b)

Dr Burton’s submissions

1. The Tribunal notes that Dr Burton objected to the tender of Dr Grace’s performance assessment (and accompanying notes, which the Tribunal will collectively refer to as the performance assessment) of Dr Burton dated 3 December 2014. Objection was taken on a number of bases, including expertise, a failure to comply with the requirements of the Tribunal’s Procedural Direction No 3 *Expert Witnesses*, and a lack of independence.
2. In summary, Dr Burton first submits that Dr Grace’s performance assessment was prepared for another purpose (i.e. for the assessment of a complaint), did not comply with Tribunal Procedural Direction 3 and therefore was not admissible. Secondly, Dr Burton submits that while a request to be excused from for non-compliance with the Procedural Direction 3 could have been made by the respondent, no such request had been made. Thirdly, Dr Burton further submits even if such a request had been made, and excused by the Tribunal, the performance assessment ought not to be admitted as Dr Grace is not independent by virtue of exercising a statutory function on behalf of the respondent; in short, she prepared her performance assessment for the purpose of expert evidence being placed before the Council, and thence the Tribunal.
3. Dr Burton also submitted that, in accordance with ss 76 and 79 of the *Evidence Act 1995* (the Evidence Act), Dr Grace’s opinion evidence ought to be rejected as not falling within the s 79 exception. While Dr Burton did not submit that the Evidence Act was applicable to these proceedings (he described it as a “starting point” to ensure procedural fairness), he submitted that the Tribunal should be guided by its principles.

The respondent’s submissions

1. The respondent submits that Dr Grace was giving evidence in her performance assessment of facts she observed, and was not giving independent expert or expert evidence. The Tribunal asked the respondent’s counsel Mr Hunt about Dr Grace’s statements in the report that “in my opinion the conduct observed falls below the standard reasonably required of a practitioner of equivalent level of training and experience” and “in my opinion the observed conduct was significantly below the standard of that reasonably expected for an osteopath of Mr Burton’s qualifications and experience”. Mr Hunt said that that evidence had the character of an opinion, but was part of the obligation of undertaking a performance assessment, and that it was then part of the Council to draw its own conclusions based on this report and other evidence before it. The performance assessment did not come about for the purpose of an expert report, rather it came about for the purpose of the Council’s investigation of the particular complaint.
2. Mr Hunt also drew the Tribunal’s attention to the *Performance Program Guidelines* referred to above, and to s 155B of the National Law. Paragraph 2.3 of the *Performance Program Guidelines* states that the purpose of an assessment is to assess whether “the practitioner’s professional conduct is at or below the standard reasonably expected of a practitioner of an equivalent level of training or experience”. Section 155B of the National Law relevantly provides:

155B Report and recommendations by assessor [NSW]

(1) An assessor who is required by a Council to conduct a performance assessment in relation to a registered health practitioner must-

(a) conduct an assessment of the practitioner’s professional performance; and

(b) give a written report about the assessment to the Council.

1. Mr Hunt submitted that, given these matters, in particular that Dr Grace *must* conduct the performance assessment of Dr Burton, and *must* give a written report about that assessment to the respondent, the statements made by Dr Grace (that is the opinions stated) should properly be understood as being statements of her assessment of Dr Burton for the purposes of the performance assessment, and should not be characterised as expert opinion for some other purpose.
2. In summary, the respondent submits that Dr Grace is not an expert, and she is not required to be qualified as such.

Consideration

1. The Tribunal rejects Dr Burton’s submission that, being guided by the rules of evidence and the principles of the Evidence Act, it ought to reject the tender of the performance assessment. In this respect the Tribunal repeats the principles set out at [30] above. In summary:
2. The Tribunal is not bound by the rules of evidence: see Sch 5D of cl 2 of the National Law and s 38(2) of the C*ivil and Administrative Tribunal Act 2013.*
3. While the Tribunal may inform itself in any way “it thinks fit”, it should base its decision upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined: *Sudath v HCCC* [2012] NSWCA 171 at [75].
4. As to the failure to comply with Procedural Direction 3, it is necessary to understand Dr Grace’s task and role. This is set out in the *Performance Program Guidelines for Osteopathy Practitioners* of February 2014 (document 6). A performance assessment:

. . . involves an Assessor/s visiting the practitioner’s practice to assess the practitioner’s professional performance in a number of key areas. A report prepared following the assessment is then presented to the Council for its consideration. . . .

2.2.3   The role of an Assessor

An Assessor is appointed by the Council to assess the professional performance of the practitioner. . . .

2.3   The performance assessment

The purpose of an assessment is to observe the practitioner (ideally in his or her own environment), to assess whether the practitioner’s professional performance is at or below the standard reasonably expected of a practitioner of an equivalent level of training or experience.

1. It is to be observed that Dr Grace’s performance assessment was not prepared for the present Tribunal proceedings. It was requested by the Council pursuant to s 154 of the National Law. As noted, Dr Burton submitted that it matters not that a report was prepared for a different purpose, and that a Court or Tribunal receiving evidence needs to have evidence prepared for its purposes, not evidence prepared for other purposes.
2. The Tribunal does not accept this submission, and considers that there was no requirement for Dr Grace to have complied with Procedural Direction 3. The Tribunal notes that support for this conclusion can be found in the terms of Procedural Direction 3 itself, which relevantly states:

7.   This Procedural Direction applies to:

(a)  any evidence given by an expert witness in the Tribunal;

(b)  any arrangement between an expert and a party for the expert to provide evidence or a report for the purposes of proceedings or proposed proceedings in the Tribunal; and

(c)  any arrangements for Tribunal appointed experts,

except that this Procedural Direction does not apply to evidence obtained from treating doctors, other health professionals or hospitals (who might otherwise fall within the definition of expert witness), unless the Tribunal otherwise directs.

1. Dr Burton submits that it is not to the point that Dr Grace was not an expert for the purpose of the Council’s deliberations or in these proceedings. He submits that if an attempt is made to adduce expert evidence, in circumstances where the Procedural Direction is not complied with, then the evidence must be rejected: *Cahill v Kenna* [2014] NSWSC 1763 at [32]. In that decision, McDougall J discussed the position where the person who prepared a report is an “expert”, but not an expert witness for the purposes of the Uniform Civil Procedure Rules (UCPR). In analysing r 31.18 of the UCPR, his Honour repeated at [32] the following passage of Barrett J in *Tim Barr Pty Ltd v Narui Gold Coast* *Pty Ltd* [[2009] NSWSC 49](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2009/49.html) at [14]

The true effect of the rule, as it thus appears to me, is that a report that is an "expert's report" because prepared by an "expert" who is an "expert witness" in the proceedings may not be admitted in evidence unless it contains a Schedule 7 acknowledgment by that "expert witness"; but a report that is an "expert's report" by reason of its having been prepared by an "expert" who is not an "expert witness" in the proceedings may not be admitted in evidence at all. In either case, however, the exclusion the rule otherwise effects may be overcome by a specific order of the court as contemplated by the opening words of the rule.

1. The Tribunal considers that this passage does not assist Dr Burton. While the Tribunal makes no comment on the correctness or otherwise of the observations of his Honour, the fundamental issue here is that the performance assessment was before the Council when it made its decision to suspend Dr Burton’s registration. As noted above, it is not appropriate that Dr Burton, who is the appellant bringing the appeal, could prevent the Tribunal from considering the evidence which was before the Council whose decision was the very subject of his appeal.
2. Accordingly, the Tribunal considers that it is appropriate that the performance assessment of Dr Grace be before it.
3. Finally, as to the lack of independence of Dr Grace by reason of her undertaking the performance assessment for the respondent pursuant to the provisions of the National Law, the Tribunal does not consider this to be an appropriate basis on which to exclude Dr Grace’s report at the outset. It is however a relevant submission when considering the weight the Tribunal should place on Dr Grace’s report.
4. For the above reasons, the Tribunal rejected Dr Burton’s objections to the tender of documents 3(a) and 3(b).

Summary of Dr Grace’s evidence

1. Dr Grace’s performance assessment of Dr Burton is dated 3 December 2014. In summary, she states that:
2. Dr Burton graduated from the British College of Osteopathy in 1960 and began practising as an osteopath in Australia in 1961.
3. In relation to Dr Burton’s assessment procedures, that his case history and physical assessment was inadequate in respect of all three observed cases.
4. Dr Burton failed to obtain informed consent in any of the three observed cases.
5. Dr Burton gave provided inadequate osteopathic treatments. In this respect Dr Grace records Dr Burton advising that he was 85 years old, and had a mild tremor. She notes that “[given] Dr Burton’s age and physical fitness, consultations that consist entirely of advice maybe acceptable. However, osteopathic patients generally expect a range of treatment approaches, including manual ones”.
6. Dr Burton had inadequate record keeping.
7. Dr Burton displayed inadequate patient handling.
8. Dr Burton concluded that Dr Burton’s conduct, observed during a general interview of 20 minutes and three osteopathic consultations and after consideration of Dr Burton’s clinical records for those consultations, fell below the standard reasonably expected of a practitioner of equivalent level of training and experience.
9. The Tribunal also had before it Dr Grace’s handwritten performance assessment notes of Dr Burton’s performance assessment. These notes corroborate the conclusions in her assessment performance. The Tribunal also had before it the briefing note of (an email of 126 November 2014) sent by the Council to Dr Grace.
10. Dr Grace was cross-examined by Mr Atkin at some length. The cross-examination covered a range of matters. One of the matters was whether or not Dr Grace had complied with an obligation under s 156 (2) of the National Law. Sections 156(1) and (2) provide:

(1)  An assessor who is required by a Council to conduct a performance assessment in relation to a registered health practitioner must—

(a)  conduct an assessment of the practitioner’s professional performance; and

(b)  give a written report about the assessment to the Council.

(2)  The report must include the recommendations the assessor considers appropriate.

1. Dr Grace indicated during the cross examination that her role was to write a report, not to make recommendations. When pressed, she stated that her conclusions as to inadequate performance standards implied the need for “remediation”. She stated that she did not make her recommendations clear.
2. When asked to agree that she did not regard Dr Burton as a risk to public safety, she responded that she thought that he was potentially a risk to public safety because of his failure to explore “red flags”. When it was put to her by Mr Atkin that she did not mention this in her performance assessment, she agreed. She stated that the failure to explore “red flags” implied a risk to public safety. She said that in the three cases she observed, there was a failure to observe red flag conditions.
3. Dr Grace was asked repeatedly about whether she regarded Dr Burton as a risk to public safety. She repeatedly said that she thought he was a potential risk. She repeatedly said that she thought that by stating Dr Burton’s failure to explore red flags another party (i.e. the Council) would take whatever steps it thought appropriate in relation to his registration. She agreed that she regarded her PA as containing the recommendations that she needed to take.
4. She accepted that she did not recommend that Dr Burton be suspended. She was asked whether if she did accept that his competence was a risk to public safety, and whether it was an emergency situation requiring immediate action. In response, she stated that she understood that Dr Burton had a small patient caseload, and that that was why the performance assessment was carried out away from his practice. She said that whilst not an emergency, his practice required prompt action. Whether it was not an emergency would depend on his caseload, and that if remediation was put in place promptly, it would not be a public safety risk.

Dr Burton’s submissions re Dr Grace

1. Dr Burton submits that Dr Grace’s “defensiveness” (manifested in her nervousness, the “shock” that her professional opinions were being scrutinised, resulting resentment, combined with “an air of superiority and/or infallibility that is always dangerous with expert witnesses”) “infected the veracity of her answers”, and “affected the credibility of her evidence in a material way”.
2. Dr Burton submits that the most serious manifestation of her lack of credibility was her repeated refusal to accept the veracity of propositions that were put to her based upon the exact words of her report. He also submits that “she took it as her role to give evidence that was supportive of the respondent’s case, rather than to give evidence that would assist the Tribunal”. These matters, Dr Burton submits, affected Dr Grace’s credibility and the weight that could be afforded her evidence.
3. The respondent rejects these criticisms of Dr Grace. In summary, it submits that:
4. While Dr Grace did not have the status of an expert witness, she showed a proper degree of objectivity, expertise and independence, and that her evidence ought to attract weight.
5. The fact that she found the experience of giving evidence both novel and stressful lays no foundation, without more, for a submission that here evidence was lacking in credit or credibility.
6. The submission that Dr Grace acted as an advocate for the respondent is not available on a fair consideration of her evidence.
7. The submission that she failed to determine that suspension action should be taken in relation to Dr Burton is misconceived in that it fails to appreciate that it fell to Dr Grace to perform and report on a performance assessment, while it fell to the respondent as an “ultimate issue” to determine what action was appropriate. If and when the respondent determined to consider the matter pursuant to s 150 of the National Law.

Dr Grace’s credit

1. Dr Burton made lengthy written submissions as to Dr Grace’s credit. He submits:

50. There can be no doubt that she (whether by intention or not) regarded it necessary to advocate for the respondent’s case and did not bring the important objectivity and impartiality so crucial to opinion evidence of this type. That is a not unexpected result in relation to a witness who has been retained for the respondent under a statutory process for a specific role on behalf of the respondent, not as an independent expert to assist the Tribunal. However, it is recognised by the promulgation of Procedural Direction 3 by the President of the Tribunal that this compromises the soundness and reliability of the evidence in relation to Tribunal proceedings. The President’s warning about such matters cannot be easily ignored.

51. Dr Grace’s evidence needs to be considered by the Tribunal in that light. Because unfortunately, it affected the credibility of her evidence in a material way. The most serious manifestation of her lack of credibility was her repeated refusal to accept the veracity of propositions that were put to her based upon the exact words of her report. It demonstrates that she understood that her report did not on its face justify the serious action taken by the respondent and that she tried (most likely subconsciously and not deliberately) to bolster or elevate the significance and gravity of her findings in the answers she gave. She took it as her role to give evidence that was supportive of the respondent’s case, rather than to give evidence that would assist the Tribunal.

52. In Dr Burton’s view, these matters materially affected Dr Grace’s credibility and the weight that can be afforded to her evidence as a whole.

1. Dr Burton emphasises the issue of credit is not suggested (submissions at [55]) to be intentional on the part of Dr Grace or to reflect on her honesty. Rather, it may be said to be the understandable result of the particular role which she was retained by the respondent to undertake and her subconscious attempt to defend and elevate her findings to justify the very grave action taken by the respondent because she believed that was her role. The Tribunal notes however that in [47] Dr Burton submits that Ms Grace’s demeanour and response to cross examination “manifest in an acute level of defensiveness that infected the veracity of her answers”.
2. The Council submits that Dr Burton’s characterisations of her as a witness, and of her evidence in certain respects, are not properly available on a fair review of the evidence. It submits that the fact a witness found the experience of giving evidence both novel and stressful lays no foundation, without more, that her evidence is lacking in credit or credibility, and that the characterisations ought to be rejected.

Conclusions

1. The Tribunal agrees. It has no reason to believe that Dr Grace was anything other than an entirely creditable witness. It does not accept that her lack of independence impugns her veracity, or that the credibility of her evidence in a material way.

Dr Burton’s documents and submissions

1. Also before the Tribunal were the materials sent by Dr Burton to the Council by letter dated 16 February 2015. These materials included:
2. Dr Burton’s written submissions of 16 February 2015.
3. A reference of Dr Greg Fitzgerald, dated 13 February 2015.
4. An Australians of the Year Awards Congratulations Certificate for Dr Burton.
5. In summary, Dr Burton states in his written submissions that:
6. The matters identified in Dr Grace’s report were skill deficiencies that could easily be addressed by remedial training, and were not matters which posed any serious risk to the health and safety of the public.
7. The bases of Dr Grace’s conclusions (namely that the conduct observed during the three consultations fell short of the standard reasonably required of a practitioner of equivalent experience and training to Dr Burton) was not discernable, and her opinion should not be relied upon.
8. While the report made passing and vague references to “things that might have been done differently” and to some published materials, there was no cohesive or transparent exposition of the standards against which Dr Burton was assessed. The failure to do so rendered all of opinions unfit to be relied upon.
9. The submissions also provide lengthy details of Dr Burton’s conduct of each of the three cases the subject of the performance assessment. In relation to the some of the strong concerns of Dr Grace, Dr Burton submitted:
10. In relation to inadequate assessments to enable clinical reasoning and judgement, “sometimes experienced clinicians start out with the bare bones for clinical reasoning and judgment; rather than jump in and give treatment where none is not necessarily indicated, failure to obtained informed consent, failure to negotiate a treatment plan, and inadequate record keeping”.
11. In relation to the failure to obtain informed consent, as these were performance assessments organised by the Council he assumed that the patients had consented.
12. In relation to the failure to negotiate a treatment plan: “In my environment, I usually inform the patient”.
13. Dr Burton also submits that there has never been any other complaint about him in 54 years of practice, apart from that of Patient A.
14. In conclusion, Dr Burton submitted that “the punishment” did not fit his profile, and that it did the Osteopathic Profession “no good” for him to be treated in such a manner.
15. The Council also had before it documents evidencing Dr Burton’s CPD activities for the last three years, and a copy of Dr Burton’s exercise program *Active Osteopathic Exercises for Sacroliliac Joint Dysfunction.* The CPD documents were the subject of the Council’s findings that Dr Burton had not demonstrated compliance with the National Board’s registration standards for 2012, 2013 and 2014.
16. In the written submissions of Dr Burton to the Tribunal, it is submitted that there is no issue that Dr Burton has failed to undertake his CDP obligations, and that therefore this evidence this evidence is irrelevant. This submission is rejected. Clearly the obligation of a practitioner in complying with and keeping up to date with their CPD requirements is relevant to their practice as an osteopath.

The Council interview

1. The Tribunal also had before it the report of the Council’s interview with Dr Burton of 20 October 2014. The purpose of the interview was to “gain an insight” into the nature of the osteopathic treatment provided by Dr Burton to Patient A. The report states that it was prepared by the (six) members of the Council.
2. Dr Burton objected to the tender of this report, submitting that it was not relevant, and and not been referred to by Dr Grace. As noted, Dr Burton’s objections based on relevance were rejected. In summary, the report states that:
3. Dr Burton did not obtain an informed consent from Patient A, did not offer information regarding the risks of his treatment, and admitted only to offering his patients books to read; performed an inadequate initial assessment; developed no differential diagnosis, no logical diagnosis and no treatment plan, and had absent and/or inadequate clinical notes; and that full and open disclosure of the risk versus benefit of the treating modalities he had offered Patent A were absent.
4. Dr Burton was vague and several times contradicted himself when discussing whether he conducts cervical manipulation.
5. The patient history relating to Patient A lacked any mention of any procedures resembling osteopathic manual therapy, and that there were no attempts to record any objective or subjective outcome measures.
6. There was justification to Dr Burton for his regime of treating Patient A’s chronic fatigue syndrome by addressing areas of the body using too much energy (lumbar and cervical rector spinal muscles).
7. Dr Burton claimed that he measured his patients’ recovery and well-being by assessing anal and drinking reflexes. On being challenged, Dr Burton did not use the anal reflex as a measure. As to the drinking reflex, the practitioner members of the Council did not understand the clinical significance or relevance of such a test. There was no other objective measure of the patient’s well-being or condition.
8. Dr Burton was vague and seemed evasive when describing what osteopathic manual therapy was preformed on the 25 days bills as osteopathy. He said it could include observation, education on how to move using less energy, and postural advice. After discussion, the Council members seriously doubted that any manual therapy was performed at all, despite Patient A being charged for osteopathic manual therapy.
9. The report concludes with the following paragraph:

The NSW Osteopathic Council is deeply troubled by the known history and the interview it conducted with Dr Burton on 20th October 2014. We consider him to be an extremely dangerous practitioner and his treatment regime to be extremely dangerous with little to no basis in responsible effective medicine. We consider that Dr Burton and other practitioners who are offering this therapeutic regime at Arcadia are placing the public at great risk. We are concerned that very impressionable, extremely sick and vulnerable people will be drawn to this facility and be swayed by his claims, and consequently receive this questionable therapy offered and billed in the guise of ‘Osteopathy’. We strongly suggest that his practice and that of any other practitioners at the Arcadia Centre should be investigated with urgency.

1. Finally, the Tribunal notes that Dr Burton did not give evidence at the hearing before the Tribunal. Neither party accepted that it bore any obligation to have Dr Burton available. The Tribunal makes no comment on this and draws no inference against either party from Dr Burton’s absence.

The statement of Mr Michael Kerry Jaques

1. Mr Jaques is the Executive Officer of the Council. His role includes the preparation of Council agendas, minutes and implementation of Council resolutions made at Council meetings, and management of the Council’s Health, Conduct and Performance programs under Part 8 of the National Law.
2. Relevantly annexed to his statement was Annexure D, being a history of prior complaints against Dr Burton in the period 8 February 2001 to date. That document records the following dates of complaints of patients, including Patient A and two complaints from the Council to the HCCC in respect of Dr Burton. One of these complaints (dated 2 June 2014) involved Patient A. The second complaint, is dated 20 November 2014. Following an interview with Dr Burton, the Council referred a complaint to the HCCC as the Council was concerned that the Council was concerned that Dr Burton lacked the competencies to work competently as an osteopath.
3. Finally, Annexure D records that on 2 April 2015 the Chiropractic Council held proceedings pursuant to s 150 of the National Law and suspended Dr Burton, and referred the matter to the HCCC for investigation pursuant to s 150D of the National Law.

Relevant legislation

1. The following provisions of the National Law are relevant to this application.
2. Section 3, which provides:

3 Objectives and guiding principles

(1) The object of this Law is to establish a national registration and accreditation scheme for--

(a) the regulation of health practitioners; and

(b) the registration of students undertaking--

(i) programs of study that provide a qualification for registration in a health profession;

(ii) clinical training in a health profession.

(2) The objectives of the national registration and accreditation scheme are-

(a) to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered; and

(b) to facilitate workforce mobility across Australia by reducing the administrative burden for health practitioners wishing to move between participating jurisdictions or to practise in more than one participating jurisdiction; and

(c) to facilitate the provision of high quality education and training of health practitioners; and

(d) to facilitate the rigorous and responsive assessment of overseas-trained health practitioners; and

(e) to facilitate access to services provided by health practitioners in accordance with the public interest; and

(f) to enable the continuous development of a flDocumentible, responsive and sustainable Australian health workforce and to enable innovation in the education of, and service delivery by, health practitioners.

(3) The guiding principles of the national registration and accreditation scheme are as follows--

(a) the scheme is to operate in a transparent, accountable, efficient, effective and fair way;

(b) fees required to be paid under the scheme are to be reasonable having regard to the efficient and effective operation of the scheme;

(c) restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality.

1. Section 3A of the National Law, which is an additional provision for NSW, provides, in terms:

3A Objective and guiding principle [NSW]

In the Documentercise of functions under a NSW provision, the protection of the health and safety of the public must be the paramount consideration.

A "NSW provision" is defined in s5 of the National Law as:

(a) a provision that forms part of this Law because of a modification made by the Health Practitioner Regulation(Adoption of National Law) Act 2009; or

(b) a NSW regulation.

**Note:** This definition is an additional New South Wales provision.

1. Section 150 of the National Law, which provides:

150 Suspension or conditions of registration to protect public [NSW]

(1) A Council must, if at any time it is satisfied 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 the action is otherwise in the public interest-

(a) by order suspend a registered health practitioner’s or student’s registration; or

(b) by order impose on a registered health practitioner’s registration the conditions relating to the practitioner’s practising the health profession the Council considers appropriate; or

(c) by order impose on a student’s registration the conditions the Council considers appropriate.

(2) A suspension of a registered health practitioner’s or student’s registration under subsection (1) has effect until the first of the following happens-

(a) the complaint about the practitioner or student is disposed of;

(b) the suspension is ended by the Council.

(3) If a Council for a health profession is satisfied a health practitioner or student registered in the profession has contravened a critical compliance order or condition, the Council must-

(a) suspend the practitioner’s or student’s registration until a complaint concerning the matter is dealt with by the Tribunal; and

(b) refer the matter to the Tribunal as a complaint.

(4) A Council for a health profession may take action under this section-

(a) whether or not a complaint has been made or referred to the Council about the practitioner or student; and

(b) whether or not proceedings in respect of a complaint about the practitioner or student are before a Committee or the Tribunal.

(5) Without limiting the conditions that may be imposed under subsection (1)(b), a Council may impose a condition requiring the registered health practitioner to undergo a performance assessment, but the condition has no effect unless the Commission agrees with the imposition of the condition.

(6) A Council must give written notice of action taken under this section to the registered health practitioner or student concerned.

(7) If a Council delegates any function of the Council under this section to a group of 2 or more persons, at least one of those persons must be a person who-

(a) is not a registered health practitioner or student in the health profession for which the Council is established; and

(b) has not at any time been registered as a health practitioner or student in that health profession under this Law or a corresponding prior Act.

1. Section 155B of the National Law, which provides:

155B Report and recommendations by assessor [NSW]

(1) An assessor who is required by a Council to conduct a performance assessment in relation to a registered health practitioner must-

(a) conduct an assessment of the practitioner’s professional performance; and

(b) give a written report about the assessment to the Council.

(2) The report must include the recommendations the assessor considers appropriate.

(3) If more than one assessor is appointed to conduct a performance assessment in relation to a registered health practitioner, the report may be made jointly or separately, but in any case must be made in the way directed by the Council.

1. Section 159 of the National Law, which provides:

159 Right of appeal [NSW]

(1) A person may appeal to the Tribunal against any of the following decisions of a Council for a health profession-

(a) against a suspension by the Council for the health profession under Division 3 or a refusal to end a suspension;

(b) against conditions imposed by the Council for the health profession on the person’s registration under Division 3 or 4 or the alteration of the conditions by the Council;

(c) against a refusal by the Council for the health profession to alter or remove conditions imposed by the Council under Division 3 in accordance with a request made by the person under section 150I;

(d) against a decision by the Council for the health profession to give a direction or make an order in relation to the person under section 148E;

(e) against a refusal by the Council for the health profession to alter or remove conditions imposed on the person’s registration, or to end a suspension, imposed under Division 4 in accordance with a request made by the person under section 152K.

**Note :** An appeal under this section is an external appeal to the Tribunal for the purposes of the [*Civil and Administrative Tribunal*](http://www.austlii.edu.au/au/legis/nsw/consol_act/caata2013326/)[*Act 2013*](http://www.austlii.edu.au/au/legis/nsw/consol_act/caata2013326/).

(2) An appeal may not be made in respect of a request by a person that is rejected by a Council because it was made during a period in which the request was not permitted under section 150I or 152K.

(3) The appeal is to be dealt with by reconsideration of the matter by the Tribunal and fresh evidence, or evidence in addition to or in substitution for the evidence that was before the Council when it considered the matter, may be given.

1. Section 159C of the National Law, which provides:

159C Tribunal’s powers on appeal [NSW]

(1) On an appeal, the Tribunal may by order terminate, vary or confirm a period of suspension or revoke, vary or confirm the conditions, as it thinks proper.

(2) The Tribunal’s order must not cause a suspension or conditions imposed by a Council to have effect beyond the day on which a related complaint about the person is disposed of.

1. Also of relevance, and relied on by the respondent, is s 41 of the National Law, which provides:

41O Other matters to be taken into account [NSW]

In the exercise of any of its functions under Subdivision 2 or 7 of Division 3 of Part 8 with respect to a complaint about a registered health practitioner or a student, a Council must have regard to any of the following matters, to the extent the Council reasonably considers the matter to be relevant to the complaint-

(a) another complaint or notification about the practitioner or student made to the Council or the National Agency, or made to a former Board under a repealed Act, including a complaint-

(i) in respect of which the Council, the Commission or a National Board has decided no further action should be taken; and

(ii) that is not required to be referred, or that the Council or the Commission decides not to refer, under Division 3 of Part 8;

(b) a previous finding or decision of a Council inquiry in relation to the practitioner or student;

(c) a previous finding or decision of a board inquiry, professional standards committee or a tribunal established under a repealed Act in respect of the practitioner or student;

(d) a written report made by an assessor following an assessment of the practitioner’s professional performance;

(e) a recommendation made, or written statement of decision on a performance review provided, by a Performance Review Panel in relation to the practitioner.

The meaning and operation of s 150 of the National Law

1. The appellant contends (written submissions at [29]) that the evident purpose of s 150 of the National Law is that it confers limited emergency powers upon the respondent and that it is only appropriate to exercise those powers for the protection of the health or safety of the public or otherwise in the public interest because urgent action is necessary for the protection of the public having regard to the need to limit the damage caused to the practitioner to that which is necessary to achieve those ends.
2. The appellant submits (written submissions at [30]) there must be a risk to the public or a public interest that involves a potential harm to the public that is so imminent and serious that the critical question whether or not the drastic and very damaging step of stopping the practitioner from practicing cannot wait to be determined by the Tribunal according to the due process provided for in the National Law or the *Health Care Complaints Act 1993* in respect of such extreme action.
3. The appellant submits that the Tribunal, in determining whether or not it is appropriate to take action, there needs to be some additional element to enable a risk of harm to be characterised as justifying suspension under s 150 of the National Law: *Reid.*
4. The respondent disputes this approach, submitting that it is an attempt to narrow the scope of a s 150 enquiry in a fashion that is both artificial and without proper regard to the terms of the National Law, the statutory objectives of ss 150 and 159 or the paramount obligations enshrined in s 3A.
5. The respondent further submits that that argument of the appellant fails to have proper or any regard to s 41O of the National Law. That provision, the respondent submits, required the Council, in taking action pursuant to s 150, to have regard to material such as the original complaint and any other complaints caught by the wide language of s 41O. It submits that, put another way, the legislation obliges the Council to consider the very material the appellant contends was not the “issue” for consideration.
6. The respondent’s submits that the appellant’s submission that because the “matter” arose before, and was considered at, the proceedings of the Council on 23 February 2015, the “matter” does not extend to what occurred at the proceedings themselves of the written findings and decision that resulted from the proceedings (being events are subsequent to the “matter” and not forming part of it), should be rejected. This is because, it submits, the Tribunal stands in the shoes of the Council, in reconsidering the matter pursuant to s 159, and is therefore permitted to consider the evidence before the Council and other relevant and admissible material before it – and to contend otherwise is a “nonsense”.

Consideration

1. The respondent submitted that, given the nature of the proceedings, that is a reconsideration by the Tribunal of the original application before the Council, such reconsideration being based on the original materials before the Council and supplemented by additional materials, the task for the Tribunal was to consider all the material before it and then determine whether it was satisfied that it was appropriate for the purposes of protecting the health and safety of any persons or is satisfied that the action was otherwise in the public interest to either suspend Dr Burton or to impose conditions on his registration.
2. Mr Hunt noted that it would be open to the Tribunal, as part of that exercise, for the Tribunal to determine whether or not it would have reached the same conclusion as the Council based on the evidence before the Council, but conceded that this was not consistent with the decision in *Reid.*

Dr Burton’s submissions

1. Dr Burton’s central position is that the Tribunal should terminate the suspension of his registration. His principal focus was on Dr Grace’s reliability and veracity, and in addition to those parts of her evidence which which he describes as concessions, namely that:
2. She had carefully read the Performance Program Guidelines.
3. She understood that she was required by the National Law to include in her report any recommendations she considered appropriate.
4. She understood that part of her role was to bring to the Council’s attention any matters she believed were relevant with respect to Dr Burton.
5. Her performance assessment brought to the respondent’s attention all matters she considered pertinent with respect to Dr Burton’s performance.
6. Her performance assessment contained the recommendations she considered appropriate. She did not believe that her findings warranted suspension of Dr Burton and did not recommend this action.
7. Her performance assessment did not contain any suggestion that Dr Burton presented a risk to public safety. Dr Burton submits that, to the extent that Dr Grace suggested in her cross examination that such a serious and critical finding should be implied from her findings about red flags, the Tribunal should reject that evidence.
8. She conceded that the red flags she identified did not present any material risk because they would have been picked up a week or so later in the normal course.
9. She found that Dr Burton did not engage in any manual or physical treatment. His treatment consisted of advice only. She reluctantly conceded that such treatment did not present any risk to the public. That is even more the case if Dr Burton’s practice does not generally involve manual treatments as she had assumed.
10. Even if for arguments sake she did regard Dr Burton’s competence as presenting a risk to public safety (which it is submitted is not stated in Dr Grace’s performance assessment and is inconsistent with her evidence about the risks), she did not regard the risk as representing an emergency requiring urgent action. Her evidence was laboured and discursive on this point. The sum of her evidence on this issue was that she did not hold this view in the circumstances at hand.
11. In any event, Dr Burton submits, (at 53]ff), Dr Grace was never of the opinion that Dr Burton presented a risk to public safety or that it was in the public interest that he be suspended from practice. Therefore, she did not believe that suspension was warranted and she did not make any recommendation to this effect on any view. To the extent that the Tribunal regards anything said in cross examination was inconsistent with this evidentiary proposition in a way that cannot be reconciled without reflecting on Dr Grace’s credit, then Dr Burton submits that the Tribunal is entitled to make findings as to her credit for the reasons set out above.
12. In the alternative, if the Tribunal is of the view that Dr Grace does provide evidence that Dr Burton was a risk to public safety or there was an imperative to act in the public interest (in the sense required in s 150), that she believed suspension was warranted and/or that she made findings and recommendations to this effect, then that evidence should be given no weight for the same reasons that are raised in respect of Dr Grace’s credit.

The Council’s submissions

1. In response, initially the Council submits that Dr Burton is seeking to reagitate an argument he had put unsuccessfully during the hearing, namely that Dr Grace was not a qualified expert and one who had not complied with Procedural Direction 3 “Expert Witnesses”. The respondent submitted that while Dr Grace did not have the status of an expert witness, she shows a proper degree of objectivity, expertise and independence and that her evidence ought to attract weight.
2. The Council also submits that Dr Burton’s submission regarding Dr Grace’s failure to determine that suspension action should be taken in relation to Dr Burton is misconceived. The submission fails to appreciate that it fell to Dr Grace to perform and report on performance assessment, while determinations as to what action was appropriate fell to Council as an “ultimate issue” if an when it determined to consider the matter pursuant to s 150.
3. The Tribunal sees substance in the Council’s submission. It notes that “performance assessment” is dealt with in Division 5 (Performance Assessment) of Part 8 (Health, Performance and conduct) of the National Law, namely:

155   How Council obtains an assessment [NSW]

A Council has the professional performance of a registered health practitioner assessed by having one or more assessors conduct an assessment of the practitioner’s professional performance, or of any particular aspect or aspects of the practitioner’s professional performance.

. . .

(1)  An assessor who is required by a Council to conduct a performance assessment in relation to a registered health practitioner must—]

(a)  conduct an assessment of the practitioner’s professional performance; and

(b)  give a written report about the assessment to the Council.

(2)  The report must include the recommendations the assessor considers appropriate.

. . .

155C   Action that may be taken by Council [NSW]

(1)  After receiving the report of an assessor about a performance assessment, a Council may—

(a)  decide that no further action should be taken in respect of the registered health practitioner the subject of the report; or

(b)  require a Performance Review Panel to conduct a performance review in relation to the practitioner; or

(c)  make a complaint against the practitioner; or

(d)  refer the matter to an Impaired Registrants Panel; or

(e)  counsel the practitioner or direct the practitioner to attend counselling.

(2)  A Council must make a complaint against the practitioner concerned if the assessment—

(a)  raises a significant issue of public health or safety that, in the opinion of the Council, requires investigation by the Commission; or

(b)  raises a prima facie case of professional misconduct by a registered health practitioner, or unsatisfactory professional conduct by a registered health practitioner.

(3)  This section does not limit a Council’s powers under section 150.

Conclusion

1. The most persuasive evidence and relevant material before the Tribunal includes the following:
2. The Council interview with Dr Burton of 20 October 2014. As the conclusion to that report states, the Council considered that Dr Burton was placing the public at great risk. As noted above, the Council concluded, on the basis of an interview with Dr Burton, that it was:

deeply troubled by the known history and the interview it conducted with Dr Burton on 20th October 2014. We consider him to be an extremely dangerous practitioner and his treatment regime to be extremely dangerous with little to no basis in responsible effective medicine. We consider that Dr Burton and other practitioners who are offering this therapeutic regime at Arcadia are placing the public at great risk. We are concerned that very impressionable, extremely sick and vulnerable people will be drawn to this facility and be swayed by his claims, and consequently receive this questionable therapy offered and billed in the guise of ‘Osteopathy’. We strongly suggest that his practice and that of any other practitioners at the Arcadia Centre should be investigated with urgency.

(emphasis added)

1. The performance assessment of Dr Grace, supplemented by her oral evidence before the Tribunal. This has been traversed above. Suffice it to say, Dr Grace states that she considered that her observed conduct of Dr Burton was significantly under the standard of that reasonably to be expected for an osteopath of Dr Burton’s qualifications and experience. In particular she found that he undertook inadequate assessments to enable clinical reasoning and judgement, failed to obtained informed consent, failed to negotiate treatment plans, maintained inadequate record keeping. She also identified other areas of concern including inadequate case history taking; failure to rule out “red flags”; failure to develop differential diagnoses; failure to establish working diagnoses; inadequate osteopathic treatments; inadequate patient handling and a failure to deliver any osteopathic care within each of the three assessments.
2. The Tribunal considers that it is not to the point that Dr Grace did not directly recommend Dr Burton’s suspension. It does not accept that the failure to do so prevents it from reaching the conclusion, consistent with its obligations under the National Law, in particular that the protection of the public is the paramount consideration.
3. In addition to these two primary matters, the Tribunal notes that:
4. Dr Burton’s CPD records establish, and it was accepted, that Dr Burton did not demonstrate compliance with the National Board’s registration standards for 2012, 2013 and 2014. Of itself, this evidence would not warrant the suspension of Dr Burton’s registration.
5. Annexure D to Mr Jaques’ statement provides some evidence of other complaints in respect of Dr Burton. Mr Hunt conceded in oral submissions that the contents of the document added little to the evidence otherwise before the Tribunal. Accordingly, the Tribunal placed no weight on this document, and considers this to be a neutral factor.
6. The Tribunal also considers that there is substance in the respondent’s submission that Dr Burton’s submissions to the Council dated 16 February 2015 in response to the complaint fail to demonstrate insight into his practice as an osteopath.
7. The Tribunal considers that, when considered cumulatively, the performance assessment of Dr Grace, the Council’s own impressions and observations at the interview on 20 October 2014 warrant the Tribunal suspending Dr Burton’s registration as an osteopath. The performance assessment performed by Dr Grace highlights that Dr Burton exhibited serious deficiencies in many facets of history taking, note taking, treatment planning, the gaining of informed consent, treatment and patient handling and exercise and rehabilitation prescription. The issue of red flags is extremely important. Even though the three patients who participated in the performance assessment did not exhibit red flag conditions, the need to exercise this standard for every patient is relevant as this can provide identification of serious conditions that require referral for specialist intervention.
8. The Tribunal does not have confidence in Dr Burton’s ability to conform with acceptable practice standards, and is satisfied that suspension of his registration is in the public interest. The health and safety of the public is the paramount consideration for the Tribunal, and the appropriate and necessary order is to dismiss the appeal and to confirm the registration of Dr Burton’s suspension.

Orders

1. The Tribunal orders that:
2. The appeal is dismissed.
3. The suspension of Dr Burton’s registration as an osteopath is confirmed.

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

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