

Senior & Junior Counsel, Clients – Be Concerned

The attached Federal Court Judgment (12 July 2016 – with paragraph references below) dismisses Mary Walker’s application for a declaration that the Bar Association of NSW acted in an oppressive, unfairly prejudicial or unfairly discriminatory manner (in breach of section 232 of the Corporation Act [83]) in addressing her application to be appointed as Senior Counsel in 2014 and 2015.

Mary Walker is a barrister and a leading mediator (an ADR practitioner).

Her application relied upon a resolution of the Bar Council of the Association in 2011 (which has not been rescinded) that the Senior Counsel Protocol should be amended to make it clear that there is no reason why a barrister who practises as a “pure mediator” should not be appointed Senior Counsel [36].

In addition a resolution was also passed in 2011 that ADR proceedings such as mediations constitute ‘barristers’ work’ for the purposes of the NSW Barristers Rules [40] (not yet incorporated in the Uniform rules).

Despite these resolutions, the 2014 Senior Council Selection Committee declined to consider Mary Walker’s application on its merits [48] by interpreting the Protocol (which remains relevantly without amendment) as excluding barristers who practice as “pure mediators” from selection.

Despite this outcome and the Executive Committee stating that where the wording of the Protocol leaves it open to an interpretation which does not reflect the intention of the Bar Council, it needed to be redrafted in order to give greater clarity to future committees [55], the Protocol remained relevantly unaltered in 2015 and remains unaltered for 2016.

When challenged by Ms Walker, the Bar Association argued in its defence that it is not restricted from acting oppressively or unfairly by the Corporations Act as:

1. Oppressive conduct would not affect Ms Walker in her capacity as a member of the Bar [104]; and
2. The selection of senior counsel is not conduct of the Association, but rather a process conducted by third parties (the President and the Selection committee) [82].

The Association’s further argument succeeded; namely that the Association is not bound to give any direction or instruction or impose any requirement over and above what is in the Protocol. Unless it is amended, all parties are entitled to proceed according to its terms [99].

Conclusion

The Association may not have been legally bound, but it was unfair for the selection process to proceed on a basis that the Protocol was left open to an interpretation which was contrary to the formal resolution of Bar Council [55], confirmed by formal resolution.

A fair silk selection process going forward requires:

- a. The Bar Council to acknowledge the selection process is the Association’s process; and
- b. The Association’s decisions, by resolution of the Bar Council, should be implemented.

These basic pillars are needed by senior members of the Bar, junior members with silk aspirations and, more importantly, the general public who rely upon the Bar Association’s leadership and the integrity of its governance.