Holman Webb
Lawyers

Health Law Bulletin

June 2012

Contents

Introduction

Welcome to the June 2012 edition of the Holman Webb Health Law Bulletin.

The last six months have seen significant developments in the regulation of health professionals, not-for-profit reform, personally controlled electronic health records, aged care and a proposed new code of practice on workplace bullying, all of relevance to the sector.

The health, aged care/retirement living and life science sectors form an important part of the Australian economy. They are economic growth areas, as more Australians retire with a significantly longer life expectancy and complex health care needs.

Against this background, Holman Webb's health, aged care and life sciences team provides advice that keeps pace with the latest developments. Our team has acted for health and aged care clients over many years, both in the "for profit" and "not for profit" sector. ■

Health, Aged Care and Life Sciences team.

Dr Tim Smyth joins the Holman Webb team

We are pleased to announce the appointment of Dr Tim Smyth as Special Counsel in the corporate and commercial team.

With degrees in medicine, law and business administration, Tim is well known in the Australian health industry, having worked as a doctor, Director of Medical Services, hospital manager, Area Health Service Chief Executive and Deputy Director-General in the NSW Department of Health. Building on over 25 years of experience, he has an in depth understanding of the health industry and government. This experience is complemented by his previous corporate and commercial legal practice at DLA Phillips Fox. Tim's legal clients have included health services, government agencies, professional associations, health funds, research bodies, Divisions of General Practice, small and medium enterprises, service providers to the health sector and Australian subsidiaries of multinational companies.

Tim is also an experienced Board director with health services, research institutes, a Commonwealth statutory authority and a commercial public company.

His areas of expertise include:

- contracts, agreements, business structures and operations
- regulatory frameworks, corporate governance and compliance
- medicolegal issues
- representation at coronial inquests, tribunals, commissions and inquiries
- dispute resolution
- privacy law and e health
- clinical governance and patient safety
- research governance.

Tim can be contacted on 0412 868 174 or email tim.smyth@holmanwebb.com.au ■

Jordan v Lee [2012] WADC 74

by John Van de Poll, Partner and Vahini Chetty, Solicitor

The recent Western Australian District Court case of Jordan v Lee is of interest as it discusses the issue of whether or not a medical practitioner should advise a patient of alternative treatments, taking into consideration recent medical developments.

In this case, Daniel Jordan, commenced proceedings against Dr Lee, neurosurgeon, and Dr Baker, paediatric oncologist, for their alleged failure to provide all relevant information relating to medical treatment. The Plaintiff currently suffers from left-sided hemiplegia.

In 1996, at the age of 11 years, the Plaintiff was diagnosed with a brain tumour situated in the region of his basal ganglia. He was referred to Dr Lee for treatment of the tumour around August 1996. Dr Lee advised the Plaintiff's parents that the potential benefits of surgery were outweighed by the potential risks given that the Plaintiff was, at that stage, generally neurologically intact. The Plaintiff was referred to Dr Baker for adjuvant therapy.

In 2000, Dr Charles Teo surgically removed 98% of the Plaintiff's tumour. Dr Teo reported that the surgical resection should have occurred earlier.

Goetze DCJ found that there was no evidence to suggest that surgical resection would have been the accepted method of treatment of the Plaintiff's tumour between 1996 and 2000. As such, the course of treatment chosen by the Defendants was reasonable. He also found that there was no duty for the Defendants to have informed the Plaintiff or his parents that other surgeons would have been able to carry out the surgery, as he found no evidence to suggest that there were any surgeons in Australia who were performing such surgery at the time.

The claim against the Defendants was dismissed. ■

Mandatory Reporting Protections tested in NSW Court of Appeal Lucire v Parmegiani & Anor [2012] NSWCA 86

by Zara Officer, Special Counsel

The NSW Court of Appeal recently delivered judgment in a test case involving the nature of the protections afforded to practitioners who make reports to the Medical Council of NSW under the mandatory reporting provisions of the Health Practitioner Regulation National Law **(National Law)**. On 20 April 2012 judgment was delivered in Lucire v Parmegiani & Anor [2012] NSWCA 86. A full court of five judges including Chief Justice Bathurst and President Allsop made a unanimous decision.

The decision clarifies that the protection afforded to medical practitioners making reports under mandatory reporting provisions is only qualified protection from civil litigation. Practitioners are not absolutely protected from defamation suits or claims for other torts being made against them, and can be exposed to litigation for making mandatory reports and complaints. However, as long as the reports and complaints are made in good faith and without malice then there are good defences available under the National Law.

The case arose out of Dr Parmegiani making a complaint to the then NSW Medical Board on the understanding that he was obligated to report breaches of standards of professional practice or competence. Dr Parmegiani and Dr Lucire were both specialist psychiatrists who had prepared expert opinions in a personal injury case in the District Court of NSW. In July 2008, when Dr Parmegiani was about to give his evidence, he sat in the District Court and heard Dr Lucire finish giving her sworn evidence. Dr Parmegiani became concerned when Dr Lucire was asked on repeated occasions whether the (former) NSW Medical Board had placed conditions on her registration, and Dr Lucire allegedly denied it.

In August 2008, Dr Parmegiani sought advice from the NSW Medical Board **(Board)** as to whether he was obligated to make a complaint and he was asked by the Board to provide further details, which he did. The Board investigated the complaint. Subsequently, in light of all of the evidence before it, the Board took no further action. Dr Lucire sued Dr Parmegiani for damages for defamation, injurious falsehood and for misleading or deceptive conduct under the Fair Trading Act (NSW) 1987. Dr Parmegiani in turn sought to strike out Dr Lucire's statement of claim on the basis of a defence of absolute privilege under the Defamation Act of NSW, and at common law.

The District Court struck out Dr Lucire's defamation claim and she appealed to the NSW Court of Appeal.

The Defamation Act extends absolute privilege to certain matters arising under the former Medical Practice Act, and now the National Law (see s. 27(2)(d) and Schedule 1 clause 15). This includes absolute privilege for the assessment or referral of complaints relating to medical practitioners. The Court of Appeal drew a distinction between the making of a complaint, and the procedures for dealing with it. The Court of Appeal held that the purpose of the Defamation Act is to confine the protection of absolute privilege to communications made for the purpose of dealing with a complaint once made. Therefore, the Defamation Act protects the Medical Council and the HCCC in their dealings with the complaint, but not the individual making the complaint.

The decision of the NSW Court of Appeal is unequivocal that there is no absolute privilege protecting practitioners who make complaints under the mandatory reporting provisions from civil suits. There are strong protections for defending such suits, provided the complaints are made in good faith, but the legislation does not prevent anyone from starting litigation. Legislative reform will be necessary if practitioners making complaints under the mandatory reporting provisions are to be protected from the commencement of civil litigation for defamation and other torts and statutory claims. ■

First Medical Tribunal decision to be appealed to the High Court of Australia

by John Van de Poll, Partner and William Madani, Lawyer

In March 2011, the Health Care Complaints Commission **(HCCC)** prosecuted Dr Victor King in the Medical Tribunal of NSW in response to complaints made by three female patients. The patients complained that Dr King's conduct in the course of various sensitive medical examinations was sexually motivated.

In the complaints made to the HCCC, the patients alleged that Dr King's conduct was sexual in nature, although the Notice of Complaint served by the HCCC did not allege any sexual motivation in his conduct. Rather, Dr King's conduct was characterised by the HCCC as being 'inappropriate' or 'contrary to the recognised standard'.

During the course of the hearing before the Medical Tribunal, counsel for the HCCC did not put the proposition to Dr King that his conduct in treating the three complainants was sexually motivated.

In its decision of 5 May 2011, the Medical Tribunal found Dr King guilty of Professional Misconduct, citing sexual misconduct as a reason for its decision. Dr King was ordered to be de-registered as a medical partitioner for a period of at least 18 months.

Appeal of decision

The Medical Tribunal's decision was appealed to the NSW Court of Appeal on the basis that Dr King was denied procedural fairness by the Medical Tribunal as it made findings against him which were not the subject of the Notice of Complaint and that he was not provided with an opportunity to have a separate hearing on the appropriate penalty.

In a split decision handed down on 22 November 2011, Dr King was unsuccessful in the Court of Appeal in respect of the procedural fairness issue, primarily on the basis that the statements provided by the complainants were found to be sufficient to put Dr King on notice that the allegations against him were of sexual misconduct. In the view of Handley AJA, Dr King was afforded 'procedural fairness'. McColl JA agreed with Handley's decision.

In his dissenting judgment, Macfarlan JA found in favour of Dr King on the basis that the most serious conduct alleged was not contained in the Notice of Complaint and much of the Tribunal's findings did not reflect the allegations made. The HCCC did not put to Dr King in cross-examination that his conduct was sexually motivated and the Tribunal failed to give proper reasons for concluding that Dr King was guilty of sexual misconduct.

The central tension between the decision of Handley AJA and Macfarlan JA was the question as to what constitutes a complaint for the purposes of a Medical Tribunal hearing. The majority was of the view that a complaint was the initial complaint made by a patient whereas Macfarlan JA was of the view that the complaint was formulated by the HCCC in its Notice of Complaint. In particular Macfarlan noted that allegations as serious as sexual misconduct require a greater level of particularity.

Special leave to the High Court

On 16 December 2011, an application for special leave was filed with the High Court of Australia in order to appeal the decision of the NSW Court of Appeal. The basis of the special leave application is that the majority of the Court of Appeal erred in finding that the Medical Tribunal had denied Dr King procedural fairness because the Medical Tribunal made significant findings of professional misconduct against Dr King which were not reflective of the allegations that he had been called to answer the proceedings.

Special leave to appeal to the High Court of Australia was subsequently refused.

As it currently stands, the Medical Tribunal is not bound by the same rules and procedures that ordinarily govern other courts. The HCCC has extensive powers and discretion in investigating and prosecuting complaints. Accordingly, any medical practitioner who is the subject of a complaint before the Medical Tribunal may have a difficult time in assessing how a complaint will be prosecuted by the HCCC and how it will be determined by the Medical Tribunal. ■

Australian Charities and Not-For-Profits Commission

by Jonathan Casson, Partner and Lena Banoob, Senior Associate

As part of the 2011-12 Federal Budget, the Government committed $53.6 million over four years to establish the Australian Charities and Not-For-Profits Commission **(ACNC)**, and related structural changes required to the Australian Taxation Office **(ATO)**, to enable a reduction of financial and compliance reporting for not-for-profit **(NFP)** organisations.

By 1 October 2012, the ACNC will be established as an independent statutory office responsible for determining charitable, public benevolent institutions and other not-for-profit status for all Commonwealth purposes.

On 9 December 2011, the Federal Treasury released the Exposure Draft – Australian Charities and Not-For-Profits Commission Bill 2011 **(ACNC Bill)**. This is the first official record of how the ACNC will operate and what its powers will be.

This ACNC Bill establishes the ACNC with the object of "promoting public trust and confidence in charities and NFP entities that provide public benefits". The object of the ACNC Bill is intended to be advanced through the administration of a process for registering and regulating charities and NFP entities by the ACNC.

How will the ACNC Bill affect your NFP?

Getting Registered

The exposure draft provides the ACNC Commissioner **(Commissioner)** with the power to register NFP entities under their specific NFP type or subtype. It outlines the registration processes and eligibility requirements for entities before they will be able to apply to be registered by the Commissioner.

Access to government support, as it is referred to in the ACNC Bill, will not be available to a NFP unless it is a registered entity under the ACNC Bill.

To be entitled to registration, your NFP must meet all of the following criteria:

- the entity is a not-for-profit entity, as defined in the Government's measure to restate and standardise the special conditions for tax concession entities
- the entity meets the governance requirements which will be set out in the governance section of the exposure draft
- the entity has current a Australian Business Number (ABN)
- the entity has not previously been a registered entity
- the entity is not a terrorist, criminal, outlaw or similar entity; and
- the entity has any of the following purposes:
  - a charitable purpose as defined by the common law definition of charity
  - promotion of Australian industry
  - encouragement of community entertainment
  - scientific purposes
  - advance and further the interest of employees or employers; and
  - community service purposes (except political or lobbying purposes).

The Commissioner is tasked with the job of assessing whether the applicant meets the conditions to be entitled for registration, including whether the entity is a NFP. Review rights are available in the event an application is rejected. The Commissioner will also have the power to revoke registration in certain circumstances, including on the broad and general "public interest" grounds.

Meeting the Reporting Requirements

The ACNC Bill currently proposes two main aspects on obligations regarding records. One is record keeping and the second is in relation to financial reporting.

Registered entities will be required to keep records that correctly record and explain the financial position and performance of the entity. These records must be thorough enough to enable true and fair financial statements to be prepared, audited and reviewed. Registered entities must also keep records that correctly record and explain their operations and acts, and which would enable the Commissioner to assess the entity's entitlement to be and to remain registered as a NFP. Such records must be kept for a period of 5 years.

On the other hand, financial reporting requirements will be based on a three-tiered system, similar to that administered by ASIC for companies. Under this system, NFPs will be classed as small, medium or large entities.

A small registered entity is defined as an entity which has annual revenue of less than $250,000 and is not a deductible gift recipient **(DGR)** at any time during the financial year.
A medium registered entity is an entity with annual revenue between $250,000 and $1 million and is not a small registered entity. A large registered entity is an entity with annual revenue of $1 million or more. Revenue must be calculated in accordance with the relevant accounting standards.

Medium and large registered entities will be required to prepare and lodge a financial report with the Commissioner annually.
The financial report (will be required to consist of) the registered entity's:

- financial statements for the year;
- the notes to the financial statements; and
- the responsible individual's declaration about the statements and notes.

This means that the accounting standards will come into play for all NFPs, even if it's just a case of determining whether the registered entity falls within the revenue thresholds for financial reporting.

The Role of the Commissioner

It has now become clear that the role of the ACNC, and therefore, that of its Commissioner will be as "regulator" of the sector.

The ACNC Bill intends to grant the Commissioner the following functions and powers:

- registering NFP entities
- promoting good governance, accountability and transparency
- providing educational information to the NFP sector
- providing information about the NFP sector to the public and to governments
- providing a central point of contact to simplify NFP interactions with governments
- monitoring and investigating registered entities to further the object of the Act; and
- enforcing the Act.

The Impact

While it is clear that the Bill is not complete and the sector awaits the Government's final determination on governance issues for NFPs, it is also clear that there is going to be time commitment and increased costs for NFPs in coming in line with the requirements of the ACNC. The hope is that this is a transitional issue only and in the long run, the process would become simpler and familiar.

Upon the commencement of the Bill, NFPs should review their Constitutions and the governance arrangements. ■

Update on the National Disability Insurance Scheme

by Alison Choy Flannigan, Partner

Senator, the Hon Jan McLucas, Parliamentary Secretary for Disabilities and Carers announced on 6 December 2011 that the Gillard Government is working with States and Territories to lay the foundations for a National Disability Insurance Scheme **(Scheme)** by mid 2013. They have also announced a new agency which will be established to lead the Commonwealth's work to design the launch of a National Disability Insurance Scheme.

On 30 April 2012, the Prime Minister announced that the Australian Government will fund its share of the first stage of the Scheme. The Australian Government has committed $1.03 billion over the next four years to implement the first stage of the NDIS.

From the middle of next year, people with disability, their families and carers in selected sites around the country will start to receive care and support through an NDIS.

This first stage of an NDIS will serve 20,000 Australians with disability. It will initially involve 10,000 people with disability starting from mid-2013 and will expand to 20,000 people from the middle of 2014.

The scheme takes into account the cost of care over the lifetime of an individual, and will focus on increasing opportunities for people with disability, their families and carers.

On 31 July 2011 the Productivity Commission published its report on Disability Care and Support.

The Productivity Commission recommended the formation of two schemes as a way of meeting the care and support needs of people with a disability:

- The National Disability Insurance Scheme **(NDIS)**; and
- The National Injury Insurance Scheme **(NIIS)**.

National Disability Insurance Scheme

The National Disability Insurance Scheme is intended to provide insurance cover for all Australians in the event of severe or profound disability, not acquired as part of the natural process of ageing. Its main function would be to fund long-term high quality care and support. Other important roles include providing referrals, quality assurance and diffusion of best practice.

The NDIS would provide long-term disability support, for example:

- Aids, appliances and home & vehicle modifications
- Personal care
- Community access support
- Respite
- Specialist accommodation support
- Domestic assistance
- Transport assistance
- Supported employment services and specialist transition to work programs
- Therapies such as occupational and physiotherapy, counselling and specialist behaviour interventions
- Local area coordination and development
- Crisis/emergency support
- Guide dogs and assistance dogs.

However, services such as other health services, public housing, public employment services and mainstream education and employment services will remain outside the NDIS, with the NDIS providing referrals to them.

The NDIS will not cover loss of income, which will be left to private insurance and the Australian Government's income support system.

National Injury Insurance Scheme

The National Injury Insurance Scheme is intended to provide a federated model of separate, state-based "no-fault" schemes providing lifetime care and support to people newly affected by a catastrophic injury. The NIIS will cover all causes of catastrophic injuries, including those related to motor vehicle accidents, medical accidents, criminal injury and general accidents occurring within the community or home. Coverage would be irrespective of how the injury was acquired, and would only cover new catastrophic cases.

The NIIS will not cover cerebral palsy (because cerebral palsy is not caused in many cases by accidents), however, people with cerebral palsy will be able to access the NDIS.

The NIIS will provide lifetime care and support services broadly equivalent to those provided under the Victorian TAC and NSW Lifetime Care and Support Scheme. This includes reasonable and necessary attendant care services; medical/hospital treatment and rehabilitation services; home and vehicle modifications; aids and appliances; educational support; and vocational and social rehabilitation and domestic assistance.

The additional funding required from the NIIS will come from existing insurance premium income sources. It will be interesting to see how this is levied from sources other than CTP, for example, medical indemnity insurers, which of course will flow through to hospital operators and health care providers.

The NIIS will extinguish common law rights to sue for lifetime care and support but not for other heads of damage, for example loss of income and pain and suffering for negligence.

The National Disability Insurance Agency

The National Disability Insurance Agency will not provide services but will, amongst other responsibilities, assess the needs of individuals and allocate a plan and budget to them and will regulate and oversee the system.

Disability Support Organisations

Disability support organisations will offer individuals brokering services, to provide individuals with planning services and guidance and to assemble "co-ordinated packages of care services" from specialist and mainstream providers.

Issues for providers

Hospital operators and providers of disability services will need to become familiar with the proposed arrangements, comply with national disability service standards, make themselves known to Disability Support Organisations and compete to provide the services in a service-led model. ■

Personally Controlled Electronic Health Records Bill 2011 Compliance Issues for Health Care Providers, including hospital operators

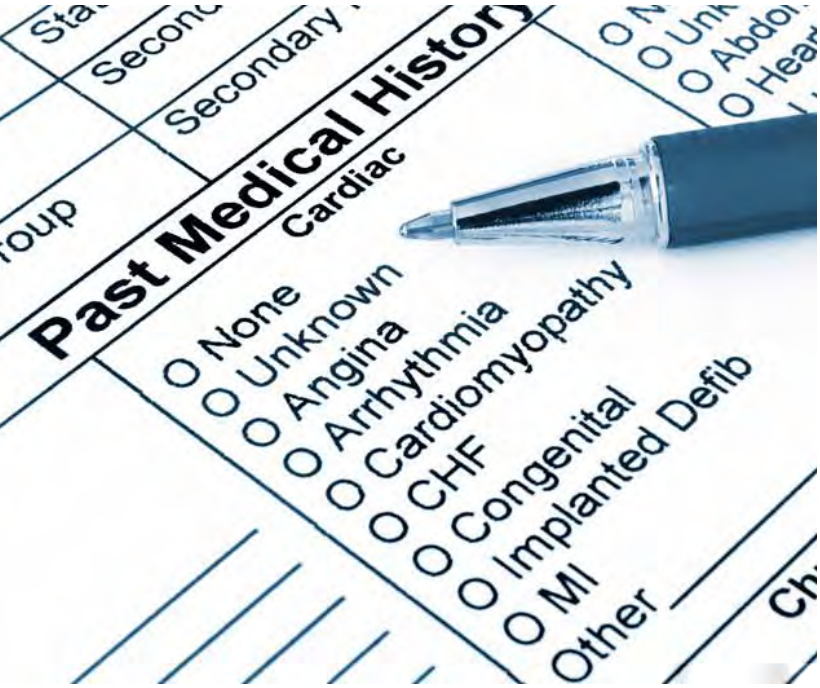
by Alison Choy Flannigan, Partner

On 23 November 2011 the Hon Nicola Roxon MP, former Minister for Health and Ageing, introduced into Parliament the Personally Controlled Electronic Health Records Bill 2011 **(the Bill)** and Personally Controlled Electronic Health Records (Consequential Amendments) Bill 2011, which are proposed to commence on 1 July 2012.

In March 2012, the Australian Government released the Personally Controlled Electronic Health Record System: Proposals for Regulations and Rules, as well as terms and conditions required of healthcare practitioners which will address matters including the security and technical requirements of participants and the types of personally controlled electronic health records **(PCEHR)** that can be authored by healthcare providers.

Some interesting points to note include:

- consumers can enter notes on their health and limit access to them by healthcare providers;
- consumers will also have the ability to enter some summary health information in their PCEHR, including medications and allergies. The information will be accessible to healthcare providers and identified as having been entered by the consumer; and
- consumers can register under pseudonyms.



Each healthcare provider organisation who participates in the PCEHR will need to:

- become familiar with the new legislation;
- review and update their IT software, especially health records systems;
- revise & update their privacy policies and procedures; and
- provide training to staff.

Further, if you wish to register to participate, you should check your insurance coverage.

Conditions of registration

It is optional for both consumers and healthcare provider organisations/healthcare providers to be involved in the PCEHR system, however, once a healthcare provider organisation has applied for registration, there is an obligation to comply with the provisions of the Act, Rules, Regulations and terms and conditions.

The Bill imposes obligations on healthcare provider organisations in relation to the collection, use and disclosure of health information contained in the PCEHR which are additional to the obligations which currently arise under existing privacy laws.

Obligations on healthcare provider organisations include:

- restrictions on uploading health records;
- ensuring that uploaded records do not infringe copyright or moral rights;
- not discriminating against consumers if they do not have a PCEHR or in relation to the consumer's choice of access controls on his or her PCEHR; and
- mandatory reporting requirements to the System Operator.

The collection, use and disclosure of health information in a registered consumer's PCEHR is limited to those acts specifically permitted under Part 4, Division 2 of the Bill:

- Collection, use and disclosure must be made for the purpose of providing healthcare to the registered consumer and in accordance with the access controls set by the registered consumer, or if no access controls have been made, in accordance with default access controls specified in the PCEHR Rules/System Operator.
- Disclosure can be made to a "nominated representative" or "authorised representative" of the consumer as defined in the Bill.
- Collection, use and disclosure can be made for the operation and management of the PCEHR system in accordance with the Bill.
- Collection, use and disclosure can be made if the participant reasonably believes that the collection, use and disclosure is necessary to lessen or prevent a serious threat to an individual's life, health or safety and if it is unreasonable or impracticable to obtain the consumer's consent to the collection, use or disclosure and the participant advises the System Operator and the collection, use or disclosure occurs not later than 5 days after the advice is given.
- Collection, use and disclosure can be made if the participant reasonably believes that the collection, use and disclosure by the participant is necessary to lessen or prevent a serious threat to public health or public safety.
- Disclosure of the PCEHR as distinct from the medical practitioners own medical records as required by law or as required by courts and tribunals is only permitted under limited circumstances stated in sections 65 and 69. Therefore, if you receive a subpoena or a request from a government department, healthcare provider organisations must not provide health information which is part of the PCEHR unless access is permitted under these sections.
- Collection, use and disclosure may be made with the consumer's consent.
- A consumer can collect, use and disclose, for any purpose, health information included in his or her PCEHR.
- A participant can collect, use and disclose health information included in a consumer's PCEHR for purposes relating to the provision of indemnity cover for a healthcare provider.

Penalties for healthcare provider organisations

In addition to potentially losing your registration to deal with the PCEHR, the Bill creates a series of civil penalties, including the following:

- Unauthorised collection or disclosure of health information included in a consumer's PCEHR if the person knows or is reckless to that fact – for an individual up to 120 penalty units ($13,200); or up to 600 penalty units for bodies corporate ($66,000), per breach.
- Failure to provide stated information to the System Operator under section 74 – up to 100 penalty units for an individual ($11,000), or up to 500 penalty units for a body corporate per breach ($55,000).
- Failure to notify the System Operator if a registered healthcare provider ceases to be eligible to be registered for the PCEHR under section 76 – up to 80 penalty units for an individual ($8,800), or up to 400 penalty units for a body corporate ($44,000).
- A healthcare provider organisation body corporate will also be liable for any acts of their employees, agents or officers acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority, which contravene the Act (section 93). ■

Australian Competition and Consumer Commission cracks down on misleading and deceptive claims placing the health of consumers at risk

by Alison Choy Flannigan, Partner, Mary Potter-Forbes, Paralegal and Joann Yap, Paralegal

There has been an increasing trend in the Australian Competition and Consumer Commission **(ACCC)** investigating and commencing proceedings to stamp out unsubstantiated claims by traders which put the health of consumers at risk[1].

Homeopathy Plus!

On 3 May 2012 the ACCC announced that it had required Homeopathy Plus! Pty Limited to remove from its website representations considered by the ACCC to be misleading and deceptive and that could lead to serious health risks for consumers.

Homeopathy Plus! claimed that the current whooping cough vaccine is dangerous and ineffective, while the homeopathic remedy is a proven and safe alternative. The ACCC considered that such claims were likely to be misleading and deceptive.

Willesee Healthcare

In March/May 2011, in Australian Competition and Consumer Commission v Willesee Healthcare Pty Limited [2011] FCA 301 and Australian Competition and Consumer Commission v Willesee Healthcare Pty Limited (No 2) [2011] FCA 752, the ACCC successfully prosecuted Willesee Healthcare Pty Limited and eight other respondents for misleading and deceptive conduct and false representations in relation to the diagnosis, treatment and cure of allergies.

Each respondent claimed that they could diagnose, treat and/or cure allergies using "Nambudripad's allergy elimination technique" (NAET) or similar techniques. These techniques involve indentifying allergens by testing the resistance of the customer's arm muscle to pressure applied while holding a vial of the suspected allergen. The treatment involved the application of pressure or needles to points on the customer's body, while the customer is exposed to the potential allergen.

The Federal Court of Australia held that the companies and individuals engaged in false, misleading and deceptive conduct by claiming that:

- They could test for and identify an allergen or a substance to a person who is allergic, when they could not
- They could cure or eliminate all or virtually all allergies, or allergic reactions, when they could not
- They could successfully treat a person's allergies or allergic reactions, when they could not
- After receiving treatment it would then be safe or low risk for a person to have contact with the substance or allergen to which they had previously suffered adverse reaction, when none of their treatments could achieve this result.

Each of the respondents were restrained from engaging in similar conduct for a period of three years, either by injunction or an undertaking to the court.

The court ordered the respondents to display corrective notices on their websites and in their clinics. The respondents were also to required to send letters or emails to current and former clients explaining that they engaged in misleading and deceptive conduct and outlining the remedies obtained by the ACCC.

Newlife and Renew (co-defendants) were ordered to pay a pecuniary penalty totaling $125,000. Further penalties and orders applied.

Allergy Pathway Pty Limited

In a separate case, in February 2011, Allergy Pathway Pty Limited and its director were fined for contempt of court after previously given undertakings to the court not to make certain representations about Allergy Pathway's ability to test for, identify and safely treat allergies.

Commentary

Pharmaceutical and medical device companies operate in a highly competitive environment and there is always pressure from sales staff to "push the boundaries".

Section 18 of the Australian Consumer Law, Schedule 2 to the Competition and Consumer Act 2010 (Commonwealth) states that a person must not, in trade or commerce, engage in conduct that is misleading and deceptive or is likely to mislead or deceive.

Similar obligations are imposed under the Therapeutic Advertising Code 2007 (Commonwealth), section 4; the Medicines Australia Code of Conduct and the MTAA Code of Practice.

Healthcare, pharmaceutical and medical device companies should be vigilant in ensuring that their advertising is not misleading and deceptive and that there is adequate data to prove their claims. ■

1 Refer to "Court Finds Allergy Treatment Claims Misleading" ACCC press release 11 March 2011

Update on Aged Care Reforms

by Tal Williams, Partner and Dwana Walsh, Solicitor

In April 2012, the Government introduced a $3.7 billion aged care reform package over 5 years, "Living Longer, Living Better". The reforms are being introduced over 5 years in response to the Australian Government's Productivity Commission Inquiry Report, "Caring for Older Australians", released on 28 June 2011. The package represents a graduated 10-year plan to reshape aged care, including initiatives to enhance choice by being consumer-directed, improving access to person-centred services, increasing affordability of services and providing incentives to facilitate the efficient use of aged care resources.

The reforms address a number of key issues in order to restructure the aged care system and to accommodate Australia's ageing population. Importantly, the reforms streamline aged care financing arrangements for residential care to give aged care providers more certainty and to enable more aged care homes to be built. The reforms are also consumer focused and introduce a range of consumer protections, aiming not only to improve the viability and sustainability of the aged care sector, but to also attract new investment and allow the industry to improve and reform.

From 1 July 2012, the Government will deliver a number of reforms. Here are just some of the initiatives:

- The maximum level of the Government daily accommodation supplement for aged care residents will be increased from $32.58 to $52.84 to recognise the true cost of providing aged care accommodation.
- Residents in aged care homes will be provided with more consumer protection and choice by having the option of paying for their accommodation through a fully refundable lump sum or a rental style periodic payment, or a combination of the two. This will include the removal of the outdated distinction between high and low level care, following a review of the Schedule of Specified Care and Services. The charging of retention amounts on accommodation bonds will also be abolished. Residents will also be granted more security by virtue of a "cooling off period", allowing them to delay their decision of how they will pay for their accommodation until they enter care and are protected by the security of tenure provisions.
- Means testing arrangements for Australians entering residential care will also operate to ensure a consistent fees policy by combining the current income and asset tests. This will prevent residents with a low income and high assets from paying for all their accommodation but not care and those residents who are asset-poor and income-rich from paying for their care but not accommodation. A lifetime cap of $60,000 on care fees will also ensure that no person will pay more than this amount during their lifetime.
- The Aged Care Funding Instrument will be refined such that the level of care being offered by aged care providers is better matched to the funding claimed by providers. It will be applied more easily by independent assessors and outside residential settings, to determine funding levels for residential and home care packages. This will give consumers greater flexibility and choice as to how they spend their subsidy and is a move towards entitlements being attached to consumers rather than providers.
- The Better Health Care Connections measure will promote the development of partnerships across health and aged care sectors. Initiatives will be introduced to encourage aged care providers to develop new models of service with public and private health care providers and medical insurers. The intention is to remove the current barriers to short term and complex health care posed by regulatory road blocks and lack of funding.
- A $75.3 million national Commonwealth Home Support Program will also be introduced to assist older Australians to remain in their homes, which will provide a range of improved support services for older Australians in their home.
- The operational home care packages will be increased from 40,000 to 100,000. This will include the Consumer Directed Care in Home Care packages, placing the individual at the centre of care decisions.
- A new income tested fee on top of the current basic fee will apply for some care recipients, which will require some care recipients to contribute more to the cost of their care but ensuring those who cannot afford to contribute will be protected.
- A new Aged Care Reform Implementation Council comprised of industry, consumer and workforce stakeholders and experts in the industry, will drive and further develop the implementation of the aged care reforms.
- A new Aged Care Financing Authority will provide independence and transparency by providing advice on pricing and financing, while also representing taxpayers, aged care providers, consumers and aged care workers.

From a legal point of view, the regulation of the industry and the plethora of compliance issues is already a major impost on suppliers. While welcoming change in the sector, the government will need to be careful to ensure that these reform initiatives (that seem to be designed to encourage innovation and competition) do not just add to the obligations on an already overregulated system. This overregulation of supply seems to be an issue that has not yet been addressed. Suppliers need freedom to be innovative if they are to meet the ever changing needs of the community. While the reforms do seem to be a step in the right direction, they fall well short of some of the more pertinent recommendations from the Productivity Commission. ■

Elder Financial Abuse and Independent Legal Advice

by Mark Victorsen, Partner and Marissa Coward, Associate

Introduction

The population of elder Australians is set to increase at exponential rates[1], which has also resulted in a concerning trend of elders giving away major assets and financial resources to relatives and caregivers without the benefit of independent legal advice[2]. These issues present unique challenges to our legal system which must adapt to accommodate the increased demand for legal assistance in instances of suspected elder financial abuse[3]. The actions of solicitors involved in these matters have been discussed in a number of cases.
From this we are able to identify what does, and does not, constitute appropriate independent legal advice to elderly clients.

Discussion

In Smith v Glegg[4],the plaintiff, an elderly woman, transferred her home to her grandson for no consideration. The transaction was instigated by her daughter, the defendant, who then sold the home and retained the proceeds. A relationship of influence was established between the plaintiff and defendant and in the absence of independent legal advice, the transaction was set aside. In relation to the actions of the solicitors involved, the following findings were made:-

- The solicitors never met or communicated with the grandson for whom they purported to act.
- The plaintiff was not represented by the solicitors, therefore advice given was not independent of the defendants' interests, particularly given no advice was provided to the plaintiff as to whether it was in her interest to give away her property[5].
- The solicitors' argument that they had explained the transaction to the plaintiff was rejected. The documents were "so inconsistent" that no lawyer could have sensibly explained their combined effect[6].

Conversely, an example of where a solicitor has provided independent legal advice was Christodoulou v Christodoulou[7]. Whilst ultimately there was no evidence of undue influence or unconscionable bargain in this matter, the Court noted that had either been established on the facts the presence of independent legal advice would have rebutted either presumption in the defendant's favour[8].

In Christodoulou, the solicitor took adequate steps to ensure the elderly plaintiff understood the nature and effect of the transaction. Justice Kaye noted the solicitor appropriately:-

- communicated with the plaintiff in her first language of Greek;
- provided advice regarding the transaction on three separate occasions and consistently sought to protect the plaintiff's interests;
- directed the son to obtain separate legal advice in respect of the transaction and was conscious not to act for both plaintiff and defendant; and
- offered alternatives to the plaintiff, including transferring her interest in the property as a testamentary gift to her son, which the plaintiff rejected[9].

It is also of paramount importance that an elderly person receive advice regarding all aspects of the proposed transaction. In the matter of Field v Loh & Anor[10], the plaintiff, an elderly woman, wished to provide friends with $180,000 in order to finance a home within which they would all reside. The arrangement was ultimately not successful and she wished to establish a constructive trust over the property in her favour.

The plaintiff's solicitor advised her not to proceed with the transaction and ultimately withdrew from acting on her behalf[11].

Subsequent to this, the plaintiff executed a statutory declaration stating the money was a non-refundable gift, having been informed this would prevent her children from claiming the money if she died[12].

Justice Douglas commented that the legal advice provided to the plaintiff advising her against entering into this transaction was sufficient, however, this advice predated the introduction and signing of a statutory declaration stating the money was a non-refundable gift[13]. The plaintiff had not received legal advice regarding the signing of the statutory declaration and the document was held to have been obtained through an unconscionable bargain[14]. The plaintiff was successful in establishing she held a constructive trust over the property.

The judiciary has highlighted that the legal profession is well placed to identify, address and prevent instances of elder financial abuse[15]. This was discussed at length in the matter of Winefield v Clarke[16], which also proposed measures to assist solicitors when advising elder clients to;

- obtain clear instructions;
- consider the elder's legal capacity and obtain a medical opinion before proceeding;
- seek instructions directly from the elder, not others purporting to act on their behalf;
- discuss and confirm that the elderly person understands the transaction, its purpose, providence and viable alternatives; and
- discuss and confirm that the elderly person understands the consideration to be paid, if any, and the arrangements for the provision of that consideration[17].

Solicitors have been involved in many cases where insufficient legal advice has been provided, resulting in elders being abused financially. There are encouraging trends emerging through the courts and community services where the plight of elders and their difficulties with utilising their legal rights are being addressed, however, in the interim it is pertinent that the legal profession remains vigilant in providing clear, complete and appropriate advice to their elder clients.

Relevant to hospital operators, retirement living and aged care providers

These cases are of relevance to hospital operators, retirement living and aged care providers with respect to their dealings with their clients and entering into financial arrangements with them.

1 The number of Australians aged 65 and over is expected to increase from 12% in 1998 (Tina Cockburn, 'Elder Financial Abuse by Attorneys: Relief Under Statute and in Equity' (2005) Proctor 22) to between 21-22% by 2031 (Sue Field, 'The Concept of Elder Law' (2002) Reform 20).

2 Fiona Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26 Melbourne University Law Review 499.

3 Sue Field, 'The Concept of Elder Law' (2002) Reform 20.

4 [2004] QSC 443.

5 Smith v Glegg [2004] QSC 443 per Justice McMurdo at [46].

6 Smith v Glegg [2004] QSC 443 per Justice McMurdo at [45].

7 [2009] VSC 583.

8 Tina Cockburn and Barbara Hamilton, 'Equitable Remedies for Elder Financial Abuse in Inter Vivos Transactions' (2011) 31(2) Queensland Lawyer 123.

9 Christodoulou v Christodoulou & Anor [2009] VSC 583 at [108].

10 [2007] QSC 350

11 Field v Loh & Anor [2007] QSC 350 [20].

12 Field v Loh & Anor [2007] QSC 350 [21].

13 Field v Loh & Anor [2007] QSC 350 [24].

14 Field v Loh & Anor [2007] QSC 350 [23]

15 Note 8.

16 [2008] NSWSC 882

17 Winefield v Clarke [2008] NSWSC 882 at [46]

Update on Personal Property Security Reforms

by Krystiana Conomos, Senior Associate

Personal Property Securities Reform

The Personal Properties Securities Act 2009 (Commonwealth) **(PPSA)** commenced on 30 January 2012.

The aim of PPS reform is to improve the ability of individuals and businesses, particularly small-to-medium size businesses, to use more of their property to secure lending. PPS reform follows the example of other countries – in particular, Canada and New Zealand.

The introduction of a national system in Australia removes the previous limitations or uncertainty on the use of personal property as security.

Prior to PPS reform, the rules for registering a security interest were different for the Commonwealth and for each State and Territory. Each had their own personal property schemes with different laws and many separate registers. The PPS Register **(PPSR)** replaces the many State, Territory and Australian Government registers, and brings them together into one national system.

What is personal property?

The PPSR is designed to hold details about security interests in personal property that can include cars, boats, stock, machinery and equipment, crops, investment instruments including shares, intellectual property and contract rights to name but a few. Personal property can also include property that will be owned in the future. It does not include, and this is an important distinction, real property (land) and any fixtures or dwellings on that land.

The Personal Property Securities Register

Data from other security registers around the country has been transferred to the PPSR.

Security interests in cars, for example, which are currently held on state-based registers known as REVS in NSW (Register of Encumbered Vehicles) and VTEC in Victoria, have been transferred to the new site.

The register of company charges has been migrated from the Australian Securities and Investments Commission to the PPSR.

The register is available at: http://www.ppsr.gov.au.

The register has two levels of access, casual users and frequent users. Businesses and consumers, who might use the register on a casual basis can pay for and perform a search without having to set up an account. A business or consumer might use the register to check if there is a security interest over an item of property that they are thinking of buying or that they have been granted a security interest in. Frequent users (anticipated to be businesses), on the other hand, can register and nominate people within an organisation for access to the register. Use of the register will incorporate protections related to privacy and searches against the names of businesses or individuals will only be allowed for purposes that are authorised. Penalties will apply for misuse of private information contained on the register and claims for damages may be brought by those who have suffered loss or damage as a result of any breaches.

When security interests (which are proscribed in the regulations) are listed on the register, financial statements will have to be submitted to ensure that the registration is valid.
A party wanting to register a security interest must believe on reasonable grounds that it holds a security interest, ie a party cannot register a security interest merely because they are wed money. Most importantly, when registering items for security it is essential that they are properly described.
This means including details of key attributes of the property including registered trademarks and serial numbers. Details that are incorrect or missing may render the registration ineffective. There are also penalty provisions for registrations that are made without foundation.

What is different?

The PPSA both confirms some areas of existing secured transactions law and provides a significant reform in other areas. Elements which have been confirmed include notice based registration, unenforceability of security interests which are not properly registered and a system of priorities which are largely (although not entirely) on temporal priority.

However, the PPSA is a significant reform in areas such as retention of title clauses, long term leases, consignments and the transfer of book debts. The failure to perfect a security interest can result in mandatory subordination under the PPSA, regardless of who has superior title.

Terms such as fixed and floating charges are now replaced with General Security Deeds[1].

In the past, of course, a security interest was always capable of being granted whenever a person or a business has taken an interest in some personal property as security for a loan or as credit for some goods received. However, it was not always capable of being registered. The new PPSR makes the whole operation more readily transparent by allowing creditors to view the number of security interests granted in a particular piece of personal property, as well as making it easier for creditors to seize goods when a creditor defaults.

We recommend that businesses:

- become familiar with the new legislation;
- ensure that security interests are registered where appropriate; and
- update their terms and conditions on contracts related to credit and ensure that their customers are aware of the new terms and conditions.

The new laws will affect all lenders and trade creditors in any type of business relationship.

By way of an example, if a business known as, let's say, Joe's Medical Centre, approaches Alison's Medical Supplies Pty Ltd for a trade credit account with a limit of $40,000, Joe's Medical Centre may be required to provide security for the value of that account. A security interest may then be established in some of Joe's Medical Centre's personal property, which might be equipment as well as the stock supplied by Alison's Medical Supplies.

The same is true of other credit relationships such as chattel mortgages, conditional sales agreements, hire purchase agreements and consignments where a security interest is created automatically. These examples have always had a security interest but they were never required to be registered to be enforceable.

Previously rights under equipment leases and romalpa clauses did not require registration to be effective. Under the PPSA these securities may need to be registered.

Relevance to health care providers

The relevance of the PPSA to health care providers include:

- When they are purchasing or selling assets;
- In obtaining credit and granting securities; and
- If they consider that a debtor may become insolvent.

Relevance to the lifesciences sector

The relevance of the PPSA to pharmaceutical and medical device manufacturers and suppliers include:

- When they are purchasing or selling assets;
- In obtaining credit and providing securities;
- In granting credit and requiring securities;
- Protecting their rights in relation to a retention of title clause (romalpa clause); and
- Protecting their rights in relation to consignment of stock and equipment leases. ■

1 Jason Harris & Nicolas Mirzai "Annotated Personal Property Securities Act 2009 (Cth)", pxxiv.

Workplace Bullying – Your Obligations

by Robin Young, Partner, Rachael Sutton, Partner and Nick Read, Solicitor

Failing to implement and follow proper procedures in relation to workplace bullying can expose a business to both criminal and civil liability. In light of the significant increase in legal action relating to bullying, Safe Work Australia has published a Draft Code on Preventing and Responding to Bullying in the Workplace. The Code, which is expected to be finalised by Safe Work Australia shortly, emphasises the importance of implementing strategies to minimise the risk of workplace bullying.

What is workplace bullying?

The Code defines workplace bulling as "repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety."

"Repeated behaviour" refers to the persistent nature of the behaviour and can refer to a range of behaviours over time, while "unreasonable behaviour" means behaviour that a reasonable person, having regard to the circumstances would see as victimising, humiliating, undermining or threatening. The definition of bullying is also extended to refer to indirect, direct, intentional and unintentional bullying. The Code provides many examples illustrating such conduct.

Who has duties in respect of workplace bullying?

Under the harmonised work health and safety laws, every business has an overriding obligation to ensure the health and safety of its workers. This obligation extends to providing a safe work environment free from bullying and harassment. Codes of Practice are practical guides to achieving the standards of health, safety and welfare required.

Risk management

The Code sets out a risk management process involving the following steps:

- Identification of risk factors
- Assessing the likelihood of bullying occurring and its impact,
- Controlling the risks by eliminating them, or where that is not reasonably practicable, minimising the risk as far as reasonably practicable; and
- Reviewing the effectiveness of the control measures.

Identification and assessing the risk of bullying involves consideration of a broad range of issues including organisational culture, negative leadership styles, inappropriate systems of work, and poor work relationships.

The Code recommends the following measures for controlling the risks of bullying:

- Managing the risks in the work environment
- Developing a workplace bullying policy
- Developing effective complaints resolution procedures
- Responding effectively to complaints
- Providing information and training on workplace bullying to workers, and
- Encouraging reporting of workplace bullying incidents.

Holman Webb are able to advise on the compliance of workplace bullying policies with the Codes, the implementation of complying policies, or investigations into allegations of bullying. ■

Changes to the Oaths Act 1900 (NSW)

by John Wakefield, Partner, and Georgina Philpott, Solicitor

On 30 April 2012, new requirements were introduced in NSW for authorised witnesses, such as Justices of the Peace, Notaries Public and legal practitioners, when witnessing stautory declarations and affidavits.

Pursuant to a new section 34 inserted in the Oaths Act 1900 (NSW) **(Oaths Act)** authorised witnesses are now required to certify on the declaration or affidavit that:

1. they have seen the face of the person making the declaration or affidavit (the **"deponent"**), or, if the face of the person making the declaration or affidavit is covered by a face covering, that they are satisfied that the deponent had a special justification for not removing the covering.
2. they have known the person making the declaration or affidavit for at least 12 months, or that they have confirmed the deponent's identity using an "identification document", or a certified copy of an identification document.

Currently, the only "special justification" for not removing a face covering is a legitimate medical reason. It is interesting to note that a statutory definition of "face" was also introduced, defined as "from the top of the forehead to the bottom of the chin, and between (but not including) the ears"

"Identification documents" include a current driver's licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport. For a full list, please see JP Ruling 2003 – Confirming Identity for NSW statutory declarations and affidavits, footnote 3.

It is important to note that a cancelled document or a document with an expiry date which has passed cannot be used. There are some exceptions, for instance, an Australian passport which has been expired for less than 2 years may be used.

Schedule 1 – Form for Certificate under section 34(1)(c) of the Oaths Act suggests the following text be inserted and adjusted accordingly on the face of the declaration or affidavit:

> **Please cross out any text that does not apply*
>
> *I [insert name of authorised witness], a [insert qualification to be authorised witness], certify the following matters concerning the making of this [statutory declaration/affidavit] by the person who made it:*
>
> *1[I saw the face of the person] or [I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering].*
>
> *2[I have known the person for at least 12 months] or [I have not known the person for at least 12 months, but I have confirmed the person's identity using an identification document and the document I relied on was:*
>
> *[describe identification document relied on].*
>
> *[insert signature of authorised witness]*
>
> *Date:*

Failure to comply with section 34 of the Oaths Act will not affect the validity of the statutory declaration or affidavit, however, a penalty of up to two penalty units ($220) may be imposed. ■

MEET THE TEAM

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Mark is a Partner in our Brisbane office. He has over 10 years experience in insurance litigation with an emphasis on dust disease, medico-legal litigation and insurance recoveries. Mark acts for insurers and self insured parties.

Mark previously worked as an in-house legal advisor for the Queensland Department of Health, where his role included managing both Area Health Service and Corporate medico-legal litigation. Mark was intimately involved in the consultation and development of the Queensland Health Indemnity Policy for both employed and Visiting Medical Officers.

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Zara is a Special Counsel in our Sydney office, she has practiced insurance law and litigation in NSW for over 17 years. She has defended a number of large catastrophic personal injury claims and has regularly advised insurers, self insurers and government entities on relevant statutory regulation in public sector litigation and liability.

Her current focus is in professional indemnity, medical negligence and disciplinary proceedings, including matters involving discrimination and defamation. She has extensive experience in coronial inquiries, including acting for medical practitioners, public hospitals, and other public sector entities. Zara started her career at Royal Melbourne Hospital in general nursing.

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