



Health Alert April 2010

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Recent *Fair Work Australia* decision hampers one health care provider's plans for flexibility

One health care company's attempt to give employees their choice of preferred working hours (which was supported by both unions and employees) results in "financial detriment" to employees according to a *Fair Work Australia* full bench.

Bupa Care Services Pty Ltd (**Bupa**) appealed against a decision of Commissioner Smith that refused to approve Bupa's enterprise agreement that covered its Victorian operations. Whilst the appeal was successful on procedural grounds, the full bench reiterated that the 'preferred hours' clause in the enterprise agreement was disadvantageous to employees.

The 'preferred hours clause' allowed employees to request to work additional hours to suit their personal circumstances (such as carer responsibilities). The stingy point with these arrangements was that employees would forgo their entitlement to overtime payments when the request to work additional hours was at their own initiation but would receive any applicable shift penalties. However, if Bupa requested or required employees to work additional hours the employee would receive overtime payments.

Commissioner Smith criticised the clause as a cost saving rather than a benefit (no matter if employees believed they were better off because they could choose to work additional hours when it suited their needs and would get work that they

might not have otherwise been given). This concept was seen as having far reaching implications for the operation of the safety net of wages and conditions and undermines the concept of 38 ordinary hours per week.

The full bench agreed that the clause was detrimental; however the bench found that Commissioner Smith did not give Bupa the opportunity to give written undertakings to remedy the Commissioner's concerns about the enterprise agreement. For this reason the appeal was successful.

The payment of overtime is an entitlement entrenched in awards. Preferred hours clauses in enterprise agreements cannot avoid the payment of overtime rates, even when employees and unions are on side. Employers can use Enterprise Flexibility Agreements or Award Flexibility Agreements to agree to vary the application of overtime rates with individual employees. Our Workplace Relations Group is able to provide you with assistance in this regard.

Doctor's fall foul of competition laws

The investigation of five Kangaroo Island doctors by the ACCC over an alleged collective boycott has highlighted the importance of medical practitioners keeping up-to-date with competition laws.

The doctors at the South Australian Island's only medical clinic are alleged to have threatened to pull out of the Island's local hospital over a pay dispute relating to after-hours overtime.



It is illegal to enter into a contract, arrangement or understanding between competitors to prevent the supply of services or if it is anti-competitive under section 45 of the *Trade Practices Act 1974* (Cth). Maximum penalties include a \$220,000 fine and a 10-year prison term.

Where health care providers have a monopoly in rural settings, there is greater potential for abuses of market power. While doctors may work in the same building, they are separate health care providers and while they are in competition with each other, they cannot threaten to withdraw their services together in an area where there are few other health care providers.

The ACCC has announced that it accepted undertakings from each of the doctors that they will not come to an arrangement or understanding to withdraw services from the hospital.

E-Health identifiers service update

A senate inquiry into the *Health Identifiers Bill 2010* (Cth) has given its support to a national e-health system for both patients and providers to access information.

Plans for the Health Identifiers Service aim to improve the delivery and administration of healthcare in Australia by collating patient data based on 16-digit numbers given to each Australian, medical professional and health care provider.

Recommendations arising from the Inquiry include the need to:

- > involve key stakeholder groups to develop a plan to implement the bills over the two-year transition period to 30 June 2012;
- > publish the plan for public comment; and

- > develop a targeted education and communication strategy prior to 1 July 2010.

The Service aims to prevent patients having to retell their medical histories and repeat tests by sharing this information. The Royal College of Pathologists of Australasia has reported, for example, that there are as many as 150,000 to 200,000 patient identification errors each year involving pathology results, which compromises patient safety.

Parliament is expected to review the Bill further in the upcoming budget session.

Another aged care inquiry

On 21 April 2010 the terms of reference for the Productivity Commission's public inquiry into aged care were announced.

To summarise the terms of reference, the Productivity Commission has been asked to:

- > systematically examine the social, clinical and institutional aspects of aged care in Australia, building on the substantial base of existing reviews into this sector;
- > develop regulatory and funding options for residential and community aged care (including services currently delivered under the Home and Community Care program for older people);
- > systematically examine the future workforce requirements of the aged care sector;
- > recommend a path for transitioning from the current regulatory arrangements to a new system;

- > examine whether the regulation of retirement specific living options, including out-of-home services, retirement villages should be aligned more closely with the rest of the aged care sector; and
- > assess the medium and long-term fiscal implications of any change in aged care roles and responsibilities.

Full details of the terms of reference are available on the [Assistant Treasurer's website](#).

Legislation update

Paediatric Patient Oversight (Vanessa's Law) Bill 2010 (NSW)

This Bill was introduced into the Legislative Assembly and received its second reading speech on 23 April 2010.

If passed, the Bill will require the governing body of a prescribed major public hospital to ensure that a paediatrician assess and approve the medical management of any person under the age of 16 years who is admitted to an adult ward of the hospital, within 48 hours of their admission.

Health Legislation (Health Practitioner Regulation National Law) Amendment Act 2010 (Qld)

This Act makes amendments to a number of Acts as a consequence of the commencement of the National Registration and Accreditation Scheme for the Health Professions in Queensland from 1 July 2010.

The Acts that are amended include the *Ambulance Service Act 1991* (Qld), *Chiropractors Registration Act 2001* (Qld), *Dental Practitioners Registration Act 2001* (Qld), *Dental Technicians and Dental Prosthetists Registration Act 2001*



(Qld), *Health Practitioners (Professional Standards) Act 1999* (Qld), *Health Services Act 1991* (Qld), *Medical Board (Administration) Act 2006* (Qld), *Medical Practitioners Registration Act 2001* (Qld), *Medical Radiation Technologists Registration Act 2001* (Qld), *Nursing Act 1992* (Qld), *Osteopaths Registration Act 2001* (Qld), *Pharmacists Registration Act 2001* (Qld), *Physiotherapists Registration Act 2001* (Qld), *Podiatrists Registration Act 2001* (Qld), *Psychologists Registration Act 2001* (Qld) and the *Queensland Institute of Medical Research Act 1945* (Qld).

Health Practitioner Regulation National Law (ACT) Act 2010 (ACT)

This Act received assent on 31 March 2010.

The objective of the Act is to adopt and implement the "National Law" in the ACT, which provides a national scheme of registration and accreditation for health professions in Australia, as contained in the *Health Practitioner Regulation National Law Act 2009* (Qld).

Statute Law Amendment (National Health Practitioner Regulation) Act 2010 (VIC)

This Act received assent on 30 March 2010.

It amends the *Health Professions Registration Act 2005* (Vic) to implement the Intergovernmental Agreement for a National Registration and Accreditation Scheme for Health Professions, which the Commonwealth and the States entered into on 26 March 2008. It also establishes a new Pharmacy Board of Victoria and set out its powers and functions (which do not include registration of pharmacists in Victoria).

Health Legislation Amendment (Midwives and Nurse Practitioners) Act 2010 (Cth)

This Act received assent on 12 April 2010.

It makes amendments to the *Health Insurance Act 1973* (Cth), including:

- > stipulating additional circumstances in which medical benefits will be payable with respect to the rendering of a pathology service (requested on or after 1 November 2010), including that it was deemed necessary by a participating midwife or nurse practitioner;
- > limiting the services which may be requested by participating midwives and nurse practitioners;
- > provide for the approval of eligible midwives and nurse practitioners as participating midwives and nurse practitioners, including the right to have a ministerial refusal reviewed by the Administrative Appeals Tribunal; and
- > extending the application of certain provisions to midwives and nurse practitioners, including s. 129AA (Private hospitals - bribery).

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