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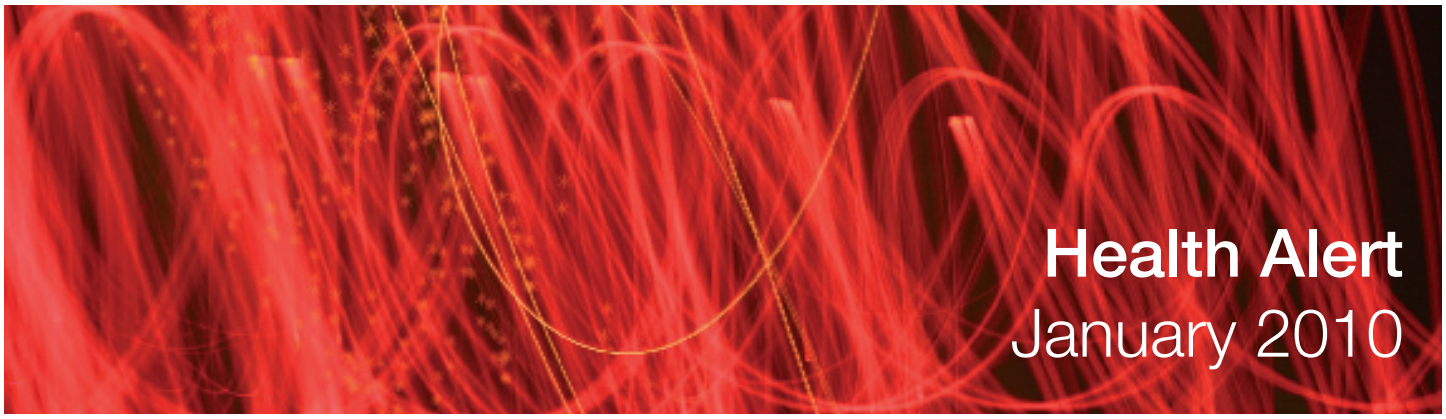

This alert contains information on the following topics:

- **When is a director's interest a 'material personal interest'?**
- **Productivity Commission – Executive Remuneration in Australia**
- **Legislation Update**

Corporate Governance

In light of the decision in ASIC v Rich which was handed down at the end of last year, we have decided to focus our first Health Alert for the year on corporate governance. For our comments on the Rich decision, please see our Directors and Officers Alert, which is available on our website.

When is a director's interest a 'material personal interest'?

Until recently, there has been little guidance as to the meaning of 'material personal interest' as that term is used in ss 191 and 195 of the Corporations Act. Section 191 requires a director to disclose any material personal interest to the board while section 195 then excludes a public company director who has a material personal interest in a matter from being present while the matter is being considered by the board or voting on the matter (unless a s195 exception applies).

Facts

The recent case of Grand Enterprises Pty Limited v Aurium Resources Limited [2009] FCA 513 provides some assistance in the interpretation of a material personal interest. A summary of the relevant facts of that case is as follows:

- Aurium Resources Limited, a publicly listed company, entered into a joint venture with Greater Pacific Gold Limited (GPG) which involved an issue of 35 million shares in Aurium to GPG;
- The issue of the 35 million shares to GPG required the approval of Aurium's shareholders;
- At the Aurium board meeting to approve the notice of meeting and explanatory memorandum 3 directors declared interests and refrained from participating in the discussions. Those directors were:
  - Remta, who was a director and chairman of both Aurium and GPG;
  - Quinn who had direct and indirect (via family trusts) shareholdings in Aurium and GPG; and
  - Benson who also had direct and indirect (via family trusts) shareholdings in Aurium and GPG.

Quinn's and Benson's interests were not referred to in the explanatory memorandum for the shareholders' meeting and the plaintiff, Grand Enterprises Pty Limited, commenced proceedings to prevent Aurium acting on the resolution to issue the shares to GPG on the basis that the explanatory memorandum did not disclose all declarations of interest and the those 'interested' directors failed to withdraw from the directors' meeting in sufficient time.

Decision

The court rejected the plaintiff's arguments and found that none of the directors had breached their obligation under s191 as:

- there was no evidence that Remta would receive any remuneration or other benefit from the proposed share issue, and as such his position as chairman and director did not amount to a 'personal' interest for the purposes of s191; and
- the shareholdings of Quinn and Benson were not sufficiently large enough to amount to a 'material' personal interest requiring disclosure.

Because there was no material personal interest found under s191, any alleged breaches of s195 were dismissed.

Things to consider

- Where a director has a personal interest that may affect the decisions they make as a director, they need to consider whether that interest is material. As this case suggests, if the decision will result in remuneration or other benefit

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being received by the director, then that interest will be material and subject to ss191 and 195 of the Corporations Act.

- A personal interest will only be material where it has the capacity to influence a director's consideration of, and vote on, a particular matter.
- The word 'personal' interest does not extend to the situation where a director has a conflicting duty (such as being a director of another contracting company) unless there are other additional issues which create an interest.

Productivity Commission – Executive Remuneration in Australia

The Productivity Commission report on Executive Remuneration in Australia was released to the public on 4 January 2010. The report was commissioned in response to community concerns that executive remuneration is out of control. The Commission found that executive remuneration has grown considerably since the mid-90s, and this has largely been due to globalisation, increased company size and the shift to incentive pay structures.

The Commission made a total of 15 recommendations, which predominantly involved amendments to the Corporations Act and the ASX Listing Rules. Some of the outcomes which the Commission sought to achieve by its recommendations are:

- all ASX300 companies should have a remuneration committee and it should comprise solely non-executive directors
- company executives identified as key management personnel and all directors be prohibited from voting their shares on remuneration reports and any resolutions related to those reports
- company executives identified as key management personnel and all directors should be prohibited from voting their shares on remuneration reports and any resolutions related to those reports
- executives should be prohibited from hedging unvested equity remuneration or vested equity subject to holding locks
- company executives identified as key management personnel and all directors should be prohibited from voting undirected proxies on remuneration reports and any resolutions related to those reports.

One of the most discussed issues covered by the Commission's terms of reference was the effect of shareholders votes on remuneration reports. The Commission addressed this issue in its final recommendation, which is that:

- where a company's remuneration report receives a 'no' vote of 25 per cent or more of eligible votes cast at an AGM, the board should be required to explain in its subsequent report how shareholder concerns were addressed and, if they have not been, the reasons why, and
- where the subsequent remuneration report receives a 'no' vote of 25 per cent or more of eligible votes cast at the next AGM, a resolution should be put that the elected directors who signed the directors' report for that meeting stand for reelection at an extraordinary general meeting. If that resolution were carried by more than 50 per cent of eligible votes cast, the board would be required to give notice that such an extraordinary general meeting will be held within 90 days.

The full version of the report is available on the Productivity Commission website

We will watch legislative developments closely and report on any activity.

Legislation Update

Retirement Villages Amendment Act 2008 (NSW) and Retirement Villages Regulation 2009 (NSW)

On 16 December 2009 the commencement date of the Act was proclaimed to be 1 March 2010. The Act amends the Retirement Villages Act 1999 (NSW).

On 18 December 2009 the Regulation was released by the NSW Department of Fair Trading. The Regulation will come into force on the same day as the amended Act.

For more information about the Regulation, please see the information sheet available on our website.

Coroners Act 2009 (NSW)

The commencement date for this Act was proclaimed on 25 November 2009 and came into force on 1 January 2010. This Act replaces the Coroners Act 1980 (NSW). Some of the changes include:

- anyone appointed as a coroner under the new Act must be an Australian lawyer and those appointed as assistant coroners must be members of staff of the Attorney General's Department
- the position of Senior Deputy State Coroner is abolished and the Minister is authorised instead to appoint an Acting State Coroner when the State Coroner is absent from duty
- it confirms that coronial jurisdiction arises regardless of whether or not a death, suspected death, fire or explosion is reported
- the current provisions relating to the reporting and investigation of deaths resulting from the use of anaesthetics are replaced with provisions relating to deaths that are not the reasonably expected outcomes of health procedures
- the current provisions that require a death to be reported (and that prohibit a death certificate being issued) if the deceased person was not attended by a medical practitioner in the 3 months preceding death are replaced with provisions that extend that period to 6 months

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- the requirement to report a death if the deceased person died within a year and a day of an accident to which the death is attributable will no longer apply
- a medical practitioner is authorised to give a death certificate concerning a cause of death in respect of a deceased person over the age of 72 who died as a result of injuries from an accident, even if the accident occurred in a hospital or nursing home.

Private Health Facilities Regulation 2009 (NSW)

It has been quite some time since the public consultation draft of this Regulation was released on 31 August 2009. We understand that the final Regulation will be released and gazetted by the end of this month and that the commencement date will be 1 February 2010.

We will keep you updated on any progress.

NHMRC Use and disclosure of genetic information to a patient's genetic relatives under Section 95AA of the Privacy Act 1988 (Cth) – Guidelines for health practitioners in the private sector

These Guidelines came into effect on 15 December 2009.

The Guidelines specify the requirements that must be met by health practitioners in the private sector if they choose to use or disclose genetic information without patient consent under National Privacy Principal (NPP) 2.1(ea). Disclosure of genetic information without consent must be in accordance with NPP 2.1(ea) and the Guidelines. The Guidelines were issued by NHMRC with the approval of the Privacy Commissioner as the means of implementing the amendment to the legislation.

The full Guidelines are available on the NHMRC website.

Assisted Reproductive Treatment Regulations 2009 (Vic)

These Regulations were made on 15 December 2009 under the Assisted Reproductive Treatment Act 2008 (Vic).

The Regulations prescribe various matters in relation to the provision of assisted reproductive treatment (ART), including the specific information that is to be kept in three registers – one maintained by the registered ART provider, another maintained by the doctor carrying out the artificial insemination and the Central Register.

The Regulations also prescribe:

- the form of consent to donate and to be treated, including the statement of a counsellor;
- the considerations to be taken into account in counselling prior to treatment, donation or surrogacy treatment and prior to posthumous use of gametes or embryos; and
- other miscellaneous subjects.

The Regulations commenced on 1 January 2010.

National Health (Pharmaceuticals and Vaccines - Cost Recovery) Regulations 2009 (Cth)

On 14 December 2009 these Regulations were made under the National Health Act 1953 (Cth).

The Regulations prescribe the following matters in relation to applications for a new or amended inclusion in the Pharmaceutical Benefits Scheme or National Immunisation Program:

- the scope and categories of, and procedures for certain applications that may be made to the Minister in relation to vaccines and certain pharmaceuticals;
- pricing and fees, including independent review fees and accounting for delays in payments;
- exemptions and waivers, including where the Secretary decides that the waiver 'involves the public interest and payment of the fee would make the application financially unviable';
- fee adjustments after overpayment; and
- review mechanisms, such as internal reviews at the request of an applicant regarding decisions on the evaluation and pricing categories of an application or the waiver of a fee and provision of a secondary right of appeal at the Administrative Appeals Tribunal.

The Regulations commenced on 1 January 2010.

Public Health and Wellbeing Act 2008 (Vic) and Public Health and Wellbeing Regulations 2009 (Vic)

The Act received Royal Assent in September 2008 but it did not come into force until 1 January 2010. It replaces the Health Act 1958 (Vic).

The Act covers a wide range of matters including:

- authorised officers within local councils and the Department of Human Services;
- pest control operators;
- cooling tower operators;
- the governance and management of a range of consultative councils established under the Act;
- the management of infectious diseases, micro-organisms and medical conditions by medical and health practitioners, the Victorian Chief Health Officer and affected individuals; and
- the development of public health policy through providing for municipal public health and wellbeing plans, a State public health and wellbeing plan and in some circumstances, health impact assessments.

The Regulations were made on 15 December 2009 and came into force on 1 January 2010.

These Regulations replace the ten regulations listed below, that were made under the previous Health Act 1958 (Vic):

- Health (Consultative Council on Obstetric and Paediatric Mortality and Morbidity) Regulations 2002);
- Health (Exempt Businesses) Regulations 2005;
- Health (Immunisation) Regulations 1999;
- Health (Infectious Diseases) Regulations 2001;
- Health (Legionella) Regulations 2001;
- Health (Pest Control) Regulations 2002;
- Health (Prescribed Accommodation) Regulations 2001;
- Health (Prescribed Consultative Councils) Regulations 2002;
- Health (Registration of Premises) Regulations 2002; and

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- Health (Seizure) Regulations 2003.

The Public Health and Wellbeing Regulations 2009 contain provisions that cover:

- Consultative Councils;
- Nuisances;
- Prescribed Accommodation and Registered Premises;
- Aquatic Facilities;
- Cooling Tower Systems and Legionella Risks in Certain Premises;
- Pest Control; and
- Management and Control of Infectious Diseases, Micro-organisms and Medical Conditions.

The new legislation applies to businesses that are deemed to pose a risk to public health, including beauty therapy and hairdressing, and businesses involving skin piercing and/or tattooing. It also applies to aquatic facilities, hotels and motels, hostels, student dormitories, rooming houses, residential accommodation and holiday camps.

Health Practitioner National Law Act 2009 (Qld)

This Act received assent on 3 November 2009.

The object of the Act is 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.

Health Practitioner Regulation Act 2009 (NSW)

This Act received assent on 19 November 2009.

The object of the Act is 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.

The Act does not adopt all of the provisions proposed in the Scheme. A separate system will be retained for dealing with complaints about registered health practitioners and students practising or studying in New South Wales.

Health Practitioner Regulation National Law (Victoria) Act 2009 (Vic)

This Act received assent on 8 December 2009.

The object of the Act is 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.

Health Practitioner Regulation National Law (Tasmania) Bill 2009 (Tas)

This Bill was introduced into the House of Assembly on 4 November 2009.

The object of the Bill is 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. The Bill contains some provisions that are specific to Tasmania.

Health Practitioner Regulation National Law (ACT) Bill 2009 (ACT)

This Bill was introduced into the ACT Legislative Assembly on 10 December 2009.

The object of the Bill is 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. The Bill contains some provisions that are specific to the ACT.

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