

Health Alert October 2010

Prohibited practices provisions: Court dismisses Primary Health Care's claim against Healthscope

On 1 October 2010, the Supreme Court of Victoria delivered its decision in the highly anticipated case of *Specialist Diagnostic Services Pty Limited v Healthscope Limited & Ors*. The case was of great interest as it involved, amongst other things, allegations of breaches by Healthscope of the prohibited practices provisions in the *Health Insurance Act 1973* (Cth) (**HIA**).

Background

The case was based on allegations by Specialist Diagnostic Services Pty Limited (formerly Symbion Pathology) (**Symbion**) that Healthscope was breaching restraint provisions in a lease between the two parties. The lease prevented Healthscope from allowing a competing pathology to operate within the John Fawcner Hospital (**Hospital**), which Healthscope acquired in late 2005.

Within months of the acquisition, Healthscope opened a competing pathology service (**Gribbles**) adjacent to the Hospital premises and commenced promoting Gribbles to Hospital staff and doctors. In its claim, Symbion asserted Healthscope was unlawfully inducing doctors and staff to refer patients to Gribbles and was thereby breaching the prohibited practices provisions of the HIA.

Outcome

While the Supreme Court found that Healthscope had promoted Gribbles over those pathology services offered by Symbion, it held that this action did not amount to a breach of law. Symbion failed to establish that doctors used Gribbles' pathology services 'because of the impact of any conduct that was more than mere competition'. As the Court did not find any breaches by Healthscope of its obligations of good faith obligations under the lease, the Court took the view that it was not necessary to make any findings on any allegations of Healthscope's breaches of the HIA.

Additionally, much of the evidence relating to the allegations of HIA breaches was of conversations between relevant individuals, without any contemporaneous written material. The Court discounted the weight given to this type of evidence given the time which had passed since those conversations took place, and the fact that a lot of those conversations occurred informally without any written record.

What this means

Unfortunately, this case does not shed any additional light on how a Court will interpret the prohibited practices provisions of the HIA. Although given the potential criminal sanctions for a breach, a Court will be particularly careful when assessing any oral evidence in the absence of contemporaneous written evidence (as the Supreme Court of Victorian was in these proceedings).

We recommend that clients take a cautious and conservative approach when negotiating any arrangements and ensure that all payments and services have a valid commercial basis to avoid potentially breaching the HIA.

Our health team regularly advises on the HIA and its impact on any commercial transactions to ensure our clients enter into arrangements which do not breach the prohibited practices provisions.

The National Health and Hospitals Network Bill 2010 (Cth)

In its first sitting fortnight, the Labor Government has tabled the first item of legislation set to enact the National Health and Hospitals Network.

The *National Health and Hospitals Network Bill 2010 (Cth)* (**Bill**) expands the function of the Australian Commission on Safety and Quality in Health Care (**Commission**) as an independent Commonwealth authority.

The Commission will be governed by a Board, Chief Executive Officer and will be chiefly responsible for setting the quality and standards of care in line with the National Health and Hospitals Network Agreement.

With a focus on health care safety and quality, the Commission will be responsible for:

- promoting programs;
- publishing information and reports;
- advising the Commonwealth Minister;
- setting standards, guidelines and indicators;
- promoting and monitoring such standards, guidelines and indicators;
- advising the Commonwealth and each State and Territory Health Minister on:
 - national clinical standards; and
 - model national schemes for the accreditation of health care service providers; and

- consulting and working with other people, organisations and governments.

Importantly, before setting any standards, guidelines or indicators under the proposed Act, Section 10(2) of the Bill requires the Commission to consult:

- clinicians;
- bodies known as lead clinician groups;
- each State and Territory Health Minister's department; and
- any other stakeholders, including the public.

While such standards, guidelines and indicators are proposed to be voluntary, the Bill provides that they may be a term or condition of:

- a grant;
- a contract or other legally enforceable agreement; or
- applied or adopted by or under a Commonwealth, state or territory law.

If passed, the proposed Act will also be extended to provide for the Independent Hospital Pricing Authority and the National Performance Authority foreshadowed in the reforms.

A 'public benefit' test for charities?

In September the Economic Legislation Committee of the Senate (**Committee**) released its report on the *Tax Laws Amendment (Public Benefit Test) Bill 2010 Cth* (**Bill**). The Committee recommended that a national commission, incorporating a public benefit test in the broader regulatory framework, should be established. The Committee said that a commission of that nature would replace a complex array of state and territory regulatory bodies, streamlining processes for charities and reducing their compliance costs. In addition, it would improve public confidence in charities by improving their transparency as well as being a source of advice and assistance to charities.

While this is only a report on a private member's bill, the fate of which is unknown in the new federal parliament, other inquiries have also recommended changes to the regulatory oversight of the not for profit sector and we will be reporting on developments on this topic as they emerge.

Legislation update

Health Administration Regulation 2010 (NSW)

This Regulation provides for quality assurance committees, root cause analysis teams, 'prescribed establishments' such as colleges, institutions and other bodies under the *Health Administration Act 1982 (NSW)* and when disclosure of certain information will not amount to an offence under that Act. The Regulation commenced on 1 September 2010.

Health Practitioners Regulation National Law (WA) Act 2010 (WA)

The object of this 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.

This Act was passed on 1 September 2010. The majority of the provisions commence on 18 October 2010, although the commencement of some provisions is yet to be proclaimed.

Pharmacy Act 2010 (WA) and Pharmacy Regulations 2010 (WA)

This legislation provides for the registration and control of premises for pharmacies and to control pharmacy businesses.

The Act establishes the Pharmacy Registration Board of Western Australia (a continuation of the

Pharmaceutical Council of Western Australia), outlining the Board's functions and processes. It also incorporates the Pharmaceutical Society of Western Australia.

The Regulations outline, amongst other things, the process of registration, the details to be recorded in the register, and other requirements under the Act for alterations to be approved by the WA Pharmacy Registration Board.

The Act and Regulations commence on 18 October 2010.

Supported Residential Services (Private Proprietors) Act 2010 (Vic)

This Act regulates private supported residential services, setting 'minimum standards of accommodation and personal support' for residents, with enforcement procedures to ensure those standards are maintained. Proprietors have a number of obligations under the Act, including disclosure to prospective residents, staffing requirements, record-keeping, complaints handling and standards compliance.

The commencement of the Act has not yet been proclaimed, but the Act provides for commencement to be no later than 1 July 2012.

User Rights Amendment Principles 2010 (Cth)

These Principles set the maximum daily accrual amount of accommodation charges for some types of residents under the *Aged Care Act 1997 (Cth)*. Residents entering care from 20 September 2010 (when the amended Principles commenced) are subject to an increased maximum amount.

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