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Health Alert

October 2011

A step closer: draft eHealth records legislation released by Commonwealth government for public consultation

On 30 September 2011, the Minister for Health and Ageing, Nicola Roxon, released the *Exposure Draft Personally Controlled Electronic Health Records Bill 2001* (Cth) and the *Exposure Draft Personally Controlled Electronic Health Records (Consequential Amendments) Bill 2001* (Cth) (**draft eHealth records legislation**) for public consultation. The draft eHealth records legislation is the vehicle through which the personally controlled electronic health record (**PCEHR**) system will be created and managed by the government.

The government also released the *Personally Controlled Electronic Health Record System: Exposure Draft Legislation (Companion Document)* which explains the draft eHealth records legislation in plain English and describes how the legislation is intended to operate as a regime.

The closing date for comments and submissions on the draft eHealth records legislation is 10.00am Friday 28 October 2011.

Click here for Exposure Draft PCEHR Bill.

It is proposed that the draft eHealth records legislation commence on 1 July 2012 (subject to parliamentary processes). Regulations are intended to be made before July 2012. The plan is that from July 2012 any individual in Australia will be able to register online for a PCEHR.

The draft eHealth records legislation currently includes:

- Key concepts of the legislative framework, such as what constitutes a PCEHR and who are the participants in the system;
- The roles and responsibilities of the System Operator (which will initially be the Secretary of the Department of Health and Ageing and then such other body established by the regulations) and its advisory committees;
- Voluntary registration of consumers, healthcare providers, and storage/portal/other contracted service providers;
- Cancellation process (noting record retention requirements will still apply even after cancellation confirmed);
- Strict security regime is envisaged to make "medical information much more secure and private than paper based records" and deterrents for contraventions have been included:
  - civil penalties of up to 120 penalty units ($13,200) for individuals and up to 600 penalty units ($66,000) for bodies corporate for unauthorised access etc of a single record and multiple penalties will arise where unauthorised access etc of multiple records;
  - contraventions of the legislation relating to health information included in a PCEHR can also be investigated under the Privacy Act 1988 (Cth); and
  - criminal penalties may arise under other legislation e.g. cybercrime offences under the Commonwealth Criminal Code.
- General matters including review of the decisions of the System Operator, reports to be provided by the

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System Operator and the Information Commissioner, review of the legislation and the regulations and other subordinate legalisation, including the PCEHR Rules.

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National System for Registering Business Names

An exposure draft of *The Business Names Registration Bill 2011* (Cth) (**Bill**) has been issued by the Commonwealth Government. The proposed legislation will implement a national system for registering businesses, replacing the business registers currently operating in each State and Territory.

The Senate Economics Legislation Committee has issued a report on the exposure draft (**Report**). The Report identifies four key benefits of a national system to small business:

- simplifying registration through a central online facility;
- registration will be once-only to apply nationwide;
- a simplified ABN registration process to be done at the same time as the name is registered online; and
- one Australia wide fee for registration and renewal.

Key issues flowing from a national system include:

- Continuation of existing state registrations with the possibility of such grandfathered business names having an additional administrative qualifier added where there are two business names now registered in different states that are identical – for example, 'Joe's Plumbing' operating as separate businesses in Brisbane and Adelaide may have their respective city added for administrative purposes, but not required to be used in their actual trading name.
- The Report deals in some detail with the Bill's restriction on allowing non-government entities to access personal information on the National Business Names Register (Register), because of the Information Privacy Principles. In particular, financial institutions are concerned at the excising of residential addresses and dates of birth from business extracts obtained from the Register. The Report suggests that the Government should give further consideration to the Bill's provision denying information brokers the level of access to business names information that they currently have from the state registers.
- The practical problems of interaction between domain names and business names are not addressed by the Bill. For example, a person with a registered business name may subsequently find that a URL identical to that name has been taken by another business. The Report says that the Bill should be an opportunity to address the issue of domain names, either through a clause stipulating that they will not be taken into account should a dispute arise (where disputes are not related to trademarks), or by legislating that domain names are a part of the registration process and are searchable.
- The Committee received a number of submissions on anticipated problems searching for trademarks under the new system. Although ASIC will have a link on its website taking users to TM Check (an online database of trademarks), that database is not comprehensive. It is the Committee's view that the online links to TM Check and the Australian Domain Name Administrator site on the ASIC website are not as direct as what has been achieved in other jurisdictions, notably the United Kingdom and Canada. The Committee notes that the National Business Register that is operated in the United Kingdom allows a business name, domain name and trademark to be registered by accessing a single website. Further, the UK's National Business Register has a free multi-search function that allows users to search for similar or identical business/company names, domain names and trademarks. The systems that operate in the UK and Canada prohibit the registration of a new business name that impinges upon an existing trademark. ASIC will not prevent the registration of a business name that may impinge upon another individual's trademark. The Committee believes that the National Business Names Register should incorporate trademarks, business/company name and domain name data, similar to the systems that are currently in operation in the United Kingdom and Canada. The committee has asked the Department of Innovation, Industry, Science and Research and ASIC to consider the international development of business name registers for the medium term future.
- The Bill restates the current position that registration of a business name does not give any proprietary rights to that name. Rather, the rationale for business name registration is that where a person is trading under a name other than their own, the public can find out who is behind the business name. Under the new system, problems with opportunistic registrations will continue – for example, an opportunist may register various likely name combinations coming out of a potential

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merger when that merger is announced. While general law and trade mark rights may enable a party with prior rights in that name to prevail, the expense and time of achieving that through legal action may exceed the costs of buying out the opportunist. As now, if a party wishes to obtain statutory protection, and the best form of protection, for a particular name they use to identify their goods/services, they should apply for trade mark registration and not rely on a business name registration alone.

The Government plans to commence the new national system in May 2012, and the Report stresses the importance of an effective prior education campaign to explain the benefits of the new system and how it will operate. We will continue to monitor progress with the proposed Bill.

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Productivity Commission Caring for Older Australians – future of accommodation bonds

The Inquiry

In April 2010, the Productivity Commission (**PC**) was asked to conduct a public inquiry into aged care. The Terms of Reference were divided into 6 points of inquiry and the point relating to the development of recommendations on funding options was sub-divided into a further 9 points, highlighting the importance and complexity of this issue in the aged care sector. After receiving some 487 submissions, the PC released a draft report in January 2011 which included 42 recommendations. A further 438 submissions were received by the PC, making it a total of 925 submissions received and in addition 13 public hearings were held. The final report "*Caring for Older Australians*" was released on 8 August 2011. The report runs for over 1000 pages and contains 58 recommendations. At least 20 of those recommendations relate directly to or touch upon funding issues. We have not attempted to regurgitate the report here, but instead have focussed in this issue on the implications of the report on accommodation bonds.

Accommodation payments

One of the key recommendations relates to the regulatory restrictions on residential accommodation payments. The PC asserts that a current problem is that accommodation charges do not reflect the costs of providing residential accommodation and that accommodation bonds bear little relation to real costs.

Under the current arrangements, there are 2 types of accommodation payments that may be payable to aged care providers. Residents requiring high care (other than on an extra service basis) may be asked to pay an accommodation charge. Residents requiring low care or entering an extra service place may be asked to pay an accommodation bond.

An accommodation charge is a daily amount a resident may be asked to pay. A maximum daily rate is set by the government (currently $30.55) and conditions apply regarding eligibility of a resident to pay, including a threshold of assets held by the resident (currently $39,000) below which the resident cannot be asked to pay a charge.

An accommodation bond is an amount a resident may be asked to pay when they require low care or enter an extra service place. It is like an interest free loan to the aged care provider who is entitled to deduct monthly retention amounts for up to five years up to the maximum amount set by the government (currently $318 per month). The balance of the bond (the ingoing amount less the retention amounts) is refunded to the resident or their estate when they leave the aged care home. The government has not set any restrictions around the amount of the bond that can be charged except that the payment of the bond cannot leave the resident with less than a specified amount in assets (currently $39,000). The bond can be paid as a lump sum, fortnightly/monthly periodically or a combination of lump sum and periodic payments. If the bond is not paid as a lump sum and on time, the aged care provider can charge interest up to the maximum permissible interest rate (currently 9%).

The *Aged Care Amendment Act 2001* (Cth), which we reported on in the last edition of the Health Alert, was enacted with the aim of providing a level of certainty around how accommodation bonds can be used, namely for capital works, investment in financial products, loans for these purposes and refunding accommodation bonds. However, restrictions on the use of income derived from accommodation bonds, retention amounts and accommodation charges have been removed.

PCs recommendations

The PC has recommended (amongst other things) the following which, if ratified and implemented by the Government, will impact significantly on the funding model for the delivery aged care which until now has greatly depended on the way in which accommodation bonds can be charged and used:

- Removing restrictions on residential places and care packages;
- Removing distinctions between residential low and high care and between ordinary and extra service bed licences;
- Allowing accommodation bonds to be charged for all residential care, abolishing regulated retention charges and giving residents choice of a periodic charge, or where offered, an accommodation bond or a combination of these;
- Limiting the accommodation bonds to no more than the equivalent of the periodic accommodation charges but uncapping the periodic accommodation charges to reflect the differing standards of accommodation;
- "Unbundling" the costs of aged care into separate policy areas: accommodation and everyday living expenses (which should be the responsibility of individuals with safety nets for those with limited means), health care (which should be subject to charging arrangements consistent with the health care system), and personal care (which should be contributed to by the individual according to capacity to pay but should not be exposed to catastrophic costs of care);
- Rate of co-contributions to be determined by government based on affordability and capacity to pay through means testing; and
- A person's share of their principal residence should be included in total assets test for supported resident status.

Implications for aged care operators

The restrictions on care places and packages have resulted in the creation of a false safety net. Providers and funders could rely to some extent on the significant barrier to new entrants into the market in defined geographical areas as a form of protection of the market and as a shield for lower quality operators. The gradual removal of this barrier, which is recommended by the PC, has the potential to create a more open and free market and thereby create an opportunity for entry by higher quality and more sophisticated aged care providers.

Removing the distinction between high and low care and allowing accommodation bonds to be charged where allowed by the market is likely to result in capital raising options for operators and may free up money so that operators can finance re-builds and/or build new facilities. Accommodation bonds are the main source of clearance of construction debt.

At present because of the way in which accommodation bonds can be charged and used, there is disparity of funding between entry and exit of residents, which is further complicated by such factors as conditions imposed by financial institutions on accommodation bond reserves. A likely change to monthly charges in a lot of cases will probably result in a change in the way in which operators will be financed, for example, changing from a short term loan for construction repaid via collection of lump sum accommodation bonds to longer term financing facilities repaid from the collection of monthly accommodation charges.

The unbundling of costs of aged care and separating out accommodation and other costs will increase consumer control over their care options and choice which will in all likelihood be influenced by the standard and quality of care offered by operators. This is likely to impact negatively on operators of older facilities and lower quality operators who will struggle to obtain the funding needed to upgrade their facilities and to attract and retain high quality nursing and support staff. No doubt financial institutions will be looking closely at the sector to establish what risks are faced by them as a result of the increased pressure on certain sectors and strategies they can implement to address those risks. Those strategies are likely to in turn increase the pressure on lower quality operators.

The amendments to the funding model for aged care recommended by the PC, and in this article we have focused on accommodation bonds, will, if implemented by the Government, in all likelihood result in significant change in the aged care services market. There is likely to be some release of financial pressure currently faced by operators through the freeing up of capital for upgrades and rebuilds with scope for savvy operators to capitalise on an emerging competitive market. On the other hand lower quality operators will struggle in this brave new world where there will be a deliberate shift to consumer power and choice.

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Commonwealth Health Reform – 5 new Commonwealth Acts, 5 new entities and new roles for 3 others, and counting...

The National Health Reform Agreement (**NHRA**) is the first step in what will be a long process of health reform in Australia. So far, five Commonwealth Acts and various other State and territory legislation have been passed or

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are proposed, 5 new entities are to be created and new roles are planned for 3 already existing bodies in order to achieve the Commonwealth health reforms.

Under the terms of the NHRA, the Commonwealth will increase its funding contribution to health up to 45% in 2014-15, and further increasing its contribution to 50% in 2017-18. In addition, the NHRA promises to increase accountability and transparency in Commonwealth funding for the health sector. In order to implement the changes and achieve these objectives, the following will be established:

- A National Health Funding Body (**NHFB**) will be established to administer the National Health Funding Pool (**NHFP**). The NHFP will hold Commonwealth and State Funds. Payment to Local Hospital Networks (**LHNs**) will be made directly from the NHFP;
- An Independent Hospital Pricing Authority (**IHPA**) will be established as a statutory body to set the nationally efficient price of hospital services;
- A National Health Performance Authority (**NHPA**) will be established to monitor and report on performance of Hospitals (Hospital Performance Reports) and Medicare Locals (Health Community Reports). The new *MyHospitals* website, in operation since December 2010, will allow individuals to see hospital performance data and make informed decisions about the services that they would like to use;
- LHNs, to be established by July 2012, will decentralise public hospital management and increase local accountability to drive improvements in performance; and
- Medicare Locals, to be established by July 2012, to improve the integration of GP and other primary health care services.

In addition to the above, the role of the following entities will be expanded:

- The Australian Commission on Safety and Quality in Health Care (**ACSQHC**) will set the quality and accreditation standards for LHNs;
- Health Workforce Australia will be involved in planning, policy and research for the reform of the health workforce; and
- The National e-Health Transition Authority will assist in developing ways of electronically collecting and exchanging health information.

We have prepared a schematic map to illustrate the relationships between the new entities and the existing entities with new roles.

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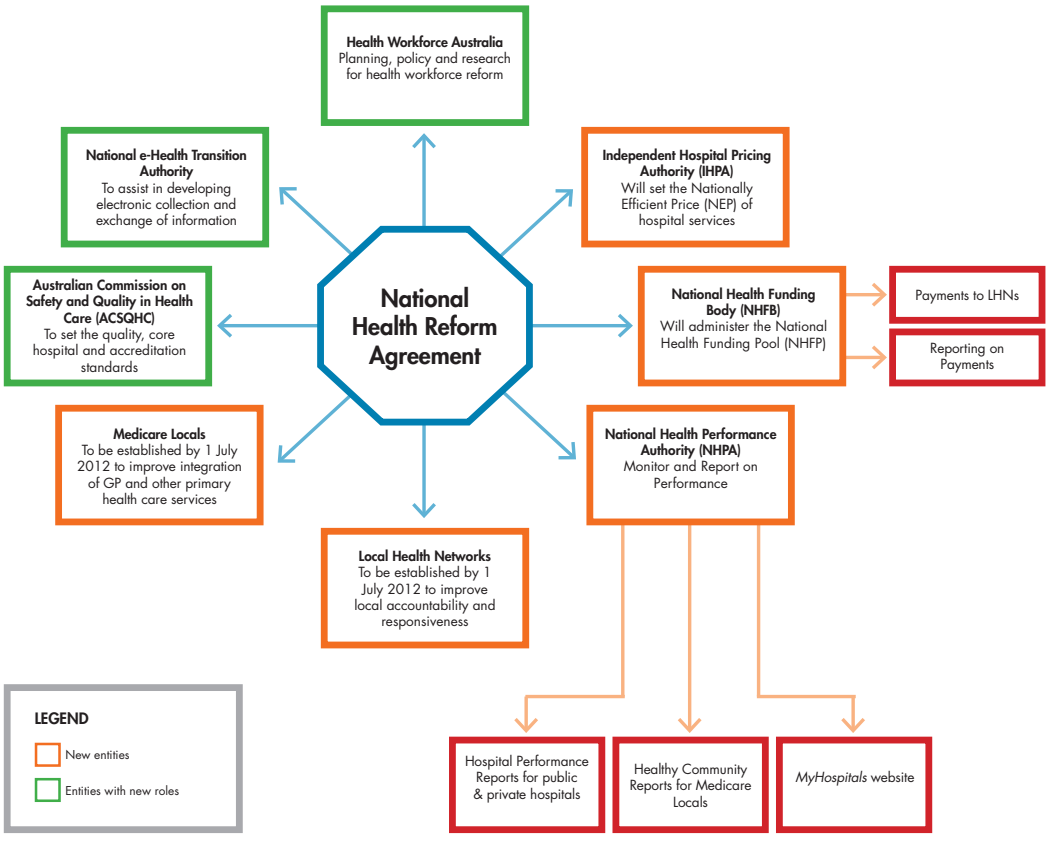

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Health Forum Seminar, September 2011

Lucinda Smith, Michael George, Fraser Bell and Karl Luke presented at our recent Health Forum seminar held on 20 September 2011.

The session covered governance in healthcare, carbon, new laws in Personal Property Securities and work health and safety, and the impact for health care organisations.

For a copy of the documents presented please click here.

Legislation Update

National Health Amendment Regulations (2011) (No. 1) 2011 (Cth)

The Regulations amend the current eligibility restrictions under the *National Health Regulations 1954 (Cth)* for access to syringes and needles through the National Diabetes Service Scheme **(NDSS)**.

The Regulations will make the following key amendments:

- insert a new definition for "insulin pump consumables" to limit insulin pump consumables to the products currently supplied under this category through the NDSS; and
- insert two new items into Schedule 1, being "needles for the delivery of injectable blood glucose lowering medications other than insulin" and "insulin pump consumables".

The amending Regulations commenced on 17 September 2011.

The User Rights Amendment Principles (2011) (No. 2) 2011 (Cth)

The amending Principles will increase the maximum daily accrual amount of accommodation charges for residents entering care on or after 20 September 2011 and before 20 March 2012 under the *User Right Principles 1997.*

The amending Principles commenced on 20 September 2011.

New Statutory Rule - Residential Care Subsidy Amendment Principles 2011 (No. 3) 2011 (Cth)

The amending principles will alter the method for assessing whether the viability supplement should be paid in respect of residents at a residential care service for the purposes of the *Aged Care Act 1997 (Cth)*.

The amendments will expand the current viability supplement arrangements to provide additional support for residential care services which specialise in providing low care in rural and remote areas, or care for homeless people or Indigenous Australians with complex behavioural needs.

The amending Principles are taken to have commenced on 1 July 2011.

National Health Reform Amendment (Independent Hospital Pricing Authority) Bill 2011 (Cth)

The Bill is one of the features of the Government's health reform package which was first announced in 2010. Under the National Health Reform Agreement **(NHRA)**, the Commonwealth agreed to fund 45 per cent of the efficient growth of hospital services (from 1 July 2014) which will rise to 50 per cent by 1 July 2017.

As part of the NHRA, the Independent Hospital Pricing Authority **(IHPA)** is to be established to determine the 'nationally efficient price' for the payment of public hospital services funded by Activity Based Funding **(ABF)**. The Commonwealth will use the nationally efficient price to determine the Commonwealth's contribution to growth funding for public hospitals.

The other responsibilities of the IHPA include:

- calculating block funding amounts for hospitals not funded by ABF;
- providing advice on loadings to the efficient price to take into account variations in the cost of delivery; and
- developing the data and reporting standards for state and territory health departments and investigation into cost-shifting disputes.

The Bill is currently before the House of Representatives. An interim IHPA has already been created (starting 1 September 2011). The Bill, if passed, will establish the IHPA as a statutory body.

Clean Energy (Household Assistance Amendments) Bill 2011 (Cth)

According to the Explanatory Memorandum, the Bill proposes to amend the *Aged Care Act 1997* in order to "provide additional support to aged care homes to

compensate them for the increased costs that they will incur on behalf of residents from the introduction of a price on carbon."

Under the Bill, the standard resident contributions will be:

- for a care recipient, the amount obtained by rounding down to the nearest cent an amount equal to 85% of the basic age pension amount worked out on a daily basis;
- for a care recipient who is a protected resident, the amount obtained by rounding down to the nearest cent an amount equal to 77.5% of the basic age pension amount worked out on a per day basis; and
- for non-standard residents, the amount obtained by rounding down to the nearest cent an amount equal to 96.5% of the basic age pension amount worked out on a per day basis.

The Bill will also provide the applicable percentage rate for the various periods for phased residents and make other miscellaneous amendments.

The Bill was introduced into the House of Representatives and received its second reading speech on 13 September 2011.

Tax Laws Amendment (2011 Measures No.7) Bill 2011 (Cth)

On 21 September 2011, the Tax Laws Amendment (2011 Measures No.7) Bill 2011 was introduced into the House of Representatives.

The Bill proposes to amend the tax law relating to public ancillary funds. The amendments, if enacted, will apply from 1 January 2012.

We consider that the main substantive changes are in the guidelines, rather than in the Bill. The guidelines are still in the draft form and not yet finalised, and we expect that they won't be finalised until the legislation is enacted.

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