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Health Alert

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When does a tenant's medical equipment become a fixture?

The below case note refers to a recent decision of the NSW Supreme Court concerning a landlord's claim that expensive medical equipment installed by a tenant was in fact a fixture that was now owned by the landlord.

This case has applied well settled law to the facts and the Court found that the equipment was not a fixture.

Significantly in this case, the Court stated that if it had found that the equipment was a fixture, it would have found it to be a tenant's fixture.

Case

Re Cancer Care Institute of Australia Pty Ltd (administrator appointed) [2013] NSWSC 37

Facts

Cortez Enterprises Pty Ltd (**Cortez**) owns a private medical facility in Hurstville. The Cancer Care Institute of Australia (**CCIA**) occupied part of that facility (**Premises**) – although there was no written lease in place between the parties.

In 2009, CCIA ordered from Varian Medical Systems Australasia Pty Ltd (**Varian**) two Clinac iX linear accelerators (**linear accelerators**) and associated equipment for a cost of approximately $9 million. The linear accelerators were installed in the Premises in late 2010.

Varian holds a registered purchase money security interest in the linear accelerators, pursuant to the Personal *Property Securities Act 2009* (Cth) (**PPSA Act**).

An administrator was subsequently appointed to CCIA.

Cortez and its mortgagee claimed that the linear accelerators are fixtures and so the title in the linear accelerator had now passed to Cortez.

The substantive issue in the case was whether or not the linear accelerators were in fact fixtures in the Premises.

Decision

Black J held that the linear accelerators were not fixtures and so Cortez had no interest in the title to them. The title to them was held by CCIA. CCIA was to be allowed to access the Premises to remove the linear accelerators.

Reasons

In essence, the considerations relevant to determine whether or not something was a fixture were:

- Was the item affixed to the land?
- If yes, what was the objective intention of the person who affixed it?
- Would removal of the item destroy the item?
- Would the cost of removal exceed the value of the item?
- Would removal of the item significantly damage the land?
- Was the attachment of the item to the land to enable the land to be better enjoyed, or to enable the item to be better enjoyed?

On the facts as presented, it was held that:

- The linear accelerators were attached to a steel base frame that was held to be separate from the linear accelerators.

- There would not have been an objective intention to give the machines to Cortez, considering that CCIA did not have long term tenure over the Premises, the cost of the machines and the fact that Varian had purchase money security interest.
- Linear accelerators are removed and reinstalled in premises and this does not destroy them, nor does it substantially damage the premises.
- The cost of removal was approximately $60,000, which was not significant considering the value of the machines.

Significance

A lease is a significant document that sets out the parties rights and obligations commonly over a long period of time.

Both landlord and tenant are best served if the lease can eliminate as many areas for dispute as possible.

In relation to fixtures, it is therefore advisable to agree a list of tenant's fixtures and landlord's fixtures and include that list in the lease before signing.

However, as it is not always possible to list the fixtures, this case serves as a useful reminder about how the Court will determine what is, and what is not, a fixture.

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Mandatory notification laws for health practitioners - is it working?

Background

Under the *Health Practitioner Regulation National Law Act 2009* (**National Law**), which commenced in 2010, registered health practitioners and education providers and employers of registered health practitioners are under an obligation to report when they have a reasonable belief that a fellow practitioner has engaged in 'notifiable conduct'. 'Notifiable conduct' includes:

- the practitioner has practiced the profession whilst intoxicated;
- engaged in sexual misconduct in connection with the practice of the practitioner's profession;
- placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment;
- placed the public at risk of harm because the practitioner has practised in a way that constitutes a significant departure from accepted professional standards.

Health practitioners and educations providers and employers of health practitioners may also make voluntary notifications.

Under s237 of the National Law, individuals and employers that make notifications are protected from any civil, criminal or other administrative liability that may arise from making a notification or giving information about a doctor in good faith.

If Australian Health Practitioner Regulation Agency (**AHPRA**) becomes aware that an employer has failed to notify AHPRA of notifiable conduct, AHPRA must give a written report to the Minister. As soon as practicable after receiving the notice, the Minister must report the employer's failure to notify AHPRA of notifiable conduct to a health complaints entity, the employers licensing authority or another appropriate entity.

A failure by a health practitioner to make a mandatory notification may result in disciplinary action by its National Board or the Health Care Complaints Commission.

A failure by an education provider to notify AHPRA of notifiable conduct may be published on the website of the National Board that registered the student or be included in AHPRA's annual report.

Notifications in 2010/11

In 2010/11, there were 8,139 notifications made under the National Law. This represents 1.3% of the total registered health practitioners. Of the notifications made, 428 were mandatory reports.

What were the notifications about?

The majority of notifications related to the practitioner's conduct (3,672), followed by concerns about the practitioner's health (319) and concerns about the practitioner's performance (1,306).

More than half of the notifications were made about medical practitioners. A small number (27) of notifications related to students, the majority of which related to nursing students in Queensland.

What action was taken?

Of the 387 mandatory notifications assessed in the 2010/11 reporting year:

- 219 were referred for investigation;

- 64 had no further action taken or referral to another investigation body; and
- In 23 matters, immediate action was initiated.

Notifications in 2011/12

In 2011/12, there were 7,594 notifications about health practitioners. Of those, 775 were mandatory notifications. This is an increase of 347 (about 40%) from the number of mandatory notifications made in 2010/11.

The table below, taken from the 2011/12 AHPRA Annual Report shows the number of notifications received by profession and state or territory (noting the last column shows the totals for the 2010/11 period):

Of the mandatory notifications about registered practitioners, 49% came from employers and 51% came from fellow practitioners.

Table 4: Registered practitioners by profession and principal place of practice[1]

Profession	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	No PPP[2]	Total 2011/12	Total 2010/11	% change
Chiropractor	56	1,511	24	692	357	45	1,202	498	77	4,462	4,350	2.57%
Dental practitioner	350	5,989	134	3,728	1,615	336	4,358	2,254	323	19,087	18,319	4.19%
Medical practitioner	1,784	28,972	945	17,682	7,142	2,048	22,365	8,855	1,855	91,648	88,293	3.80%
Midwife	39	418	29	321	343	9	747	229	52	2,187	1,788	22.32%
Nurse	4,848	81,927	3,276	57,491	28,393	7,570	80,982	31,076	6,682	302,245	290,072	4.20%
Nurse and midwife[3]	719	13,491	579	7,321	2,601	723	10,297	3,292	248	39,271	40,325	-2.61%
Optometrist	71	1,553	28	929	234	84	1,163	366	140	4,568	4,442	2.84%
Osteopath	32	510	2	149	29	38	843	52	21	1,676	1,595	5.08%
Pharmacist	420	8,274	186	5,187	1,919	628	6,578	2,852	504	26,548	25,944	2.33%
Physiotherapist	441	6,888	145	4,379	1,928	394	5,904	2,798	624	23,501	22,384	4.99%
Podiatrist	47	946	17	631	370	90	1,195	375	19	3,690	3,461	6.62%
Psychologist	794	10,066	216	5,220	1,466	524	8,009	3,082	268	29,645	29,142	1.73%
Total 2011/12	9,601	160,545	5,581	103,730	46,397	12,489	143,643	55,729	10,813	548,528		3.47%
Total 2010/11[4]	8,976	156,139	5,121	99,850	44,441	12,407	137,361	52,111	13,709	530,115		

1. Data are based on registered practitioners as at 30 June 2012.
2. No principal place of practice (PPP) will include practitioners with an overseas address.
3. Practitioners who hold dual registration as both a nurse and a midwife.
4. Subsequent to the publication of the 2010/11 annual report, further data cleansing of the 'no PPP' reduced the total number from 16,836 to 13,709.

Australian Health Practitioner Regulation Agency, *Annual Report 2011/12*, AHPRA, Brisbane, 2012

What were the notifications about?

The majority of notifications related to the concern that the practitioner was placing the public at risk of harm due to a practice that constituted a significant departure from accepted professional standards (62%) followed by impairment (27%), alcohol or drugs (6%) and sexual misconduct (5%).

What action was taken?

Of the mandatory notifications, 387 were assessed. These assessments had the following outcomes:

- Around half of these notifications were referred for investigation;
- 92 were referred to a health or performance assessment;
- 75 had no further action taken or referral to another investigation body;
- 24 practitioners were given a caution or conditions were imposed on them;
- 1 was referred to a tribunal for disciplinary proceedings.

Areas for concern?

In an article in the Journal of Law and Medicine Kim Forrester (Associate Professor, Faculty of Health Sciences and Medicine at Bond University) (2012) 20 JLM 273 discussed a major area of concern, being whether the mandatory notification provisions relating to 'impairment' will discourage health practitioners from seeking assistance or treatment in relation to mental health or other issues and/or may not fully disclose all information if

they do seek medical advice on those issues. This may be the case despite the fact that the threshold for making a mandatory notification is very high, requiring the health practitioner to form a reasonable belief that the impairment will place the public at *risk of substantial harm*. It is also important to note that mandatory notification obligations do not apply to impairments that are (or capable of being) diagnosed and adequately managed.

Discussion

Prior to the introduction of mandatory notification regime, decisions by health practitioners to report concerns about the conduct of other health practitioners was discretionary. The National Law introduced the concept of voluntary notifications but also, significantly, imposed mandatory reporting obligations on health practitioners and also on education providers and employers of health practitioners.

The regime is only just over 2 years old but the trend appears to show increasing numbers of notifications.

Almost half of the mandatory notifications made in 2011/12 were by employers of registered health practitioners.

Health practitioners, education providers and employers of health practitioners must each understand their obligations and the consequences of notifying and failure to notify under the mandatory reporting regime contained in the National Law.

Prudent education providers and employers of health practitioners will develop reporting strategies and guidelines to ensure that notifications and reports are made in compliance with the National Law.

Recommendations

We recommend that you consider developing a clear reporting strategy including:

- ensuring that any decision to notify (whether under the mandatory or voluntary regime) is made in good faith after assessing the conduct and properly investigating the activity;
- developing clear policies to be implemented which give guidance around notification requirements; and
- ensuring that the notification policies are consistently implemented.

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Retirement villages industry reform - Western Australia

The recommendations of the Statutory Review of Retirement Villages Legislation report, released in 2010 by the Western Australian Department of Commerce, are currently being realised through major reforms of the retirement village industry in Western Australia.

The retirement village industry in Western Australia is regulated by the *Retirement Villages Act 1992* (**Act**), the *Retirement Villages Regulations 1992* (**Regulations**) as well as a code of practice prescribed under the *Fair Trading Act 2010*, the *Interim Code of Fair Practice for Retirement Villages 2012* (**Code**).

The current round of reforms are being implemented by the *Retirement Villages Amendment Bill 2012* (**Bill**) which was assented to on 5 November 2012. The Bill will become operational on 5 May 2013. However, the Government has flagged that the nature and complexity of reforms will mean that a second bill will be introduced to implement the remainder of the reforms. The Government has not indicated when this will occur.

The reforms in the Bill are wide ranging, but broadly focus on management, charges to residents and residence contracts. A summary of the key changes is as follows:

- The Bill provides the Commissioner with the ability to apply to the State Administration Tribunal to appoint a statutory manager of the village where:
  - the wellbeing or financial interests of the residents of the retirement village may be at risk;
  - the administering body of the village has contravened or is contravening an order made by the State Administration Tribunal or a court; or
  - the administering body has contravened or is contravening certain sections of the Act.

  The statutory manager can be appointed to administer all functions or only some specified functions of the operator. The administering body is required to cooperate with the statutory manager and a penalty of $20,000 applies if it does not cooperate.
- The Bill prohibits certain corporate entities and individuals from being part of the administering body of a retirement village or being involved in its administration. Bankrupts, persons whose affairs are under insolvency laws, a person who has been convicted of a serious offence, a person disqualified from managing a corporation and a person who was a director of a corporation when it was wound up are all prohibited from being involved in the administration of a retirement village, for at least a certain period of time.

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- The Bill allows the regulations to prescribe matters that must or must not be included in residence contracts. A person is prohibited from entering into a contract with a prospective resident that does not conform to the requirements of the regulations in this respect and a $20,000 penalty can be imposed on those who do so. Additionally, the Bill allows residents to apply to the State Administrative Tribunal for an order varying or voiding terms of a residence contract where the contract does not reflect the Regulations.
- The Act does not limit a resident's liability to pay recurrent charges after that resident has permanently vacated his or her premises. The Bill will allow the Regulations to limit the liability of a departing resident for recurrent charges after he or she has permanently vacated. However, the restriction will not apply to residents who are the registered proprietor of their premises.
- The Bill allows former residents who do not own their premises to deduct recurrent charges from the premium (or ingoing contribution) payable to that former resident on departure. In other words, the payment of recurrent charges can be deferred until the premium is refunded.
- The Bill allows residents to apply collectively to the State Administrative Tribunal in relation to a dispute regarding an increase in recurrent charges or the imposition of a levy.
- The Act requires owners to provide certain documents to prospective residents five working days prior to that resident entering a residence contract. The Bill will increase that time to 10 working days.
- The cooling off period has been extended to enable residents to have at least 17 working days between receiving the relevant documentation and being contractually bound to take up residency in the village.
- The Act requires premiums (or ingoing contributions) to be held on trust by the administering body until the resident either enters into occupation of the premises, or it becomes apparent that the person will not enter into occupation. The Bill will amend these provisions to allow payments to be released from trust once a resident is entitled to occupy the premises and the cooling off period has expired, rather than when a resident actually takes up occupancy.
- The Regulations can only create an offence that is subject to a maximum penalty of $500. The Bill will raise this maximum penalty to $5,000.

We will keep you updated of further amendments to the Act, Regulations and Code as they progress through Parliament.

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Update on retirement villages legislation in Victoria

Further to our November 2012 Health Alert (Click here), the *Retirement Villages Amendment (Information Disclosure) Bill 2012* (VIC) was assented to on 12 February 2013. The *Retirement Villages Amendment (Information Disclosure) Act 2013* (VIC) will become operative on 1 March 2014.

The amendments principally aim to increase the amount of information available to prospective residents concerning retirement villages by:

- requiring operators to provide a factsheet to prospective residents containing a summary of prescribed information relating to the retirement village; and
- requiring the operator to make certain prescribed documents available for inspection to prospective residents.

We will provide you with a further update when the information for the factsheet and the documents to be disclosed are prescribed.

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Has your ancillary fund lodged the ancillary fund return for the 2011/2012 financial year?

A reminder to the trustees of ancillary funds (both public and private ancillary funds) that most ancillary fund returns for the 2011/2012 financial year were due for lodgment with the Australian Taxation Office (**ATO**) on 28

February 2013. If the trustee of the ancillary fund fails to lodge the ancillary fund return by the lodgment due date, the ATO may impose an administrative penalty.

This is the first time that public ancillary funds have been required to lodge ancillary fund returns with the ATO.

The trustee of each ancillary fund would have received notices to furnish an ancillary fund return 2012 for the fund issued by the ATO. If the trustee has been unable to lodge the ancillary fund return by the lodgment date, the trustee should contact the ATO as soon as possible to find out if an extension may be granted.

The ATO form for the 2012 ancillary fund return is available at the ATO website. Refer to links below to the ATO form and instructions for lodgment:

- Click here for ATO form for 2012 ancillary fund return.
- Click here for lodgment instructions.

Before completing and lodging an ancillary fund return, the important issues that the trustee needs to consider include:

- Has the ancillary fund been complying with the relevant guidelines (i.e. *Private Ancillary Fund Guidelines 2009* for private ancillary funds and *Public Ancillary Fund Guidelines 2011* for public ancillary funds)?
- Has the audit on the compliance with the guidelines by the fund and the trustee been finalised? The audit must be finalised before the date the ancillary fund is required to lodge the return.
- Have the ancillary fund's financial statements been audited? The audit must be finalised before the date the ancillary fund is required to lodge the return.
- Has the ancillary fund distributed only to deductible gift recipients (**DGRs**) that are endorsed under item 1 of the table in s30-15 of the *Income Tax Assessment Act 1997* (**ITAA 97**) (i.e. doing DGRs), and not DGRs that are endorsed under item 2 of that table (i.e. ancillary funds).
- Has the ancillary fund complied with the minimum annual distribution rule (generally 4% of the market value of the public ancillary fund's net assets, and 5% for a private ancillary fund)?
- If the ancillary fund was formerly a prescribed private fund, did it choose to apply the transitional distribution rules during the financial year?
- Has the market value of the ancillary fund's gross assets as at 30 June 2011 and 30 June 2012 been estimated? Has the market value of land been estimated within the last three financial years?
- Has the ancillary fund been wound up or ceased to be an ancillary fund during the financial year? If so, it must include the audit report when it lodges the ancillary fund return 2012.
- Has the trustee advised the ATO of every change to the ancillary fund's governing rules?
- For public ancillary funds, was the public invited to contribute to the ancillary fund? Did the public, or a significant part of it, contribute to the ancillary fund?
- Was every financial dealing of the ancillary fund with an associated person or entity made at arm's length?

The trustee should take care when completing the return, because the ATO will use the information in the return to determine the ancillary fund's compliance with the guidelines. Failure to comply with the guidelines by the ancillary fund may give rise to administrative penalties and also risk losing its DGR endorsement.

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