

Health Law Bulletin

February 2015



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Introduction

Welcome to the February 2015 edition of the Holman Webb Health Law Bulletin.

The West Australian Court of Appeal has recently handed down its decision in the case of *Dekker v Medical Board of Australia* commenting upon the obligation of a medical practitioner to act as a good Samaritan. It has also been a time of change for the aged care sector and there have been some interesting employment law cases relevant to the health and aged care sectors, including a hospital being held in breach of anti-discrimination laws by preferring Australian medical school graduates.

We trust that this edition of the Health Law Bulletin brings to you articles of relevance to the sector.

The health, aged care/retirement living and life science sectors form an important part of the Australian economy. They are economic growth areas as more Australians retire with a significantly longer life expectancy and complex health care needs.

Against this background, Holman Webb’s health, aged care and life sciences team provides advice that keeps pace with the latest developments. Our team has acted for health and aged care clients over a number of years, both in the “for profit” and the “not for profit” sector.

Some of our team members have held senior positions within the health industry.

Please do not hesitate to contact me or any member of our legal team should you have any questions about the Health Law Bulletin content and articles or if one of your colleagues would like to be added to our distribution list. ■

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Do doctors have an obligation to be good Samaritans? *Dekker v Medical Board of Australia [2014] WASCA 216*

By Zara Officer, Special Counsel

The facts

On a dark Saturday evening on 27 April 2002, Dr Leila Dekker was driving her Toyota Hilux home on a dirt road in a relatively remote area near Roebourne, WA, after dumping rubbish at the tip. She stopped on the dirt road at a t-intersection waiting to turn right. A Land Rover travelling at “significant speed” along the road on which she was proposing to turn suddenly veered towards her. Dr Dekker narrowly avoided collision by driving her car forward across the road ending up at the edge of the opposite embankment. The Land Rover passed just behind her, crossed the dirt road and another embankment and rolled into a ditch. Dr Dekker heard the impact but could not then see the other vehicle.

Dr Dekker was not injured, but she was “in a state of shock”, “petrified” and “freaked out”. She feared for her personal safety. It was dark. Dr Dekker had no torch. She was not carrying medical or first aid equipment. She had no mobile phone with her. The police station was a minute or two away and so Dr Dekker immediately went there to report the incident. She did not first check on the Land Rover or its occupants.

The disciplinary finding

The Medical Board of Australia brought disciplinary proceedings against Dr Dekker which were heard by the Western Australia State Administrative Tribunal (SAT). The SAT found Dr Dekker guilty of improper conduct in a professional respect, by leaving the scene of the accident in order to notify the police without stopping to make an assessment to see if anyone was injured and in need of medical assistance.

The appeal

The West Australian Court of Appeal (the Court) reversed the decision.

The Court found there was no evidence before the SAT that there was a professional duty or obligation on Dr Dekker immediately following the accident to assess the medical condition of the occupants of the other vehicle and render medical assistance to those occupants, if necessary, and if possible. There was no evidence that this was a generally accepted professional duty by members of the medical profession of good repute and

competency in 2002. In the alternative, if there was no specific professional duty to stop and render assistance, there was no evidence before the SAT that in general, other medical practitioners of good repute and competence would regard the failure to stop and render assistance as improper, disgraceful or dishonourable.

The relevant test required a finding as to whether Dr Dekker's conduct would reasonably be regarded as improper by professional colleagues of good repute and competency generally in 2002. The SAT had made that finding without any expert or other evidence to that effect. It was insufficient for the members on the SAT merely to hold a personal conviction that Dr Dekker's conduct was improper. It was not proved that this was the generally accepted view of members of the medical profession in 2002.

The Court also found that the SAT erred in finding that Dr Dekker should have used her headlights to illuminate the scene of the accident, when there was no evidence that this was possible.

The SAT had found that Dr Dekker's state of shock was not relevant to the question of whether she had engaged in improper conduct, and was relevant only to the question of penalty. It had made a finding that Dr Dekker had a professional duty to overcome or at least put aside her shock, and to render assistance. The Court of Appeal disagreed. Dr Dekker's condition of shock and distress was relevant to whether Dr Dekker was physically capable of rendering assistance.

The unusual circumstances

A number of unusual circumstances in this case were relevant to the Court reversing the disciplinary decision. There was no existing doctor/patient relationship between Dr Dekker and the other car involved in the accident. There is no specifically applicable professional duty to render assistance in the particular circumstances as suggested by the SAT. There was a lack of light. Dr Dekker was involved as a participant in a near-miss accident and was not a disinterested observer or passer-by. Dr Dekker was distressed herself and did not have a mobile phone and did not have any medical or first aid equipment on her. Further, the police station was just a minute or so away.





In summary

The appeal was allowed on the basis that:

- (a) there was no evidence of a specific professional duty to stop and render assistance as formulated by the SAT;
- (b) the rules of natural justice precluded the SAT from drawing on its own knowledge and experience to find a specific professional duty; and
- (c) insofar as the SAT merely relied on a general duty to care for the sick, when applied to the specific circumstances of this case, that finding could not be upheld in the absence of evidence.

If there is good reason not to stop, medical practitioners may avoid adverse disciplinary findings if they encounter a motor accident and choose not to render assistance. Examples are given in the judgment of some such scenarios (such as when on the way to another emergency). Future cases will depend on their specific facts. Practitioners should be aware there may be circumstances where they should stop and provide medical assistance. ■

Guardianship and powers of attorney. Prevention is definitely better, but a “cure” is available if required

By Dr Tim Smyth, Special Counsel

The saying, “prevention is better than the cure”, is one that has been used across centuries and across cultures. Planning ahead for times when you may be unable to make decisions yourself is often accepted as very good advice. But like many New Year resolutions, it is not always actioned.

With life expectancy increasing, family support structures changing and the growing number of people living with dementia, this proverb is becoming increasingly relevant to Australian society.

While not always actioned ahead, it is reassuring to know that the law in Australia on guardianship and powers of attorney provides a very flexible and responsive “cure” framework. A look at some recent decisions by the Guardianship Division of the NSW Civil and Administrative Tribunal¹ (**Tribunal**) illustrates this point.

What are the legal “basics”?²

A person who is still able to make decisions for themselves can authorise another person as their agent for purposes such as operating a bank account and dealing with a range of government agencies such as the Australian Taxation Office, Centrelink and Medicare, by signing a form. However, appointing another person for other decisions such as entering into business contracts or dealings with property will require a more formal appointment under Power of Attorney or Guardianship legislation.

The key to effective “prevention” is understanding the differences between “person responsible”, a power of attorney, an enduring power of attorney, an enduring guardianship, a legal guardian and a financial manager.

Person responsible

Under guardianship legislation, a “person responsible” may make some decisions regarding consent for medical or dental treatment on behalf of a person who is unable to do so themselves due to a

disability. In addition to a legal guardian, a “person responsible” can include:

- a spouse (including defacto and/or same sex spouses); or
- an unpaid carer; or
- a relative or friend who has a “close personal relationship” with the person.

General power of attorney

A general power of attorney is the appointment under a formal legal document of another person or legal entity (the **attorney**) by a person (the **principal**) authorising the attorney to do things in relation to legal and financial matters on behalf of the principal.

Depending on the terms of the appointment, an attorney may deal with money, bank accounts, shares, real estate and other assets of the principal. To deal with real estate, the power of attorney must be registered with Land and Property Information (**LPI**).



An attorney does not have powers to make decisions about personal care, medical treatment or the “lifestyle” of the principal. These decisions will generally require the appointment of a guardian.

An attorney cannot vote on the principal’s behalf at elections and cannot carry out the principal’s duties as a trustee for someone else.

Appointing an attorney does not limit the right of the principal to continue to make their own decisions about their money and their property, while they have the mental capacity to do so.

¹ The NSW Civil and Administrative Tribunal (NCAT) commenced on 1 January 2014. Established under the *Civil and Administrative Tribunal Act 2013 (NSW)*, NCAT brought together 22 former separate tribunals, including the Guardianship Tribunal. NCAT deals with a broad and diverse range of matters, from consumer claims, tenancy issues and building disputes, to decisions on guardianship and administrative review of government decisions. NCAT currently has four Divisions. The Guardianship Division determines applications about people with a decision making disability and who may require a legally appointed substitute decision maker

² For convenience, this article refers to the legal framework in NSW. This framework applies to persons aged 16 years and above. The framework in other States and Territories is similar, but not exactly the same. Holman Webb can provide readers in other jurisdictions with advice on local legal frameworks.

In NSW, the legislation governing powers of attorney is the *Powers of Attorney Act 2003* and the *Powers of Attorney Regulation 2011*. If appointing a person, the attorney must be over the age of 18. The legislation provides a very flexible framework enabling the principal to:

- appoint an attorney for a limited time or for a limited purpose;
- appoint more than one attorney;
- nominate a substitute attorney if the attorney dies or is no longer able to act;
- specify limits and conditions on what the attorney can do; and
- revoke or change the power of attorney.

The attorney must act in the principal's best interest and in accordance with the terms of their appointment. Unless authorised by the principal to do so, the attorney cannot make gifts or donations using the principal's assets or be paid or receive a benefit sourced from the principal's assets.

Importantly, a general power of attorney automatically terminates if the principal loses the mental capacity to make decisions themselves or the principal dies. If the principal wants the power of attorney to continue after loss of mental capacity, they must make an enduring power of attorney instead.

Enduring power of attorney

Unlike a general power of attorney, an enduring power of attorney continues to operate after the principal has lost their mental capacity. As well as applying the maxim "prevention is better than cure", appointment of an enduring power of attorney enables the principal to choose who the attorney will be.

In NSW the same flexible legislative framework applies as with a general power of attorney. However, there are two important additional requirements.

The person appointed as attorney (and any subsequent attorney) must sign the form to indicate that they accept the appointment before their appointment can come into effect. The second requirement is that the principal's signature appointing the attorney must be witnessed by a prescribed witness.

Is a power of attorney made outside NSW effective in NSW and vice versa?

As a general rule, a general power of attorney can be used in NSW if made elsewhere in Australia or overseas. One made in NSW will also generally be recognised interstate. With enduring powers of attorney, due to the differing laws in other States and Territories there will be a need to check what acts are permitted under the enduring power of attorney.

If the attorney is to deal with real estate (including leasing and mortgages), the power of attorney must be registered with LPI. For an enduring power of attorney made outside NSW to be registered, LPI will require a certificate from a lawyer in that jurisdiction certifying that the enduring power of attorney was made in accordance with the applicable law in that jurisdiction.

What about disputes regarding powers of attorney?

If there is a dispute that cannot be settled otherwise, the principal needs to make an application to the Tribunal or to the NSW Supreme Court, depending on the nature of the power of attorney and the nature of the dispute.

The Tribunal has the power to review enduring powers of attorney and provides a faster and less costly means of review.

Enduring guardian

An enduring guardian is someone appointed by a person to make personal or lifestyle decisions for that person when they are not capable of making such decisions themselves. While the appointment must be made while the person has the mental capacity to understand what they are doing, the appointment only takes effect and the enduring guardian can only act, once the person becomes incapable of making the decisions.

An enduring guardian cannot make decisions about a person's money or property; this requires an enduring power of attorney or appointment of a financial manager.

In NSW, the legislation governing the appointment of enduring guardians is the *Guardianship Act 1987*.

As with powers of attorney, the process of appointing an enduring guardian is a relatively simple process, using the form in Schedule 3 of the *Guardianship Regulation 2010*. The enduring guardian must also sign the form to accept the appointment. The signing of the form by the person appointing the enduring guardian and the signed acceptance of the appointment must be witnessed by a prescribed witness.

In appointing an enduring guardian a person can specify what kinds of decisions the enduring guardian can make on their behalf. These functions can be very wide and general or specific. The appointment form under the Act has a list of functions that can be amended. The person appointing the enduring guardian can also specify that the enduring guardian must consult with other person(s) before making some decisions. Under the Act, an enduring guardian must act in the person's best interests and in accordance with the Act.

The enduring guardian must be at least 18 years old and cannot, at the time of the appointment, be:

- providing medical treatment or care to the person on a professional basis;
- providing accommodation or support services for daily living to the person on a professional basis; or
- a relative of one of the above.

More than one enduring guardian can be appointed and a person can also appoint an alternative enduring guardian who can act only if the original enduring guardian dies, resigns or becomes incapacitated.

If a person loses capacity and their appointed enduring guardian dies, resigns or becomes incapacitated, and there is no other enduring guardian or alternative enduring guardian able to act, an application will need to be made to the Tribunal for another person to be appointed as enduring guardian.

If a person has a genuine concern over what an enduring guardian is or is not doing they can apply to the Tribunal for a review of the appointment. The Tribunal can vary, revoke or confirm the appointment, including varying the functions of the enduring guardian.

Importantly, an enduring guardianship ends:

- when the person appointing the enduring guardian dies;
- if it is revoked by the person making the appointment³;
- if the person making the appointment subsequently marries (unless the marriage is with the enduring guardian);
- the enduring guardian dies or becomes incapacitated;
- the Tribunal revokes the appointment; or
- the Tribunal makes a guardianship order that suspends the appointment of the enduring guardian.

Can an enduring guardian act in other States and Territories?

Generally, the answer is yes, however it will depend on the legislation in that State or jurisdiction. NSW recognises enduring guardianship appointments validly made in other Australian States and Territories.

Recognition of enduring guardian appointments made overseas and vice versa is a much more complex issue and needs to be dealt with on a case by case basis. If the person has already lost capacity, it may be simpler for an application to be made to the Tribunal for appointment of an enduring guardian if required.

Guardian

A guardian differs from a person with a power of attorney. A guardian is someone legally authorised to make personal or lifestyle decisions on behalf of a person with a decision making disability. A guardian cannot make financial or property decisions, although the same person may also have these powers under a power of attorney or under an appointment as a *Financial Manager*⁴.

In NSW, the appointment of a guardian for a person is made by the Guardianship Division of the Tribunal. The appointment follows a hearing by the Tribunal. Applications may be made by the person themselves, a person who the Tribunal accepts has a legitimate interest in making the application or by the Public Guardian⁵. The Tribunal must be satisfied that appointment of a guardian is actually necessary and that other arrangements cannot satisfactorily address the issues of concern.

Guardianship orders by the Tribunal are very flexible and can be for a limited time or for limited purposes. Depending on the functions given to the guardian by the Tribunal, a guardian can make decisions including:

- where the person should live;
- what support services the person requires and should use;
- what healthcare and other treatment the person should receive; and
- whether restrictive practices are appropriate in the management of the person's behaviour.

In making the application, the applicant can suggest a suitable person (including the applicant) to be appointed as their guardian. The Tribunal will consider this suggestion but is not bound by it.

In appointing a guardian, other than the Public Guardian, the Tribunal must be satisfied that the person is suitable, willing to take on the role and is aged over 18. The Tribunal will also consider whether there are conflicts (especially financial) between the interests of the person and the suggested guardian.

Financial manager

Under NSW legislation, a financial manager is someone legally authorised to make financial and legal decisions on behalf of a person who is incapable of managing their affairs. Generally, this will only be required where other arrangements are not in place, are not adequate or are not operating in the best interests of the person concerned.

In addition to an enduring power of attorney, these arrangements might include an earlier appointment by the person who does not have complex investments or property of someone as their agent for banking, Centrelink and taxation affairs for example.

³ Revocation requires completion of a Revocation of Appointment of Enduring Guardian form, witnessed by an eligible witness and written notice to the enduring guardian of the revocation.

⁴ Financial Manager is the term used under the *Guardianship Act 1987 (NSW)*.

⁵ A statutory office under the *Guardianship Act 1987 (NSW)*.

If the Tribunal is satisfied that a financial manager is required, the Tribunal can make flexible orders as to the functions of the financial manager, the term of their appointment and to what assets the financial manager is authorised to manage on behalf of the person.

For jurisdictional reasons, the Tribunal can only consider applications for persons who have assets in NSW.

The applicant can suggest a suitable person (including themselves) for appointment as financial manager. The Tribunal will consider the suggestion and look at their financial management experience, their own financial history and any conflicts of interest. If the Tribunal does not have someone suitable or willing to take on the role, the Tribunal can appoint the NSW Trustee⁶ as financial manager for the person.

If appointing a private person as financial manager, the Tribunal will make this appointment subject to supervision by the NSW Trustee. The NSW Trustee will decide how the financial manager can deal with the assets under a formal “Directions and Authority” from the NSW Trustee.

Financial managers are generally expected to act gratuitously and cannot be remunerated or reimbursed for personal costs without the approval of the NSW Trustee or Supreme Court. The Tribunal cannot authorise remuneration or reimbursement of costs.

As the NSW Trustee will charge an annual fee based on the value of the assets being managed, careful consideration should be given to whether a financial manager needs to be appointed.

“Restrictive practices” and guardianship

The Tribunal can give a guardian a function to make decisions regarding “restrictive practices”. While the *Guardianship Act 1987 (NSW)* does not define this term, a restrictive practice generally involves limiting the person’s freedom of movement or access to places or objects, usually through some form of physical restraint. The need to consider such practices often arises in the context of challenging behaviour.

Use of medication to achieve this purpose is an issue dealt with under the consent to medical treatment provisions of the Act. While generally, this consent can be given by a “person responsible”, an enduring guardian or a guardian with medical consent functions, some forms of medical treatment and some situations will require an application to the Tribunal.

At common law, restraining a person, confining them to a space or withholding their possessions is unlawful⁷. Such actions are only lawful if:

- the person concerned is able to give informed consent;
- a guardian with a restrictive practice function consents;
- it is reasonably necessary to avoid death or serious harm to the person; or
- it is reasonably necessary to do so as part of self-defence.

Carers and care facilities need to give consideration to whether a guardian needs to have a restrictive practices function where a client has significant ongoing challenging behaviour.

Reviews and appeals regarding Tribunal decisions

Reviews of decisions made in the Guardianship Division of the Tribunal are undertaken by the Division. Appeals are heard by either the Appeal Panel of the Tribunal or the Supreme Court.

Reviews are not appeals. They occur where circumstances have changed warranting a review, the guardianship order is not working in the best interests of the person, there is a need for new functions or the need for a guardian no longer exists. The Tribunal will automatically review orders where the period of the order is coming to an end. The Tribunal can also undertake an “own motion” review without a need for an application from another person, if the Tribunal believes a review is required in the best interests of the person.

The Tribunal can also review the appointment of a particular financial manager rather than the financial management order itself. The Tribunal can only revoke the appointment of a financial manager if the appointed person is no longer willing to act, the best interests of the person requires a different person to be financial manager or the need for the financial management order itself no longer exists.

Appeals can be made a party to the proceedings of the Tribunal. The appeal may be on a question of law or, subject to the Appeal Panel (or Supreme Court) granting leave for the appeal, any other grounds.

An appeal must be lodged within 28 days of the later of the person being notified of the Tribunal’s decision or being provided with a statement of reasons for the decision.

Some recent decisions of the Tribunal

The following six cases illustrate the flexible framework under the Tribunal, ensuring that the best interests of the person concerned are met.

⁶ In NSW, the NSW Trustee and Guardian was formed on 1 July 2009 following legislation to merge the former Public Trustee NSW and the Office of the Protective Commissioner.

⁷ Such actions might constitute assault, false imprisonment or detainee.

AWR [2014] NSWCATGD 42 (27 November 2014)

Here the Tribunal decided to dismiss an application from a hospital social worker for the appointment of a guardian and financial manager for a 73 year old man (Mr AWR) living with a long term friend and carer. In November 2013, the man had appointed his carer as enduring guardian and the carer's daughter as his alternative enduring guardian. They had also been appointed as attorney and substitute attorney under an enduring power of attorney.

The social worker was concerned that the carer was no longer able to provide care for Mr AWR.

As an enduring guardian had been appointed, the Tribunal needed to consider whether a guardianship order was needed. During the hearing, it became evident that Mr AWR was now accepting of the need for residential aged care and that he was happy for his enduring guardian to determine an appropriate facility. The carer confirmed that she was happy to be Mr AWR's enduring guardian.

On the basis of the above the Tribunal determined that there was no need to appoint a guardian.

The hospital social worker had also applied for a financial management order. Before making such an order, the Tribunal needs to be satisfied that it is necessary and in the best interests of the person. At the hearing, the Tribunal was satisfied with the management of Mr AWR's finances by the carer and noted that the carer remained able to do so, including after Mr AWR moved into residential aged care. The financial arrangements put in place by the carer were working well. Accordingly, the Tribunal dismissed the application for a financial management order.

This case illustrates the ability of a concerned person (the hospital social worker) to make an application to the Tribunal, with the Tribunal then gathering appropriate information and hearing from Mr AWR, his carer and health professionals by teleconference. The Tribunal was able to determine that the current arrangements and developments since the application was lodged were working and that there was no need to make the orders sought.

KMC [2014] NSWCATGD 43 (4 December 2014)

Here, the Tribunal declared a purported revocation of an enduring power of attorney invalid, revoked a guardianship order and made a financial management order.

Mrs KMC is a 77 year old woman living in a residential aged care facility since March 2013, moving to high care in October 2014. She had lived at home with her husband Mr NTC and she had three surviving children. Mrs KMC had significant cognitive impairment.

Her daughter applied to the Tribunal in May 2013 for appointment of a guardian and financial manager. At that time, (her husband) Mr NTC was trying to have his wife leave the aged care hostel and was refusing to pay an accommodation bond. The application for the appointment of a financial manager was subsequently withdrawn after the bond was paid.

Mrs KMC had appointed Mr NTC as her attorney in August 2010 and subsequently appointed her daughter and son as attorneys under an enduring power of attorney in September 2012. In September 2012, Mrs KMC also appointed her daughter and son as enduring guardians.

Following the application to the Tribunal in May 2013, due to the conduct of the husband Mr NTC, the Tribunal had appointed the Public Guardian with functions of access and accommodation for a period of 12 months. This appointment of the Public Guardian automatically suspended the enduring guardian's functions.

In April 2014 a revocation of the enduring power of attorney was executed, signed by Mr NTC and witnessed by a solicitor. In June 2014, the solicitor acting for Mr NTC applied to the Tribunal for an adjournment of the statutory end of term review of the 12 month appointment of the Public Guardian and a 6 week adjournment was agreed.

In July 2014, the daughter and son again applied for appointment of a financial manager for their mother.

In August 2014, the Tribunal varied the guardianship order appointing the Public Guardian by renewing it for a further 12 months but narrowing the functions to decisions about what access Mrs KMC had to other persons, in view of continuing concerns over Mr NTC's behaviour when visiting the aged care hostel. The Tribunal appointed Mr NTC as guardian to make decisions about accommodation, health care and other services for Mrs KMC as there was no longer significant conflict on these issues.

In October the Public Guardian, the daughter and the son all applied to the Tribunal for reviews of the guardianship order.

The Tribunal now had six proceedings before it:

- three requests for review of the guardianship order made in August 2014;
- two requests for review of the April 2014 revocation of the enduring power of attorney; and
- the July 2014 application for appointment of a financial manager.

Under section 37 of the *Powers of Attorney Act 2003 (NSW)*, a review of a revocation of an enduring power of attorney can be treated by the Tribunal as an application for a financial management order under the *Guardianship Act 1987 (NSW)*.

There was no doubt that Mrs KMC was cognitively impaired and unable to manage her affairs.

The Public Guardian's application was based on "an unworkable division of authority" between the Public Guardian and Mr NTC in the order. The daughter and son had applied seeking to appoint the Public Guardian with all functions of a guardian, including the functions currently held by Mr NTC.

Evidence from the nursing home indicated that the current care arrangements were appropriate and the nursing home had not experienced difficulties with Mr NTC. Mrs KMC's children were able to visit their mother. The daughter and son advised the Tribunal that they remained concerned that their father might want to remove their mother from the nursing home and that he did not consult with them in relation to Mrs KMC's care and treatment. Their preference was that the Public Guardian have all of the guardian functions.

As the circumstances had changed and Mrs KMC was now settled in the nursing home and the nursing home and Mr NTC were working co-operatively, the Tribunal noted that there were no accommodation, care or treatment decisions that needed to be made in the foreseeable future requiring appointment of a guardian at the present time.

Accordingly, the Tribunal decided to revoke the guardianship order it had made earlier in 2013. Normally, this decision would then revive a suspended enduring guardianship.

The Tribunal turned to consideration of the purported revocation of the enduring guardianship in April 2014. Under amendments made in 2013 to the *Powers of Attorney Act 2003 (NSW)*, the Tribunal now has the power to review revocations. The Tribunal determined that it was appropriate to review the revocation, as back in 2012 when Mrs KMC had executed enduring powers of attorney and enduring guardianships, there was no argument that she was capable of doing so and that this expressed her wishes at that time.

The solicitor who witnessed the revocation by Mr NTC advised the Tribunal that Mr NTC had instructed him that Mrs KMC lacked the capacity in 2012 to appoint enduring attorneys and guardians. On that basis, his view was that Mr NTC validly exercised his power of attorney from 2010 and was able to revoke a subsequent "invalid" instrument.

The Tribunal considered the general principles of agency law and the powers of an attorney. In relation to making a power of attorney (including an enduring power of attorney), the Tribunal noted that the *Powers of Attorney Act 2003 (NSW)* expressly provides that only the principal may create or revoke the power of attorney. Hence once the principal has lost capacity, no other person can create a power of attorney or revoke one. Revocation can only occur through the review mechanisms under the Act – the Tribunal or the Supreme Court. Accordingly, Mr NTC did not have the power to revoke the enduring power of attorney made by Mrs KMC in 2012 and this enduring power of attorney granted to the daughter and son remained valid.

In relation to the application for a financial management order the Tribunal considered the criteria required to be established:

- that the person concerned is not capable of managing their financial affairs;
- there is a need for another person to manage the financial affairs; and
- it is in the best interests of the person that a financial management order be made.

Mr NTC had been managing his wife's financial affairs to date. However, the daughter and son were unhappy with these arrangements, but had not to date sought to exercise their powers under an enduring power of attorney. While the Tribunal had not been asked to review the power of attorney given to Mr NTC in 2010 or the enduring power of attorney given to the daughter and son in 2012, there was a significant potential for confusion with two powers of attorney in existence.

The Tribunal determined that there was need to appoint a financial manager to manage Mrs KMC's financial affairs and then considered who that person should be. The Tribunal heard evidence supporting Mr NTC's abilities and management to date of his wife's assets. The Tribunal decided that it was appropriate in all the circumstances to now formally appoint Mr NTC as financial manager as this would resolve the potential confusion and would also bring Mr NTC's financial management of his wife's financial affairs under the supervision of the independent NSW Trustee.

[SKC \[2014\] NSWCATGD 39 \(29 October 2014\)](#)

This case involved a review of the operation and effect of an enduring power of attorney made by Mr SKC in April 2014. Mr SKC was a 63 year old man living in supported accommodation apartments managed by a not-for-profit aged care service provider. He had appointed his niece as his attorney under an enduring power of attorney. He also appointed her as his enduring guardian.

In August 2014 the Tribunal received an application from the care manager requesting the appointment of a financial manager and a review of the power of attorney. The application stated that Mr SKC had expressed concerns to the care manager about the management of his financial affairs by his niece. The care manager proposed that the NSW Trustee be appointed financial manager and stated that the niece was happy to relinquish her role as attorney.

During the hearing the Tribunal received evidence concerning an inheritance of around \$50,000 received by Mr SKC and a series of withdrawals depleting the account prior to Mr SKC alerting the care manager and a stop being placed on the account. While the niece had provided some of the withdrawn funds to Mr SKC she had used some for her own purposes. The care manager had referred the matter to the police.

Mr SKC advised that he would like his friend Mr HMX to assist him in managing his affairs in the future instead of his niece. Mr HMX was willing to take on this role and the Tribunal was satisfied that he was capable of assisting Mr SKC in managing his financial affairs.

To make an order relating to the operation and effect of an enduring power of attorney, the Tribunal must be satisfied that it is in the best interests of the person to do so and that an order would better reflect the wishes of the person.

The Tribunal noted that the niece wished to relinquish her appointment. Had she not done so, the Tribunal would have removed her. The Tribunal determined that it would be in the best interests of Mr SKC for an alternate attorney to be appointed and that such an appointment better reflected Mr SKC's wishes at the current time.

In addition to appointing Mr HMX as an enduring attorney for Mr SKC, the Tribunal considered whether Mr SKC was capable of managing his financial affairs. The Tribunal was satisfied that Mr SKC was not able to do so and the Tribunal considered that it was in Mr SKC's best interests that Mr HMX was also appointed as his financial manager for the next 12 months. This appointment would enable Mr HMX to work with the police to recover funds and would also apply the supervision of the NSW Trustee.

Due to the making of the financial management order, the enduring power of attorney is automatically suspended. The Tribunal determined that the financial management order should be reviewable and for a period of 12 months. The Tribunal felt that in 12 months' time there may be no need for a separate financial management order with supervision by the NSW Trustee, and that Mr HMX could then manage Mr SKC's financial affairs under the enduring power of attorney.

BLX [2014] NSWCATGD 36 (1 October 2014)

Mrs BLX was a 69 year old woman living with her son and carer in Sydney. Mrs BLX had a stroke in 2013. She had previously been living with her husband, but a breakdown in that relationship led to conflict regarding her living arrangements, care and contact with her husband, and conflict between her husband and her son.

An urgent application for appointment of a guardian had been made to the Tribunal by the manager of service provider to Mrs BLX.

Before making a decision, the Tribunal is required to try and resolve the issues where possible and appropriate. Following receipt of expert reports and hearing from Mrs BLX, her son, her husband and the service provider, the Tribunal determined that Mrs BLX had a disability which partially prevented her from managing herself. While able to decide what she would like to do, Mrs BLX was unable to action these decisions due to her disabilities and the conflict between her son and her husband. Mrs BLX wanted to visit her terminally ill sister in Indonesia.

The Tribunal determined that there was a need for a guardian to be appointed with limited functions to make decisions about Mrs BLX's desire to travel to Indonesia, her access to her husband and others and control of her passport. The Tribunal is unable to appoint the Public Guardian if there is a suitable private person who can be appointed guardian. Given the serious conflict between her husband and her son, the Tribunal determined that it was in Mrs BLX's best interests if the Public Guardian was appointed as guardian with these limited functions. The Tribunal determined that the order should be for a period of 6 months.

YGC [2014] NSWCATGD 41 (27 November 2014)

This case was a review of a financial management order made in August 2014 for 3 months. Ms YGC is 17 and a resident of a secure residential facility operated by the department of Family and Community Services. In 1999, the Children's Court made Ms YGC a ward of the state under the *Children (Care and Protection) Act 1987 (NSW)*. The Minister has parental responsibility until Ms YGC turns 18 in late 2015.

In August 2014, the Tribunal had made a financial management order appointing the NSW Trustee as financial manager, with the order to be reviewed in 3 months. On reviewing an order, the Tribunal must either confirm, revoke or vary the order. The Tribunal can only revoke the order if satisfied that Ms YGC is capable of managing her affairs and that it is in the best of interests of Ms YGC that the order be revoked.

Evidence provided to the Tribunal indicated that Ms YGC would continue to have problems with decision making and managing her financial affairs and the Tribunal determined that she was incapable of doing so. Under the Children's Court order of 1999, if the financial management order was revoked, the Minister would have responsibility for the management of Ms YGC's financial affairs as part of the Minister's parental responsibilities for wards. The Department advised the Tribunal that an option open to the Minister was to appoint the NSW Trustee as the Minister's agent for this purpose.

The Tribunal determined that it would be in Ms YGC's best interests if there was certainty as to who had the power to manage Ms YGC's financial affairs. The Tribunal determined that this power should be exercised by the Minister. Accordingly, the Tribunal revoked the financial management order of August 2014 appointing the NSW Trustee and ordered the NSW Trustee to transfer the funds it held to the Minister.

OLL [2014] NSWCATGD 40 (27 October 2014)

This case considered the issue of whether orders as to costs should be made. The matter arose following applications in March and July 2014 to the Tribunal by Mr MBM seeking a review of appointments by Mrs OLL of her son, Mr QAT as an enduring guardian and an as enduring attorney. Mrs OLL was 94 and living at home with professional in-home carer support. Mr MBM was a long-time friend of Mrs OLL.

Under directions hearings, the Tribunal granted leave for legal representation of Mr MBM and Mr QAT. The Tribunal also ordered that Mrs OLL have separate representation. Both applications were set down for hearing on 24 July 2014.

Mr MBM had made the applications on the basis that he had understood that Mrs OLL was concerned about the restrictions placed on Mrs OLL by her son Mr QAT in relation to access by Mr MBM and access to her finances. Mr MBM was also concerned about the quality of care Mrs OLL was receiving. The independent representative for Mrs OLL advised the Tribunal that Mrs OLL did not have such concerns and did not want Mr MBM to visit her. In light of this information, Mr MBM then sought to withdraw his applications as he did not wish to act contrary to Mrs OLL's wishes. Both applications were then dismissed by the Tribunal. Mr QAT made an application for costs. The amount sought was \$25,250.

Based on the detailed material that had been submitted prior to the hearing date, there was no evidence before the Tribunal of any concerns about Mrs OLL's care and welfare.

The Tribunal's power to make costs orders is under s60 of the *Civil and Administrative Tribunal Act 2013 (NSW)*. As a starting point, the Act provides that each party pay its own costs. To make a costs order, the Tribunal must be satisfied that there are special circumstances warranting an award of costs. Factors that the Tribunal can take into account include the conduct of a party, whether the application or claim had a reasonable basis in fact or in law and the nature and complexity of the proceedings.

A review of an enduring guardianship is a review under the *Guardianship Act 1987 (NSW)*. Costs orders in the Guardianship Tribunal (prior to the formation of the NSW Civil and Administrative Tribunal) were rare. The Guardianship Tribunal had determined that persons should not be deterred from bringing "substantial and well-motivated" applications for fear of a costs order. This approach had been endorsed in two Supreme Court cases.

Mr QAT argued that Mr MBM's application was misconceived, frivolous, lacking in substance or vexatious and that it had no tenable basis in fact or in law. His conduct over the past years demonstrated that Mr MBM did not have Mrs OLL's best interests in mind.

Mr MBM refuted the arguments and also submitted that the Tribunal not proceeding to a hearing meant that the Tribunal could not make findings as to whether there was a reasonable basis for the applications. He submitted that he had acted reasonably in making the applications and that as soon as he became aware of the independent representative's report of Mrs OLL's views, he had promptly sought to withdraw them.

The Tribunal noted that while not bound by the rules of evidence, an applicant must still provide credible evidence to support their application. It is not sufficient to "raise unsubstantiated allegations" and require the other parties to refute them. The material provided by Mr MBM was created by him and did not have independent corroboration. The Tribunal found that in relation to his main allegations, "his claims are not tenable".

Mr MBM's conduct prior to the hearing and his evident lack of understanding of the roles of attorney and enduring guardian also undermined his credibility and the basis for a number of his allegations. The Tribunal also noted that Mr MBM had filed his application for review of the enduring power of attorney 4 months after making his application for a review of the enduring guardianship and less than 2 weeks prior to the allocated hearing day. Mr MBM's claims asserting incapacity of Mrs OLL were also inconsistent with this claims asserting Mrs OLL's expressed wishes and instructions to Mr MBM.

The Tribunal found that the applications were "not reasonably commenced" and that special circumstances existed justifying a costs order being made.

Summary

These cases illustrate the flexibility in approach of the Tribunal and the Tribunal's overriding objective to determine what is in the best interests of the person who has impaired decision making ability. The Tribunal has the ability to flexibly use the roles of guardian and financial manager.

They also illustrate the importance of lawyers and health, aged care and community services managers understanding the distinctions between an attorney, a guardian and a financial manager and the process for appointing an enduring attorney and/or guardian.

They also reinforce the value of that old adage, "prevention is better than cure". Planning ahead should be on everyone's list of New Year resolutions! ■

Consumer Directed Care – Want vs Need

By Alison Choy Flannigan, Partner

1. Introduction

The process of discussion between the home care service provider and the client (and/or the client's carers/family members) is now a formal part of Commonwealth funded community care services with consumer directed care ("CDC"). As a result, service options have become more transparent to consumers. Good service providers historically had high engagement with consumers. With CDC, there will be more information available to consumers so that they can make informed decisions – and you will see more elderly people stay at home longer with the appropriate home care support.

Each home care service provider must incorporate CDC into their policies and procedures, arrangements with clients, update their information brochures and record the discussion process. Training of staff is also important.

CDC gives older people and their carers greater say about the types of care services they receive and the delivery of those services.

The legal obligations in relation to CDC are in the *Aged Care Act 1997 (Cth)* which in turn refers to:

- (a) the User Rights Principles 2014 (Cth); and
- (b) conditions of Commonwealth funding – refer to the Home Care Programme Guidelines – which relate to home care packages.

2. What is Consumer Directed Care?

The Department of Social Services, in the *Home Care Packages Programme Guidelines* (July 2014) ("Guidelines") defines "consumer directed care" (CDC) as:

"a way of delivering services that allows consumers to have greater control over their own lives by allowing them to make choices about the types of aged care and services they access and the delivery of those services, including who will deliver the services and when. Under a CDC approach, consumers are encouraged to identify goals, which could include independence, wellness and re-ablement. These will form the basis of the Home Care Agreement and care plan".

The consumer decides the level of involvement they wish to have in managing their package, which could range from involvement in all aspects of the package, including co-ordination of care and services, to a less active role in decision-making and management of the package.

The objective of CDC is to provide greater transparency to the consumer about what funding is available under the package and how those funds are spent.

3. CDC principles

Under the Guidelines, the following principles underpin the operation and delivery of packages on a CDC basis:

3.1. Consumer choice and control

Consumers should be empowered to continue to manage their own life by having control over the aged care services and support they receive. This requires the provision of, and assistance to access, information about service options that enable a consumer to build a package that supports them to live the life they want.

3.2. Rights

CDC should acknowledge an older person's right (based on their assessed needs and goals) to individualised aged care services and support.



3.3. Respectful and balanced partnerships

The development of respectful and balanced partnerships between consumers and home care providers, which reflect the consumer and provider rights and responsibilities, is crucial to consumer control and empowerment. Part of creating such a partnership is to determine the level of control the consumer wants to exercise. This will be different for every individual, with some people requiring or wanting assistance to manage their package and others choosing to manage on their own.

Consumers should have the opportunity to work with the home care provider in the design, implementation and monitoring of a CDC approach. Home care providers should be encouraged to include consumers in their CDC redesigns. Care and services must be within the scope of the Home Care Packages Program.

3.4. Participation

Community and civic participation are important aspects for wellbeing. CDC in aged care should support the removal of barriers to community and civic participation for older people, if they want to be involved.

3.5. Wellness and re-ablement

CDC packages should be offered within a restorative or re-ablement framework to enable the consumer to be as independent as practical, potentially reducing the need for ongoing and/or higher levels of service delivery.

Many people enter the aged care system at a point of crisis. Such situations may require the initial provision of services designed to address the immediate crisis. However, there should always be an assumption that the older person can regain their previous level of function and independence with re-ablement services being offered at a time that suits/supports the individual circumstances.

3.6. Transparency

Under a CDC package, older people have the right to use their budgets to purchase the aged care services they choose. To make informed decisions about their care, older people need to have access to budgeting information, including the cost of services, the contents of their individualised budgets and how their package funding is spent.

4. Mental capacity to make decisions

In aged care, the difficulty is ascertaining whether or not the client is mentally capable to make their own decisions.

If the client is mentally incapable, then there may be disputes. It is extremely difficult if the patient has mild dementia with intermittent cognitive periods, has appointed an enduring guardian and the resident and the guardian disagree about what services should be provided.

We have come across a number of cases where:

- (a) the client is in denial of their needs or the need to seek assistance;
- (b) the client is too proud to seek assistance but requires it;
- (c) the client does not agree with the service provider;
- (d) disputes with family members about appropriate care;
- (e) self-interested family members, acting against the best interests of the client.

5. CDC is mandatory for home care packages, but what if the consumer does not want a home care agreement?

From July 2015 all home care packages must be delivered on a CDC basis. The CDC requirements are set out in the Home Care Package Guidelines.

Section 2.3 of the Home Care Packages Programme Guidelines state:

“While the home care provider must always offer and be prepared to enter into a Home Care Agreement, the consumer may choose not to sign a Home Care Agreement.

In such cases, the home care provider is still required by legislation to observe its responsibilities to negotiate and deliver the level and type of care and services the consumer needs.

It is important that the home care provider documents the reasons for not having a signed Home Care Agreement and the basis on which agreed care will be delivered.”

6. What if there is disagreement over a want vs a need?

CDC does not go so far to require the service provider to do as the consumer directs. A service provider may decline a consumer request in certain circumstances. However, services providers will need to justify such decisions.

If there is disagreement between the service provider and the consumer, section 3.1.8 of the Home Care Package Guidelines 2014 provides the following guidance.

“The following list provides a guide to home care providers as to when it might be reasonable to decline a request from a consumer.

- *The proposed service may cause harm or pose a threat to the health and/or safety of the consumer or staff.*
- *The proposed service is outside the scope of the Home Care Packages Programme.*
- *The home care provider would not be able to comply with its responsibilities under aged care legislation or other Commonwealth or State/Territory laws.*
- *The consumer’s choice of service provider is outside the home care provider’s preferred list of service providers and all reasonable effort has been made to broker an acceptable sub-contracting arrangement.*
- *The requested service provider will not enter into a contract with the home care provider.*
- *There have been previous difficulties or negative experiences with the consumer’s suggested service provider.*
- *Situations in which a consumer may want to go without necessary clinical services (resulting in a possible compromise of their health and/or wellbeing) in order to “save” for a more expensive non-clinical service.*
- *The cost of the service/item is beyond the scope of the available funds for the package.”*

The above is provided as guidance only and is not an exclusive list.

Where the home care provider is unable to give effect to the consumer’s preferences or request for services, the reasons must be clearly explained to the consumer and documented.

7. Duty of care issues and commentary

Each service provider must undertake their duty of care and advise of material risks. In relation to risk and liability there needs to be a balance between the autonomy of the client and risk management.

There has been and will continue to be a duty of care owed by service providers to safeguard the health and wellbeing of consumers – CDC does not change this.

CDC requires service providers to be more transparent and competitive.

All service providers should have policies and procedures in place to ensure compliance with work, health and safety laws, privacy, consent and consumer rights. They should all have appropriate insurance. CDC does not change these legal obligations.

10. Further information

For more information refer to:

- the *Home Care Packages Programme Guidelines* July 2014;
- Evaluation of the Consumer-directed care initiative – Final Report (KPMG);
- *User Rights Principles 2014 (Cth)*;
- *Aged Care Act 1997 (Cth)*; and
- Department of Social Services’ Information on Consumer Directed Care Packages⁸. ■

⁸ Department of Social Services, Ageing and Aged Care, *Information on Consumer Directed Care Packages*, <<https://www.dss.gov.au/our-responsibilities/ageing-and-aged-care/publications-articles/guides-advice-policy/information-on-consumer-directed-care-packages>>.



Hospital's internship policy found to be discriminatory: *Wang v Australian Capital Territory (Discrimination)* [2015] ACAT 5

By Rachael Sutton, Partner and Alicia Mataere, Senior Associate

A Chinese born doctor, Dr Wang, who applied for an internship with Canberra Hospital was found to have been both directly and indirectly discriminated against by reason of his race under a policy which prioritised candidates for internships.

The *Health Practitioner Regulation National Law* establishes the Australian Health Practitioner Regulation Agency (**AHPRA**). AHPRA consists of several boards including the Medical Board of Australia (**MBA**), which is responsible for, among other things, registration of medical practitioners.

Graduates from Australia and New Zealand must obtain provisional registration and complete 12 months supervised training before becoming eligible for unconditional registration.

In order to work as health practitioners in Australia, international medical graduates (**IMGs**) must have their qualifications formally recognised and be registered by the MBA.

There are three pathways by which IMGs can become registered: the Competent Authority pathway, the standard pathway and the specialist pathway. Dr Wang was only eligible for the 'standard pathway': His qualifications are from an institution listed in the International Medical Education Directory, but not from a Competent Authority in Canada, Ireland, New Zealand, the UK, or the US, and he applied for general (not specialist) registration.

To complete the standard pathway, IMGs must be certified as having passed theoretical and clinical exams set by the Australian Medical Council, secure provisional registration and an offer of suitable employment, and complete 47 weeks of supervised practice (an internship).

The approaches and needs of medical systems vary between countries; graduate training is specifically tailored to the health system of the country in which the education is given. The requirements imposed upon IMGs are designed to ensure that they have the knowledge and practical experience of the Australian system needed to safely practice in Australia.

Responsibility for training medical practitioners in Australia is shared between the Commonwealth and the States and Territories. The Commonwealth funds university medical education, while the States and Territories fund internships in public hospitals.

Since additional funding and incentives were introduced in 2006, the number of medical graduates has dramatically increased. Since 2013 the number of graduates has exceeded the number of internships available. To address this situation, the States and Territories reached a number of inter-governmental agreements on the availability of internships.

As a result of such an agreement, the ACT Government implemented a priority system with the intention of preferring ANU graduates over graduates of other Australian universities and preferring Australian graduates over international graduates.

Dr Wang arrived in Canberra in 2001 and is a permanent resident of Australia. He holds an MBBS and Master's degree in neurology from the Tianjin Medical University in China. His degrees had been formally recognised by the relevant authorities in Australia. He had satisfied all the requirements for registration as a health practitioner in Australia except that he needed to complete a 1 year internship and he applied to Canberra Hospital (as well as several other hospitals) for an internship.

Each year Canberra Hospital (and many others like it) is faced with the problem of more applications from medical graduates for internships and second year graduates for RMO positions, than training positions. The priority policy which is to guide the allocation of internships was approved by the ACT Health Minister. This policy created priority Categories 1-8 which depended upon the geographic location of the university from which an applicant's medical qualification was obtained. Category 1 is limited to ANU graduates. All internationally trained graduates were automatically in Category 8. The categories inbetween deal with graduates of other Australian universities.

At the time Dr Wang applied, in 2014, there were only enough training positions in the ACT for applications in Category 1 with a few left over for Category 2. There was no prospect of a Category 8 graduate being allocated a training position.

Dr Wang complained that the automatic allocation to Category 8 of internationally trained graduates was unlawful discrimination on the basis of nationality.

The ACT Government argued that the policy did not discriminate on the basis of race because it only took into account where a person trained, not their ethnicity.

Australian Capital and Administrative Tribunal (**ACAT**) Member Anforth did not accept this submission, stating

It is beyond trite and warrants no argument, that it is 'generally' the case that graduates of a Chinese medical school are 'generally' of Chinese nationality, and the same is also true of other nations.



The ACAT found:

- Dr Wang had been discriminated against by reason of his race in contravention of section 8(1)(a) and 8(1)(b) of the *Discrimination Act 1991 (ACT) (the Act)* in automatically placing him in Category 8 of the Priorities Policy governing internships, however;
- Dr Wang did not establish that the hospital had discriminated against him by virtue of his race in contravention of section 8(1) (a) or of section 8(1)(b) of the Act in relation to the RMO positions.

In the judgment, the ACT Health Minister was criticised for signing off on the policy which allowed hospitals to preference doctors trained in Australia and commented that the policy may also be in breach of the Constitution of Australia.

The tribunal has asked the ACT Government to justify the “reasonableness” of its conduct and criticised the ACT Health Minister for signing off on such a policy. ACAT Member Anforth said:

“It is not open to a Minister ... or to any public administrator to side step that law because they perceive parochial economic advantages in doing so.”

Both parties have been given more time to make submissions in light of the findings of ACAT.

To ensure your recruitment and selection policies are not discriminatory, contact Rachael Sutton or Alicia Mataere in our Workplace Relations team. ■



What is a Health Promotion Charity?

By Alison Choy Flannigan, Partner and Joann Yap, Solicitor

The Australian Charities and Not-for-profits Commission (ACNC) has released an exposure draft Interpretation Statement (**Statement**) to provide guidance on how the ACNC understands the meaning and scope of the charity sub-type of 'health promotion charity' (HPC)⁹, and has invited feedback from the public and not-for-profit sector.

An HPC is an "institution whose principal activity is to promote the prevention or control of diseases in human beings". The introduction of the HPC category has recognised that there is a subgroup of charities that promote the prevention or control of disease outside the scope of public benevolent institutions. The Statement explains the ACNC's approach on the relevant elements required to obtain registration as an HPC.

Briefly, your organisation may be registered as an HPC if it satisfies all of the following, including that the organisation:

- meets the eligibility criteria to be registered as a 'charity' under the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)*. The ACNC does not consider that the organisation's purpose needs to be the advancement of health in order to qualify;



- meets the definition of an 'institution', which requires the organisation to be incorporated as a legal structure and to carry out a charitable purpose. Mere trusts or funds will not be institutions. Consideration will be given to factors including structure, size, permanence, recognition and activities;
- has a *main* activity (or conducts an activity more than any other activity) that promotes the prevention or control of diseases in human beings, though this does not need to consume the majority of the organisation's time or resources;
 - 'Disease' is understood to be a broad term covering both mental and physical illness, as long as the illness is an identified disease rather than a general health condition or symptom. Exceptions arise where the health condition or symptom (such as obesity), if left untreated, will degenerate into identified disease (such as heart disease or diabetes);
 - 'Promote' is taken to include the growth, development, progress of, encouragement of or fostering of the prevention or control of the disease;
 - 'Prevention or control' of disease includes taking action to reduce the disease's spread, managing and treating disease and activities to alleviate suffering or distress caused by the disease;
 - The organisation does not need to demonstrate success in promoting the prevention or control of disease, or its success in actual prevention or control; and
- ensures that, if it fundraises for charities, it identifies the charity or disease that it fundraises for.

Examples of HPCs that have been registered by the ACNC include:

- research and education into treatment and care for people suffering from brain cancer;
- provision of mental health nurses paediatric staff to rural communities;
- cancer awareness programs conducted in rural areas;
- providing sexual health and STI awareness classes for young people; and
- providing behavioural therapy for serving and retired military personnel suffering from post-traumatic stress disorder and military-induced stress illness. ■

⁹ Australian Charities and Not-for-profits Commission, 'Exposure Draft – Commissioner's Interpretation Statement: Health Promotion Charities' (December 2014) <http://www.acnc.gov.au/ACNC/Contact_us/Pub_consult_comment/ConsultationHPC/ACNC/Edu/Consultation_Health.asp>

When is the use of volunteer labour in breach of the Fair Work Legislation? *Fair Work Commission v Crocmedia* [2015] FCCA 140

By Rachael Sutton, Partner and Alicia Mataere, Senior Associate

It is estimated that approximately 6.1 million people perform unpaid volunteer work in Australia. There is no doubt that volunteers are a vital part of the Australian community, in many instances performing and providing fundamental services for the community. However, volunteering is not the only form of unpaid work in Australia, with most young people and recent graduates often performing unpaid work to gain experience in the hope that it may lead to paid work. This is despite the *Fair Work Act 2009 (Cth)* prohibiting the performance of unpaid work, unless it is a vocational placement.

In 2013, the then Fair Work Ombudsman, Nick Wilson, commissioned a research report¹⁰ by Professors Andrew Stuart and Rosemary Owens into the nature and prevalence of unpaid work in Australia, with a focus on unpaid work experience, internships and trial periods. Whilst unable to provide any statistics, the report found that, within Australia, unpaid work existed on a scale “substantial enough to warrant attention as a serious legal, practical and policy challenge.”

It was this report which founded the Fair Work Ombudsman’s compliance, education and intervention campaign into unpaid work in Australia.

That campaign resulted in a number of investigations and ultimately a prosecution in which an employer in the media industry was fined \$24,000 out of a potential fine of \$51,000¹¹. Specifically, the media company was using a number of “work experience” persons and “volunteers” to produce radio and television programs. Following the Fair Work Ombudsman’s initial enquiries, all “work experience”, “volunteers” and “contractors” were offered employment and back payments made. Nonetheless, and despite the company’s cooperation a prosecution was still commenced.

The prosecution related to 2 work experience students who performed unpaid work for approximately 3 weeks, after which they were offered casual employment. Even though they were offered casual employment, the employees were only paid \$75 per shift or between \$80 to \$120 on weekends as reimbursement for “expenses”. As a consequence of the company characterising the payments as reimbursement for expenses, the company was required to back pay the employees for all time worked, a total of \$22,168.08, as the payments made could not be used to set off the total amounts owed.

In penalising the company the Court noted that whilst the company had not deliberately exploited the 2 employees, the company could not avoid the “proposition that it is, at best, dishonorable to profit from the work of volunteers, and at worst exploitive”.

This case is an important reminder for all organisations which use volunteer or unpaid labour. Whilst the use and engagement of volunteers, interns and work experience placements is legitimate, it is fundamental that organisations put in place appropriate documentation, policies, training and processes to ensure and maintain the nature of the relationship. It is also important to remember that an organisation’s work, health and safety obligations extend to its unpaid labour as well.

The ultimate cost for 3 weeks of unpaid labour by 2 people was substantially more than the employees minimum wages and was no doubt a difficult lesson for the company involved. To ensure your unpaid labour doesn’t cost more than a wage, contact Rachael Sutton or Alicia Mataere in our Workplace Relations team. ■



¹⁰ The Fair Work Ombudsman, Research Reports, available at <http://www.fairwork.gov.au/about-us/reports-and-submissions/research-reports>.

¹¹ *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140.



Update on Directors Duties for the Not-for-profit sector

By Alison Choy Flannigan, Partner

1. Introduction

There are a number of individuals who are invited to be appointed as a director or officer of a corporate charity. People may agree to become directors of a charity because they have a personal connection to the charitable cause (for example, the charity is relevant to their field of expertise or their family and friends), however, they may have limited experience in managing a company. There are many companies who operate in the not-for-profit health and aged care sector including:

- hospital operators;
- disability service providers;
- community care and aged care providers; and
- health and medical research institutes.

Many of the larger health and medical charities are incorporated as public companies limited by guarantee. Directors and officers of Australian companies which are incorporated under the *Corporations Act 2001 (Cth)* (**Corporations Act**) and which are also charities registered under the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* (**ACNC Act**) owe a number of responsibilities and duties.

Whilst this article focuses on companies, unincorporated associations which are registered with the ACNC are subject to the ACNC legislation and common law.



2. What duties apply?

Directors duties under Governance Standard 5 of the *Australian Charities and Not-for-Profits Commission Regulation 2013 (Commonwealth)* (**ACNC Regulation**) passed under the ACNC Act currently apply to directors of not-for-profit charities which are registered with the Australian Charities Not-for-profit Commission (**ACNC**) which are not Commonwealth companies or subsidiaries of Commonwealth authorities.

Part 1.6 of the Corporations Act states that certain sections of the Corporations Act do not apply to those charities, including sections 180 to 183 (directors duties) and section 185, to the extent that it relates to sections 180 to 183.

Note that some provisions of the Corporations Act still apply to charities, including some criminal offences.

However:

- many of the duties of directors in the Corporations Act are similar to duties in the Governance Standard 5 - although there are differences, notably Governance Standard 5 places the primary obligation upon the company. The ACNC Regulations uses the words “reasonable steps to ensure compliance with duties” and the Corporations Act duty of care and diligence uses the words “that a reasonable person would exercise”;
- the Commonwealth Government has announced that it will abolish the ACNC, however, the repealing legislation¹² has not yet been passed; and
- directors owe obligations similar to the Corporations Act in equity and common law.

As Governance Standard 5 is relatively new, there are no/limited reported judgements on Governance Standard 5.

Therefore, taking this all into consideration, we recommend that it would be prudent for directors and officers of charities to be mindful of directors duties both under the Corporations Act and Governance Standard 5, noting that currently, if an action were to be commenced, it would be commenced under the ACNC Act and those sections (and not the Corporations Act) would apply (until the ACNC Act is repealed.)

This is the reason why I have included both Corporations Act and common law and equity duties in this article.

3. Who is a director and officer?

The Corporations Act refers to “directors and officers”.

A “director” of a corporation is appointed to the position of director or alternate director of the corporation. A person can also be a director of a corporation if they act in the position of the director or is accustomed to act as a director.¹³

¹² *Australian Charities and Not-for-Profits Commission (Repeal) (No1) Bill 2014 (Cth)*.
¹³ Corporations Act, section 9, definition of “director”.

An “officer” of a corporation includes:¹⁴

- (a) a director or secretary of the corporation;
- (b) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation’s financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation).

4. Who is a “responsible entity”?

The ACNC Act refers to “responsible entity” of a “registered entity”. A “responsible entity” of a company which is registered under the ACNC Act includes a director of that company, a person who performs the duties of a director, and a member of the committee of management of the unincorporated association, regardless of the name of the position or whether or not he or she is validly appointed or duly authorised to act. If the registered entity is a trust, the responsible entity includes a director of the corporate trustee.

5. ACNC Governance Standards

The ACNC governance standards are a set of core, minimum standards that deal with how charities are run (including their processes, activities and relationships) – their governance.

The standards require charities to remain charitable, operate lawfully, and be run in an accountable and responsible way. They help charities remain trusted by the public and continue to do their charitable work. Because the governance standards are a set of high-level principles, not precise rules, your charity must decide how it will comply with them.

Charities must meet a set of governance standards to be registered and remain registered with the ACNC. The governance standards do not apply to a limited class of charities called ‘basic religious charities’.

Charities do not need to submit anything to the ACNC to show they meet the standards, but must have evidence of meeting the standards that they can provide if requested.

The governance standards are as follows:

5.1. Standard 1: Purposes and not-for-profit nature

Charities must be not-for-profit and work towards their charitable purpose. They must be able to demonstrate this and provide information about their purposes to the public.

5.2. Standard 2: Accountability to members

Charities that have members must take reasonable steps to be accountable to their members and provide them with adequate opportunity to raise concerns about how the charity is governed.

5.3. Standard 3: Compliance with Australian laws

Charities must not commit a serious offence (such as fraud) under any Australian law or breach a law that may result in a penalty of 60 penalty units (currently \$10 200) or more.

5.4. Standard 4: Suitability of responsible persons

Charities must take reasonable steps to:

- (a) be satisfied that its responsible persons (such as board or committee members or trustees) are not disqualified from managing a corporation under the Corporations Act or disqualified from being a responsible person of a registered charity by the ACNC Commissioner, and
- (b) remove any responsible person who does not meet these requirements.

5.5. Standard 5: Duties of responsible persons

Charities must take reasonable steps to make sure that responsible persons are subject to, understand and carry out the duties set out in this standard.

¹⁴ Corporations Act, section 9, definition of “officer”.

6. Governance Standard 5

Governance Standard 5 requires a “registered entity” to take reasonable steps to ensure that its “responsible entities” (including directors) are subject to, and comply with, the following duties:

- (a) to exercise the director’s powers and discharge the director’s duties with the degree of care and diligence that a reasonable individual would exercise if they were a director of the company;
- (b) to act in good faith in the company’s best interests, and to further the purposes of the registered entity;
- (c) not to misuse the director’s position;
- (d) not to misuse information obtained in the performance of the director’s duties as a director of the company;
- (e) to disclose perceived or actual material conflicts of interest of the director. A perceived or actual material conflict of interest that must be disclosed includes a related party transaction;
- (f) to ensure that the company’s financial affairs are managed in a responsible manner; and
- (g) not to allow the company to operate while insolvent.

Notes to Governance Standard 5 state:

- (i) Note 1: Governance Standard 5 sets out some of the more significant duties of responsible entities (directors). Other duties are imposed by other Australian laws, including the principles and rules of the common law and equity.
- (ii) Note 2: Some of the duties imposed by other Australian laws may require a responsible entity (director) to exercise its powers and discharge its duties to a higher standard.
- (iii) Note 3: For paragraph (f), ensuring that the registered entity’s financial affairs are managed in a responsible manner includes putting in place arrangements and tailored financial systems and procedures. The systems and procedures for a particular registered entity (company) should be developed having regard to the registered entity’s size and circumstances and the complexity of its financial affairs.

The systems and procedures may include:

- (a) Procedures relating to spending funds (for example, the approval of expenditure or the signing of cheques); and
- (b) Having insurance that is appropriate for the registered entity’s requirements.

For (e) above, a perceived or actual material conflict of interest must be disclosed:

- (a) If the responsible entity is a director of the registered entity – to the other directors (if any); or

- (b) If the registered entity is a trust, and the responsible entity is a director of the trustee – to the other directors (if any); or
- (c) If the registered entity is a company – to the members of the registered entity; or
- (d) In any other case, unless the Commissioner provides otherwise, to the Commissioner in the approved form.

Governance Standard 5 imposes the primary obligation upon the registered entity (the company) rather than the responsible entity (the director). However, directors would still owe liabilities under common law and equity.

7. Protections under Governance Standard 5

There are four areas of protection under the Governance Standard.

7.1. Protection 1

(1) A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity’s duties, relies on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:

- (a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
- (b) a professional adviser or expert in relation to matters that the responsible entity believes on reasonable grounds to be within the individual’s professional or expert competence; or
- (c) another responsible entity in relation to matters within their authority or area of responsibility; or
- (d) an authorised committee of responsible entities that does not include the responsible entity.

(2) In determining whether the responsible entity has made an independent assessment of the information or advice, regard must be had to the responsible entity’s knowledge of the registered entity and the complexity of the structure and operations of the registered entity.

7.2. Protection 2

A responsible entity meets this protection if the responsible entity makes a decision in relation to the registered entity, and the responsible entity meets all of the following:

- (a) the responsible entity makes the decision in good faith for a proper purpose;
- (b) the responsible entity does not have a material personal interest in the subject matter of the decision;

- (c) the responsible entity informs itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate;
- (d) the responsible entity rationally believes that the decision is in the best interests of the registered entity.

Note 1: Protection 2 is also referred to as the “business judgement rule”.

Note 2: Protection 2 relates to the duty (a) mentioned under Governance Standard 5.

In this section: “decision” means any decision to take, or not take, action in relation to a matter relevant to the operations of the registered entity.

7.3. Protection 3

A responsible entity meets this protection if:

- (a) at the time when the debt was incurred, the responsible entity had reasonable grounds to expect, and did expect, that the registered entity was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or
- (b) the responsible entity took all reasonable steps to prevent the registered entity from incurring the debt.

Note: Protection 3 relates to the duty (g) mentioned under Governance Standard 5.

7.4. Protection 4

This section is satisfied if, because of illness or for some other good reason, a responsible entity could not take part in the management of the registered entity at the relevant time.

8. Duties and responsibilities under the Corporations Act

8.1. Duties

Directors and officers of companies owe a number of duties and responsibilities. The Corporations Act requires directors of corporations (currently excluding ACNC registered charities) to comply with duties including:

- (a) A duty of care and diligence;¹⁵
- (b) A duty to exercise the directors’ duty in good faith in the best interests of the company and for a proper purpose;¹⁶
- (c) A duty to not improperly use their position to gain an advantage for themselves or someone else;¹⁷
- (d) A duty to not improperly use the information of the company to gain an advantage for themselves or someone else or to cause detriment to the company;¹⁸

- (e) A duty to ensure that they do not act recklessly or with intentional dishonesty;¹⁹
- (f) A duty to disclose a material conflict of interest;²⁰
- (g) A duty to ensure that a corporate trustee to comply with its trust obligations; and²¹
- (h) A duty to ensure that the company does not incur a debt/liabilities whilst insolvent.²²

It is important to note that a breach of these obligations could result in personal liability to the director or officer.

8.2. Care and diligence – civil obligation

A director or other officer of a corporation must exercise his or her powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if he or she:

- (a) were an officer of a corporation in the corporation’s circumstances; and
- (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer²³.

Examples of this duty include:

- (c) Neglecting to observe management, find out the financial position of the corporation and failing to inform the board of relevant developments that could adversely affect the corporation: *Australian Securities and Investments Commission v Rich* (2003) 174 FLR 128; and
- (d) Failing to ensure that the Company met basic legal obligations, such as record keeping and payment of wages to employees: *Australian Securities and Investments Commission v PFS Business Development Group Pty Limited* (2006) 57 ACSR 553.

In the Corporations Act case of *Australian Securities Investments Commission v Adler* (2002) 168 FLR 253, Santow J made the following comment regarding the objective assessment of the officers conduct:

“[I]n determining whether a director has exercised reasonable care and diligence one must ask what an ordinary person, with the knowledge and experience of the defendant might be expected to have done in the circumstances if he or she was acting on their own behalf.”

It is never acceptable to blindly delegate. Reliance is only reasonable where the officer had sufficient monitoring systems in place so as to be aware of the possible existence of internal irregularities.

¹⁵ Corporations Act, section 180.

¹⁶ Corporations Act, section 181.

¹⁷ Corporations Act, section 182.

¹⁸ Corporations Act, section 183.

¹⁹ Corporations Act, section 184.

²⁰ Corporations Act, section 191.

²¹ Corporations Act, section 197.

²² Corporations Act, section 588G.

²³ Corporations Act, section 180.

8.3. Business judgment rule

A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of care and diligence, and their equivalent duties at common law and in equity, in respect of the judgment if he or she:

- (e) makes the judgment in good faith for a proper purpose; and
- (f) does not have a material personal interest in the subject matter of the judgment; and
- (g) informs himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and
- (h) rationally believes that the judgment is in the best interests of the corporation.²⁴

The officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in his or her position would hold.

Note that the business judgment rule only operates in relation to duties under this section and their equivalents under common law or equity (including the duty of care that arises under the common law principles governing liability for negligence), it does not operate in relation to duties under any other provision of this Act or under any other laws.

In this section "business judgment" means any decision to take or not take action in respect of a matter relevant to the operations of the Commonwealth authority.

There have been a number of Corporations Act cases on the business judgment rule. In *Gold Ribbon (Accountants) Pty Limited (In liq) v Sheers* [2006] QCA 335 Keane JA found that a director who takes no interest in the affairs of the Board cannot be said to have made a business "judgment" to come within the scope of this defence.

8.4. Reliance on information or advice provided by others

If:

- (a) a director relies on information, or professional or expert advice given or prepared by:
 - (i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
 - (ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence; or
 - (iii) another director or officer in relation to matters within the director's or officer's authority; or

- (iv) a committee of directors on which the director did not serve in relation to matters within the committee's authority; and
- (b) reliance was made:
 - (i) in good faith; and
 - (ii) after making an independent assessment of the information or advice, having regard to the director's knowledge of the authority and the complexity of the structure and operations of the authority; and
- (c) the reasonableness of the director's reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty;

the director's reliance on the information or advice is taken to be reasonable unless the contrary is proved.²⁵

8.5. James Hardie and Centro

The James Hardie²⁶ and Centro²⁷ cases indicate that directors cannot delegate their 'core, irreducible' responsibilities, by relying too heavily on management and expert advice. For example, they must read and review proposed financial statements. A central fact in the Centro case was the directors' failure to notice that \$2 billion in current liabilities had been wrongly classified as non-current.

9. Common law and fiduciary obligations

The duties under the Corporations Act are based upon common law duties and fiduciary obligations which continue to apply.

At common law directors owe a duty to act with "care, skill and diligence".

Also, a director is said to be in a fiduciary, as opposed to an arm's length, relationship with the company. A fiduciary relationship is sometimes referred to as a relationship of trust and confidence. Because the relationship between the director and company is a fiduciary relationship, a high standard of loyalty is set for directors by principles of equity. The standard of loyalty is reflected in both positive and negative obligations.

The positive duties of loyalty of a company director include the duties:

- (a) to act in good faith in the best interests of the company;
- (b) to act for proper corporate purposes; and
- (c) to give adequate consideration to matters for decision and to keep discretions unfettered.

The negative aspects of the duty of loyalty are those which require directors to avoid conflicts of interest of various kinds.

²⁴ Corporations Act, section 180 (2).

²⁵ Corporations Act, section 189.

²⁶ ASIC v Hellicar & Ors [2013] HC17; Shatton v ASIC [2012] HCA 18.

²⁷ ASIC v Healey & Ors [2011] FCA 717.

10. Liability in tort

Directors can be personally liable for torts committed by them in the course of their duties, for example in negligence and *for* defamation.

11. Other legislation

Directors and officers are required to comply with all relevant Commonwealth and State and Territory laws.

Some laws may (depending on the circumstances and the conduct of the director) place a personal liability on a director if the company does not comply with them. These laws include:

- (a) *The Competition and Consumer Act 2010 (Commonwealth)*;
- (b) *The Health Insurance Act 1973 (Commonwealth)*;
- (c) Work, health and safety laws and workers compensation;
- (d) Customs legislation;
- (e) Environmental legislation; and
- (f) Equal employment opportunity and anti-discrimination legislation.

12. Insurance and indemnity

It is highly recommended that all companies procure and maintain directors and officers insurance, however, remember that insurance will not cover all of the activities of the company and its directors and officers.

With ACNC charities, it is important to ensure that the insurance covers both the charity and the directors and officers.

A company or a related body corporate may provide an indemnity to a person who is a director or officer of the authority from any liability incurred by the person as an officer of the company, except in relation to the following:

- (a) a liability owed to the company or a related body corporate; or
- (b) a liability for certain pecuniary penalties under the Corporations Act; or
- (c) A liability that is owed to someone other than the company or a related body corporate and did not arise out of conduct in good faith.²⁸

The exemption does not apply to a liability for some legal costs.

13. Charitable trusts

A charity usually holds assets and monies in trust for its charitable purpose, which is usually stated as the objects in its Constitution.

Usually, there is a charitable trust which requires the trustees to ensure that the assets and monies to be used for that charitable purpose.

14. Checklist

It is recommended that all directors and officers of a corporate charity:

- (a) obtain a copy of the company's Constitution and familiarize themselves with the Constitution, including the objects of the company and ensure that the company operates in a manner which is consistent with those objects;
- (b) familiarize themselves with their legal and corporate governance duties;
- (c) spend the time to attend Board meetings and read the Board papers (including financial statements) and do not be afraid to ask questions of management, do not rely solely upon the advice of management and experts;
- (d) disclose all conflicts of interests and excuse themselves from making decisions when they have a conflict of interest with the company;
- (e) ensure that the company has adopted robust corporate governance arrangements, including a code of conduct, conflict of interest policy and delegation policy, including banking authorities, accounting and audit;
- (f) ensure that the company keeps adequate records and meets its legal and corporate responsibilities, including in relation to the Corporations Act (as applicable), the ACNC Act, employment law obligations and work, health and safety;
- (g) ensure that the company complies with its reporting obligations to the ACNC;
- (h) ensure that the company has adequate insurance, including directors and officers insurance;
- (i) ensure that the assets and funds of the company are accounted for and used appropriately and in accordance with the objects of the company;
- (j) ensure that registered charities do not make inappropriate distributions, payments or benefits to directors, officers and/or members. Any payments or benefits to directors or members must be considered carefully to ensure that they are appropriate and legally acceptable; and
- (k) bring your expertise, ideas and enthusiasm to the table, keep an open mind to other people's ideas and don't forget the altruistic reason why you joined the charity.

²⁸ Corporations Act, section 199A.



Corporate charities should:

- (a) bring these duties to the attention of their responsible persons/directors (such as providing to them a copy of Governance Standards and this article);
- (b) encourage their responsible persons to attend, prepare and participate at meetings;
- (c) have governance policies and processes in place, including to manage conflicts of interest;
- (d) if it comes to the attention of the company that a responsible person is not undertaking their obligations, take action which is reasonable.

15. Further information

Please note that this briefing paper is up to date as of 20 February 2015 (the date of preparation). Directors and officers must be mindful to keep up to date with changes to legislation and the common law.

Further information regarding being a director of an Australian registered charity is available at the website of the Australian Charities and Not-for-profits Commission at: http://www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds_overview.aspx?hkey=456b1d22-8869-4ad0-a0cd-48607244216e

ACNC Governance Standards Guidance, August 2013

Further information regarding being a director of an Australian company is available at the website of the Australian Securities and Investment Commission: <http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/>

The Australian Institute of Company Directors holds useful seminars for company directors: <http://www.companydirectors.com.au/> ■

Guidelines on the disclosure of genetic information

By Alison Choy Flannigan, Partner and Sandra Ivanovic, Senior Associate

Introduction

Human genome sequencing has allowed for the identification of the genetic links to a number of diseases and disorders. Genetic information obtained from an individual is now not only of relevance to the health of that individual but also to the health of their genetically related family. This article summarises Commonwealth and NSW legislation when deciding on whether to use or disclose genetic information.

In March 2014, the *Privacy Act 1988* (Cth) (**Privacy Act**) was amended to allow health practitioners to use or disclose their patient's genetic information without their consent in specific circumstances as reflected in Australian Privacy Principle (**APP**) 6.2(d) and section 16B(4) of the Privacy Act. The National Health and Medical Research Council (**NHMRC**) issued guidelines for the '*Use and disclosure of genetic information to a patient's genetic relatives under section 95AA of the Privacy Act 1988 (Cth)*' (**NHMRC Guidelines**). The NHMRC Guidelines are applicable to health practitioners in the private sector.

Similarly, following the amendments to Health Privacy Principle (**HPP**) 10 and 11 in the *Health Records and Information Privacy Act 2002* (NSW) (**HRIPA Act**) which came into effect on 1 November 2014, the Information and Privacy Commission released NSW Genetic Health Guidelines entitled '*Use and disclosure of genetic information to a patient's genetic relatives: Guidelines for organisations in NSW*' (**NSW Guidelines**). The NSW Guidelines (which largely mirror and were reproduced from the NHMRC Guidelines) specify the requirements which must be met by an organisation (which includes NSW public sector agencies, NSW public health organisations and NSW private sector persons) if they choose to use or disclose genetic information of their patient without the patient's consent.

Requirements of the legislation

Both the Commonwealth and NSW legislation allow for the use of a patient's genetic information without consent in circumstances where there is a reasonable belief that doing so is necessary to lessen or prevent a serious threat to the life, health and safety of another individual who is a genetic relative of the patient.

Pursuant to section 16B(4) of the Privacy Act, use or disclosure of genetic information is only permissible if:

- an organisation has obtained the information in the course of providing a health service to the first individual; and
- the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of another individual who is a genetic relative of the first individual;

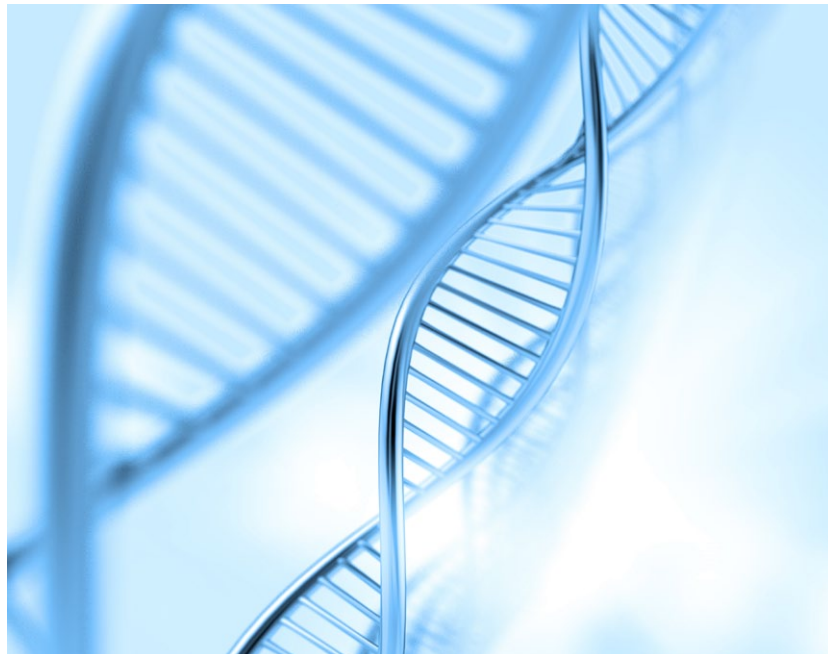
- the use or disclosure is conducted in accordance with NHMRC Guidelines approved under section 95AA; and
- in the case of disclosure the recipient of the information is a genetic relative of the first individual.

HPP 10(1)(c1) and HPP 11(1)(c1) of the HRIPA Act specify the legislative requirements of the use and disclosure of genetic information in NSW.

HPP 10(1)(c1) allows for an organisation to use genetic information without consent for a secondary purpose if the information is genetic information and the disclosure of the information for the secondary purpose:

- is to genetic relative of the individual to whom the genetic information relates; and
- is reasonably believed by the organisation to be necessary to lessen or prevent a serious threat to life, health or safety (whether or not the threat is imminent) of a genetic relative of the individual to whom the genetic information relates; and
- is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purpose of this paragraph.

HPP 11(1)(c1) differs only to the extent that it deals with the disclosure (as opposed to the use) of the genetic information.



The Guidelines

Disclosure of genetic information has the potential to cause distress to an individual and must be managed appropriately. Compliance with the NHMRC and the NSW Guidelines by organisations when considering the use or disclosure of genetic information is compulsory. It is important for practitioners to understand that neither the legislation or the guidelines create an obligation upon organisations to use or disclose the genetic information – they simply set out the requirements to be followed when a decision has been made in relation to use or disclosure without consent of the patient (or their authorised representative).

Both sets of guidelines specify that the exception to use or disclosure of the genetic information without consent of the patient does not apply to genetic information that presents a serious threat to an unborn child. In such circumstances a patient's consent must be obtained in order to disclose their genetic information to a pregnant mother that presents a serious threat to an unborn child.

The NSW Guidelines are summarised as follows:

Guideline 1 Use or disclosure of genetic information without consent may proceed only when the authorising medical practitioner has a reasonable belief that this is necessary to lessen or prevent a serious threat to the life, health or safety of a genetic relative.

Guideline 2 Specific ethical considerations must be taken into account when making a decision about whether or not to use or disclose genetic information without consent.

Guideline 3 Reasonable steps must be taken to obtain the consent of the patient or his or her authorised representative to use or disclose genetic information.

Guideline 4 The authorising medical practitioner should have a significant role in the care of the patient and sufficient knowledge of the patient's condition and its genetic basis to take responsibility for decision making about use or disclosure.

Guideline 5 Prior to any decision concerning use or disclosure, the authorising medical practitioner must discuss the case with other health practitioners with appropriate expertise to assess fully the specific situation.

Guideline 6 Where practicable, the identity of the patient should not be apparent or readily ascertainable in the course of inter-professional communication.

Guideline 7 Disclosure to genetic relatives should be limited to genetic information that is necessary for communicating the increased risk and should avoid identifying the patient or conveying that there was no consent for the disclosure.

Guideline 8 Disclosure of genetic information without consent should generally be limited to relatives no further removed than third-degree relatives.

Guideline 9 All stages of the process must be fully documented, including how the decision to use or disclose without consent was made.

What is a serious threat to life, health or safety of genetic relatives?

In circumstances where the consent cannot be obtained, both the NHMRC and the NSW Guidelines provide that the medical practitioner must first determine if there is a serious threat to a genetic relative. There must be a reasonable belief by experts in the field that the threat reflects a significant danger to the individual, which may or may not be imminent. This could include a life threatening illness or the threat of a disease or psychological harm that may result in death or disability without timely decision or action.

Considerations include:

- the nature of the conditions, its risks and treatment options; and
- the probability that the relative may also have the condition or be a carrier, and the modes of inheritance.

If a serious threat to the life, health or safety of a genetic relative is identified, the practitioner is then required to turn their mind to whether the potential to lessen or prevent the threat exists, including:

- whether the condition is preventable or treatable (ie. will the relative benefit from the disclosure); and
- if the condition is incurable, whether the knowledge allows for optimal management.

The guidelines impose a duty of good faith on the practitioner when making such a decision requiring them to draw on their experience, training and expertise. It provides the practitioner with some practical tips and ethical requirements of good practice, for example:

- take reasonable steps to obtain consent and advise the patient to contact relatives;
- hold further discussions with the patient and ask that they reconsider their refusal of consent;
- allow the patient sufficient time to think about their decisions and consider arranging genetic counselling;
- discuss with the patient the process of disclosure without consent and explain to them that disclosure can take place without consent;
- establish whether the patient is competent to make their own decision (including seeking independent expert advice if the person is determined not to be competent or the patient is a child/young adult);
- be aware that the process can cause the patient a great deal of distress and manage this appropriately;

- notify the patient that a decision has been made to disclose without consent; and
- fully document all stages of the process.

A health practitioner has an ethical obligation to their patient or their authorised representative to inform relatives of the diagnosis, but is under no legal obligation to disclose the information to genetic relatives themselves whether consent is given or not.

What information should be provided?

The NHMRC Guidelines states that disclosure to genetic relatives should be limited to genetic information that is necessary for communicating the increased risk and should avoid identifying the patient or conveying that there was no consent for disclosure.

Information provided to genetic relatives should:

- not identify the patient or the genetic status or genetic condition that has been identified;
- simply state that a tendency to develop a potentially serious heritable disorder has been identified in the family;
- state that notification of relatives under such circumstances is permissible under the Privacy Act;
- suggest that the recipient use the contact details provided to receive further information (for example by taking the letter to their GP who could make contact for them);
- include details of the nearest genetic counselling services; and
- if possible, use a letterhead that does not identify the condition.

A sample template letter is provided in the Guidelines.

Contacting relatives

The legislation allows for disclosure of genetic information, but it does not allow for the collection, use and disclosure of the contact details of the relatives. Therefore, the practitioner will need to already have the contact details of the relatives or to have obtained them through lawful means.

The Guidelines recommend a procedure of cascading contact, in which the health practitioner obtains the consent of the relative to disclose to further relatives.

Scenario

The Guidelines provide some examples of scenarios. Scenario 4 of the NSW Guidelines describes a situation where an authorised representative of the patient does not give consent for disclosure. In the light of the serious threat to genetic relatives, a decision is taken to disclose to the relatives without the consent of the authorised representative.

“A man with dementia came to a private clinic accompanied by his wife. In the past he had been shown to have a mutation for the Huntington disease gene. The husband was severely demented and could not communicate.

Assessment confirmed that he was unable to understand his situation and give consent to inform genetic relatives of their risk and his wife was identified as his authorised representative. Information about the implications of the diagnosis for genetic relatives and consideration of disclosure that would have been given to the patient was then given to his wife. During the course of these discussions, the neurologist ascertained that the patient and his wife had not told their adult children or the patient’s siblings of this risk. When the father was admitted to hospital, the three adult children supplied names and addresses for contact in the event of deterioration.

Despite careful explanation from the neurologist and the social worker on a number of occasions, as well as by other clinicians when the husband was admitted to hospital, the wife (as authorised representative) continued to refuse to notify her children of their risk.

Points for consideration:

- *What factors support disclosure in these circumstances? — The authorising medical practitioner has a reasonable belief that disclosure to the man’s children is necessary to lessen or prevent a serious threat to the adult children’s life, health or safety. The couple’s adult children and other genetic relatives, if informed of their risk of inheriting the Huntington disease mutation, may wish to consider undertaking predictive testing.*

Knowledge of this risk would allow planning for the disease’s onset. If a predictive test is taken, the risk of inheritance is further clarified and may influence major life decisions, as well as allowing early recognition of manifestations, such as treatable depression and cognitive changes.

- *What factors weigh against disclosure? — Despite counselling, the children’s mother, as authorised representative for her husband, is adamant that the children should not be informed of their risk. Disclosing without consent is likely to irrevocably change relationships within the family. There is the possibility that adult children could be unduly distressed, that they may already have the onset of illness or could have a prodromal psychiatric illness. It is also possible that the mother may be refusing to disclose in order to conceal non-paternity.*

- *What information could be given to the patient? — In this case, reasonable efforts have been made to ensure that the patient's understanding is as thorough as possible. This included explaining the condition and the implications of disclosure using simple language. The neurologist then assessed the patient's ability to give informed consent. In this case the patient was severely impaired at presentation. When a person is judged as one who is unable to meaningfully consider and make a decision, reasonable efforts should be made to ensure that the person is, in fact, unable to understand this particular issue and its implications.*
- *What information could be given to the authorised representative? — As it has been determined that the patient lacks capacity to give informed consent, the wife as authorised representative should be given the necessary information and assistance regarding the disclosure to enable her to make an informed decision on the patient's behalf. Such information should include, for example, the likely threat to genetic relatives if they are not advised of their risk and therefore do not seek health advice, and the process for disclosure. It is important that the woman be asked to consider what her husband's wishes would have been. She could also be actively encouraged to seek further advice from a genetic counsellor.*
- *Who might be involved in decision-making? — The treating neurologist may elect to take this matter further by discussing with experienced colleagues whether or not to disclose in these circumstances. If there is reasonable belief that disclosure is necessary to lessen or prevent a serious threat, a decision may be taken to disclose without consent.*
- *How might disclosure take place? — In this case the couple's adult children could be contacted. Conditions such as Huntington disease are incurable and diagnosis can cause great anxiety. Before contacting the relatives, the disclosing health practitioner should be aware of interventions and actions that may help people who are dealing with the prodromal psychological consequences of being informed about the diagnosis, and of specific care for the relatives."*

Conclusion

With developments in the area of gene technology and the increasing use of pathology testing and health data linkage we are at the threshold of dealing with legal and ethical issues associated with the collection, use and disclosure of genetic information.

The legislation, NHMRC Guidelines and the NSW Guidelines set out the framework to assist the health practitioners when deciding on whether to use or disclose genetic information. Medical practitioners should familiarise themselves with the relevant laws and guidelines to ensure that they understand and comply with the legislative requirements.

In order to avoid complaints and claims, if at all possible, it is recommended to seek to obtain the consent of the patient before disclosing their genetic information to their family members. In addition, some people may prefer to not know their genetic predisposition to hereditary diseases and this should be respected. ■

TGA Review Panel to Review Medicines and Medical Device Regulation

By Alison Choy Flannigan, Partner and Joann Yap, Solicitor

The Australian Government announced on 24 October 2014 that a panel of three experts would conduct an independent review of the regulation of medicines and medical devices, to examine specific aspects of the regulatory framework administered by the Therapeutic Goods Administration (TGA).²⁹

The Review conducted by Emeritus Professor Lloyd Sansom AO, Mr Will Delaat AM and Professor John Horvath AO will, focus on identifying:

- areas of unnecessary, duplicative or ineffective regulation that could be removed or streamlined without undermining the safety or quality of therapeutic goods available in Australia;
- opportunities to enhance the regulatory framework so that Australia will remain well positioned to effectively respond to global trends in the development, manufacture, marketing and regulation of therapeutic goods.

According to the Terms of Reference³⁰, the Review will make recommendations to:

- ensure there is an appropriate balance between risk and benefit in the regulation of prescription, over-the-counter, complementary medicines and medical devices, as well as access for individuals to unapproved medicines and medical devices;
- simplify and streamline the approval processes undertaken by the TGA, including recommendations on:
 - fast tracking approvals processes for medicines and medical devices;
 - opportunities for working together with overseas regulators; and
 - exploring how risk assessments, standards and determinations of regulators can be used more extensively by Australian regulators when approving the supply of medicines and medical devices;
- ensure regulatory arrangements are flexible to accommodate developments in medicines and medical devices, including streamlining of cross-category regulatory approvals;

- improve processes that assist industry, researchers and consumers to navigate the regulatory system;
- support work underway on medical device reforms and clinical trial approval arrangements; and
- any other matters that the review committee regards as important and relevant to the safe and efficient supply of effective medicines and medical devices to the Australian people.

However, the Review will not make recommendations in relation to:

- any aspect of the Pharmaceutical Benefits Scheme;
- work by the Department of Health on the reimbursement systems;
- National Health and Medical Research Council arrangements relating to research and development; or
- work currently underway by the Department of Health and the Department of Industry on ethics processes for clinical trials

The Panel held a forum on 12 November 2014 for peak consumer, health professional and industry bodies to brief them on the process for the Review and opportunities to engage with the Panel³¹. On 21 November 2014, the Panel called for submissions from interested parties in response to its Discussion Paper³², which closed on 5 January 2015.

The Review report is scheduled to be provided to the Minister for Health, Prime Minister, Assistant Minister for Health, and the Parliamentary Secretary to the Prime Minister responsible for deregulation, by 31 March 2015.



²⁹ The Hon Peter Dutton MP and Senator The Hon Fiona Nash, Joint Media Release 'Expert Panel to Review Medicines and Medical Devices Regulation' (24 October 2014) < <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarele-yr2014-dutton091.htm>>.

³⁰ The Department of Health, 'Review of Medicines and Medical Devices – Terms of Reference' < [http://www.health.gov.au/internet/main/publishing.nsf/Content/8ADF9C3204463DCA257D74000EF5A0/\\$File/Terms%20of%20Reference%20-%20PDF%20Version.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/8ADF9C3204463DCA257D74000EF5A0/$File/Terms%20of%20Reference%20-%20PDF%20Version.pdf)>.

³¹ The Department of Health, 'Expert Review of Medicines and Medical Devices Regulation' (20 January 2015) <<http://www.health.gov.au/internet/main/publishing.nsf/Content/Expert-Review-of-Medicines-and-Medical-Devices-Regulation>>..

³² Emeritus Professor Lloyd Sansom AO, Will Delaat AM and Professor John Horvath AO, 'Review of Medicines and Medical Devices Regulation Discussion Paper' (November 2014) <[http://www.health.gov.au/internet/main/publishing.nsf/Content/8ADF9C3204463DCA257D74000EF5A0/\\$File/Review%20of%20Medicines%20and%20Medical%20Devices%20Regulation%20Discussion%20Paper.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/8ADF9C3204463DCA257D74000EF5A0/$File/Review%20of%20Medicines%20and%20Medical%20Devices%20Regulation%20Discussion%20Paper.pdf)>..

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John has more than 15 years experience in Health Law, both in medical negligence and medical discipline. John leads the Sydney medical malpractice team at Holman Webb and acts for leading MDO's.

John has presented widely, not only on trends in negligence litigation, but also on trends in medical disciplinary processes. John's broad range of experience in insurance litigation has given him unique perspective on developments in negligence litigation.

John's extensive experience in defending medical malpractice claims, assisting practitioners through disciplinary processes and acting for a number of medical defence organisations has given him an in depth understanding of trends in the health industry.



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Sandra is a Senior Associate in the Holman Webb Health, Aged Care and Life Sciences Team.

Prior to joining Holman Webb Sandra was a senior commercial lawyer with the NSW Ministry of Health where she gained in depth experience and an understanding of the health industry. Sandra started her career legal career at the Australian Securities and Investments Commission where she was involved in litigation and provision of legal advice in support of ASIC's enforcement, regulatory and compliance activities. Bringing with her over seven years of commercial and regulatory legal experience, Sandra has extensive corporate experience with a focus on the health industry.

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