

# Health Business Newsletter

June 2010

## National Registration of Health Professionals

Australia's new national registration and accreditation scheme commences on 1 July 2010 in those jurisdictions which will have passed the National Law as at that date. At the time of the writing of this article, the National Law has been adopted in Queensland, New South Wales, Victoria, the Australian Capital Territory, the Northern Territory, the bill is awaiting debate in the Legislative Council in Tasmania, and in South Australia a draft bill has been released for consultation.

From 1 July 2010 ten health professions will be regulated by national legislation. There will be one National Board for each health profession which will set standards and policies for the regulation of the relevant health profession. Each National Board will be supported in this task by the Australian Health Practitioner Regulation Agency (AHPRA). The professions which will be nationally regulated are: medical practitioners, nurses and midwives, dental practitioners, chiropractors, physiotherapists, optometrists, pharmacists, psychologists, osteopaths and podiatrists.

Each profession will have a National Board which will be responsible for the registration of professionals practising within that profession.

Each Board has developed Registration Standards with which registrants must comply. While each profession has certain registration requirements which apply to its registrants, registration standards which apply across all professions include standards requiring registrants to:

- Hold professional indemnity insurance;
- Demonstrate recency of practice. In some cases, a practitioner returning to an area of practice after a period of absence may have to submit a re-entry plan including details of supervision plans and re-education plans;
- Disclose criminal convictions, guilty pleas

and findings of guilt irrespective of whether a conviction is recorded;

- Demonstrate English language skills;
- Participate in continuing professional development (CPD) relevant to their scope of practice.

Registrants may be eligible for 'specialist registration' if they meet eligibility and qualification requirements under the National Law and the applicable registration standards (if any). Recognised specialties are approved by the Ministerial Council. As at 1 July 2010, specialist registration may be granted to:

- Medical practitioners in one or more of 23 recognised specialties;
- Dental practitioners in one or more of 13 recognised specialties; or
- Podiatrists in the recognised specialty of podiatric surgery.

The recognised specialties are published on the relevant National Board's website.

All health practitioners registered under the National Law will be obliged to make mandatory notifications in circumstances where a health practitioner or an employer of a health practitioner has a reasonable belief that another health practitioner has:

- a. Practised the practitioner's profession while intoxicated by alcohol or drugs; or
- b. Engaged in sexual misconduct in connection with the practise of the practitioner's profession; or
- c. Placed the public at risk of substantial harm in the practitioner's practise of the profession because the practitioner has an impairment; or
- d. Placed the public at risk of harm because the practitioner has practised in a way that constitutes a significant departure from accepted professional standards.



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The National Board and AHPRA have issued consultation papers on codes and guidelines that will assist health practitioners meet their obligations under the National Law including the making of mandatory notifications. All health practitioners should have regard to those guidelines.

For medical practitioners, from 1 July 2010, the Medical Board of Australia will operate under the National Law in those jurisdictions that have as at that date, adopted the National Law. The State and Territory medical boards/councils will become committees of the Medical Board of Australia and will be delegated powers to continue to deal with registrations and notifications locally as part of the national scheme.

In New South Wales, doctors' health, professional performance and conduct matters including complaints and notifications will be dealt with outside the National Scheme and will be administered by the Medical Council of New South Wales under legislation, which at the time this article was written is yet to be introduced into the New South Wales Parliament.



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## The Fair Work Act 2009

All private sector employees in Victoria, Queensland, New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory are covered by the Federal industrial relations system which is regulated under the provisions of the *Fair Work Act 2009* (Cth) (*the Act*). The features of the industrial relations system include:

- The establishment of Fair Work Australia (FWA) and the Fair Work Ombudsman (FWO);
- 10 minimum employment standards known as National Employment Standards;
- New modern awards;
- Collective bargaining; and
- Protections against unfair dismissals for employees.

### Fair Work Australia (FWA) And The Fair Work Ombudsman (FWO)

FWA has the authority to vary awards, make minimum wage orders, approve collective agreements, decide unfair dismissal claims and resolve workplace disputes.

A Fair Work Division has been established in the Federal Magistrates Court to determine civil claims arising under the Act including claims alleging dismissal in contravention of a general protection, unlawful termination of employment and discrimination.

The FWO appoints Fair Work Inspectors empowered to investigate and enforce

compliance with relevant Commonwealth workplace laws and industrial instruments

### National Employment Standards

The ten National Employment Standards apply to all employees covered by the federal workplace relations system:

- Thirty-eight hours of work each week;
- Parents with young children may request flexible working arrangements. A request may only be refused on reasonable business grounds;
- A period of up to 12 months unpaid leave for each parent in association with the birth of a child. If both parents take leave the periods of leave must be for separate periods. A request may be made for a further 12 months leave;
- Four weeks of paid annual leave per year;
- An entitlement to 10 days of paid personal/carer's leave for each year of service, 2 days of paid compassionate leave, and 2 days of unpaid carer's leave (if carer's leave is exhausted). Casual employees are entitled to 2 days compassionate leave per occasion and 2 days of unpaid carer's leave.
- An entitlement to be absent from work for a prescribed community service activity such as jury service;
- Long service leave;
- An entitlement for an employee to be absent

from work on public holidays. An employer may reasonably request an employee to work on a public holiday, and an employee may only refuse if the request is not reasonable.

- A stipulated minimum notice period for employers who are terminating, or making redundant, the services of an employee. The notice period required is commensurate with the length of employment;
- A Fair Work Information Statement detailing the rights and entitlements of employees.

### Modern Awards

In addition to the National Employment Standards, modern awards may include 10 minimum conditions of employment tailored to an industry or occupation including: minimum wages, types of employment, overtime and penalty rates, allowances, leave related matters and dispute resolution.

The modern awards that apply to the Health Services Industry are:

- Health Professionals and Support Services Award 2010;
- Nurses Award 2010;
- Medical Practitioners Award 2010; and
- Age Care Award 2010.

Modern awards will not apply to an employee earning an annual salary of more than

\$100,000 (pro rata for part time employees) indexed annually.

Modern awards will be reviewed by FWA every 4 years, following which FWA may revoke or vary modern awards. Wages under modern awards will be reviewed annually.

Employers and employees will be able to vary the application of modern awards to meet the needs of the employer and employee by agreement. Further advice should be sought before entering into such an arrangement.

### Collective Enterprise Agreements

The Act provides for the making of enterprise agreements which are written agreements setting out the working conditions which are agreed upon by an employer and the majority of employees. Those agreements are subject

to approval by FWA and must satisfy a better-off overall test to ensure employees will be better off under the agreement than under the relevant award.

### Termination Of Employment

Unfair dismissal laws have been re-instated. Employees working in a small business (fewer than 15 employees) may only bring an unfair dismissal claim after they have been employed for 12 months, and employees in larger business must have served a minimum of 6 months employment. 'Operational reasons' is no longer a defence to a claim for unfair dismissal, although a dismissal will not be unfair if it is a genuine redundancy.

Small businesses must comply with the Small Business Dismissal Code.

### Transfer of Business

The Act provides for the transfer of enterprise agreements and certain modern awards of business from one employer to another. The Act provides that there will be deemed to have been a transfer of business to a new employer if the employment of the employee with the older employer was terminated, the employee is then re-employed by a new employer within three months, and the transferring employee performs the same or substantially the same work for the new employer.



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## Update - Health Services Act 1991 (Qld)

The *Health Services Act 1991* (Qld) ("the Act") has been amended by Part 7 of the *Health and Other Legislation Amendment Act 2009* No. 44 (Qld).

The amendments commenced on 11 December 2009 and follow recommendations made by the Commission for Children, Young People and Child Guardian and the Queensland Ombudsman. The objective of these amendments is to enable confidential information to be released for the protection, safety or well being of a child and to assist the Director-General and Queensland Health's lawyers to effectively carry out their responsibilities.

### The Health Services Act 1991 (Qld)

Section 62A of the Act imposes a duty of confidentiality on health service employees. A health service employee must not disclose to another person (directly or indirectly) confidential information acquired by virtue of the person's employment with the health service if a person who is receiving or has received a public sector health service, that is, a patient, could be identified from the confidential information. The obligation applies to persons who are former employees and extends to information from which the identity of a deceased person could become known.

Whilst the Act does contain a number of exceptions for appropriate and accountable disclosure, some legitimate reasons for needing to disclose information had previously been overlooked. As such, it was possible for health service employees to inadvertently breach section 62A by providing confidential information to the Director-General or Queensland Health's lawyers.

### New section 62PA

The inclusion of section 62PA of the Act clarifies the position that the Chief Executive may disclose confidential information to a lawyer

representing the State in a matter.

Section 62PA relevantly provides that the requirements of section 62A do not apply to the disclosure of confidential information by the Chief Executive if the disclosure is to a lawyer in relation to the matter and the lawyer is representing the State in relation to the matter.

The explanatory notes to the amending legislation provide the following further guidance, and indicate that the protection of section 62PA may extend to the release of information about a person:

- a. who is not a party to the litigation, but may be relevant to the matter in dispute, and advice is needed as to whether the information would be admissible evidence and should be relied upon in the litigation; and
- b. where the information may relate to a different incident or illness, but a causal connection is suspected and advice is needed as to whether the information should be relied upon (i.e. a person sues the State of Queensland for malpractice arising from a fracture, however the person's mental health records are assessed to determine whether they may be relevant to the matter).

Importantly, the explanatory notes stipulate that to ensure the effective operation of this provision, the Chief Executive will delegate this power to appropriately qualified people such as medical records staff, Health Information Managers, Freedom of Information Officers.

We recommend that employees seek medico-legal advice prior to releasing information.



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## The High Court of Australia brings finality to 'loss of chance' claims

In the June 2009 issue of the Health Business we reviewed the decision of the NSW Court of Appeal in *Gett v Tabet [2009] NSWCA 76*. This decision was appealed to the High Court of Australia. On 21 April 2010 the High Court handed down its judgment in the matter of *Tabet v Gett [2010] HCA 12* dismissing the appeal. This decision brings finality to not only the parties to the proceedings but also the legal profession at large in relation to 'loss of opportunity' claims in medical negligence proceedings.

In short, the plaintiff suffered a seizure and was diagnosed with a brain tumour for which she was operated upon, yet sustained irreversible brain damage. The trial judge found the defendant had been negligent for failing to order a CT prior to the plaintiff's seizure. The issue for the Court was whether the plaintiff was entitled to recover any compensation for what she alleged was a 'lost opportunity' to obtain earlier treatment, which may have resulted in a better outcome. On one point of appeal, the Court of Appeal essentially found that the evidence as to the

nature of the 'lost chance' was insufficient to support a finding that the negligence caused the plaintiff to suffer any specific or identifiable injury, separate to the totality of the plaintiff's brain injury which was also contributed to by other non-negligent causes (such as the underlying tumour).

Although each case will always turn on its own facts, by confirming that the Court of Appeal achieved the correct result in this case, the High Court of Australia has sent a clear message that the law in Australia does not recognise or permit compensation for plaintiffs in medical negligence proceedings who have lost the 'possibility' of a better outcome – compensation will only be awarded when a plaintiff can prove on the balance of probabilities that the negligent act or omission caused their injury.



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