

Health Business Newsletter

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Medical Indemnity and Graduate Medical Students

Graduate medical students commencing work in the public hospital system will be covered under the relevant State and Territory Government's professional indemnity insurance policy for negligence claims arising during the course of the discharge of their duties within the public hospital system. The cover offered is usually limited to negligence claims and will not usually extend to legal advice and assistance regarding complaints and representation before investigatory bodies and tribunals.

Tort law reform in many jurisdictions in the recent years has resulted in a reduction in the number of negligence claims being made against medical practitioners.

The reduction in medical negligence claims has been accompanied by an increase in the number of complaints being made to State and Territory based registration and complaints bodies (the Health Care Complaints Commission in New South Wales and its equivalents in other States and Territories), and bodies such as Medicare Australia and other regulatory bodies, including the Private Health Insurance Ombudsman.

Generally speaking, the indemnity cover provided to medical practitioners employed in State and Territory public health systems extends to negligence claims only. When faced with a disciplinary (or other) complaint a medical practitioner may find him or her self on his own. While professional associations can and do offer assistance and advice to medical practitioners in these circumstances, this assistance often does not extend to funding legal advice and representation for individual members.

In addition to the possibility of a complaint, as a member of a treating team in the public hospital, it is foreseeable that at some stage an employed medical practitioner may be required to provide a statement to, or give evidence before, a Coronial Inquiry. While

advice and assistance is generally available to the employed medical practitioner by the employer, should a conflict arise amongst members of the treating team, that employed medical practitioner may ultimately be faced with the need to secure his or own representation.

When commencing, or during, employment with a State or Territory based health system medical practitioners should give careful consideration to obtaining their own insurance cover. That is, separate cover and/or in addition to the cover provided by the employer's insurer. In addition to access to legal advice and representation, the professional and personal support services offered by medical indemnity providers to their members can be invaluable. The stresses and strains which accompany the receipt of a complaint, and the complaints process, often take medical practitioners by surprise, and can be particularly difficult for junior medical practitioners who are generally inexperienced in dealing with such matters.

The policies and products offered by insurers may differ, and enquiries should be made of medical indemnity providers regarding the policies and products available to medical practitioners employed in the public health system.

Graduate medical practitioners may think indemnity cover an unnecessary expense in the early stages of a career, the benefits of same, if needed, can be considerable.



Scott Chapman - Partner
Sydney
Phone: (02) 9228 9317
Scott_Chapman@tresscox.com.au



Dominique Egan - Partner
Sydney
Phone: (02) 9228 9261
Dominique_Egan@tresscox.com.au



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Contractor or Employee for Workers Compensation Purposes

A worker is someone who is employed under a "contract of service," or in certain circumstances a "contract for service". A contract can be made either orally or in writing, and applies to full time, part time and casual workers.

The nature of the relationship between a worker/contractor and the principal contractor/ or employer is complex. For some work situations, certain roles do not fit into defined categories. Many people working as contractors can still be treated as workers for workers compensation purposes.

Who needs a workers compensation policy

Anybody who operates a business and employs workers or engages contractors, must obtain a workers compensation policy.

Who is covered by workers compensation insurance

If a person or business employs or hires workers on a regular basis, they are considered to be an employer and must have a workers compensation insurance policy. Generally, a worker is someone who receives wages or commission, regardless of the number of hours worked each week, and includes workers who work away from the employer's premises.

The term "contract of service" has been subject to a range of Court and Tribunal rulings about whether an employer/worker relationship exists.

These rulings have identified a range of factors that are used to determine whether a "contract of service" exists.

Many people are treated as workers for workers compensation purposes. The law refers to them as "deemed workers". If someone is "deemed" to be a worker, their employer/principal contractor must have a workers compensation insurance policy.

Some examples of "deemed workers" include:

- Workers lent or on hire;
- Outworkers;
- Certain contractors;
- Rural Workers;
- Voluntary ambulance workers;
- Drivers of hire vehicles and hire vessels;
- Caddies and others employed through a club.

Contractors

People working as contractors (including subcontractors) under labour hire service agreements may also be "deemed workers". Workers compensation law does not rely on the tax status of the person carrying out the work to determine whether that person is a worker, "deemed worker" or contractor.

Indicators of whether a contractor is a deemed worker include:

- The terms of arrangement.
- Whether the contractor can employ or contract other people to perform the work.
- Whether the contractor works at stated hours on usual days and the contract specifies the hours or days.
- Whether the contractor measures and inspects the site and provides a fix priced quotation inclusive of labour hire and material.
- Whether the contractor deals directly with the client requesting the worker or the principal contractor for whose benefit the work is done.
- Whether the contractor can make a profit or loss over the market rate for a tradesman working in the industry.
- Whether the contractor supplies materials, machinery and equipment used in the completion of the job.
- Whether the contractor can be liable for unsatisfactory work.

Sole Traders and Partnerships

If a sole trader or partnership employs workers, they must take out a workers compensation policy. However, the sole trader or partner may not be personally covered by the policy.

So how do you distinguish between an employee or contractor

A contractor is more likely to:

- Carry on an independent business in his or her own name or under a business name.
- Be engaged to carry out a particular task using his or her own skill and judgment.
- Employ others, delegate or subcontract work to others.

- Be paid on the basis of a job quotation.
- Supply his or her own tools and materials.

An employee is more likely to:

- Be subject to the direction of the employer as to what work is to be performed, the time of the work to be performed and the manner which it is performed.
- Be required to actually carry out work.
- Be paid on a time basis.
- Have tools and material supplied by the employer.
- Work exclusively for a single employer.
- Be subject to PAYG tax arrangements.

When is a contractor deemed to be a worker:

- The contractor does not employ workers.
- The contractor does not subcontract part or all of the contracted work.
- The worker is not part of a business or trade regularly carried out by the contractor in his/ her own name or under a business.

A contractor is not a worker if a number of the factors which are outlined are met:

- The contract for the work is made between a principal and the contractor's limited liability company or partnership.
- The contractor employs new workers in relation to the contract, or the contractor subcontracts all or part of the contracted work.
- The contractor is a trade person conducting a business in a recognised trade, and the nature of the contracted work is in that trade.
- The contractor, who may be a sole trader, is shown carrying out an independent business in his or her own name or under a business name.

A critical question as to whether someone is a contractor or employee is the level of control held over that particular person by the employer/principal contractor.

Each State has differing legislation on what constitutes a worker or "deemed worker" and WorkCover in each state provides guidelines as to whether someone is considered a worker or contractor for workers compensation purposes.

WorkCover NSW has a private ruling and self assessment tool online. Employers can now apply online for a private ruling on whether a person or entity is considered to be a worker or contractor for wage record and premium calculation purposes.

The ruling does not impact on a person's ability to lodge a workers compensation claim nor can

it be used in any claims related matters – i.e. it does not disentitle someone from making a claim for workers compensation entitlements.

In considering whether someone is a contractor or worker in a particular state it is important that guidance is sought, TressCox is able to provide template questions, guidelines and guidance to ascertain whether someone is

considered a worker or contractor in particular circumstances.



Andrew Vandervord - Special Counsel
Sydney

Phone: +61 2 9228 9362

Andrew_Vandervord@tresscox.com.au

Mandatory Reporting now in place for Queensland Medical Practitioners

Most Queensland doctors are probably aware that new obligations on reporting certain misconduct by other doctors commenced under the Medical Practitioners Registration Act 2001 (Act) from 1 January 2010.

Obligations from 1 January 2010

A doctor must now report certain types of misconduct (Reportable Misconduct) to the Medical Board of Queensland when the doctor becomes aware, of or reasonably suspects, that another doctor has engaged in such misconduct.

Failure to report Reportable Misconduct of another doctor is now a ground for disciplinary action against the doctor who does not make a report.

The purpose of the legislation is to ensure that misconduct of a nature that is considered to be reprehensible or which causes or is likely to cause physical or psychological harm to a patient is reported to the Medical Board.

It is then a matter for the Medical Board to investigate the allegations.

The legislation provides sanctions (imprisonment or fine) for acts of reprisal, as it has always done.

What conduct must be reported

The Act categories Reportable Misconduct into 4 general areas as follows:

- sexual misconduct within the practice of the profession (eg conducting a sexual relationship with a patient);
- practice of the profession while intoxicated by either a drug or alcohol;

- practice of the profession while either physically or mentally impaired (other than by drugs or alcohol) which causes or is likely to cause significant harm to a patient;
- practice of the profession in a way that significantly departs from accepted standards of the profession which causes or is likely to cause harm to a patient.

Harm is defined as any detrimental effect on a person's physical or psychological wellbeing.

Although there has been some disquiet expressed about mandatory reporting, as can be seen the first three categories of Reportable Misconduct namely, sexual misconduct in relation to a patient and treating patients while intoxicated or otherwise physically or mentally impaired are the types of behaviour that many doctors as well as the general community would expect to be reported irrespective of the legislation.

It should also be noted that the obligation to report a doctor who is physically or mentally impaired only arises when that impairment either causes or is likely to cause harm.

As for the last category the departure from accepted standards has to be a significant departure from those standards. This takes into account the fact that there is often 'more than one way to skin a cat', and although some doctors may use a certain type of treatment that others may not, they wouldn't necessarily criticise those who don't follow a similar practice. Again the departure has to either cause or be likely to cause harm before an obligation to report it arises.

Exceptions

The obligation does not apply if the doctor who becomes aware of the Reportable Misconduct knows or reasonably believes that the conduct has already been reported to the Medical Board.

Exceptions are also made for doctors who are employed or engaged by an insurer for the doctors whose conduct is under question or doctors who are also lawyers, providing legal services to the doctor.

There are no exceptions for treating doctors.

If in doubt seek advice

This regime has been introduced into Queensland as a precursor for the National Registration and Accreditation Scheme, which also includes mandatory reporting, and is due to commence on 1 July 2010.

I encourage any doctor who becomes aware of another doctor engaging in conduct that falls within the four categories discussed above to report such conduct to the Medical Board.

If you are at all in doubt, you should seek legal advice or the assistance of your Medical Defence Organisation or contact:



Katharine Philp - Partner
Brisbane

Phone: +61 7 3004 3536

Katharine_Philp@tresscox.com.au

VMO Contract Arrangements in NSW

When Visiting Medical Officers (VMOs) contract with Area Health Services they should seek professional advice regarding the remuneration options that may be available to them at the public hospitals at which they will be providing services. A failure to do so may result in a lost opportunity to be remunerated at a higher rate or claim the entitlements to which VMO may be eligible at a particular hospital or hospitals.

Some hospitals in NSW only offer sessional payment arrangements, and similarly, some other hospitals only offer fee-for-service arrangements. At some hospitals, a Department may make an election to be remunerated at either sessional or fee-for-service rates.

VMOs should make the appropriate enquires and seek advice prior to entering into a service contract, be it a sessional or fee-for-service contract, as to whether they have a choice to be remunerated on a sessional or fee-for-service, or at another rate, depending upon the hospital/s at which they are contracted to provide services. In some cases, different hospitals within the same Area Health Service may have different contract and remuneration options available to a VMO. VMOs should not necessarily rely entirely on the advice provided to them by Area Health Services. There is no specific obligation upon an Area Health Service to bring remuneration options to the attention of the VMO, and if an election is not made at the appropriate time, an Area Health Service may refuse to retrospectively remunerate the VMO at the higher rate once an election is made at a later date.

The Joint Agreement between the New South Wales Branch of the Australian Medical Association (NSW) and the NSW Department of Health (Agreement) provides that VMOs who have appointments at hospitals where the Rural Doctors Settlement Package (RDSP) applies, those VMOs have the right to make an election as to the rates at which they will be remunerated.

Clause 15 of the Agreement provides that Fee-for-Service VMO Specialists have appointments exclusively in hospitals to which the Rural Doctors Package applies, they may choose to be remunerated under one of the following arrangements:

- a. the Fee-for-Service arrangements provided by this Agreement;
- b. Sessional arrangements; or
- c. Rural Doctors Package arrangements (until the time of the Agreement in the mid-1990s those arrangements were confined to general practitioner VMOs in those hospitals).

In circumstances where Fee-for-Service VMOs carry out work in RDSP hospitals and other hospitals at which the RDSP does not apply, they may also choose between the above three options for that part of their work which is actually carried out exclusively in RDSP hospitals. For example, a VMO may principally provide services at which he or she is remunerated at standard Fee-for-Service rates, and may also be providing services at smaller rural hospitals within the same Area Health Service at which RDSP rates apply. In order to be paid at RDSP rates, the VMO must advise the Area Health Service that he or she wishes to be so remunerated and should submit claims for payment for services provided at those hospitals at the higher rate.

In our experience, if an election is not made at the time the VMO enters into a service contract to provide services at a RDSP hospital, those VMOs who submit claims at standard rates will be paid at those rates until an election to be paid at the higher rate is made. Claims to be retrospectively remunerated for services provided at a RDSP hospital have recently been refused.

Under the terms of the 2007 Fee-for-Service and Sessional Determinations, VMOs providing services at Regional Hospitals may be entitled to be remunerated at higher rates for call backs (in the case of Fee-for-Service arrangements) and on-call and call backs (for sessional arrangements), and may be eligible to claims professional support payments.

A VMO should also carefully review the schedules to the VMO Contract to ensure that the schedules correctly reflect the VMO's understanding of the services he or she is contracting to provide, the hospitals at which those services will be provided, and the budgeted hours.

VMOs should seek professional advice before entering into a service contract. For further information regarding your particular circumstances and contractual arrangement, please contact:



Scott Chapman - Partner
Sydney
Phone: (02) 9228 9317
Scott_Chapman@tresscox.com.au



Dominique Egan - Partner
Sydney
Phone: (02) 9228 9261
Dominique_Egan@tresscox.com.au

Health Team Contacts

Don Munro
Partner, Sydney
Phone +61 2 9228 9219
Don_Munro@tresscox.com.au

Scott Chapman
Partner, Sydney
Phone +61 2 9228 9317
Scott_Chapman@tresscox.com.au

John Petts
Partner, Melbourne
Phone +61 3 9602 9432
John_Petts@tresscox.com.au

Katharine Philp
Partner, Brisbane
Phone +61 7 3004 3536
Katherine_Philp@tresscox.com.au

www.tresscox.com.au

Sydney
Level 20 135 King Street
Sydney NSW 2000
Phone +61 2 9228 9200
Fax +61 2 9228 9299

Melbourne
Level 9 469 La Trobe Street
Melbourne VIC 3000
Phone +61 3 9602 9444
Fax +61 3 9642 0382

Brisbane
Level 40 Central Plaza 1
345 Queen Street
Brisbane QLD 4000
Phone +61 7 3004 3500
Fax +61 7 3004 3599

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