Health Legal Report – March 2016

Welcome to the March 2016 edition of the Health Legal Report.

In this issue of the Health Legal Report we discuss:

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- Privacy and Health Records – *Wolstencroft v Zola (Human Rights)* [2015] VCAT 1790
- Corporate and Clinical Governance – *Todd (a pseudonym) v The Queen* [2016] VSCA 29
- *Health Legislation Amendment (eHealth) Act* 2015 (Cth), *Health Legislation Amendment (eHealth) Regulation* 2015 (Cth), *My Health Records (Assisted Registration) Rule* 2015 (Cth) and *My Health Records Rule* 2016 (Cth)

We also set out some of the Bills we are tracking throughout Australia, as well as some useful information links.

HealthLEGAL

Level 12, 484 St Kilda Road
Melbourne VIC 3004
ABN 52 104 156 694

Phone: 03 9865 1300
Fax: 03 9012 4353

Regional Development Australia Murraylands and Riverland Inc v Smith [2015] SASCFC 160

By Anne Howard, Solicitor

Introduction

The Full Court of the Supreme Court of South Australia found that an employment contract, which was terminated by the employer when Government funding for the employee's position was withdrawn, was not a frustrated contract because the employment contract did not contain an express provision that the contract could be terminated in the event that funding was withdrawn. This meant that the employer had repudiated the contract and was liable for damages.

Facts

The respondent, Mr Kenneth Smith (the plaintiff at trial), was, until January 2010, employed by the Riverland Development Corporation (the **RDC**) as its Chief Executive Officer. The RDC was incorporated pursuant to the *Associations Incorporation Act* 1985 (SA) (the **Act**) to promote economic development in rural South Australia. Funding for the RDC was provided pursuant to a resources agreement executed by the South Australian Minister for Regional Development, the RDC and local councils. Relevantly, the resources agreement provided that the Minister could withhold funding in the following relevant circumstance:

> Refusal of payment
>
> 3.3.1 …….
>
> 3.3.2 The Minister may, after consultation with the Association and the Councils, adjust or alter the Term, the Purpose and the Minister's Funding if the Minister believes it is desirable, as a consequence of changes to relevant Commonwealth Government funding policies and priorities.

Notably, the provisions of Mr Smith's employment contract, governing when and in what circumstances his employment as CEO could be terminated, were not congruent with this provision of the Resource Agreement. This is because the employment contract only provided that Mr Smith's employment could be terminated immediately by the RDC for cause or upon the RDC giving four weeks' notice in the case of failure to meet the job requirements outlined in the position description. In January 2010, a decision was made to amalgamate the RDC with the Murraylands Regional Development Board Inc. (the **MRDB**), to form the appellant (the defendant at trial) with the name Regional Development Australia Murraylands and Riverland Inc.

As a consequence of the amalgamation, the RDC and the MRDB were dissolved and Mr Smith's employment as CEO of the RDC ceased. The employment of the MRDB's CEO, Mr Lewis, also ceased. Both CEOs, however, were invited to apply for the position of CEO of the appellant and informed that the unsuccessful candidate would be offered the position of Business Manager of the appellant, with the same salary and conditions as they enjoyed in their existing roles.

Both CEOs applied for the job and Mr Lewis was appointed as the CEO. Mr Smith was offered the Business Manager position, which he rejected.

Subsequently, Mr Smith brought proceedings for wrongful dismissal and sought damages calculated by reference to salary and other financial benefits, payable in accordance with his contract of employment as CEO of the RDC, foregone for the balance of the contract term. Relevantly, Mr Smith's contract of employment had an expiry date of 30 June 2013 and Mr Smith remained unemployed at the time of the trial (in 2012).

Trial judge's decision

At trial, Mr Smith argued that the appellant had repudiated his CEO contract by amalgamating with the Board.

In response, the appellant argued that the CEO contract was frustrated because Mr Smith entered into the CEO contract on the common assumption that the government would continue to fund the RDC, thereby ensuring Mr Smith's employment as CEO, and that the CEO contract gave the Minister the power to terminate due to policy change. Therefore it could not be said that the withdrawal of government funding produced a situation radically different to that contemplated by the parties. In the alternative, the appellant argued that Mr Smith had failed to accept repudiation by entering into a new contract of employment. In the further alternative, the appellant argued that Mr Smith failed to mitigate his loss because he did not seek other employment.

After a lengthy consideration of the evidence the trial judge found that the RDC was not faced merely with an option to amalgamate with the Board or go out of existence but had the further option of seeking to enforce its contractual right of funding to continue. In other words, amalgamation and the consequent extinction of the CEO position was a matter within its control. Accordingly, the trial judge found that, in the circumstances, the alleged frustrating event was self-induced. In addition, the trial judge found that there was no basis for implying a term of termination due to withdrawal of government funding into the contract because the CEO contract did not expressly provide for such termination and the contract would not be rendered ineffective or unworkable without such a term. The trial judge held that the inference that must be drawn was that the parties agreed to bear the risk that funding of the RDC might be terminated due to a change in government policy. Therefore, the amalgamation constituted an act of repudiation of Mr Smith's CEO contract by the RDC and Mr Smith had accepted repudiation of the contract.

The trial judge held that the contract had not been frustrated and found liability for damages following repudiation. Further, the trial judge was not satisfied that Mr Smith's reasons for declining to apply for other positions were unreasonable and therefore awarded damages in the sum of $335,574.08. Relevantly, the trial judge assessed damages on the basis, amongst other things, that Mr Smith was entitled to full contractual entitlements until 30 June 2012 (approximately 2 years and 4 and a half months) by which time the trial judge considered he should have "lowered his sights" and taken employment with lower remuneration and less status, which the trial judge considered would have been available. For this reason, the trial judge discounted the damages award with respect to the remaining 12 months of the contract period.

The appellant appealed this decision.

The appeal

The appeal was heard by the Full Court of the Supreme Court of South Australia.

Repudiation or frustrated contract?

The Court upheld the trial judge's decision that the contract had not been frustrated on the basis that the RDC knew that it was a foreseeable risk that funding would be withheld. In the Court's view, because the RDC took that risk, the RDC had repudiated the contract.

The basis of the Court's finding was as follows:

- The RDC had promised that it would retain and pay Mr Smith as its CEO in accordance with the terms of the contract of employment. There was no basis for implying a term permitting the RDC to terminate the employment into the contract.
- The supervening event (that being the decision by the Minister to withdraw the RDC's funding) did not render the contractual obligation incapable of being performed because it had become a radically different thing from that which had been undertaken. This was because the contractual obligation imposed on the RDC did not change. While this was a circumstance that could have been provided for in the contract of employment, no provision was made for the foreseeable circumstance that the RDC's funding, which was entirely out of its control, might be withdrawn.
- Whilst a continuation of funding was always essential to the continued existence of the RDC and its capacity to employ staff, it was never an assumption, common to the RDC and Mr Smith, that such adequate funding necessarily would remain in place throughout the 5 year term of the CEO contract.
- The RDC's inability to comply with its obligations under the contract of employment arose as a consequence of a foreseeable risk assumed by

the RDC at the time it entered into both the Resource Agreement and Mr Smith's CEO contract, without expressly providing for adequate protections.

- Therefore, at the time of entering into the CEO contract with Mr Smith, the RDC had assumed the risk that its funding might be brought to an end as a consequence of a change in government policy.

However, the Court disagreed with the trial judge's finding that the RDC had alternatives to amalgamation available to it including, in particular, challenging, by way of litigation if necessary, the Minister's conduct in forcing it to amalgamate on pain of losing its funding entirely. This was because the Court found that the RDC would seem to have had no practical or viable choice but to proceed in the way it did.

Failure to mitigate loss

The Court held that the trial judge had erred in not finding that Mr Smith had failed to mitigate his losses and found that Mr Smith had acted unreasonably by refusing the Business Manager position. As a consequence, he had failed to take steps open to him to mitigate his losses.

On the evidence before the Court, the Court was of the view that Mr Smith wanted a position in the Riverland area in South Australia, equivalent to that which he had lost, with the same salary, conditions and status, and until such a position came along he was not seriously interested in anything else. The Court also was of the view that the fact that Mr Smith did not apply for jobs during his period of unemployment (from 2010 to 2012) suggested that he lacked enthusiasm, diligence and flexibility as a result of a fixed mind-set.

Further, the Court considered that Mr Smith must have understood his chances of obtaining an equivalent position to have been very limited. In particular, the court observed his strongly held intention to remain in the Riverland area, his desire only to acquire work commensurate with his experience and qualifications, that came with the same salary level and status he had enjoyed as CEO of the RDC. In light of this, the Court was of the view that it must have been apparent to him that positions fulfilling those criteria would be very difficult to come by.

Accordingly, the Court held that the trial judge's finding that Mr Smith had not acted unreasonably in failing to lower his sights for more than 2 years was "excessively" generous. This was because the Court considered that it was unreasonable for Mr Smith to not seek alternative employment, even at a lower salary and status, for more than 2 years.

Conclusion

On the basis of the above, the Full Court held that:

- The contract of employment had not been frustrated and the trial judge was correct to find a liability for damages following a repudiation of the contract.
- Mr Smith acted unreasonably in not accepting the alternative position of Business Manager, which he was offered and, as a consequence, failed to mitigate his loss. Had he accepted the alternate position, the loss claimed and awarded by the trial judge would have been eliminated.
- If Mr Smith did not act unreasonably in refusing the alternative position, he unreasonably failed to mitigate his loss in that he should have "lowered his sights" at a time earlier than as found by the trial judge. Had he done so, he would have obtained a position albeit at a lower salary, and the loss, as calculated by the trial judge, would have been further reduced.

Accordingly, the Court allowed the appeal.

Compliance Impact

This case highlights the importance of ensuring that any contracts that are dependent on funding, under a funding agreement that contains a provision that the funding may be withdrawn, contain adequate terms so that in the event that funding is withdrawn, the organisation has the ability to terminate the contract without being liable for damages.

If you have any questions arising out of this article, please contact ***Anne Howard*** *on* ***(03) 9865 1311****.*

Useful information links

At Health Legal we regularly access a broad range of information to ensure we keep up to date on what is happening in our areas of interest, both here in Australia and overseas.

In each publication we will share some of our regularly accessed sources of information, which we believe our clients will find useful. The links we would like to share this time are:

- The *Clinical Communique* published by the Victorian Institute of Forensic Medicine (**www.vifmcommuniques.org**): a newsletter written by clinicians for clinicians about lessons learned from deaths investigated by the Coroners Court.
- Office of the Australian Information Commissioner (**www.oaic.gov.au**):
  Broad range of information relevant to the work of the Australian Information Commissioner, including privacy and Freedom of Information guidelines and decisions.
- Linked In group and feed:
  Harvard Business School (leadership and management news and articles)
- Ethics & Health Law News (**www.ehln.org**):
  A joint service provided by the Centre for Health Governance, Law and Ethics and the Centre for Values, Ethics and the Law in Medicine (University of Sydney) which provides up to date information on developments in health law and ethics from Australia and internationally.

Recent Awards

Health Legal's team members are acknowledged leaders in the health and aged care sector with Legal Counsels Natalie Franks and Claudia Hirst both of whom were once again recently selected for inclusion in the *Best Lawyers*® list for Australia.

Natalie was also given the honour of being awarded the 2017 Best Lawyers 'Lawyer of the Year' in the practice area of Health & Aged Care Law in Melbourne (as selected by her legal peers). Only a single lawyer in each practice area in each community is given this award.

Furthermore, Health Legal was recently announced as the boutique winner of the 2016 Corporate International Magazine Global Award 'Health Law – Law Firm of the Year in Australia'.

Wolstencroft v Zola (Human Rights) [2015] VCAT 1790

By Giovanni Marino, Senior Solicitor

Introduction

The Victorian Civil and Administrative Tribunal (**VCAT**) recently found that a health provider could not rely on section 95(3) of the *Health Records Act* 2001 (Vic) (concerning consent provided by a legal representative of a deceased person) in order to refuse parents access to the health records of their deceased son.

Facts

The parents sought access to health records held by the respondent psychologist. The records related to their deceased son, who was treated by the psychologist for around five years from 2007. The son died in 2013. The parents were the son's legal representative and administrators of his estate.

The parents sought access to the records under the *Health Records Act* 2001 (Vic) (**HRA**). The psychologist refused to provide access to the records for a number of reasons, including that providing the records would be contrary to the son's expressed wishes for his parents to not have access to them, as the son was estranged from his parents and wished to keep his treatment confidential. In refusing access, the psychologist relied on section 95(3) of the HRA.

Section 95 of the HRA

Section 95 of the HRA states:

> 95 Deceased individuals
>
> (1) This Act applies in relation to a deceased individual who has been dead for 30 years or less, so far as it is reasonably capable of doing so, in the same way as it applies in relation to an individual who is not deceased.
>
> (2) Subject to subsection (3), if an individual has died, a right or power conferred on individuals by a provision of this Act is exercisable in relation to the deceased individual, so far as the circumstances reasonably permit, by a legal representative of the deceased individual.
>
> (3) A purported consent by a legal representative of a deceased individual is void if, when giving it, the legal representative knows or believes that the consent does not accord with the wishes expressed, and not changed or withdrawn, by the individual in his or her lifetime.

Hearing at VCAT

At VCAT, the psychologist argued that the content of the records were confidential to the son, and to provide these records would be contrary to his previously expressed wishes. The psychologist claimed that in those circumstances, the parents were not entitled to production of the records because of section 95(3) of the HRA.

The parents claimed that the psychologist's reliance on section 95(3) of the HRA was 'misconceived', and the psychologist could not refuse them access to the records, for reasons including the following:

- The word 'consent' in section 95(3) was concerned with circumstances where the legal representative of a deceased person has consented to the collection, use or disclosure of health information to a third party. This was not the case here, as the parents sought *access* to the records while standing in their son's shoes.
- It was irrelevant that they were the son's parents – the only relevant matter was that they were his legal representatives.
- If the legislature had intended that rights of access by legal representatives of deceased persons be restricted by reference to their wishes, it could have done so. In this regard, the parents drew attention to section 85(4) of the HRA (concerning individuals without capacity to consent) which provided that '[s]ubject to the Guardianship and Administration Act 1986, an authorised representative of an individual must not give consent or request access to, or the correction of, health information' if this was contrary to the prior expressed wishes of the individual.

- Section 27 of the HRA was also not applicable in these circumstances. Section 27 relates to health information provided in confidence by someone other than the person to whom it relates, with a request that the information not be communicated to the person to whom it relates. The parents claimed that the confidentiality mentioned in section 27 did not arise from the son's consultations with the psychologist.

In response to the parents' position, the psychologist submitted that as section 95(3) of the HRA was 'subject to' section 95(2), it ought to be read as requiring consideration of the wishes of the deceased in relation to requests for access.

The psychologist's written submissions to VCAT included the statement that:

> A reading of the legislation which allows for automatic access to health records upon death by legal representatives is not in keeping with the spirit of the Health Records legislation, nor the policy considerations which underpin it. Release of such information without any consideration of the wishes of a deceased patient or client, is against the spirit of the legislation …

The psychologist also referred to the Australian Psychological Society (**APS**) Code of Ethics (**Code**). The psychologist noted that under the Code, a duty of confidentiality owed to a client continues after that client's death. VCAT also noted that the APS had provided a submission and had concerns about release of records without regards to a deceased client's wishes.

Decision by VCAT

VCAT ultimately found that the psychologist could not rely on section 95(3) of the HRA to refuse access to the son's records.

VCAT's findings included that:

- Section 25 of the HRA provides an individual a right to access their health information.
- Section 95(2) states that a right or power conferred on an individual by the HRA is exercisable by a legal representative of the deceased person. Additionally, if a person other than the individual seeks access to the health information, then section 30 and 31 of the HRA provide that that they may only do so where authorised by the individual. Section 33(3)(d)(ii) of the HRA also requires that requests for access made by a legal representative of a deceased person be in writing. These provisions (while requiring authorisation for sections 30 and 31) do not require consent of the individual before death in order for these access rights to be exercised.
- Taking into account the broad words of section 95(2) and sections 30, 31 and 33(3)(d)(ii), VCAT agreed with the parents' contention that section 95(3) was not applicable in circumstances where the legal representative of the individual exercises a right of access, and so the question of whether a purported consent may be void did not arise.
- The fact that section 85(4) of the HRA makes express reference to the wishes of the individual in those circumstances mitigates against a similar requirement being implied in respect of deceased individuals. If Parliament had intended the powers of a legal representative be similarly limited when requesting access to records of a deceased individual, it could have expressly made such a requirement.
- The APS Code, a psychologist's duty of confidentiality, and other ethical obligations are not matters which can be read as implying any different obligations for psychologists dealing with the HRA.

VCAT also referred to the APS submission, in which the APS suggested that the HRA be read in a manner which allows for only partial disclosure of information legitimately necessary for the legal representative to use in the administration or winding up of the deceased's estate. VCAT found that the HRA did not provide a basis for reading its provisions in that way, and did not give VCAT power to make assessments of the propriety of a legal representative's actions in respect of health records.

Compliance Impact

This case provides guidance for health services when dealing with requests for health records of deceased persons made by their legal representatives. VCAT's decision suggests that when considering a right of access made by the legal representative under the HRA, the expressed wishes of the deceased person does not limit this right of access.

If you have any questions arising out of this article, please contact ***Giovanni Marino*** *on* ***(03) 9865 1339****.*

Todd (a pseudonym) v The Queen [2016] VSCA 29

By Anne Howard, Solicitor

Introduction

In this case, the Victorian Supreme Court, Court of Appeal recently considered an application to grant leave to appeal decisions made by Her Honour Judge Sexton in relation to an application to produce material that contains confidential communications under section 32C of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).

Health Legal represented a Centre Against Sexual Assault as an interested party in the Court of Appeal.

The Legislative Framework

Division 2A of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) (the **Act**) deals with 'confidential communications'. The Act creates a limited privilege which protects the communications between a victim of sexual assault and their doctor/counsellor.

Section 32B of the Act defines a 'confidential communication' to mean:

> 'a communication, whether oral or written, made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a registered medical practitioner or counsellor in the course of the relationship of medical practitioner and patient or counsellor and client, as the case requires, whether before or after the acts constituting the offence occurred or are alleged to have occurred'.

By virtue of section 32C(1)(b) of the Act, unless the Court grants leave to compel the production, a document is not be produced if it would disclose a confidential communication. This means that the Court's permission is required to issue a subpoena.

For the purposes of determining the application for leave to compel the production of the confidential communication, the Court *may* order that the document be produced to it and *may* inspect it (but must not make the document available, or disclose its contents, to the applicant for leave) (section 32C(6) of the Act).

Section 32D(1) provides that a Court must not grant leave to compel the production of protected evidence unless satisfied, amongst other things, that the evidence will – either by itself or having regard to other evidence produced or adduced or to be produced or adduced by the party seeking leave – have substantial probative value to a fact in issue. Section 32D(2) then spells out a number of matters that the Court must take into account, including the extent to which the protected evidence is necessary to allow the accused to make a full defence.

The 32C applications

The underlying case involved an alleged sexual assault.

In December 2015, the accused, by his solicitors, served five applications (the **32C applications**) to issue a subpoena pursuant to section 32C of the Act on a number of different individuals and organisations. Relevantly, one of the organisations was a centre against sexual assault (**CASA**) that provides services to victims of sexual assault throughout Victoria.

The 32C applications hearing

The 32C applications were heard before Her Honour Judge Sexton in the County Court of Victoria in December 2015.

The accused asserted that pursuant to section 32D of the Act, the evidence in the material sought would have substantive probative value to a fact in issue, specifically whether the conduct alleged occurred, and the reliability and credibility of the complainant. The accused also submitted that in order to decide whether to grant leave under section 32D of the Act, section 32C(6) of the Act compelled Her Honour to inspect the documents.

On the evidence before the Court, Judge Sexton was not satisfied that the test in section 32D(1) of the Act – that the protected evidence of which production was sought will have 'substantial probative value to a fact in issue' – was met.

Judge Sexton was also not prepared to order, under section 32C(6), that the material be produced to the Court alone for the purposes of determining the 32C applications. Her Honour considered that she should only receive the material 'if there was some material suggesting a basis which needs to be explored by a judge looking at the material'. Further, Her Honour observed that:

> 'It could not be intended by the legislation in Division 2A that the discretion that the court may order that documents be produced to it and inspected for the purpose of determining an application for leave, should be exercised on a lower threshold than for general subpoenas'.

In the context of this case, Her Honour found that there was 'no material before her to suggest that the complainant was suffering from a psychiatric or psychological condition before or at the time of the alleged offending'.

Her Honour further concluded, on the basis of the complainant's lengthy cross-examination, over two days at committal, that:

> 'even if she [had] suffered depression since the alleged events as she admitted she [had], it did not…affect her capacity to observe, recollect or express the matters which her evidence [was] tendered to prove'.

In summing up, Her Honour described the test required by section 32D(1) of the Act as follows:

> '…It must be established that the evidence will have substantial probative value for a fact in issue as the first limb of the test, and here there is no indication that there is any such evidence in such existence. As I have indicated, there is nothing before me to indicate that I should explore the matter further by receiving materials under section 32C(6). Therefore, the first limb not being met, it is not necessary to consider the other limb or limbs if necessary and therefore the applications are refused'.

When asked to certify pursuant to section 295(3) of the *Criminal Procedure Act* 2009 (Vic), that Judge Sexton's ruling was of sufficient importance to the trial to justify it being determined on an interlocutory appeal, Her Honour refused to do so. Her Honour was of the view that, 'while there are a number of questions in this case, they are not attended by sufficient doubt for the reasons [Her Honour] gave in [her] ruling'.

The Appeal

Subsequently, Counsel for the accused submitted an application for leave to appeal to the Court of Appeal – Supreme Court of Victoria under section 295 of the *Criminal Procedure Act* 2009 (Vic). The appeal only applied to two organisations (one of them being the CASA) and one individual.

In general terms, the basis of the accused's appeal was that:

- Judge Sexton had failed to exercise her discretion under section 32C(6) of the Act to order the production of the documents so that a judgement could be made pursuant to section 32D(1) of the Act; and
- Judge Sexton erred in making the comparison required by her under section 32D(1) of the Act without inquiry as to the production of relevant material and proceeding to make the judgement without satisfying herself that there was no relevant material other than that that was before her.

The appeal was heard before Weinberg, Whelan and Priest JJA on 3 March 2016 and leave was sought and granted for the CASA to intervene as an interested party.

Counsel for the accused submitted that it was 'impossible to make a proper adjudication on the matters required by the legislation without the documents sought to be subpoenaed'. Counsel for the accused also contended that no decision can be made under section 32D(2) unless the documents are seen by the judge. As understood by the Court, 'the gist' of Counsel's submissions was that *may* in section 32C(6) of the Act should – at least in this case – be read as *must*.

In considering the accused's arguments in respect of the evidence at committal, the Court found as follows:

> 'A fair reading of the complainant's evidence at committal makes plain that she suffered depression after the alleged offending, manifested by her indulging in self-harm. She was prescribed antidepressant medication and undertook counselling. On her evidence, she had undertaken no treatment – pharmacological or otherwise – for any psychiatric or

> psychological condition prior to the offences perpetrated against her. Despite the clear import of the complainant's evidence, however, counsel for the applicant submitted to the primary judge that "just because one has (self-harmed) after, doesn't mean that there's no problem before". That, with respect, ignores the fact that the complainant's depression – which had its onset after the alleged offending – says nothing about her psychological condition at the time of the relevant events. Moreover, on the material presently available, I see nothing to suggest that the fact that the complainant has suffered from depression since the alleged offending bears upon her general reliability or credibility as a witness'[7].

Therefore, the Court held that Judge Sexton was correct to find that the accused had not demonstrated that the relevant protected evidence had substantial relevance to a fact in issue.

Turning to the issue of whether Her Honour had failed to exercise her discretion under section 32C(6) of the Act to order the production of the documents, the Court rejected the accused's submission that *may* should be read as *must*. The Court made this finding on the following basis:

> 'On the face of it, a statutory provision which uses the term "may" is permissive. Thus, if the statute provides that a person "may" do something, the person has a discretion whether or not to do it.
>
> Section 32C(6) provides that a court may order that a confidential communication be produced and inspect it. Had the legislature's intention been that the court must in all cases order production of the relevant document and inspect it, it might have been expected that s 32C(6) would be expressed in obligatory terms. It is not. Hence, although one might readily imagine cases where it would be necessary for a court to inspect a document in order to determine whether it could properly be said to satisfy the three limbs in s 32D(1), it is not mandatory that it be done in every case. The judge has a discretion which must be exercised according to the facts and circumstances of each particular case. Based on the evidence before the judge in this case, however, it cannot be concluded that inspection of the protected communications was required'.

Accordingly, the Court held that the appeal was without substance and refused to grant leave to appeal.

Compliance Impact

This case provides guidance that in determining an application to grant leave to issue a subpoena for material containing confidential communications, it is not mandatory for the Judge to inspect the documents in order to determine whether the three limbs in section 32D(1) of the Act are satisfied. Instead, section 32C(6) operates by granting the Judge a discretion to inspect, which must be exercised according to the facts and circumstances of each particular case.

*If you have any questions arising out of this article, please contact **Anne Howard** on **(03) 9865 1311**.*

Precedents/Standard Form Agreements and Policies

Due to client demand, we have developed a range of standard form Agreements and Policies which are commonly used by health, aged care and community service providers. The documents have been prepared in a template form so they can be completed by your staff and include service contracts for the provision of pathology and radiology services, requests for tenders, leases and supply of goods contracts.

Precedents recently added to our range include a consultancy suite hire contract, supply of equipment with associated services agreement, sponsorship agreement and a short form Request for Proposal.

*For further information about these precedents please contact **Natalie Franks** on **(03) 9865 1324** or **natalie.franks@healthlegal.com.au**.*

Health Legislation Amendment (eHealth) Act 2015 (Cth), Health Legislation Amendment (eHealth) Regulation 2015 (Cth), My Health Records (Assisted Registration) Rule 2015 (Cth) and My Health Records Rule 2016 (Cth)

By Teresa Pollock, Compliance Associate

The *Health Legislation Amendment (eHealth) Act* 2015 (Cth) (the **Amending Act**) commenced on 27 November 2015 and has amended the *Healthcare Identifiers Act* 2010 (Cth), *Personally Controlled Electronic Health Records Act* 2012 (Cth) and *Privacy Act* 1988 (Cth).

The *Health Legislation Amendment (eHealth) Regulations* 2015 (Cth) (the **Amending Regulation**) commenced on 15 December 2015 and has amended the *Healthcare Identifiers Regulation* 2010 (Cth) and *Personally Controlled Electronic Health Records Regulation* 2012 (Cth).

The *My Health Records (Assisted Registration) Rule* 2015 (Cth) commenced on 18 December 2015 and this has repealed and replaced the *PCEHR (Assisted Registration) Rules* 2012 (Cth).

Finally, the *My Health Records Rule* 2016 (Cth) which repealed and replaced the *PCEHR Rules* 2012 (Cth) and *PCEHR (Participation Agreements) Rules* 2012 (Cth), commenced on 9 February 2016.

Background

As a result of reviews of Australia's eHealth measures, namely the Healthcare Identifiers Services and the PCEHR system, a number of recommendations were made to the Australian Government in order to improve and align both services and improve usability. The Amending Act implements the Australian Government's response to the reviews.

Healthcare Identifiers Act & Regulation amendments

The Amending Act has revised the permissions to collect, use and disclose information under the *Healthcare Identifiers Act* 2010 (Cth), making it easier for participants using the system to comprehend what is and is not authorised. The Amending Act has also inserted several new authorisations which is intended to reflect how organisations engage with one another.

PCEHR Act & Regulation amendments

Most notably, the Amending Act and Amending Regulation have renamed the *Personally Controlled Electronic Health Records Act* 2012 (Cth), the *Personally Controlled Electronic Health Records Regulation* 2012 (Cth), the *My Health Records Act* 2012 (Cth) and the *My Health Records Regulations* 2012 (Cth) respectively. This name change is intended to better reflect the partnership between healthcare providers and individuals in the healthcare system.

References to a *PCEHR* (personally controlled electronic health record) have been updated to the new *My Health Record*. Also a *consumer* is now referred to in the Act as a *healthcare recipient*.

The rules regarding assisted registration of a healthcare recipient for a My Health Record have also been updated. Records of consent obtained from healthcare recipients under the previous *PCEHR (Assisted Registration) Rules* 2012 (Cth) are no longer required to be kept and organisations should refer to the Compliance Register for detail of when destruction is permitted.

The *My Health Record Rule* 2016 (Cth) which replaces the *PCEHR Rules* 2012 (Cth) and *PCEHR (Participation Agreements) Rules* 2012 (Cth) are largely unchanged. However, there are additional rules regarding exercising due care and skill when uploading or downloading records in the My Health Record system and regarding notification to the System Operator of system-related (non-clinical) errors or material changes to the system.

Privacy Act amendments

The Amending Act has made minor amendments to the definition of *health information* and *health service* in the *Privacy Act* 1988 (Cth). Most importantly, it has clarified that health-related disability, palliative care and aged care services are considered health services (as recommended by the Australian Law Reform Commission).

An additional *permitted health situation* (in relation to the collection by an organisation of health information about an individual) has also been inserted into the *Privacy Act* 1988 (Cth). It concerns the collecting of health information about a third party if:

- it is necessary for the organisation to collect the family, social or medical history of an individual (the **patient**) to provide a health service to the patient; and
- the health information about the third party is part of the family, social or medical history necessary for the organisation to provide the health service to the patient; and
- the health information is collected by the organisation from the patient or, if the patient is physically or legally incapable of giving the information, a responsible person for the patient.

Conclusion

Organisations who use healthcare identifiers and/or PCEHR should familiarise themselves with the changes made by the Amending Act and the various new rules.

In particular, organisations should review when they are authorised to collect, use and disclose identifying information under the *Healthcare Identifiers Act* 2010 (Cth) and update policies accordingly.

Organisational policies referring to the old *PCEHR* and associated legislation references should also be updated to refer to the new name *My Health Record*.

Old records of a healthcare recipient's consent obtained in accordance with the *PCEHR (Assisted Registration) Rules* 2012 (Cth) should be destroyed in accordance with the requirements of destruction under the *My Health Records (Assisted Registration) Rule* 2015 (Cth).

*If you have any questions arising out of this article, please contact **Teresa Pollock** on **(03) 9865 1337**.*

Compliance Alert Service

In response to client demand we have developed a compliance alert service which complements our existing legislative compliance products and services.

Updates to the Compliance Register and Self-Assessment Questions are delivered on a quarterly in arrears basis so that you are updated on legislative changes which have occurred in previous 3 month period.

We have now launched an alert service which provides you with pro-active advanced warning of the commencement of new significant Acts and Regulations. "Significant" Acts and Regulations means those which will have a significant operational impact on your organisation. As part of this alert, we will provide you with a summary of the legislation and provide you with a link to the relevant Act/Regulation.

This alert service will allow you to prepare for new legislation before the Acts and Regulations have commenced.

LAW COMPLIANCE

If you would like to add this service to your current subscription (or if you have any questions), please contact ***Teresa Pollock*** *on* ***(03) 9865 1337*** *or* ***teresa.pollock@lawcompliance.com.au***.

Staff News

We are pleased to welcome **Astrid Keir-Stanley** back from maternity leave. In her role as Compliance Associate, Astrid develops and updates our range of legislative compliance products.

In February we also welcomed 3 new paralegals, **Jeremy Smith**, **Tessa Pham** and **Chris Chosich**, who will assist us with our expanding range of services.

Legislative Changes being tracked

The following significant Bills are being tracked by our compliance team to ensure that our subscribing alert clients are notified once they are passed by Parliament:

- Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (Cth)
- Privacy Amendment (Notification of Serious Data Breaches) Bill 2015 (Cth)
- Fair Work Amendment (Protecting Australian Workers) Bill 2016 (Cth)
- Superannuation Legislation Amendment (Choice of Fund) Bill 2016 (Cth)
- Rooming House Operators Bill 2015 (Vic)
- Health Complaints Bill 2016 (Vic)
- Public Health Bill 2014 (WA)
- Public Health (Consequential Provisions) Bill 2014 (WA)
- Gene Technology (Western Australia) Bill 2014 (WA)
- Health Services Bill 2016 (WA)
- Mental Health (Review) Amendment Bill 2015 (SA)
- Voluntary Euthanasia Bill 2016 (SA)
- Hospital and Health Boards (Safe Nurse-to-Patient and Midwife-to-Patient Ratios) Amendment Bill 2015 (QLD)
- Fire and Emergency Services (Smoke Alarms) Amendment Bill 2015 (QLD)
- Fire and Emergency Services (Domestic Smoke Alarms) Amendment Bill 2016 (QLD)
- Medical Services Amendment Bill 2015 (NT)

*If you would like details of these new Bills please contact **Teresa Pollock** on **(03) 9865 1337** or **Teresa.pollock@lawcompliance.com.au**.*

Contact us

For further information please contact:

Natalie Franks
Legal Counsel
Direct: 03 9865 1324
Email: natalie.franks@healthlegal.com.au

Claudia Hirst
Legal Counsel
Direct: 03 9865 1340
Email: claudia.hirst@healthlegal.com.au

Sarah Caraher
Senior Associate
Direct: 03 9865 1334
Email: sarah.caraher@healthlegal.com.au

Alon Januszewicz
Senior Associate
Direct: 03 9865 1312
Email: alon.januszewicz@healthlegal.com.au

Megan Balakumar
Senior Associate
Direct: 03 9865 1333
Email: megan.balakumar@healthlegal.com.au

Christopher Sykes
Senior Associate
Direct: 03 9865 1329
Email: christopher.sykes@healthlegal.com.au

Astrid Keir-Stanley
Compliance Associate
Direct: 03 9865 1320
Email: astrid.keir-stanley@healthlegal.com.au

Teresa Pollock
Compliance Associate
Direct: 03 9865 1337
Email: teresa.pollock@healthlegal.com.au

Giovanni Marino
Senior Solicitor
Direct: 03 9865 1339
Email: giovanni.marino@healthlegal.com.au

Anne Howard
Solicitor
Direct: 03 9865 1311
Email: anne.howard@healthlegal.com.au

Ksandra Maruna
Compliance Solicitor
Direct: 03 9865 1320
Email: ksandra.maruna@healthlegal.com.au