

# In the Loop - Autumn 2018

The Hicks Oakley Chessell Williams Newsletter

HICKS  
OAKLEY  
CHESSELL  
WILLIAMS  
Lawyers & Notary

## David Williams



From 1 July 2018, David Williams will continue his consultancy role in the firm on a more flexible basis. He will be available one day each week, and at other times by arrangement.

Pascale d'Avrincourt's role as David's assistant will continue.

All other matters relating to wills and estates should be directed to Lachlan Vallance, Accredited Specialist in Wills and Estates, and Hayley Hunter, Senior Associate.

## Introducing Vincent Caruso and Harish Nair



Vincent Caruso -  
Principal Lawyer

Vincent has worked as General Counsel and Company Secretary for a multi-national optical retailer with over 700 franchisees and Deputy General Counsel for a multi-national electrical retailer with over 100 franchisees.

Vincent can provide assistance with a host of commercial matters including, franchising, corporate law, company secretarial matters, consumer and competition law, employment, unfair/unlawful dismissals, selling and purchase of business, trusts and business structures.



Harish Nair -  
Associate

Harish has joined our Litigation Team.

Harish is an experienced litigation and arbitration lawyer with a focus on corporate, commercial,

construction, owners corporation law and property law.

He makes regular appearances in the Court of Appeal, Supreme Court, Federal Court and County Court and VCAT.

## Do you have a Data Breach Response Plan in place?

**As of 22 February 2018 the *Privacy Act 1988 (Act)*, which has been amended, now makes it compulsory for individuals and companies\* to implement a Data Breach Response Plan when a data breach occurs.**

The Act imposes harsh penalties, \$360K for individuals and \$1.8M for companies, for failing to comply with the Notifiable Data Breach (NDB) scheme.

The NDB scheme is meant to strengthen and protect personal information held by organisations. If a breach occurs organisations must inform the Office of the Australian Information Commissioner as well as all affected individuals.

### What is a Data Breach?

A data breach occurs when personal information that an entity holds is subject to unauthorised access or disclosure, or is lost. Examples of data breach include:

- loss or theft of physical devices (such as laptops, phones and storage devices) or paper records that contain personal information;
- unauthorised access to personal information by employees or former employees;
- inadvertent disclosure of personal information due to 'human error', for example an email sent to the wrong person;
- disclosure of an individual's personal information to a scammer, as a result of inadequate identity verification procedures.

### Why do you need a Data Breach Response Plan?

A Data Breach Response Plan enables an entity to respond quickly to a data breach. By responding quickly, an entity can substantially decrease the impact of a breach on affected individuals, reduce the costs associated with dealing with a breach, and

reduce the potential reputational damage that can result. If the response plan was implemented properly, quickly and efficiently there may be, in some circumstances, an opportunity to forego individual notification.

### What is a Data Breach Response Plan?

A Data Breach Response Plan is a framework that sets out the roles and responsibilities involved in managing a data breach. It also describes the steps an entity will take if a data breach occurs.

### What should the Plan cover?

The more comprehensive your Data Breach Response Plan is, the better prepared your entity will be to effectively reduce the risks and potential damage that can result.

For example, information that should be in a plan includes:

- a clear explanation of what constitutes a data breach;
- a strategy for containing, assessing and managing data breaches;
- the roles and responsibilities of staff;
- how your entity will record data breach incidents;
- review: evaluate how a data breach occurred.

If you would like us to review or draft a Data Breach Response Plan for your organisation please contact our office on 03 9550 4600.

*\*All businesses and NFPs with annual turnover of >\$3M and, irrespective of turnover, all: private sector health service providers, traders in personal information, TFN recipients, personal information holders who undertake certain activities such as government contracts.*

Vincent Caruso - Principal Lawyer



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## Advanced Care Directive - patients have a greater say under overhaul of medical decision making laws

**You now have the power to have a greater say in the type of medical treatment you receive should you lose the ability to make decisions, thanks to the wide-ranging new laws that came into effect on 12 March 2018.**

Under the *Medical Treatment Planning and Decisions Act 2016*, decisions relating to your medical treatment when you lose capacity can be made in advance. Your instructions relating to your treatment can be set out in a legally binding document known as an "Advanced Care Directive".

Under the new laws, you also have the power to appoint someone, known as a "Medical Treatment Decision Maker" who will have the authority to make decisions about your medical treatment when you lose capacity. You will no longer make an Enduring Power of Attorney (Medical Treatment) to appoint this person. However, any Enduring Powers of Attorney (Medical Treatment) made before the new laws came into effect will remain valid.

### What is an Advanced Care Directive?

An Advanced Care Directive is a legal document that may contain:

- "Instructional Directives" - legally binding instructions relating to the consent or refusal of treatment and/or
- "Values Directives" - non-binding statements about your values and feelings in relation to medical treatment

Medical treatment includes dental treatment and treatment for mental illness. It also includes treatment such as surgery, the administration of prescription medication and palliative care. However, a medical practitioner may administer palliative care despite any information to the contrary in an Advanced Care Directive.

Although an Advance Care Directive can be in any form, it must meet certain requirements including that it be:

- in writing
- in English
- contain personal details of the person giving it
- witnessed by two people, one of whom must be a medical practitioner
- signed by the person giving it

With the exception of emergencies, your health care provider will have an obligation to make reasonable efforts in the circumstances to locate your Advanced Care Directive if you lack capacity and a decision about your medical treatment must be made. In the absence of any Instructional Directives in relation to your medical treatment, your health care practitioner must identify your Medical Treatment Decision Maker.

### What is a Medical Treatment Decision Maker?

A Medical Treatment Decision Maker will have the authority to make medical treatment decisions they reasonably believe you would have made had you had capacity. The medical treatment decision maker must ascertain your values and preferences by undertaking a series of steps, the first of which is considering any Values Directives in an Advanced Care Directive. If a Medical Treatment Decision Maker is unable to ascertain your preferences and values, their ultimate obligation is to promote your social and personal wellbeing.

A Medical Treatment Decision Maker will not have the power to refuse palliative care. Also, if your Medical Treatment Decision Maker refuses "significant treatment" on your behalf, your health practitioner must notify the Office of the Public Advocate who will review the decision to ascertain its reasonableness.

If you do not have an appointed Medical Treatment Decision Maker, the role will be undertaken by the first of the following with whom you are in a "close and continuing relationship":

- spouse or domestic partner
- primary carer
- adult child
- parent
- sibling

The formal requirements of an appointment of a Medical Treatment Decision Maker are the same as those for the Advanced Care Directive. However, one of the witnesses need only be an "authorised witness" rather than a medical practitioner.

### What is a Support Person?

Under the new laws you will be able to appoint someone to assist you with the making of decisions relating to your medical treatment. For example, a Support Person may coordinate your care while you are ill. They will have the power to access your medical records, but will not be able to make medical treatment decisions on your behalf.



### What happens to my existing Enduring Power of Attorney (Medical Treatment) after the new laws were introduced on 12 March 2018?

- An agent or alternate agent under an Enduring Power of Attorney (Medical Treatment) made pursuant to the *Medical Treatment Act 1988* is recognised under the new laws as your appointed Medical Treatment Decision Maker.
- Refusal-of-treatment certificates and appointments made under the *Medical Treatment Act 1988* will continue to have the same effect.

### What about my Enduring Power of Attorney (Personal Matters)?

An attorney appointed under an Enduring Power of Attorney (Personal Matters) with the power to make medical treatment decisions pursuant to the *Powers of Attorney Act 2014* becomes your appointed Medical Treatment Decision Maker. However, the definition of "personal matters" in the *Powers of Attorney Act 2014* now does not include any matters that relates to medical treatment.

Should you wish to discuss your care planning needs or review your existing documentation, please contact our Wills and Estates team on 03 9550 4600.

**Kate Williams - Lawyer**

## Is the Contract you Agreed to Unfair? We can help!

***“The only thing that makes life unfair is the delusion that it should be fair.” Unknown***

**Fortunately, the Australian Competition and Consumer Commission (ACCC) does not subscribe to that quote and it has been a little over a year since the new unfair contract terms regime came into effect. Unfortunately though, there has only been scant media coverage of the new regime, if at all, which now applies to business to business contracts where one of the parties is a small business.**

The new regime is designed to put large and small organisations on the same playing field when negotiating contracts. In the past large organisations were able to dictate their terms to a small business entering into an agreement on a ‘take it or leave it’ basis. The new regime has changed the, ‘take it or leave it’ proposition completely.

If a small business is provided with a standard form contract from a large organisation and there are terms in the contract which are deemed, ‘unfair’ then those terms deemed unfair will be struck from the contract even if the contract has been signed by both parties and is currently on foot.



### What is an unfair term?

- a term that enables one party (but not another) to avoid or limit their obligations under the contract
- a term that enables one party (but not another) to terminate the contract
- a term that penalises one party (but not another) for breaching or terminating the contract
- a term that enables one party (but not another) to vary the terms of the contract

### What contracts does the regime cover?

- if the contract is for the supply of goods or services or the sale or grant of an interest in land
- if at least one of the parties is a small business (employs less than 20 people, including casual employees employed on a regular and systematic basis)
- if the upfront price payable under the contract is no more than \$300 000 or \$1 million if the contract is for more than 12 months.

If a contract is varied on or after 12 November 2016, the law applies to the varied terms.

**The unfair contracts regime is a powerful tool for small business and has far reaching implications for large organisations.**

### JJ Richards & Sons Pty Ltd (JJ Richards) Case

At the end of last year the Federal Court declared that eight terms in the standard form contract used by JJ Richards to engage small businesses were unfair, and therefore void, following ACCC action. As a consequence JJ Richards had to contact approximately 2,300 customers and advise them that the eight terms in their contracts were not enforceable.

### Some of the terms deemed unfair were:

- binding customers to subsequent contracts unless they cancel the contract within 30 days before the end of the term, for example: automatic renewal
- allowing JJ Richards to unilaterally increase its prices
- removing any liability for JJ Richards where its performance is “prevented or hindered in any way”
- granting JJ Richards exclusive rights to remove waste from a customer’s premises
- allowing JJ Richards to suspend its service but continue to charge the customer if payment is not made after seven days
- creating an unlimited indemnity in favour of JJ Richards

If you would like us to review or draft your contracts to ensure that they don’t fall foul of the legislation or assist in negotiating a contract please do not hesitate to contact us.

**Vincent Caruso - Principal Lawyer**

## Clients to benefit from digitisation of litigation

**Victoria's legal profession has embraced digitisation, improving efficiency and cutting clients' costs. Hicks Oakley Chessell Williams' litigation team, having recently completed an electronic Supreme Court trial, is no exception.**

Matthew Hicks, Principal and Law Institute of Victoria Accredited Specialist - Commercial Litigation, said because the matter was a large one, a third party provider was engaged to run the e-trial.

The provider created an electronic court book, which contained the more than 1,000 documents required during the trial. The provider also set up the court room to enable material such as evidence to be displayed electronically during the trial.

### Benefits of an e-trial

Matthew said the benefits of an electronic trial were numerous.

"Hard copies of documents are not required during an electronic trial," he said. "This makes preparing for a trial easier. Staff spend less time photocopying and handling documents. "



Matthew said document management was much more efficient during an e-trial than it was ordinarily.

"Electronic court books can be searched, so finding a relevant document during a trial is easy," he said. "Gone are the days of trawling through numerous folders to find one document."

Matthew said these efficiencies translated into lower costs for clients, however it is important for arrangements for electronic trials to be made early in the course of a proceeding. It can be difficult to change from a paper based trial to an electronic trial mid way through a proceeding.

### Courts and technology

The days of litigation consuming vast quantities of paper are almost a thing of the past, with Victorian courts embracing digitisation.

Traditionally hard copies of documents were filed at court counters, served on opponents, made available to the other side during the discovery process and tendered in evidence. Increasingly filing is done online and documents can be served via email. Solicitors are also generally able to communicate with courts via email.

### Courts use of technology

- The Victorian County Court recently introduced an app to assist jurors in personal injury cases better understand the anatomical structure of the human body. The app features a male and female model and more than 8,200 3D anatomical structures.
- The Federal Court lists an e-courtroom among its case management tools. This is a "virtual courtroom" which "avoids the need for an in-person appearance (in appropriate applications, being especially useful for the resolution of interlocutory disputes.)" Hicks Oakley Chessell Williams has had experience in using the e-courtroom.
- A Victorian Supreme Court practice note on the use of technology in litigation notes that "dealings in hard copy are to be the exception rather than the rule in all aspects of civil litigation in the Court". It also states "parties should be prepared to address the Court on the use of technology at an early stage of a proceeding."

*Kate Williams - Lawyer*