

## Russell Kennedy Home Care Compliance Update – Current Issues and Trends

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Friday 7 August 2020

**Presenters:** Victor Harcourt, Anita Courtney, Solomon Miller & Anthony Massaro



# Webinar housekeeping

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- All attendees will be on mute and their cameras turned off for the entire webinar.
- We have BD tech support live to assist with any technical issues.
- Use the chat function for any comments/technical issues.
- Use the Q&A function for specific questions related to the webinar content. Questions will be addressed at the end of the webinar.
- There will be a post-webinar survey link sent at the end of the webinar. We value attendee feedback. Presentation slides will also be sent to all attendees.
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback.
- This webinar is being recorded.

## Disclaimer

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The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice.

Should you require specific advice on the topics or areas discussed, please contact the presenters directly.

# Introducing Anita Courtney

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## **Anita Courtney**

Principal

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Anita is a Principal in Russell Kennedy's Aged Care Team who specialises in helping home care and residential care providers comply with their legal responsibilities.

Anita helps providers respond to the Aged Care Quality and Safety Commission. She also helps providers with their duty of care and in responding to complaints.

Anita also reviews and drafts HCP and CHSP client agreements, Pricing Schedules and policies and provides training to home care workers on issues like consent and good recordkeeping.

Anita has been recognised by Best Lawyers in Australia for her expertise in Health & Aged Care Law for their 2020 listing and was ranked as a Recommended Lawyer by *Doyle's Guide* in the area of Health and Aged Care.

# Introducing Solomon Miller

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## **Solomon Miller**

Principal

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Solomon is a Principal with over 18 years' experience acting for a range of aged care, home care and health clients where he specialising in contracting, governance, privacy and compliance matters.

Solomon has particular expertise in documenting home care service delivery arrangements.

Solomon was ranked as a Recommended Lawyer by *Doyle's Guide* in the area of Health and Aged Care in its 2020 listing.

# Introducing Anthony Massaro

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**Anthony Massaro**

Principal

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Anthony is a Principal in our Workplace Relations, Employment and Safety Team. He has been advising home care providers on workplace issues for over 17 years.

In today's webinar, Anthony is going to discuss a number of employment- and safety-related issues for the home care sector.

In addition to his role as a Principal, Anthony is a Russell Kennedy Male Advocate for Gender Equality, a member of the Solicitor Advocates for Change Program and a member of the Executive LGBTI Ally Forum.

Anthony has been recognised by *Best Lawyers in Australia* since 2014 for his expertise in Occupational Health and Safety Law.

# Webinar overview

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- Introduction
- Today's presenters
- Current compliance issues in home care:
  - Home Care Pricing Transparency Transition
  - Increasing your Service Charges
  - Charging the ITF
  - Inclusions and Exclusions: Expenditure Requests
- Contracting and suppliers
- Workplace issues
- Live Q&A
- Key takeaways and how we can help

# Transition to Home Care Pricing

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**From 1 July, all pre-1 July 2019 clients must be transitioned to the new pricing rules:**

- No separate fee for “business costs” (ie admin fees).
- Having a copy of the Pricing Schedule in their agreement, together with reasons for any deviation from that.
- You must obtain consent from clients to make these changes.

## **Issue: What if clients refuse to agree?**

- Legislation does not have an exception to the above for clients who do not want to stay on old rules. There may be no way to comply.
- Risks with charging administration fees.
- Keep good records to show what you have done.
- Cease charging administration fee and charge package management fee instead?



# Increasing your Service Fees and PM and CM Fees

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- **Basic rule:** You can only increase fees or introduce new fees with the client's agreement or "consent".
- Writing to them to say "*here are our new fees, tell us if you object, take it or leave it*" is not enough.
- You cannot terminate a client's agreement because they do not agree to your new fee structure.
- You need to actively consult and obtain the client's consent.
- If you implement fee changes without consent, it is very likely that the Commission will not accept this and may require you to refund the difference in fees.
  - "*Implied consent*" will only take you so far!

# Mitigation strategies

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- Client agreements:
  - Ensure you have a pricing review clause in the client agreement and/or Pricing Schedule to allow you to increase fees.
  - Be careful with very broad clauses such as “*we will notify you of our fee changes by giving you 28 days’ notice*”. Unlikely to be enforceable:
    - Not specific enough.
    - *Australian Consumer Law* issues.
  - Need something more specific – eg increases by up to CPI, 5% etc.
- Retrospective consent: Go back and renegotiate?
- Limited term agreements?

# Charging the ITF: Is it mandatory?

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- It is often said that it is “*mandatory*” to charge the ITF.
- Commission is critical if you do not charge the ITF.
- Nothing in the legislation says it is mandatory.
- Risk comes if you refuse to provide services, regulators say you **MUST** provide services to the value of the package.
- Also, what happens when the client exits the service, how do you calculate the refund?
  - Do you include the amounts you charged but did not collect? OR
  - Can you just calculate it based on the amount actually paid?
- Regulator’s position on this is unclear.
- You should have a policy for collecting the ITF in case asked about it.

# Tips for managing the ITF

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- Discuss the ITF with clients on commencement.
- Make it clear they must pay if applicable.
- If you do not, then confirm in writing the ITF as soon as it is received.
- Always include the ITF in the client agreement and charge in advance if they do not have their assessment.
- If the client does not pay, you need to take action:
  - *Minimum*: Letters/discussions.
  - Suspension, reduction in services: Be careful.
  - Termination: You are entitled to terminate where fees are outstanding for a reason within the care recipient's control.
  - Debt collection?

# Home Care: Inclusions and exclusions

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- There is a renewed focus on how providers are allowing funds to be used.
- The rules about what you can and cannot allow consumers to use their package for are set out in the *Quality of Care Principles*, s 13, and Part 3.
- This has not changed since 2013, but the interpretation by the regulators *is* changing:
  - Focus on home modifications and technology.
- The Manual expands on this and is the most detailed guidance to date.
- According to the Manual, the Commission will direct providers to refund the service charges if the provider allows the consumer to use their HCP funds for items/services that are not allowed.

# Discussion and examples

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- **Know the rules:** If an item is in the “grey zone”, you need to show that it is “required to support the consumer to live at home” (s 12 the *Quality of Care Principles*).
- Some examples we have been asked about are:
  - Internet
  - Social clubs
  - Funeral insurance or costs
  - Hearing aids
  - Shoes
  - Furniture removal

# Home modifications

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- The following are allowed:
  - *“home maintenance, reasonably required to maintain the home and garden in a condition of functional safety and provide an adequate level of security”*;
  - *“modifications to the home such as easy access taps, shower hose or bath rails”*; and
  - *“assisting the care recipient and homeowner to access technical advice on major home modifications”*.
  
- The following is not allowed:
  - *“Home modifications or capital items that are not related to the care recipient’s needs”*.

# Tips and strategies for expenditure

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- You need to understand the rules and have a written policy.
- Understand what is **allowed**, what is **prohibited** and what is **grey zone**.
- Be clear with consumers and make sure your Care Managers/Coordinators do not over-commit. If you promise to reimburse a client and later find out you cannot pay for it with the HCP funds, you may have to fund it.
- Compliance-wise, safer to say no and have the Commission overrule you.
- You need to be careful with:
  - Home modifications and other “*big ticket*” items.
  - Items in the “*grey zone*” – eg technology, shoes.
  - Consider obtaining an independent assessment from a health practitioner if you are unsure.
  - Split costs with others in the home?



# Summary

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- Increased focus on home care compliance, particularly on finances.
- Need to be careful with:
  - Transition to pricing rules
  - Have you transitioned all your clients?
  - Implementation of fee increases
  - Charging the ITF
  - Managing expenditure requests

# Getting supporting documentation right

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## *Hi ho, hi ho, it's off to work we go!*

- Home modifications give rise to distinct issues.
- Relying on standard procurement templates can be a problematic.
- For example, how is the AP authorizing works? Why is the AP on the hook to manage a works contract, defect liability periods etc?
- Reimbursement concerns understood.
- But consider alternative ways to document works.
- Understand / reconsider critical processes. For example, sign off on scope of works. Fixed sum quotes.

## **Enabling consumers to better understand documentation**

- Better experience/engagement + mitigates risks. For example, unconscionable or misleading conduct.

# Easy English Guide



**Agreement**

This guide has some defined words.

The first time we write a defined word:

- the word is in blue
- we write what the defined word means.



**You can get help with this guide**

You can get someone to help you:

- read this guide
- know what this guide is about
- find more information.



**About this guide**

When we say we and us it means the home care provider.

RK Russell Kennedy Lawyers 1



For more information on the Guide, download your [sample copy here](#).

# Insurance and Indemnities

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## The sky isn't falling?

- Sense of changing appetite of insurers.
- But fundamentals the same?
- For example, there has always been exclusions? There has always been a claims-made-versus-claims-occurring issue?
- When did you last review an insurance policy in full?

## What's the fuss about indemnities?

- Interaction with insurance – accepting an uninsured liability?
- Rendering cover void?

# Workplace matters – overview

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## As advertised on the invitation

- Changes to SCHDSI award
- Portable Long Service Benefits Scheme
- Health and safety for home care in the context of COVID-19

## A week is a long time in workplace law

- New COVID-19 reporting obligations
- Worker permit scheme

# Changes to SCHDSI Award

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## Increases to casual weekend and public holiday penalty rates

- Award review decision from September 2019
- Changes made to the Social, Community Home Care and Disability Services Industry Award 2010
- Added casual loading onto weekend and public holiday loadings:
  - Full effect commenced 1 July 2020
  - Saturday casual rate – 175%
  - Sunday casual rate – 225%
  - Public holiday casual rate – 275%

# Portable Long Service Scheme

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## Some uncertainty as to whether the scheme applies to home care

- The Authority has said that home care workers are covered
  - No reason or justification provided for that assessment
- The Act includes:
  - “home care support services for persons with a disability or other persons who are vulnerable, disadvantaged or in crisis”*
- Regulations specifically exclude aged care
- Guidance note includes:
  - “home care support services provided in a private residence that is [sic] not health or aged care work”*
- Providers who predominantly provide aged care services in the home are probably excluded

# “Permitted Worker” Permit Scheme Directions

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- A person can leave home to work, if it is not reasonably practicable to work from home.
- A person must not leave home to attend a Work Premises unless they have a permit or an exemption applies.
- “*Work Premises*” means premises of an employer, including a work vehicle.
- Is a home care worker attending work premises of an employer?
- Does a person who leaves home to work, but does not attend work premises of an employer, need a permit?
- Exemption for health workers carrying photo ID from their employer which identifies their place of work
- Is a home care worker a health worker?
- Does place of work have to be the person’s home – can it be the employer?



# Can a home care provider issue a permit?

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- Permit can only be issued by a Permitted Employer conducting a Permitted Service:
  - “*Permitted Services*” include aged care and community services.
  - “*Permitted Employer*” is an organisation operating a Permitted Work Premises:
    - “*Permitted Work Premises*” include aged care, community services, disability services, community based health services.
  - Section 17(11): Permitted Services are the services of Permitted Industries on the DHHS website:
    - Include aged care, community services, disability services, community based health services.
- **Probably intended to cover home care.**
- Must keep a record of all permits issued.

# The permit itself

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- Completing the document with false or misleading information – penalty of up to **\$19,826.40** for an individual and **\$99,132** for a body corporate.
- Employer must attest that:
  - workplace is compliant with public health directions;
  - all reasonable steps taken to ensure a safe working environment; and
  - COVIDSafe plan.
- Employees must also state that they understand the language around Diagnosed Persons and Close Contacts.
- Must ensure staff are across safety and infection control measures, and what to do if they or their close contact are diagnosed with COVID-19.
- Ensure staff conduct high-level site audits.
- **Pull staff if not confident about safety and infection control?**

# Safety obligations in home care

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## Same obligations, new risks

- Provide and resource safe systems of work:
  - Clearly established infection control practices
  - Hygiene
  - Social distancing
  - Gloves and masks (in a range of sizes).
- Training, instruction and supervision:
  - Ensure staff understand the infection control practices
  - Ensure staff know how to use the personal protective equipment
  - Ensure staff are using it.

# Safety obligations in home care

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## Same obligations, new risks

- Reporting obligations
  - Require staff to report regarding clients with cold or flu symptoms.
  - Request that clients notify in advance if they are experiencing cold or flu symptoms?
  - Require staff to report regarding clients who refuse to comply with infection control procedures.
- Consultation and review
  - Ensure staff are using PPE.
    - Unless they have a legitimate excuse.
  - Follow up on any issues reported.

# Safety obligations in home care

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## New notification obligations as of 28 July 2020

- Expansion of obligation to report workplace incidents.
- Must notify WorkSafe immediately on discovering that:
  - an employee or contractor is diagnosed with COVID-19; AND
  - they attended the workplace within the 14 days before diagnosis or onset of symptoms.
- Workplace must be under the employer's management and control.
  - Unlikely to be the case in home care.

# Safety obligations in home care

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## Don't forget the old risks

- Occupational violence
  - Establish behavioural expectations with clients.
  - Communicate and follow-up incidents.
  - Training for workers – dealing, de-escalation, avoidance, obtaining assistance and reporting.
- Unsafe sites
  - Train workers in conducting high-level site assessments.
- Travel risks
  - Fatigue management.
  - Schedule to ensure adequate time to travel safely between clients.

# Q&A – Your Russell Kennedy Contacts

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## Feedback

Scan this QR code to provide instant feedback on the session.

## Conclusion/key takeaways – how we can help:

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- Get your worker permits sorted out, if you have not already.
- Ensure your staff understand infection control protocols.
- Take some time to consider procurement models.
- Contact Bridget McDowall at [bmcdowall@rk.com.au](mailto:bmcdowall@rk.com.au) to buy our *Easy English Guide*.
- Webinar Feedback Survey – please complete and thank you!



### Feedback

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