



## Legal Advice on employment status of GP Registrars during training

*The following advice has been provided by GPRRA's solicitors in relation to the employment status of GP Registrars during GPT1, GPT2 and GPT3. This advice is not legally binding on individuals and is provided without prejudice. Individual circumstances may vary and we would encourage you to seek your own legal advice as needed.*

### 1. Overview

#### 1.1 The National Minimum Terms and Conditions for GP Term 1 and GP Term 2 Registrars 2009 document

We have considered the document that you have provided to us titled *National Minimum Terms and Conditions for GP Term 1 and GP Term 2 Registrars 2009* ("the Accord").

We confirm your advice that the Accord does not give rise to any legally binding obligations between the organisations that entered into the Accord - i.e. yourselves ("GPRRA") and the National General Practice Supervisors Association ("NGPSA"). From the material that has been supplied to us we note that GPRRA is "the peak national representative body for general practice registrars in Australia" and that one of its most important functions is to provide resources to support GP Registrars throughout their training and represent their interests. This includes negotiating their pay and conditions of employment.

We also note that the website of the National General Practice Supervisors Association ("NGPSA") states that it "represents the interests of GP Supervisors in the provision of vocational training and education" and that it "provides a legal entity for negotiating with the Government and other interested parties" on issues such as terms and conditions of employment. Its principal object is to promote quality vocational training within the Australian General Practice Training Program ("AGPTP").

The Accord referred to above is limited to all GP Registrars engaged in:

- the first 6 month placement in a general practice or equivalent setting within the AGPTP (also known as "GPT1"); and
- the second 6 month placement in a general practice or equivalent setting within the AGPTP, (also known as "GPT2").

We confirm your advice that those GP Registrars who are in their subsequent term of training ("GPT3"):

- (a) are not explicitly covered by the Accord;
- (b) continue to undergo supervised training;
- (c) their supervision requirements are set by the Royal Australian College of General Practitioners or the Australian College of Rural and Remote Medicine (jointly referred to in this letter as "the College") and are substantially less than those in previous terms; and
- (d) can negotiate their own terms of engagement.

### 2. Advice

- 2.1 From the information provided to us we understand that each of the GP Registrars who undertake general practice vocational training (during any of the terms referred to above), do so in order to be eligible to sit the College examination. Once they pass this exam and are able to establish that they have successfully completed the relevant College's training and assessment requirements they are entitled to be admitted as Fellows of that College. This will then enable them to practise on an unsupervised basis as General Practitioners.



- 2.2 **In our opinion, the relationship between GP Registrars and the party that engages their services is one of employer and employee and not principal and independent contractor.** This is because the salient features of an employer/employee relationship (referred to in paragraph 3 below) are evident in the present arrangements, in particular the following:
- (a) the requirement to undertake supervised work as part of their vocational training requirements;
  - (b) their inability to practise on their own account during these terms or provide medical services to third parties without supervision (irrespective of the degree of supervision);
  - (c) the requirement to work for specified minimum periods during their training;
  - (d) the fact that they are subject to the direction and control of the practice that engages their services;
  - (e) any agreement between the parties to be bound by the terms and conditions of employment referred to in the Accord.
- 2.3 We therefore consider that **each of the following relationships** referred to in Dr Guest's e-mail during terms GPT1, GPT2 or GPT3, is that of an employer / employee:
- (a) a GP Registrar working in a single practice in a supervised capacity within the context of the AGPTP;
  - (b) a GP Registrar working in a single practice and a single hospital as one supervised placement within the context of the AGPTP (where the hospital billings are considered the same as practice billings);
  - (c) a GP Registrar working in a single practice and a single hospital as one supervised placement within the context of the AGPTP (where the hospital billings are considered separate to practice billings);
  - (d) a GP Registrar working in two practices in a supervised capacity within the context of the AGPTP with separate billings from each practice.
- 2.4 It is necessary to consider the terms of engagement between the GP Registrar and the relevant practice and / or hospital in the circumstances described in paragraphs 2.3(b), 2.3(c) and 2.3(d) above in order to identify the correct employer. It appears that the situation referred to in paragraph 2.3(d) involves two separate employment agreements with two separate practices. If you would like further advice in this regard please provide us with a sample of the agreements that are usually entered into between these parties, alternatively, details of their terms and conditions of engagement.
- 2.5 The relevance of the Accord is that it reinforces the fact that the parties have entered into an employer/employee relationship. Where a GP Registrar and an employer have agreed to be bound by the provisions of the Accord during the GPT1 and GPT2 terms, we consider that its provisions will continue to apply to the employment relationship if the GP Registrar continues to be engaged with the same party during the GPT3 term and no agreement is entered into to vary the provisions of the Accord. However, each case needs to be considered on its own merits.
- 2.6 Where the parties have expressly entered into a separate agreement regarding the terms and conditions of the GP Registrar's engagement during the GPT3 period those terms and conditions must comply with the minimum requirements of the applicable award and the Fair Work Act 2009 ("FW Act") which we refer to in paragraph 4 below. We note, for example, that clauses 6.1.4 and 6.1.5 of the Accord provide for the payment of a minimum annual salary, alternatively a percentage of gross billings, whichever is the greater. If a similar arrangement has been entered into with a GP Registrar during his/her GPT3 term, this arrangement would be in order - provided that the minimum salary paid to the GP Registrar complies with the minimum entitlements contained in the applicable award and/or the FW Act.
- 2.7 Our advice does not consider whether the terms and conditions referred to in the Accord are in accordance with any minimum provisions contained in an applicable Award/the Fair Work Act 2009. Please let us know if you would like us to consider this issue.



2.8 We refer to the remaining two questions in Dr. Guest's e-mail set out below and respond as follows:

(a) **The legal rights of GP Registrars who are forced into a contractor situation.**

It is illegal to force a person who would otherwise be an employee to become an independent contractor. It is also illegal to represent an employment relationship as being one of principal/independent contractor.

Both the current FW Act and its predecessor (the Workplace Relations Act 1996 which is replaced with effect from 1 July 2009) include strict provisions that prohibit a person from misrepresenting employment as being one of an independent contracting arrangement or coercing/exerting undue influence on a person to become an independent contractor.

Under the FW Act this conduct is known as "adverse action". A person who is forced to enter into an independent contractor agreement is entitled to apply to Fair Work Australia to resolve the matter failing which it may be referred to a court which can impose penalties of up to \$33,000 for each breach.

If a person who is engaged under sham contracting arrangements is dismissed, that person may also institute unfair dismissal proceedings out of Fair Work Australia and recover any outstanding employment entitlements that should have been paid.

(b) **Can an employer who is unable to collect payments from patients pass this on to a GP Registrar?**

Generally, the answer to this question is no. The GP Registrar may consider such an attempt to constitute "adverse action" or a repudiation of the employment agreement. Legal proceedings may then be instituted to prevent this conduct, to recover outstanding entitlements and to penalise the employer. A possible exception relates to an agreement between the parties whereby:

- the employee will receive a commission/payment based on the billings of the practice in addition to payment of the minimum employment entitlements arising under law ("the Additional Payment"); and
- the Additional Payment will be reduced by an agreed amount where a patient defaults on a payment - provided that this does not result in a reduction of that employee's minimum employment entitlements.

**3. Distinguishing features of employees / independent contractors**

**Attached**, please find a table that we have sourced and adapted from the website of the Department of Innovation, Industry, Science and Research regarding the above matter.

**4. Federal awards / legal regulation**

4.1 We can confirm that there are a number of Federal awards that could apply to GP Registrars during the terms of their employment. It is not possible, however, to list all of those awards because of the different circumstances of each employment arrangement which may also differ on a state by state basis.

4.2 If you would like us to provide you with our views regarding which award is likely to apply in a specific employment situation please provide us with further details in this regard. It would, however, be more cost effective if you contacted Fair Work Australia on 1300 799 675 for assistance in this regard as this is a free service that is available to the general public. Alternatively, we can identify which new awards ("Modern Awards")