

MEMORANDUM OF ADVICE

HEALTH SERVICES UNION of AUSTRALIA VICTORIA NO 3 BRANCH

Re Peter MacCallum Cancer Centre Deed of Release

1. I am instructed that the HSUA has agreed in principle with Peter MacCallum Cancer Centre ("Peter Mac") to resolve matters between them arising from alleged breaches of various industrial instruments. The parties are proposing to enter into a Certified Agreement incorporating agreed terms and conditions including a new salary structure and job security. As part of this settlement HSUA is agreeing to not pursue any claims in relation to the alleged breaches, and will not assist or encourage claims by others.
2. I am instructed that Peter Mac is asking its employees to enter into a Deed of Release with it in relation to the alleged breaches, and that if employees decline to do so Peter Mac will not proceed to consummate the settlement between it and HSUA.
3. I have been asked to advise in respect of the proposed Deed of Release prepared by Peter Mac for it and its employees to enter into.
4. I am instructed that a number of your members employed by Peter Mac have queried the statements made in the preliminary part of the document in the paragraphs after the word "WHEREAS". These introductory or background paragraphs are known as recitals. I am instructed that your members are particularly concerned by those in paragraph (C) regarding Peter Mac's denial of breaches etc. Those members have queried these statements apparently because they believe that Peter Mac is liable, and further that they may not believe Peter Mac's protestations of innocent intent.
5. The purpose of recitals in documents of this nature is to explain the nature of the agreement being entered into by reference to the

background. Recitals in a deed of release frequently restrain the width of general language used in the release itself. Normal rules of interpretation apply to releases. Language will be interpreted having regard to the surrounding circumstances against which it came into existence and with special reference to the ambit of the dispute that is usually the occasion of its creation.

6. The principle is that prima facie the release should be read as confined to the matters forming the subject of the disputes which the deed recites. In this present instance paragraphs (B) and (C) describe the issues raised against Peter Mac, and Peter Mac's response to those issues. Paragraph (C) merely recites Peter Mac's response and its position in regards to those issues. It does not purport to be, and is not, a statement of fact other than the fact that Peter Mac takes that position and makes that response. The recitals have the effect of confining the subject of dispute which is resolved by the Deed to the allegation of the breaches and the denial by Peter Mac.
7. It does not matter for the purposes of describing the dispute whether any party disagrees with the other's position; indeed this usually forms the essence of the subject matter of the dispute. It also does not matter that a party does not believe the other's motivation or explanation.
8. The employees signing the Deed do not endorse or accept in any way what Peter Mac is saying, they do no more than acknowledge that paragraph (C) is Peter Mac's response and position. The very fact that there is the dispute demonstrates that they do not agree with Peter Mac's position.
9. Agreement to a settlement is usually without admission of liability by any party or comment as to the merit of any claim. This Deed is unremarkable in its recitals.
10. I am also asked to advise whether members will be prevented from pursuing a claim for back pay in respect of alleged breaches if they sign the Deed.

11. As a general proposition, an employee cannot enter into a contract which has the effect of avoiding an award obligation, as such an obligation arises under statute. For this reason there may be some doubt whether an employee can release Peter Mac from any obligations arising from the alleged breaches.
12. However the Courts have distinguished agreements or contracts which purport to substitute wages or conditions for award obligations, from agreements or contracts entered into to compromise or settle disputes about the application of awards or like instruments. In such cases it has been held that an employee who has entered into an agreement to resolve a dispute about an alleged statutory entitlement was estopped from denying the effect of that agreement and thus prevented from bringing an action for the satisfaction of the claimed statutory entitlement. It has also been stated that availability of the doctrine in cases regarding compromise agreements and dispute resolution requires specific consideration on a case by case basis.
13. The doctrine of estoppel is to the effect that if a party has conducted itself in a way which has induced another party to believe that a legal relationship existed between them, and the other party has relied on that belief to its detriment, then the first party will be prevented from denying the legal relationship.
14. In the present circumstances Peter Mac will have relied on the conduct of the employees in signing the Deed to believe that it has a legal relationship with those employees in settlement of the dispute about back pay which precludes them from bringing an action against it for any back pay. It has relied on that belief to agree to provide undertakings about job security. In those circumstances I consider that a Court may well conclude that the employee should not be permitted to deny the effect of the Deed.
15. Accordingly it is my opinion that the Deed may prevent an employee from bringing an action, particularly when Peter Mac is giving undertakings

about job security. I consider that members signing the Deed should presume that they will be thus prevented from bringing such a claim.

16. Regardless of the effect of the Deed, it should be remembered that the alleged breaches are just that; allegations. In order to succeed in any claim for back pay, it would be necessary to prove to the Court that the obligations exist and have the effect that HSUA and its members contend. No matter how strong a case the HSUA or its members may be advised it is, there is always the risk, ever-present in any litigation, of failure.

David Langmead

Douglas Menzies Chambers

10 September 2003