



# Does the fine print really matter?



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**Chris Mariani** explains the importance of reading the fine print.

I recently read the Hippocratic Oath and the AMA Code of Ethics. The morals that underpin these documents I assume are drummed into medicos through their training years and become a part of their personality (at least for the majority). My personal experience as a patient is the doctors I have seen have put my needs as a patient first, and their bank balance (and anything else) second.

I speak with many young doctors who are first entering private practice – with many openly admitting their medical training has not equipped them to run the business side of a medical practice. From a risk management perspective, a common issue I see first-hand is the doctor failing to understand the business relationship they are entering into – and it's only when something goes wrong they realise the 'fine print' they have signed up to matters.

In a private practice setting, a doctor is legally liable to compensate a patient where they breach their duty of care to the patient and the patient suffers a loss (assuming the patient decides to bring a civil claim against the doctor). A doctor can't ask a patient to sign a contract, with the fine print saying the patient agrees not to bring such an action.

By contrast, in a business to business transaction – a service provider can (and frequently does) sign a medical practice up to terms of service in which the medical practice

contractually promises to not bring a claim against the service provider, even in the case of negligence. These terms may be legally binding on the practice (but see the section titled "small business unfair contracts legislation" on page 69 of this magazine). A common area this occurs is in IT Services contracts – and the following clause was in an IT Services contract between an IT provider and one of my practice clients recently:

*You agree and acknowledge that we accept no liability or responsibility arising for any indirect or consequential loss, damage or expense of any kind or nature and you release and forever discharge us from any such responsibility and liabilities and any claims, demands or causes of action in respect thereof.*

Imagine the scenario where your practice signed this IT agreement and the IT provider's negligence caused a massive breach of patient privacy - say all your patient files became publically searchable – **such as happened with the Red Cross in October 2016**. The potential outcome of this type of event could easily become:

- Patient/s bring a civil claim against you for a breach of privacy. The damages sought are in the millions of dollars.
- You report the matter to your medical indemnity insurer (most medical indemnity insurers cover a civil claim for breaches of patient privacy – although one insurer does

exclude this from their policy, which would leave you significantly exposed. An optional cover is available by application, but the sub-limit of \$100,000 is woefully insufficient when the standard policies cover \$20 million). The exclusion in the doctor policy reads "for any claim, investigation or proceeding arising from or relating the loss of, damage to, or the failure to properly protect the security of, electronic or hard copy medical records").

- Your insurer starts to manage the claim, discovers the IT supplier was negligent and the cause of the loss. The insurer lodges a counter-claim against your IT supplier.
- The IT supplier sends a copy of the IT services contract you signed to the insurer pointing out the indemnity clause above.
- The Insurer writes to you advising that you have breached a term of their policy by signing a contractual guarantee, which has denied the insurer the right to "subrogate" against the IT provider. The insurer points out relevant clauses in their policy (as below) and advises the doctor/practice the signing of the IT contract has resulted in the doctor not being covered for any cost, which the insurer would have been able to recover from the IT supplier, if not for the contract.

Policy exclusions and conditions in a medical indemnity policy:

### **Policy Condition**

*(a) We may, in Your name, pursue a right of contribution or indemnity that You may have against any other person whether or not We have paid any or all of a Claim or other matter covered by the Policy.*

*(b) You must not, without Our prior written consent, engage in any conduct that has the effect of excluding, restricting or modifying any right of recovery that We may have against another person.*

### **Policy Exclusion – Contractually Assumed Liability:**

*We will refuse or reduce a claim for cover under the Policy which relates to any Claims, Claim Costs or Expenses; in any way related to any duty or obligation assumed under contract by You except to the extent that Your liability is the same as Your liability had the duty or obligation not been assumed.*

## SO, HOW DO YOU PROTECT YOURSELF FROM THE FINE PRINT?

Seek independent advice before you enter into any contract, whether it be an IT contract, lease for rooms, or purchasing an insurance contract. Contracts are littered with fine print, technical jargon and often take years of training and practical knowledge to be able to interpret and identify issues. **Before** you sign, seek advice from the following experts (and ones that have medico clients and experience):

- Lawyer – overall legal review and advice, identify commercial risks and relevant laws.
- Accountant – such as GST, capital gains and other issues.
- Insurance Broker – identify insurable risks and clauses that impact your insurances.
- Other relevant professional – e.g. if the contract is a lease, then someone who negotiates leases for a living.

### **Some practical tips:**

- Think about what the other side is trying to achieve. Often the side drafting the contract is aiming to:
  - Get paid (or receive the product/service)
  - Define the relationship and responsibilities
  - Protect their business interests
  - Limit their liabilities
  - Secure their rights of termination
- If the contract was drafted by the other side, there's a (very) good chance it won't be in your favour.
- Whilst you cannot have a patient sign a form that essentially says "you can't sue me even if I am medically negligent" – other businesses can sign you up to clauses that say exactly this.

- If you sign up to bad contracts – many of the risks you face are simply not insurable. And the chances are the insurances you have paid good money for may be voided as you have breached a term of the insurance policy or triggered an exclusion (almost every insurance policy contains exclusions for contractual liabilities and where you waive your rights of subrogation)
- Understand your legal rights and remedies under the small business unfair contract laws
- Get a copy of the contract in PDF or Word format. Many of the problem clauses in a contract can be found by searching for the following words and if these appear, they usually are not in your favour:
  - Indemnity/indemnify
  - Waiver
  - Subrogation
  - Release
  - Hold harmless
  - Consequential
  - Damage
  - Discharge

## SMALL BUSINESS UNFAIR CONTRACTS LEGISLATION

There is an excellent report from the ACCC available [here](#) on this topic which I encourage you to read.

Some of the important points from the report I have summarised below;

On 12 November 2016 small business unfair contracts legislation was introduced in Australia. This new law may protect a small business (defined as less than 20 employees) from unfair terms in business-to-business “standard form” contracts where the contract value is for no more than \$300,000, or \$1 million if the contract is for more than 12 months. The law applies to any new or renewed contract entered into on or after this date.

In general terms, a “standard form contract” is one that has been prepared by one party to the contract and where the other party has little or no opportunity to negotiate the terms – that is, it is effectively offered on a ‘take it or leave it’ basis. It is assumed that an agreement is a standard form contract unless the party that prepared the contract is able to prove that it is not.

To be unfair under the ACL, a term must:

- cause a significant imbalance in the parties’ rights and obligations under the contract,
- not be reasonably necessary to protect the legitimate interests of the party advantaged by the term, and
- cause detriment (financial or otherwise) to a small business if it were to be applied or relied upon.

All three elements of the unfairness test must be proved in order for a term to be deemed unfair. In determining whether a term is unfair, the court or tribunal must also take into account the transparency of the term, and the contract as a whole.

The report provides some further information on areas like Indemnities. I suggest you read the report and also when briefing your lawyers ask them about the legislation and how to best protect yourself. ©

### TIME TO REVIEW YOUR MEDICAL INDEMNITY AND OTHER INSURANCES?

Please contact Chis Mariani on 0419 017 011 or [chris@mgrs.com.au](mailto:chris@mgrs.com.au) for an obligation free discussion.

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