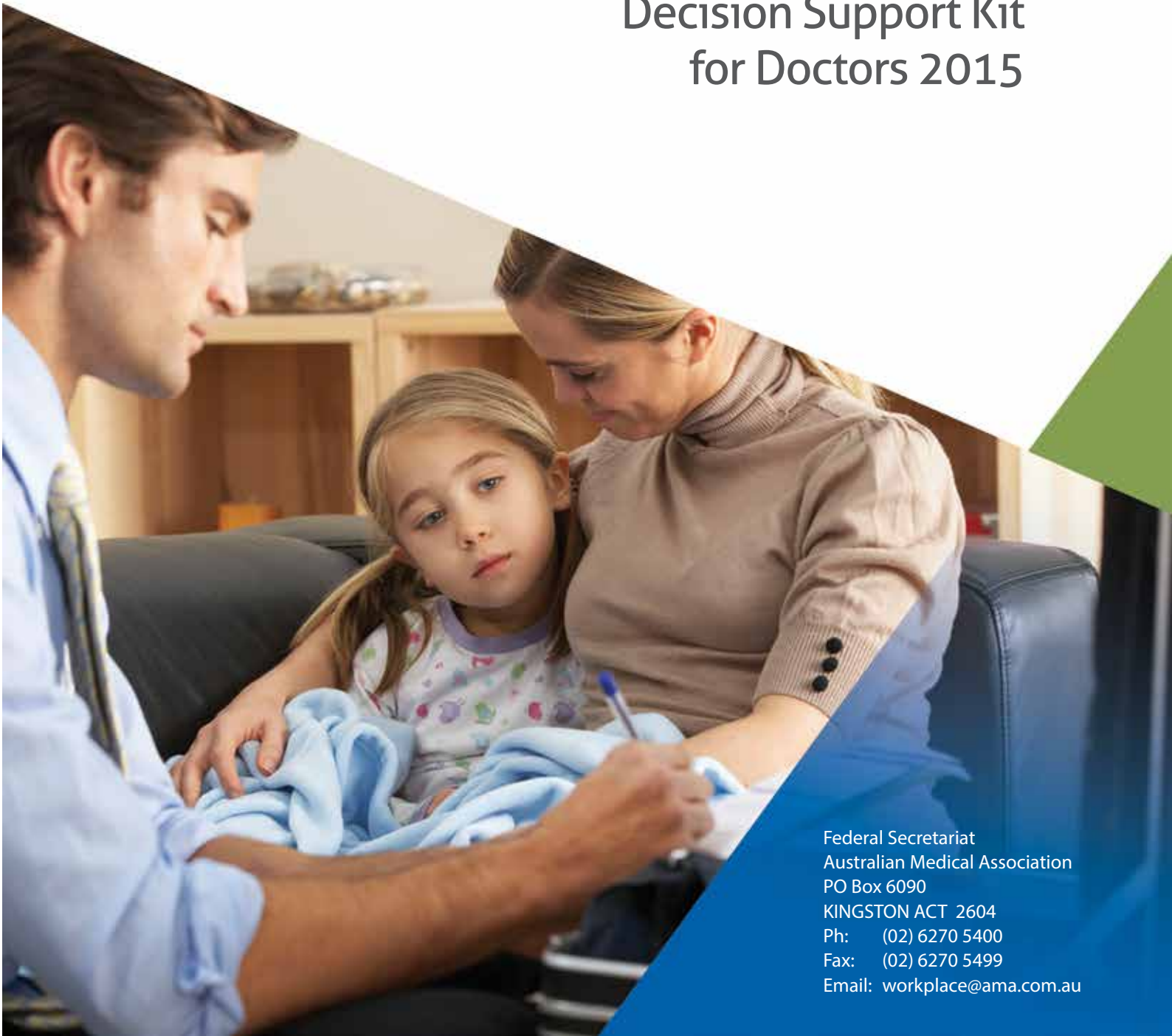




AMA

CORPORATISATION OF GENERAL PRACTICE

Decision Support Kit for Doctors 2015



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You are strongly advised to obtain your own legal, accounting and financial advice prior to making binding decisions in relation to an engagement with a corporate entity. You should also talk to a colleague who has first-hand experience of working with a Corporate to gain insight into their experiences.

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INTRODUCTION

The nature and organisation of medical practice in Australia has been changing significantly in recent years. Falling levels of income in general practice, high levels of stress, the changing demographics of the medical workforce and the increased complexity of running a small business are all significant factors driving this change. In recent times the emergence of corporate models of medical practice have been viewed by many doctors as a potential solution to seemingly entrenched problems in the current models of practice. Others view the development with some mistrust and fear that the commercial imperatives of a corporation will necessarily place undue pressure on the clinical independence of doctors and adversely impact on patient care.

Various models of corporatised practice exist, from the relatively simple model that provides management and services, to a model that entails complete divesting of a doctor's existing practice, with the doctor then becoming an employee of the practice. It is a complex and rapidly changing landscape.

This publication is aimed at general practitioners and specialists thinking of a corporate engagement and is not designed to be either pro- or anti- corporate models of practice.

The different models of corporatisation currently emerging will obviously require careful consideration when assessing and negotiating a package that will be suitable to your individual circumstances. Some doctors will be selling an interest in an existing practice or a complete practice. Some will be paid partly in cash and partly in shares of the corporation. For other doctors a more 'minimalist' approach will be the preferred option, whereby a corporate entity merely takes over the administration of the existing practice in exchange for an agreed fee.

Against this diversity of corporate medical practice models, the principal purposes of this kit are to raise awareness of issues associated with corporatisation generally and to provide some useful and practical guidance to the information that may be required in order for doctors to negotiate the corporatisation process more safely.

HOW TO USE THE KIT

This kit is divided into six parts. Each of these parts is further divided into specific areas. A general discussion is provided on each particular subject, followed by a listing of some of the key issues involved and a boxed summary of the central theme of the discussion. The kit has been designed to accommodate both the casual and informed reader as well as those doctors wanting a more detailed study of particular topics.

The parts are as follows:

1. General Issues

This part provides background information on the nature of a corporate identity and a discussion of the commercial imperatives of large publicly listed companies.

2. Contractual Documentation

This part discusses the importance of understanding the effects of the arrangements you will be entering into and their particular terms and conditions.

3. Sale of your Existing Practice

This part is for those doctors who will be selling their interest in an existing practice prior to joining a Corporate. It includes sections on disposal of assets, handling of current staff and termination of existing commercial arrangements.

4. Practising Under the Corporate Umbrella

This part deals with the issues that are likely to confront doctors in a contractual arrangement with a Corporate entity. It includes sections on mode of engagement, remuneration, clinical independence, support services, management fees, flexibility, leave and insurance.

5. Life and Practice after the Corporate

The fifth part is concerned with the effects of a termination of your relationship with the Corporate. It discusses issues such as methods of terminating the contractual relationship, the types of obligations that survive the contract and restrictions on your future practice rights.

6. Summary and conclusion

The final part of the kit is a summary of the essential aims of informed involvement in the corporatisation process.

Not all the issues raised will be relevant to your circumstances. Nor might the Corporate readily provide all the information you request, particularly if the Corporate considers the information may be commercially sensitive. No adverse inference should necessarily be drawn against the Corporate in such circumstances.

In general terms, it should also be emphasised that the kit is not intended to be used as a comprehensive 'checklist' for an individual contemplating practice under a corporate structure. Rather, it is intended to be used as a tool to guide doctors and their advisers to some of the issues and details that should be taken into account when contemplating any such important practice decision.

The kit will not come to a decision for you, but should be of assistance in helping you make a decision for yourself.

It may provide options or alternative scenarios to consider before deciding if the proposed arrangement is right for you. Depending on the arrangement or contract it is possibly the most significant decision you will make in your practice, with a range of implications, and one which will be extremely difficult to reverse.

It would also be prudent to consider whether alternative models of Corporate practice might be more suitable to your circumstances, such as forming a company yourself, or in conjunction with like-minded practices, to develop similar services and practice arrangements to those on offer from the Corporates.

1. GENERAL ISSUES

What is a Corporate?

A great deal of debate has been taking place in recent years within the medical profession and the wider community regarding the growth of 'corporatised' primary health care.¹ But what is a Corporate?

To attempt to provide a succinct yet comprehensive definition would create as many questions as it answers. For the purposes of this kit, a Corporate may be described as a legal entity created through the process of incorporation. As such, this entity may enter into contractual relations, sue and be sued and engage in commerce. Corporatisation of medical practice is viewed by some as a more convenient vehicle than traditional practice models through which private health commerce may be effectively organised and conducted on a much larger scale.

Although some corporate structures may be 'boutique' in nature and operate under the form of a small private company, at the other end of the spectrum a great deal of market penetration has been achieved to date by large public and private companies venturing into the healthcare market in order to seek attractive profits by capturing an entire array of medical services.

In this kit, the word 'Corporate' is used in a generic sense and is not intended to identify any particular corporate practice model or company. The kit does, however, focus on issues concerned with the larger corporate models, as it is in this arena that doctors are more likely to require guidance, given some of the unfamiliar conceptual issues involved.

Commercial Imperatives of a Corporate

Issues of good governance aside, the principal concern of any corporation engaged in commerce or trade is to return a profit to its owners or shareholders. In broad terms, these commercially oriented companies exist to increase market share and make a profit.

In the case of a corporation engaged in the provision of health services, part of the profit will be derived from the services doctors are contracted to provide to the Corporate. In business terms, a doctor contracted to a Corporate is a working asset and will be expected to turn a profit either from management fees deducted from their individual activities, or by acting as a referral gateway to other activities in which the Corporate may have a financial interest, such as diagnostic services or admission to selected private hospitals.

This does not necessarily mean that the Corporate will not have a 'human face' or is inclined to treat doctors as little more than fee earning assets. There is little long-term benefit for any corporation to treat its workforce poorly.

Nevertheless, doctors may be entering into binding arrangements with large corporations that control millions of dollars of assets and whose strategic focus differs from the concerns of doctors providing medical services to patients.

¹ Not to be confused with the corporate entity known as Primary Health Care Limited.

Moreover, these corporations must necessarily generate profits on invested capital. It is important to remember that simply because a commercial entity chooses to invest in the delivery of health services, it does not follow that it has any altruistic motive in relation to overall health policy or even standards of patient care. The ultimate responsibility for patient care will still rest with the medical practitioner.

What You Need to Understand

You will be entering into contractual arrangements with companies, some of which are seeking to make substantial profits from the provision of health care services. You will need to recognise this is a potentially foreign environment to that which you have previously experienced and many of the principles which have guided decisions governing your professional career to date may no longer be as applicable, appropriate or even valid.

2. CONTRACTUAL DOCUMENTATION

Understanding the Nature of the Contract

Many doctors will already be familiar with the complexities of grappling with contracts. Some practices are already incorporated. There is, however, a significant difference in entering into a contractual arrangement with what are, in some instances, multinational corporations.

Previously, you may simply have been able to walk into the office next door and informally change your working arrangements with your partner. That may not be so easy with a Corporate. Large corporations may not be overly concerned with tailoring individual arrangements or making minor changes to your contract once the terms are settled. Do not be surprised if you are expected to practise strictly in accordance with the terms of your contract.

That is why it is crucial to understand the terms of the various contracts, especially in relation to the more complex relationships contemplated under some models. Doctors are highly educated professionals (by wider community standards) and neither the Corporate nor a Court would have a great deal of sympathy if you breach a term of the contract through ignorance. The consequences of a breach may quickly result in you being without rooms, records, staff or patients and possibly having to pay damages.

Case note:

Idameneo (No.123) v Robalino [2009] NSWSC 969,

A doctor sold his practice to a corporate and agreed to work at two of its medical centres. The doctor was issued with a breach notice on the basis that he failed to work to the extent specified in his contract on weekends and public holidays. It was suggested he had maintained a home practice. It was also alleged that the doctor agreed to see certain patients in priority to others, contravening the 'no appointment' policy. After the doctor failed to remedy the alleged breaches, his contract was terminated.

The court found that the home practice contravened the terms of the contract and deprived the corporate of substantial revenue. It was held that the doctor's breaches were sufficiently serious to justify termination. The doctor was ordered to pay \$162,567.78 in damages to the corporate.

Understanding the Terms of the Contract

The overriding principle is that you are strongly advised to seek legal advice if you do not fully understand the terms and conditions of the contract.

Not only do the details of contracts differ between the Corporates, so might the terms and conditions of contracts issued by the same Corporate to different doctors be significantly different depending upon the individual circumstances. For those reasons, it is impractical to provide anything other than general guidance on these issues. Doctors may be required to sign what may be several large and complex contracts to effect the transition from independent private practice to practice in the service of, or under the umbrella of, a Corporate.

Consideration

The legal concept of consideration is an important aspect of the contractual process. Contracts may provide that a 'purchase price' will be paid to you in consideration for certain acts on your part. In very loose terms, consideration may be described as the price paid by the Corporate for your promise to do something in exchange for that purchase price.

The 'promise' may include obvious items such as executing all necessary documents to effect the sale of your premises and assets, dismissal or transfer of all your current non-medical staff and ownership of your patient records. It may also be intended to include compensation for you agreeing to enter into restrictive covenants restricting when and where you practise after you leave the corporate structure.

That, in turn, makes it more difficult to avoid the onerous obligations of the covenants if it can be established that part of the purchase price was compensation for you entering into those covenants in the first place.

Restraint of trade clauses are rigorously pursued by Corporates as this protects the goodwill in the business they have bought. If you breach a restraint of trade clause, you can expect not only to have to pay damages, but you may also face an injunction, preventing you from working within the restricted area.²

See also the section on *Contractual Restrictions on Future Practice Rights*.

Heads of Agreement

Heads of Agreement are documents outlining the main issues relevant to a tentative contractual agreement. They are often used in commercial negotiations. Some Corporates will want you to enter into a Heads of Agreement that sets out the essential terms that have been agreed between you and the Corporate. They are generally considered to be non-binding however they may be binding in some circumstances so care should be taken before signing a Heads of Agreement.

Heads of Agreement may also stipulate any conditions required to be met by either party before the final documentation is settled. As the contracts have been drafted on behalf of the Corporate, the agreement to terms and conditions is normally only subject to a due diligence check by the Corporate. Conversely, you may also be able to insert conditions of your own by negotiation.

It is important to determine the actual legal effect of such documents. The Heads of Agreement might reflect that:

- The parties have finalised their agreement and intend to be bound immediately. For example, an assent to the terms without any associated power to vary those terms will normally be indicative of a completed contract.
- The parties have agreed to all the terms but have made performance of one or more terms conditional upon the execution of a formal document/s.
- The parties do not wish to be bound until they have completed the formal document. The parties retain the right to withdraw if agreement cannot be reached on outstanding matters.

² See for example: *Idameneo (No. 123) Pty Ltd v Deady* [2013] VSC 727
<http://www.austlii.edu.au/au/cases/vic/VSC/2013/740.html>

The first two may be regarded as creating binding relations, but the third may be viewed as a record of the terms which are intended to form the basis of a later formal agreement. The third type would not normally create a binding contract.

Where there is an intention by the parties to create binding contractual relations through a Heads of Agreement, it is likely that the document is binding and enforceable. Each case will be different so you should seek legal advice to determine whether a specific Heads of Agreement is binding.

Payments made under such agreements may be viewed as anticipatory, intended to form part of the 'deposit' under the contract, or may be simply payments to guarantee the purchasing party will enter a reasonable contract.

Key Issues To Consider

- Does the Heads of Agreement create a binding contract?
- If so, what are the terms of that contract?
- Are there any avenues by which to lawfully avoid any obligation created under the contract?
- If the Heads of Agreement provides for negotiations to settle the precise details, what are the consequences if agreement cannot be reached?
- What are the legal ramifications if the arrangement is not proceeded with at this stage?

What You Need to Understand

Before you execute any formal documentation you will need to determine the legal effect of a Heads of Agreement, the effect and meaning of any terms and conditions 'agreed', the means by which it can be terminated and whether there is any mechanism to withdraw without penalty once you sign. **DO NOT SIGN ANY DOCUMENT UNTIL YOU ARE SURE OF ITS STATUS AND WHAT IT MEANS TO YOU.**

This may entail obtaining professional advice. Do not proceed on verbal assurances of the other party.

3. SALE OF YOUR EXISTING PRACTICE

This section is relevant to those doctors entering into arrangements whereby they sell their existing practice to the Corporate.

Assets

The following is a general guide to the 'assets' that might be included in a business transaction of this nature.

- Goodwill
- Buildings
- Leases
- Medical equipment
- Office equipment
- Medical supplies
- Business name
- Patient Records (including issues of ownership, sale)
- Intellectual property
- Web, email addresses and social media accounts
- Debtors

Some Key Issues To Consider

What exactly will the Corporate be purchasing from you pursuant to the terms of the contract?

- Is the Corporate purchasing simply the assets or is it purchasing an existing business?
- Do you actually own all these assets?

You cannot sell something you do not have any proprietary rights over. For example, doctors are warned to be careful in relation to the sale of patient records, as these may be the property of the practice, or the individual doctor who created them. With respect to patient records and notes, the provisions of the Privacy Act and State privacy legislation should also be taken into account.

- Are these assets free from encumbrances?

This is an important issue. It means that any mortgages on properties must be discharged at the time of settlement, as might leases or other encumbrances registered on title. It also means you will be responsible to discharge those encumbrances, so remember to factor in the financial costs to you of discharging a mortgage or terminating a sub-lease when assessing the overall package on offer.

- What is the value of these assets?

You may be content to rely upon a valuation performed under the contract, or have an independent valuation conducted at your own expense. If the assets have not been valued properly, you will not be in a position to assess whether or not you are being paid a fair or market price.

- What are the Capital Gains Tax implications of selling my existing practice? It is highly advisable that you consult with your accountant on significant implications, the potential taxation liability that should be factored into your assessment of the overall financial package on offer.³

What You Need to Understand

What have you specifically contracted to sell to the Corporate, do you actually own these assets and are you being paid a fair price for them? From a taxation perspective, is the purchase price properly characterised as income or capital, or a combination and what are the implications of each?

Patient Records

The patient records that you have made generally belong to you unless there are other specific arrangements in place with other parties, such as business partners or contractors. If you move to the corporate you can probably expect that most patients will continue to attend you. But some might not and may want to obtain copies of their records.

Most corporate contracts will contain a provision to the effect that patient records vest in the corporate. This means that if you take your patient records to the corporate then they will become the property of the corporate. This could become problematic if your former patients seek access to their records. Perhaps a solution would be to retain the original records yourself and only bring a copy to the corporate but this will need to be done by agreement with the purchasing entity. Some corporates will immediately archive existing records off-site and charge patients a fee to retrieve their records when requested. This, understandably, causes some aggravation among patients who have had their record at a particular site for a number of years and then are told they need to pay a fee to have it sent from a 'warehouse'. It is prudent to notify patients of any change in where their records will be kept and how they can gain access to them and what fee, if any, will be charged.

In a number of state and territories there are laws which require a doctor to maintain records for seven years from the date of the last service. Your medical defence organisation would probably advise you to do this in any event.

³ See for example, TR1999/16 which set out issues such as the relationship between goodwill of a business and other assets of the business.

In the Australian Capital Territory, for example, legislation requires a medical practice to give notice to the territory health department and to patients of its intention to close the practice.⁴ The purpose of this is to allow patients to gain access to their records before the practice closes.

Some Key Issues To Consider

- What arrangements should you make to retain your patient records (or at least a copy) when you move to the corporate?
- How will you comply with laws requiring a doctor to keep medical records?
- Do you need to give notice to state or territory authorities and to patients of your intention to close your existing medical practice?

Staff

Doctors

Some corporate models require that all doctors currently within the practice also come under the corporate umbrella. In some cases it may be a condition precedent of the entire arrangement that you bring any such doctors with you. The Corporate may expect a percentage of these doctors' fees for management services, but may not intend to create any legal relationship between itself and the doctor other than that of an independent contractor.

This may place pressure on you to change, or better define, your legal relationship with doctors working in your former practice. Simply because such a doctor has entered into a contractual relationship for the Corporate to provide an equipped surgery and to take a share of his/her billings, does not mean that any previous arrangements with you can simply be ignored.

You should also factor into your financial assessment the fact that you may forego any revenue you may previously have collected from that doctor for use of the surgery and ancillary support services.

Some Key Issues To Consider

- Are you required to bring all doctors in your practice with you?
- If so, what inducements are available to achieve this?

Some Corporates suggest you should pay part of your purchase price to employed or sessional doctors as a financial inducement to also join.

- What is the effect if those doctors choose not to join the Corporate, or cannot agree on terms and conditions? Does the entire contract fall over, or is there some alternative solution to such a scenario.
- What is the current employment status of other doctors in your practice?

Are these doctors' employees or independent contractors? Will the move to a Corporate change this relationship or require a re-defining of the existing relationship from the perspective of liability? In most cases they will be engaged on a contract basis. Make sure your engagement with the Corporate does not put you in breach of a current agreement you may have with doctors.

⁴ Principle 11, Health Records (Privacy and Access) Act 1997 (ACT)

What You Need to Understand

Do you have to bring other doctors with you to the Corporate, how do you achieve this, and what is the effect if this does not occur, or agreement cannot be reached with the other doctors in your practice?

Non-Medical Staff

Non-medical, support and administrative staff are the next group to consider. The success of any transition will rely heavily on how this group is engaged, or if they feel marginalized or aggrieved with the process. They will provide the crucial link between you and your patients during what could be a very confusing and unsettling time for your patients.

For those doctors attracted to the practice management service provider model, staff arrangements may not be greatly affected. However, some of the larger corporate models, however, require that you terminate all existing staff. Those staff may or may not subsequently be offered employment with the Corporate, a process over which you will have no control.

Terminating existing staff can be both an expensive and difficult exercise. It is unlikely, although not impossible, that your former staff will be offered employment on similar or enhanced terms as those enjoyed previously. Some may not be offered employment at all and some will find the offer unacceptable for a variety of reasons.

These are issues you must manage effectively and sensitively in order to minimise disruption to your practice before it is sold. In this respect, your staff may well look to you, fairly or not, to act on their behalf. In addition, as your former staff may well return to your practice as Corporate employees, it is not in your longer term interests to have appeared insensitive to their employment concerns on previous occasions.

Staff that are unhappy, disruptive or overtly lacking in loyalty to you will not make your working day any easier. As they may not be your staff anymore in the Corporate, remedying systemic staff problems may prove to be a problematic process. It also necessarily means that any staff in your 'new' practice will be responsive to the wishes of the Corporate as their employer and that may emerge as a cultural change issue which could present its own unique challenges from time to time.

The process of terminating staff usually requires that you pay out accrued entitlements that are able to be cashed out, such as recreation leave and long service leave. This can quickly become an expensive exercise if you have long serving staff who have not always taken leave as it accrues. Alternatively, the Corporate may agree to assume responsibility for the accrued entitlements of employees who elect to take up a position with the Corporate.

You will also be required to settle any outstanding issues such as workers compensation, superannuation, unfair dismissal claims and any common law claims (law suits) that may be pending. Eligibility for termination payments will be governed by the terms and conditions of employment, whether individual contract or industrial award.

It is likely that in this situation, 'Transfer of Business' principles will apply to the employees who are transferring from your employ to that of the corporate.

A transfer of business occurs when:

- an employee begins working for the new employer within 3 months of ending their job with a previous employer and
- the employee's duties are the same or nearly the same as they were for the previous employer and
- there is a 'connection' between the previous and new employers

An employee that moves from the old employer to the new employer in a transfer of business is called a 'transferring employee'.

You should obtain proper advice from an employment specialist if you have doubts or concerns about this process. Also, check the Fair Work Ombudsman website at:

<https://www.fairwork.gov.au/employee-entitlements/when-businesses-change-owners>

Some Key Issues to Consider

- Are you required to terminate all existing staff members?
- If so, does the Corporate guarantee them ongoing employment?
- Will this employment be on similar terms and conditions?
- Are the superannuation or other benefits of existing staff portable?
- What must you do to lawfully terminate existing staff? Look at issues such as notice periods, whether there is a power to terminate etc.
- How much will it cost to 'cash out' accrued benefits?

There may be ways to minimise your outlays by directing staff to expend all leave prior to settlement. This may also be attractive to staff because of the obvious income tax implications of receiving lump sum payments as a wage earner.

- Are you required to fund redundancy payments?

This is important to ascertain due to the potentially large sums of money that may be involved for long serving employees.

What You Need to Understand

If you are required to terminate staff, what is the best method of achieving this process with a minimum of disruption and dissatisfaction to all parties concerned? How much will it cost to terminate staff and are there any methods by which you can lawfully minimise expenses in this area?

Termination of Existing Commercial Arrangements

Most Corporates will insist on a certain level of management rights. This may extend to the entire range of services required to support your practice. For example, they may insist on the total provision of:

- facilities
- administration functions
- management functions
- all services
- all advice, assistance and information
- rostering

Moreover, these may be contracts of exclusivity, which means you will be legally precluded from obtaining or seeking those services from third parties. It is therefore necessary to delineate with some accuracy those administration and support services which will be provided by the Corporate.

Once those particular services have been identified, the next step is to determine how that existing service is provided. For example, is the photocopier service maintained by written contract? Is there an oral agreement to provide stationery? Have you always purchased consumables from the same company? The third step is to terminate the redundant arrangements in a manner appropriate to either the terms of the agreement for their supply or the nature of the relationship.

It is important to ensure, that by entering into exclusive service arrangements with the Corporate, you do not breach existing contracts with current suppliers. Unilateral breaches or repudiations of existing arrangements may lead to damages claims against you from contracted suppliers to your present business.

Some Key Issues to Consider

- What exactly will the Corporate provide in the way of support services?
- Is that an exclusive arrangement?
- Do you have formal or informal contracts with suppliers for those services later to be provided by the Corporate? It is important to note that 'contractual' arrangements need not be reduced to writing. Contractual relations may be in the form of oral contracts, or may be inferred by a course of conduct over a period of time, or even by industry 'norms'.
- How do you legitimately terminate those arrangements? For example, some contracts may require a period of notice in writing, some may be terminable 'at will'.

What You Need to Understand

Having identified the range of support services that will be provided by the Corporate, how do you terminate all potentially conflicting current arrangements in the most effective manner?

The Sale Price

The price received for your existing practice may be in the form of cash alone or a combination of cash, shares and other considerations.

Cash Sale Price

The sale price will commonly be in the form of cash payment to an account nominated by you. The concept of a cash purchase price is relatively straightforward, although some variations do exist.

It is hazardous to offer comment on the commonly asked question regarding the adequacy of the price obtained for your practice. In simple terms, the practice is worth what the market will pay for it. There is certainly anecdotal evidence that some Corporates are willing to pay a premium for particular practices. From that perspective, the only contemporary yardstick for comparison purposes may be what another Corporate is prepared to offer for your practice.

Some Key Issues to Consider

- How is the purchase price to be paid?
- Is any amount to be withheld?
Some contracts provide that a portion of the purchase price, around 20-30%, will be retained by the Corporate for a period of time as a warranty.

What You Need to Understand

How much are you being paid and do you have immediate access to those monies? Are the payments properly characterised as either capital or income? This may have consequential Capital Gains Tax or Income Tax implications.

Combination Cash/Shares Sales Price

Some Corporate contracts provide that the sale price will be paid as a combination of cash and shares in the Corporate. In essence, the Corporate is investing in itself part of the sale price owed to you.

The advantages to a Corporate of such an arrangement are obvious, but you need to make a careful decision regarding the profitability of an investment over which you have no apparent control. One advantage to this arrangement is that you may gain some influence over Corporate affairs, not so much as a doctor, but as a shareholder in the company.

The combination cash/shares price model thus requires a consideration of two discrete issues – the attractiveness or otherwise from financial and taxation perspectives of investing in the Corporate and the potential degree of influence that share parcel may give you over broader Corporate affairs.

Investment Considerations

As a general principle, shares will attract a return on the initial investment through either upward movements in the share price itself, or through the issuing of dividends on the shares, or a combination of both. Conversely, a fall in the listed share price will correspondingly result in the incurring of a loss on your investment. Poor profitability by the Corporate may also result in no dividends being issued in any given year. In this context, it is important to take into account likely future national economic trends when assessing the mid to long-term security of investing in corporations engaged in the business of providing healthcare services. It is also important to consider 'legislative risk' when investing in a company whose revenues are heavily dependent on government decisions such as the level of Medicare rebates.

These are complex issues and it is recommended the individuals seek expert advice when assessing the relative merits of investing a significant sum of money in the Corporate itself. See also related sections in this kit on ethical and legal issues that may arise with share ownership in the Corporate and disposal of your shareholding when terminating your relationship with the Corporate.

Some Key Issues to Consider

- May you decline the offer to take up shares in the Corporate?
- Is it possible to have the shares issued in the name of another entity you control?
There may be taxation advantages in having the shares issued in the name of a discretionary trust, proprietary company or similar vehicle in order to maximise taxation relief.
- What is the share price history of the stock?
- Do the shares pay dividends?
- If so, are the dividends partly or fully franked, or not franked at all?
- Does the Corporate pre-pay tax on the dividend on your behalf and, if so, to what extent?
- How difficult will the stock be to dispose of?
- Will your shareholding affect your overall investment/taxation strategy and, if so, to what extent?
- May you liquidate your investment at any time?
- If you choose to liquidate, what are the Capital Gains Tax implications if you realise a profit on the investment?
- Is the company operating from a sound financial base?
Look at issues such as secured creditors, debentures, mortgages and other charges registered on the company to obtain a picture of the debt/equity ratio of the corporation. Also ascertain the extent, if any, of unsecured creditors or unregistered charges.

- What effect will known future company actions have on the share price?
- What is the operating environment of the corporate healthcare market likely to be in the near future and how might this affect profitability?
- Do your shares rank equally with other shares in a winding up?
- In the case of a winding up, where do shareholders rank with respect to satisfying all creditors of the Corporate? Shareholders usually rank last in a winding up and therefore receive little or no share of the liquidated assets of the company.

What You Need to Understand

Is the part payment of the purchase price by way of issuing shares in the Corporate a sound investment for you and your individual circumstances?

Degree of Influence

Although it may not be readily apparent, the parcel of shares may be viewed as being of greater significance than a mere investment. This is because the shares may have attached to them certain rights that will permit you to influence corporate decision-making.

Issues of good governance aside, the Corporate is principally concerned with returning the best possible profit to those who have invested capital in the venture. In that respect, company officers must be responsive to the needs of the shareholders, particularly those investors who have the larger or majority shareholding.

In order to assess your potential level of influence within this environment it is necessary to determine how your individual shareholding fits within the overall structure of the Corporate and any associated rights that may be attached to your shares, such as voting rights. Even if your individual shareholding is insufficient to exert any real influence on its own, it may be the case that the combined shareholdings of all doctors engaged with the Corporate will be sufficient to form a voting bloc of some significance in order to progress issues of concern to doctors.

It is important to ascertain precisely what level of influence your shareholding may enjoy, as an effective voting voice for doctors at general meetings may go a long way to alleviate some of the loss of control that will almost inevitably occur under some corporate structures. In addition, the fact that doctors are the essential and initial fee earners for the entire commercial enterprise should also enhance your relative influence on company affairs. The Corporates simply cannot survive without doctors and that factor should always be borne in mind when negotiating with the Corporate individually, or in your collective capacity as a group of shareholders.

Some Key Issues to Consider

- How many shares have you been issued?
- How many shares has the Corporate issued in total?

These two pieces of information will enable you to assess the basic strength of your bargaining position as a shareholder of the Corporate.

- How many shares have been allotted by the Corporate?

The Corporate may only have issued 10,000 shares to date, but may be authorised to issue 10,000,000 more. This 'dilution' of your shareholding strength obviously affects the relative influence of your shareholding if those further shares are issued in the future.

- Do your shares have voting rights?

Some shares may not have voting rights.

- Are your shares of equal value to other shares issued by the Corporate?

Companies may issue different 'classes' of shares, such as preference shares or A class shares with superior voting rights, dividend rights, or enjoying preferential treatment in a winding up.

- Are your shares fully paid for?

If shares are not fully paid for at the time of purchase, the shareholder may be liable for a 'call' by the Corporate for that unpaid amount in the future.

- How many shares have been issued to other doctors in the practice?
- What is the total percentage of company stock that is intended to be issued to doctors – both currently and taking into account any future bonus share or options issues.
- Does the Corporate intend further major share issues and, if so, to what extent?

What You Need to Understand

You need to obtain a working understanding of the level and degree of influence that your shareholding may grant you individually, or in concert with other doctors in the Corporate, over the operational activities and strategic direction.

4. PRACTISING UNDER THE CORPORATE UMBRELLA

Modes of Engagement

Generally, doctors belong to one of four major “employment” groupings. Doctors will probably be one of:

- an employee
- an independent contractor
- a sole trader or
- a practice principal (either in the form of incorporation, trust or partnership)

Most corporate models contract with either the practice, in whatever form it is, or the individual doctors within the practice. The mere fact of a practice entering into an agreement with a corporation does not automatically or necessarily change the legal relationships among doctors within the practice.

Some doctors, however, may be placed in a less secure position than others. A doctor who merely leases a room and use of facilities within a larger practice will need to consider different issues to a salaried GP within the same practice.

If you are a partner in a practice, you should also consider how specific aspects of the contract with the Corporate may affect your relationship with your other partners. For example, is the entire practice penalised if one of the doctors breaches an essential term of the contract permitting rescission by the other party? Similarly, if the Corporate commences litigation proceedings against a partner in the practice for unpaid service fees, do the other partners incur a contingent liability for the same debt? Remember that in general, each partner is individually liable for debts incurred by the other partners.

Your contractual status in relation to the Corporate, as a general principle, will be either that of independent contractor or employee. Both may appear under different guises. For example, an independent contractor to the Corporate may be either a tenant doctor or a practice principal.

Generally, where there is a right on the part of the employer to control the activities, the law will regard the person as being an employee rather than an independent contractor. Nevertheless, the ramifications of whether one is an independent contractor or employee are significant and your legal adviser should be specifically consulted on this issue. The overwhelming majority of Corporate contracts will define your status as that of independent contractor.

Effects of Modes of Engagement

An independent contractor is running their own business and is invariably personally responsible for an entire raft of employment issues which, for employees, are generally the responsibility of the employer. These include:

- Workers compensation (for any staff that remain in your employment)
- Public liability insurance
- Professional indemnity insurance
- Superannuation
- Disability insurance
- Taxation arrangements
- Leave arrangements
- Payment of Goods and Services Tax for those services which are taxable supplies

If you are not presently responsible for arranging and paying for these items, then these are additional costs you will need to investigate and assess as part of the overall package on offer.

Most doctors are familiar with these concepts and should be well-versed in the principles involved. More information about employment and independent contracts is available for members from the Federal AMA in the publication '*Guidelines on Service Contracts Between Doctors and Medical Practice Principals*.'

What You Need to Understand

What is your employment status with the Corporate? If different to your present circumstances, what do you need to put in place to give effect to these new arrangements and to provide a degree of protection to yourself? How much will these new arrangements cost?

Remuneration

Overall remuneration levels under a Corporate structure will usually be derived from a number of differing primary and secondary sources, including consultation fees, incentive payments and non-fee for service income.

Base Remuneration

This section is concerned with that part of your remuneration which will be directly derived from your share of the fees generated from the patients you treat.

Virtually all Corporate models operate on a fee splitting arrangement, with most Corporates deducting a percentage of billings as a management or service fee. The net amount, less any further administrative charges that may be levied by the Corporate under the terms of the contract, is then remitted to you and may usefully be described as your base remuneration.

Some Key Issues To Consider

- What are the specific details of the fee-splitting arrangement?

The same Corporates have been noted offering quite different levels of administration or management fees depending upon the individual/practice to be engaged. You may attempt to negotiate this figure down.

- What additional charges may be levied by the Corporate in addition to a straight percentage cut of billings?

Other administrative charges may apply from time to time. As some Corporates impose financial penalties for under-performance or absence from work on extended leave, the extent and triggering factors of these additional imposts should be clarified with the Corporate.

- What is your likely level of remuneration with the Corporate?

A useful starting point may be to examine your billing patterns based on consultations alone from the past two to three years and calculate the total fees earned. Then deduct the proposed Corporate fee from those billings to obtain an estimate of how much you would earn if you continued with the same practice pattern. That figure should then be used, together with other forms of remuneration, to obtain an overall picture of your projected earnings.

- By what methods may you enhance that level of remuneration?

This may include seeing a greater volume of patients, a differing case mix or higher fees. Discuss methods of enhancing this aspect of your income with the Corporate. Check carefully whether you will be pressured to maintain a certain 'throughput' – turnover of patients, which might impact significantly on your normal work practices and relationship with patients.

- What events may lead to reductions in the level of remuneration?

Government moves to a greater proportion of 'blended payments' over 'fee-for-service' arrangements may adversely impact on future earnings if that means any future upward movements in 'fee-for-service' payment levels suffer by comparison and your individual income is predominantly reliant upon patient throughput.

- What other methods of remuneration are available to you?

Some Corporates may offer an hourly or sessional rate. This may be attractive to those wishing to work part-time.

- If there is a determination of inappropriate practice made by a Professional Services Review Panel and an order that you refund monies to Medicare, will the corporate pay its component of the refund, ie. the corporate pay the management fee component for each item?

You should seek advice on obtaining an indemnity from the Corporate in relation to matters such as this.

What You Need to Understand

How your 'base' remuneration will be calculated. What is the likely quantum of your base remuneration during the life of the contract and what factors may lead to increases or reductions in that base level?

Non Fee for Service Payments and Performance Pay Schemes

Practice Incentive Payments (PIP) and other government payments

A range of incentive programmes, administered by the Department of Human Services, exists to support general practice. Some practices maintain that these belong to the practice. Others share them with contracted doctors or employees. You should be clear on what arrangements the Corporate proposes for these.

Some Key Issues to Consider

- How does the Corporate calculate its 'costs' in obtaining the PIP payment?
- What percentage of the PIP payment does the Corporate retain as profit?
Under most contractual arrangements, the Corporate will retain around 50% of the payment for its own purposes.
- How is the net PIP payment disbursed?
Is it distributed based on the highest fee earners in the Corporate, is it distributed equally, or is it distributed as the Corporate sees fit in its discretion? Doctors are especially warned against the uncertainties of the Corporate distributing PIP payments as it sees fit, as there is no guarantee any doctor would receive a share of the payment.
- Does your contract protect you against change to the PIP Scheme arrangements or the introduction of new funding programs?

What You Need to Understand

If you have traditionally relied upon PIP payments as a significant contribution to overall income, are the new arrangements likely to alter that position and, if so, to what extent? Conversely, if you have been formerly precluded from sharing PIP income in private practice, how may you access part of those payments under the Corporate structure?

Performance Pay and Bonus Schemes

The Corporate may have bonus schemes in place through which you will be able to enhance your income. There are potential dangers to such schemes and it is recommended you are aware of both the nature of the schemes and any potential they may have to prejudice your status as a practising doctor.

For example, the Corporate may provide you with an estimated billings target and, if that target is exceeded, you will receive a greater share of the extra revenues generated. Bodies such as Medicare Australia will doubtless monitor such schemes from the perspective of over-servicing, inappropriate referral patterns or failure to disclose a financial interest in a referral or other recommended service.

In most cases, the individual doctors whose provider number is associated with any perceived wrong-doing will be targeted by investigating authorities. Corporate 'pressure' is no answer to any investigation by Medicare. Appropriate and ethical behaviour must be maintained and any pressure by the Corporate to overstep ethical boundaries must be resisted.

Some Key Points To Consider

- What bonus or performance pay schemes exist within the Corporate?
- Do these schemes conform with relevant legislation and applicable ethical and probity standards? If they do not, it is your Provider Number and your registration that is at risk.

What You Need to Understand

What schemes are available to maximise or enhance your income? Are you comfortable from a legal and ethical standpoint with what is required of you under these schemes?

Method of Payment of Remuneration

Many doctors will already have in place sophisticated income streaming and taxation arrangements in order to maximise their net income. For example, some doctors may have discretionary trusts or private companies established to direct income in order to lawfully minimise taxation liability. Other doctors may direct income to other individuals or entities for the same purpose. It is common practice to direct income to a spouse/partner or other family member in consideration for providing secretarial or support services. Such an arrangement may no longer be available to you when practising under the Corporate umbrella. The savings available under such schemes can be quite significant, depending upon your personal circumstances. It is noted that most Corporates will attend to all billings, deduction of management fees and remittance of any net amounts to you.

What You Need to Understand

Does the accounting system in place within the Corporate have sufficient flexibility to permit income streaming or other methods of remittance that may be to your personal taxation advantage? If so, will the Corporate entertain flexible payment options?

Control and Provision of Medical Services

Clinical Independence

Corporate contracts will usually have specific clauses delineating your clinical independence. Notwithstanding such clauses, you must remain on your guard to ensure that your clinical independence is not compromised indirectly through influences on referral patterns, changes to throughput of patients or various financial inducements. Interference with your clinical independence may amount to unconscionable conduct.

Other significant issues include patient mix, capacity to bulk bill, fee setting and the freedom to pursue areas of personal interest within medicine.

Professional Indemnity Insurance

Most Corporates will insist you maintain your own professional indemnity insurance. This is also a natural corollary of the independent contractor nature of most arrangements and serves to place a convenient barrier between you and the Corporate, whereby the latter takes no responsibility for acts on your part and further, under most contracts viewed to date, you provide a specific indemnity to the Corporate in the event of any such loss occurring.

Continuing Professional Development

This important element of medical practice has been recognised by most Corporates in their contractual documentation by the specific inclusion of continuing professional development.

Nonetheless, it is important to analyse the actual mechanics of any arrangements from an overall perspective, as the most attractive schemes on paper may pale somewhat if there are significant risks of income reduction involved.

It should always be emphasised in your dealings with the Corporate that continuing professional development is a necessary tool of prudent practice and your continued registration. It may even reduce your indemnity premiums.

Other Insurances

All doctors should seek advice on the likely range of insurances that will be necessary in order to practise securely. This includes defining what insurances are required, who is responsible to pay and the nature of risk exposure. In some circumstances the Corporate may take responsibility for negligent actions of non-medical staff in your practice and this may even extend to a full indemnity.

Other issues to consider include the provision of insurances for fire, theft, workers' compensation and public liability.

Other Clinical Issues

In the larger corporations it may be difficult to communicate effectively with Corporate management on clinical issues. It is therefore important to have mechanisms in place whereby you are able to securely raise issues of clinical concern. As can be appreciated, these are not issues that will be immediately appealing to those company officers managing the financial and accounting arms of your practice.

Ideally, your Corporate should have in place a Medical Director to deal with these issues, as there is a real risk some clinical issues will not be fully understood or may not be a priority to the accountants within the organisation and with whom you may have most of your dealings.

Some Key Issues To Consider

- Does your contract specifically provide for the maintenance of clinical independence?
- Who sets your fees?

This should be you (unless you are an employee or operate within a structure authorized for fee setting by the Australian Competition Consumer Commission (ACCC) to avoid any unwelcome attention from the ACCC.

Most Corporates are aware of this issue and have specifically provided for this in their contractual documentation. (see note below on ACCC authorisation).

- Do any of your contractual obligations have the potential to impact adversely on this independence?
- Are you free to speak publicly on clinical issues?

Corporates may attempt to impose a 'gag' on doctors speaking publicly. Determine the extent of any proposed restraint and the specific areas to which it relates. Most contracts will preclude you from speaking publicly on any matter in relation to the Corporate.

- Who bears the cost of compliance for patient privacy programs?
- What does it mean if your contract provides that the Corporate will 'arrange' all your patient appointments?

Does 'arrange' mean a total lack of control over who you see, or how many patients you see? Probably not, but it is an issue that should be investigated simply in order to determine the extent of the control this clause gives the Corporate over your patient base.

- Do you have complete freedom over your patient case-mix?
Are you free to maintain any particular clinical interests you have?
- Are you free to reject certain types of procedures?
If you are a female doctor, for example, will you be given all the pap smears in the practice to perform?
- Are there any current work practices within the Corporate that may affect your clinical independence?
This issue is best discussed with other doctors already in practice under the Corporate umbrella. The AMA's Code of Ethics will further refine some of these issues.
- Are there any specific legislative requirements of which you should be aware?
For example, the Medical Board of Australia's *Good medical practice: a code of conduct for doctors in Australia*⁵, ('the Code') which is legally binding on doctors, contains a section on conflicts of interest. Doctors should ensure that their arrangements with the Corporate do not put them in breach of the Code.
See also: The AMA's position statement on *Medical Practitioners' Relationships with Industry 2010. Revised 2012*.⁶
- Who is responsible for maintaining the currency of your professional indemnity insurance?
This will invariably be you, but consider asking the Corporate to negotiate a group 'Corporate' rate of indemnity insurance on your behalf as doctors.
- What happens in the event that you lose your medical registration or do not maintain your indemnity insurance?
In most cases this will be sufficient cause to permit the Corporate to terminate your contract. It may also occur if you lose your PIP accreditation.
- What continuing professional development schemes are in place under the contract?
Look at how these schemes are accessed, how they are funded and any financial implications that may arise as a result. Will a trip of six weeks have a negative impact on your billings and/or the management fee?
- Is the Corporate willing to pay for memberships of professional associations?
It would be surprising if Corporates were reluctant so to do. In addition, the Corporate may be able to negotiate a reduced 'Corporate' rate of membership of professional associations.
- Are there appropriate mechanisms in place to advance clinical issues within the Corporate structure?
It would be a mistake to assume the financial and accounting sections of the Corporate have any interest or expertise in these areas. Does the Corporate employ a Medical Director to progress clinical issues within wider management?
- What is the full range of insurances you are likely to require?

⁵ <http://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx>

⁶ <https://ama.com.au/position-statement/medical-practitioners-relationships-industry-2010-revised-2012>

ACCC Authorisation

In March 2013, the AMA applied for and was granted by the ACCC authorisation (no. A91334⁷) for a period of five years, until 14 March 2018, to permit all GPs who practise in a single practice that:

- a) operates within one of the following business structures:
 - i. a partnership of two or more GPs where not all partners are natural persons (that is, where at least one is a body corporate or other separate legal entity);
 - ii. an associateship of two or more GPs;
 - iii. any other business structure which involves two or more separate legal persons, whether natural persons, partnerships and/or bodies corporate; or
 - iv. any of the above which, from time to time, employs GPs on a locum basis; and
- b) share three or more of the following: patient records, common facilities, a common trading name, and/or common policies and procedures to engage in:
 - intra-practice price setting;
 - collective bargaining, as single practices with VMO Service Purchasers, in relation to the provision of VMO Services to public hospitals; and
 - collective bargaining, as single practices, with Medicare Locals (now Primary Health Networks), in relation to the provision of services.

What You Need to Understand

When you have obtained answers to the questions above, do you consider you will be comfortable with the degree of control that will be exercised by the Corporate, directly and indirectly, over the manner in which you practise medicine?

Provision of Support and Administrative Services

This issue involves a number of steps. The first is to determine exactly who is responsible for providing all the services that will be required to support your medical practice in its new configuration. Once that has been determined, the second is to look carefully at the range of services it will be the responsibility of the Corporate to provide. It is desirable to conduct such an analysis in order to make an assessment of the level of services that it will be the responsibility of the Corporate to provide to you.

By obtaining a working understanding of the level of support you will be given by the Corporate once you have commenced practice, you will be in a better position to assess what you are paying the Corporate for and to negotiate a better level of service for those areas you may consider inadequate. Your bargaining position in this respect is much stronger during the negotiation stage of your engagement. Although it is readily conceded this may become a time consuming exercise, the benefits of having obtained a clear picture of your new daily working environment will make it significantly easier to assess the financial and lifestyle merits of the overall package on offer from the Corporate.

⁷ <http://registers.accc.gov.au/content/index.phtml/itemId/1078772/fromItemId/401858>

Some Corporate packages contemplate the provision of the complete range of support services, under other packages there may be a division of responsibilities. In the case of the former, it is especially important to come to a mutual understanding of what the Corporate intends to provide to you, as you will ordinarily be precluded under the terms of the contract from seeking those services elsewhere.

For example, it is common to see clauses such as: "The Corporate will provide an adequate level of secretarial and nursing support". Who decides what is 'adequate' in the event of a disagreement and against what standards should it be measured? The inherent danger in such a loosely worded clause is that what the Corporate deems to be an adequate level of secretarial support may not necessarily equate with what you consider an appropriate level.

Similar issues could arise in relation to defining 'adequate' nursing support, maintenance of office equipment and even what may be a reasonable number of pens or linen for your practice to consume over any given quarter. Identifying and remedying any potential misunderstandings during the negotiation stage is a prudent business measure that may make your new working life that much more enjoyable.

It should be emphasised that you may discover significant improvements to practice support infrastructure in your new working environment. At the very least, the Corporate should be in a position to provide up-to-date facilities, equipment and support services. In that sense, this exercise will also serve to highlight any advantages that the new arrangements should secure for you concerning this often undervalued aspect of your practice.

Some Key Issues to Consider

- Is the Corporate contracting to provide you with all necessary support services?
- Exactly what levels of support are intended to be provided?

This will require direct and detailed questioning of the Corporate. A useful method may be to list all services you currently require and compare that with what is on offer from the Corporate, paying particular attention to the level of support. Look critically at these proposals and ask to speak with other doctors in the Corporate, as their experience on the ground should be an invaluable indicator.

- Do these levels of support favourably compare with your existing situation?
- What is the actual cost to you of providing this support at present?

Look at both actual costs and percentage of income.

- Does this favourably compare with cost projections of procuring those services from the Corporate?

Again, look at both projected costs and the percentages to be charged for the more complete picture. Be aware that the same Corporate may offer different rates to different doctors regarding the level of the management fee to be charged, so be prepared to negotiate.

- If you are unhappy with the level of support intended to be provided, is the Corporate willing to negotiate a superior level of support?

How do you negotiate day-to-day issues with the Corporate, remembering that you are involved in the 'small business' end of their very large business? How long will it take them to respond to issues or requests? This information may best be gained from a colleague who has first-hand experience in dealing with the Corporate.

- If you are not satisfied regarding the level of support once you are under the Corporate umbrella, what mechanisms are in place to address such problems?

Does the contract provide for dispute settling procedures in such a situation, how are they accessed, and who bears the cost?

What You Need to Understand

Firstly, does the percentage of fees you will be paying to the Corporate in exchange for the provision of services represent 'value for money' having regard to both the range of services to be provided and the level to which they will be provided? Secondly, apart from financial considerations, do you consider the range and level of services to be adequate in any event?

See also the section on *Termination of Existing Commercial Arrangements* for further information on this topic.

Flexibility in work arrangements

At some point in the future you may decide that the circumstances under which you originally contracted with the Corporate have changed and, for example, you want to reduce your overall working hours. This may be because you are close to retirement, or want to start a family, or for any number of valid reasons. In such cases, it is possible to vary your working hours? While the short answer is 'yes' in most cases, it is likely to come at a cost.

Another issue to consider is the physical location in which you practice. Be aware that some Corporate contracts have as a condition that you may be re-located to another site operated by the Corporate. This may be in a location you do not wish to work. As you have agreed to this condition by signing the contract, you may be placed in the rather unenviable position of moving or risking legal action from the Corporate for breach of contract.

Some Key Issues to Consider

- Does the contract itself permit re-negotiation of working hours?
- If so, what are the financial impediments to a reduction in working hours?
- Under the terms of the contract, can the Corporate unilaterally move you to another location and, if so, how may you successfully resist such a move?

What You Need to Understand

Determine how flexible your working arrangements will be, how changes may be negotiated and examine the likely financial implications of contract and location changes. You may have difficulty fully performing your agreement if you become ill during the contract period. You may have to work extra days beyond the initial contract period or pay a penalty to the corporate. You may also find that support for you during times of illness, recovery and return to work are very limited.

Leave

The issue of leave is dependent on the status of your relationship with the Corporate. As a general principle, if you are an independent contractor leave is essentially a matter for you to arrange in accordance with any specific contractual terms on the subject. Employed doctors will have their leave arrangements determined solely in accordance with the terms and conditions of their employment contract.

Independent contractor doctors are in a different position. Two separate schemes may be in place with the larger Corporates.

Under one scheme, doctors are permitted to absent themselves from their workplace for defined periods in any given year without incurring any specific penalty, apart from the obvious loss of income over that period. This may equate to around six weeks per year for general or unspecified purposes and seven days per year for sick leave. Any time taken in excess of that period, however, may incur a penalty in that the term of your engagement can be extended by the Corporate, in order to make up for any extended periods during which you have been absent from your practice.

This may mean that you may have to work well after your primary contract has terminated, to 'make up' for days you have taken off as sick days.

Under the other major model, doctors may take leave in any form for any period, but penalties may be invoked if the Corporate considers the absence excessive. The penalties include an 'excess fee' that is levied in an amount determined by the Corporate. Doctors are also responsible for arranging locum relief in conjunction with the Corporate.

Under this model doctors may also be charged the Corporate management fee during their absence. This arises as the Corporate is entitled to recover at least a set minimum management fee each year. If the Corporate 'take' of your fees results in a shortfall due to reasons such as an absence of six weeks on study leave overseas, you may be required to make up this shortfall to the Corporate. The penalty may also be triggered if you fail to bring in sufficient fees to the Corporate over the course of a year. Other leave schemes do exist, but these are principally derivations of the two major schemes discussed above.

These types of leave provisions may be particularly challenging for those with family responsibilities.

We are aware of one contract under which absence due to disability for more than six months resulted in immediate termination of the contract by the Corporate with one day's notice and no capacity for the doctor to claim any loss for such a termination as a term of the contract.

Some Key Issues to Consider

- What are your options in relation to taking leave while engaged with the Corporate?
- What is the full range of financial penalties that may be invoked for an extended absence?
- How will any family responsibilities you may have affect your earning capacity?
- If you are planning to have a child, how will this affect both your engagement itself and your subsequent income levels?
- Who is responsible to pay for a locum and how does this affect the management fee?
- Does the Corporate have any study leave scheme in place and, if so, how is this scheme accessed and funded? If not, why not?
- Is it possible, or practical, to take out some form of insurance to cover any extended absences that have arisen from factors beyond your immediate control e.g. serious illness of yourself or a family member?

What You Need to Understand

What exactly is your entitlement to take leave under the terms of the contract? What is the full range of financial implications for taking leave and at what stage are any such financial penalties invoked?

Maintenance of the Contractual Relationship

The terms of the contract will primarily determine the minimum period you must stay with the Corporate. This will invariably be for a period of years. Issues to consider include re-negotiation of the contract upon the expiry of its original term and mechanisms for dealing with contractual disputes during the life of the relationship. If the Corporate has purchased all of the assets of your business that will be a permanent arrangement, unless you purchase it back. Depending on the arrangement, you may end up being merely an employee or contractor to the Corporate with no rights in the actual business structure.

Some Key Issues to Consider

- What is the length of your initial contractual relationship?
This will normally be expressed as a period of years or months.
- How may that period be extended?
Is there an automatic offer of a further contract? If not, what factors will influence the Corporate to offer you another term if you so wish?
- Does the contract continue to run after its nominal expiry date?
Some contracts provide that the relationship continues automatically, but may be terminated at will by the giving of notice in writing.
- What are you able to do to resolve disputes with the Corporate?
Look at methods of dispute resolution contained within the contract. Discuss with your legal adviser the fairness or otherwise of these procedures and also what other mechanisms are available to you at law to resolve disputes. Does the Corporate employ a Medical Director with responsibility for progressing issues such as these? This is an area where there is potential for ongoing concern, and it is often overlooked in the initial phase of signing with the Corporate.
- If the Corporate is in financial difficulty, what are the implications for you from a commercial and clinical perspective? This is especially significant if the practice is required to merge at a later date, or is taken over by another Corporate and a forced amalgamation or relocation takes place.
- Are you required to 'brand' your practice with the corporate logo?
You may be required to erect corporate signage on the exterior and display promotional material inside your surgery.

What You Need to Understand

How the contractual relationship is likely to be managed, what dispute resolution mechanisms exist and what other mechanisms are in place that are intended to provide continuity of the relationship.

5. LIFE AND PRACTICE AFTER CORPORATE

General

There may come a time in the future when you decide that you wish to terminate or simply not renew your relationship with the Corporate. Moreover, you or the Corporate may take some action or omit or fail to do something that consequently entitles the other party to seek damages or even terminate the contract. This section provides an overview of the issues you will need to consider when you are contemplating life or practice after the Corporate.

From a general perspective, if you are severing your connection with the Corporate, you may need to start a new practice completely from scratch. If you sold your practice, rooms and assets prior to providing your professional services to the Corporate, you will need to develop these all over again, in addition to recruiting new staff if you are not joining an established practice.

You should be aware that a long-term relationship with the Corporate may create a form of 'dependency' by you on the Corporate and its services that you may find difficult or prohibitive to replicate in independent practice. Practice accreditation, business laws and employment law are constantly changing. Dependency on a corporate can quickly create gaps in recency of knowledge.

Types of Termination

Contracts and the relationships they regulate may be ended in a variety of ways.

By Agreement

Most contracts will expressly provide that the contract may be terminated at any stage prior to its nominal expiry date by mutual agreement. Even if not expressly included, the existence of such a clause may be implied in most circumstances. You may be required to give substantial notice of termination – 90 days is not uncommon. Any existing or accrued entitlements are not normally extinguished by a mutual termination.

By Effluxion of Time

Contracts are usually expressed to run for a period of time. At the expiry of this period, the agreement will come to an end. It is important to understand that not all obligations under the contract will cease at this time, even though the major component of the relationship is no longer operative. Therefore, any monies due and owing prior to termination will still be due and owing. Restraint clauses are also an example of obligations that may not even come into effect until the main contract is at an end.

The contract may also provide that, notwithstanding the expiry of the original contractual period, the contract automatically continues in existence or further specified period/s until terminated by notice in writing given by one party to the other. Under such an arrangement all obligations remain current until the agreement is formally terminated. It may not be desirable to permit such a tenuous arrangement to continue indefinitely, although it does provide you with the option of a reasonably quick method of termination.

By Default

A contract may be brought to an end by one party after the other party has breached the contract to such an extent that the other party is entitled to terminate the contract if it chooses so to do.

Certain clauses within the contract may be identified as 'default' clauses in that both parties agree that following the occurrence of specified events the other party has the right to bring the contract to an end. These may include events as diverse as you losing your right to practice medicine, failing to meet contractual obligations governing income generation or bringing the reputation of the Corporate into disrepute. Other clauses may be identified as 'essential' terms or clauses. This evidences the parties' intention that these identified and agreed terms are considered so fundamental to the operation of the entire agreement that a breach of one of these obligations may entitle the other party to treat the contract as being at an end.

Contracts may be terminated for many other reasons including frustration (for example, if the premises due to be sold to the Corporate are destroyed by fire prior to settlement of the sale), mistake or contracts made for an illegal purpose, but these are much more unusual circumstances. The effects of termination will often be directly dependent on the cause of termination.

What You Need to Understand

Identify the means by which the contract can be ended and be aware of potential actions of yours that may entitle the Corporate to either seek damages from you, terminate the contract, or both. It is also useful to be aware of what actions on the part of the Corporate may entitle you to seek damages or rescind the contract.

Effects of Termination

The terms of the contract will govern much of what occurs following separation from the Corporate. If you are retiring from medicine altogether a termination of the agreement may not present any ongoing issues of significance, apart from those obligations that would have existed in any event, such as maintaining an appropriate level of indemnity insurance.

Conversely, if you intend to continue to practise medicine following a period with the Corporate, you should be aware of what restrictions, if any, have been placed upon you pursuant to the terms of the contract. From a practical perspective, you will also need to identify and put in place the full range of services that you will need to replicate. Issues such as what is the most effective model of practice for you as an individual could be usefully re-visited at this juncture.

Some Key Issues to Consider

- What ongoing obligations are likely to be extended beyond termination of the contract?

- What, if any, assets or information (such as patient records) are you permitted to take with you?

This will include an analysis of ownership of confidential information by the Corporate and what the terms of the contract define as 'confidential information'. Ordinarily, the Corporate will seek to include all patient records. You may have to pay the corporate a fee to obtain copies of patient records.

- How will you comply with laws relating to maintaining patient records?

Some state and territory laws require patient records to be maintained for seven years from the date of the last service provided.

- Are you precluded from seeing former patients?

- Will the corporate facilitate access to your records if you need them to defend yourself?

Access to your records will be necessary if you have to defend a claim of negligence brought by a patient or if you have to answer a complaint made to the Medical Board or if you have to respond to Professional Services Review Panel investigation of inappropriate practice.

- What other practical steps should you consider?

This encompasses issues such as the costs of obtaining and equipping new rooms, staff and transfer of accounts.

What You Need to Understand

- Identify and understand the likely impact of any obligations that will survive termination of the contractual arrangements.

Case note:

- *Idameneo (No 456) Pty Ltd v Alexander* [2011] NSWCA 418 confirms that a party seeking to enforce a restraint does not have to be involved in exactly the same 'industry' and therefore directly in competition in all aspects of its business with the party alleged to be in breach of the restraint (the doctor). In this case, it was initially held that there was no valid restraint because Symbion did not share any goodwill in the doctors' practices. However, on appeal, it was found that there was a legitimate interest for Symbion to protect as Symbion had acquired the goodwill of the practice. The court rejected the view that a restraint of trade was not enforceable if the parties are in different industries.

Contractual Restrictions on Future Practice Rights

It is not uncommon in contemporary commercial practice to seek to restrain individuals from setting up in competition with a contracting entity once the original contractual relationship has been terminated or has expired. These clauses are ordinarily referred to as 'restrictive covenants' or 'restraint clauses'. It is important to emphasise that these clauses are solely for the benefit of the Corporate.

The intent of such clauses is to prevent you practising medicine within a certain radius of your practice location for a specific period both during the life of the agreement and for a period of time thereafter. Such restrictions enable the Corporate to protect its market share within a defined area, maintain revenue streams and promote a stable investment climate for its shareholders. It may also effectively preclude former patients of yours/the Corporate following you to your new practice.

Such clauses are commonly written in the form of a descending scale of both time periods and geographic radii.

As a hypothetical example, such a clause may be expressed as:

- a. Not to practice medicine within a 10 kilometre radius of your current practice, but if 10 kilometres is held to be unenforceable by a Court, then,
 - b. Not to practice medicine within an 8 kilometre radius of your current practice, but if 8 kilometres is held to be unenforceable by a Court, then,
 - c. Not to practice medicine within an 6 kilometre radius of your current practice, but if 6 kilometres is held to be unenforceable by a Court, then,
- ... and so on.

The clauses are drafted in an identical manner with respect to time preclusion periods. The Corporate, if it chooses to enforce the clause, will seek to restrain you by the commencement of particular types of legal proceedings.

The principal method of defence is to argue that the clause is unreasonable in terms of either the time period sought to be restrained or the geographic area sought to be enforced, or both. Accordingly, rather than run the risk of the entire restraint clause being struck out for being unreasonable, it has become common practice for Corporates to insert a range of enforcement periods and areas.

The enforceability or otherwise of these clauses will depend on the overall suitability of these clauses to the medical profession as determined by the Courts from time to time and the application of principles derived from case law to your particular circumstances. For example, a restraint area of 10 kilometres may be perfectly reasonable for a practice in a country centre, but may be considered excessive for a similar practice in the CBD of a major capital city.

Some Key Issues to Consider

- It is important to note that such clauses do not prevent you from assisting in an emergency.
- As individual circumstances vary, will the Corporate consider negotiating reasonable alternative restraint clauses by mutual agreement?
- Are there any other associated restraint provisions?

For example, are you prohibited from any form of medical practice during the restraint period, or simply the clinical activities you undertook for the corporate.

- Are you precluded from undertaking other paid work during the life of your contract with the Corporate?

For example, you may have an interest in another practice, or practise for another surgery on weekends or after hours.

- Does the restraint extend to others?

Some contracts contain exclusions on working or forming other professional relationships with former associates of the Corporate.

What You Need to Understand

Determine the likely validity of restraint clauses and their potential to adversely impact on your freedom to practise medicine, both during the life of the arrangement with the Corporate and the duration of the restraint period thereafter.

Litigation and Corporates

Our research shows that most of the major Corporates in Australia have been involved in some litigation. This is not a criticism – it is their right to do so. It serves as an observation that they tend to pursue their contractual and other legal rights vigorously. This does not take into account the disputes that have not been made public or which have settled prior to being litigated.⁸

This is not to draw undue attention to legal tensions, merely to emphasise that Corporates view their relationship with doctors as a commercial relationship and will generally not hesitate to take legal action where they perceive a breach by a doctor. This means that their contracts must be read VERY thoroughly before signing and it should always be remembered that they are binding. To challenge the terms of a written contract that you have signed is a very difficult and expensive process.

⁸ See for example: GPs hauled into court by medical centre giant
<http://www.smh.com.au/national/gps-hauled-into-court-by-medical-centre-giant-20101006-167w0.html>
and
Primary Health Care settles case against former GP
<http://www.gannawarratimes.com.au/story/901482/primary-health-care-settles-case-against-former-gp/>

6. SUMMARY AND CONCLUSION

It is readily conceded that not everyone will be prepared to conduct such an exhaustive investigation as contemplated by this kit. Such an investigation may not even be necessary in all cases. Further, the kit deliberately assumes a low level of commercial knowledge, although most medical practitioners will be familiar with many of the matters discussed.

There will be doctors who are prepared to enter into long term binding arrangements with little or no real understanding of what their new earning and working environment will be like.

It is not recommended that any doctor, irrespective of his/her perceived level of legal and accounting competence, or how unobtrusive the practice changes appear to be, enter into any formal agreement with a Corporate without first obtaining good-quality legal and financial advice.

The kit is intended to serve as a practical guide to doctors to assist them in coming to a decision that will best suit their personal circumstances when considering engagement with a Corporate. The following steps provide a brief summation of the processes described in greater detail in the body of the kit.

The Key Steps

STEP ONE

FORM AN OBJECTIVE PICTURE OF YOUR CURRENT POSITION

Look at what you like and dislike about aspects of your professional practice at present. Income and the degree of effort required to earn it are certainly prime aspects of this process, but also consider what is important to you in terms of family and lifestyle issues, clinical independence, degree of control over the manner in which you practise medicine, your physical working environment, security, administration and other issues.

STEP TWO

FORM AN OBJECTIVE PICTURE OF YOUR FUTURE POSITION WITH THE CORPORATE

Go through a similar process utilising the information you now have to hand regarding your proposed arrangements with the Corporate.

STEP THREE

COMPARE THE TWO

Be objective! Remember that the things that you were unhappy with in practice before may well be repeated with the Corporate if not specifically addressed. The negotiation process is actually a good opportunity to remedy those problems or irritations.

What You Need to Understand

Having made the comparison between your present circumstances and your likely future circumstances, the financial position you will be in and what is important to you as an individual, the question is quite simple – will you be better off overall or not?

Corporatisation has been growing in recent years and is likely to continue to grow. As with any system, some doctors have had positive experiences, some have had negative experiences. It is a good idea to talk to someone you know or can talk to about their first-hand experiences with a Corporate.

Some issues you may need to consider

On the positive side:

- You may be freed from administrative burdens and able to concentrate on practising medicine
- You may have greater flexibility in your work hours and practices
- You may have a chance to earn a substantial income
- The extended hours and services provided by corporatised medical centres can benefit the community
- It may be a way to gradually ease into retirement with part-time hours
- A substantial sign-on fee paid by the Corporate may be financially beneficial to you

On the negative side:

- You will be an employee or contractor of the Corporate – whatever your status, you will be there to serve their interests first and will lose a degree of control over how the business is run
- The practice will be first and foremost a business, there to make money
- You may be forced to work hours that do not suit you
- You may go from an appointment system to a drop-in system, changing the character of your practice completely
- Complex contractual arrangements may have terms and conditions you were not expecting

The 'Corporate' solution may present the ideal environment for some doctors, for others it will not. If you find the arrangement does not suit you at some later date it is unlikely you will be permitted to simply terminate the arrangement at will. With that principle in mind, carefully assess your position and what it is you actually seek from the practice of medicine before you accept an engagement with a Corporate.

More Information

Additional information on corporatisation and contract issues may be obtained from the AMA and your legal and financial advisers.

- *Guidelines on Service Contracts Between Doctors and Medical Practice Principles – 2015*
- An excellent and detailed analysis of corporatisation is contained in the report: *State of Corporatisation A report on the corporatisation of general practices in Australia*, Medicare Financing and Analysis Branch Department of Health and Ageing, February 2012

Available at:

[http://www.health.gov.au/internet/main/publishing.nsf/Content/foi-disc-log-2012-13/\\$File/222-1213%20Doc%206%20State%20of%20Corporatisation%20Report%20-%20February%202012.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/foi-disc-log-2012-13/$File/222-1213%20Doc%206%20State%20of%20Corporatisation%20Report%20-%20February%202012.pdf)

We strongly recommend that practitioners considering, or interested in, engaging with a Corporate read this report.

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