



# HEALTH ALERT

**24 May 2010**

Welcome to this week's edition of Health Alert. The Health Alert is transmitted on Monday of each week (unless there is a public holiday on Monday).

Health Alert is a summary of the critical judgments, legislation, press releases and news items which have come to our attention each week. Many of the summaries will contain a hyperlink.

If an item is of special interest, we may insert commentary into the body of Health Alert. However in general, Health Alert is a quick and effective means of ensuring that you are aware of significant recent changes with little or no commentary from ourselves.

If you would like to include a colleague or contact on our distribution list, or be removed from the list and not receive further issues from us, please contact **Anne Arfi** at [anne.arfi@dlaphillipsfox.com](mailto:anne.arfi@dlaphillipsfox.com) with the relevant contact details.

**Nigel Preston and the DLA Phillips Fox Health Team**

## JUDGMENTS

### **Australia. Federal Court**

#### **Primary Health Care Ltd v Commissioner of Taxation [2010] FCA 419**

The case involved six separate applications concerning Part IVC of the *Taxation Administration Act 1953* (Cth) in respect of objection decisions made by the respondent, the Commissioner of Taxation. The case involved a number of legal issues, including transfer of copyright on the sale of business, and use of copyright for taxation purposes. However, this summary deals with the key issue, namely the question of copyright in medical records. The court was asked to determine whether copyright existed in any part of the relevant patient records. This issue was relevant in this case because the respondent had been claiming income tax deductions arising from its acquisition of copyright interests as part of its purchase of medical practices.

Primary Health Care (PHC) owned and ran a number of medical centres throughout Australia, with the majority being in NSW. A feature of these centres is that patients could not make appointments. If they wanted to see a particular practitioner they

could wait until that doctor was available, otherwise were seen by whichever doctor was available. This meant that it was necessary for each doctor at the medical centre to have access to all patient records.

PHC provided a number of sample patient records for each clinic. The records consisted of records created in each practice, as well as documents created by third parties and sent to the practice, such as reports from specialist practitioners, procedural and test reports such as radiology and pathology reports. PHC did not assert claims in respect of any third party reports, however, it did claim copyright in respect of health summary sheets, consultation notes, and referral and other letters written in respect of the patients. For PHC to show that copyright existed in the medical records, PHC was required to identify the works in which it said copyright existed, and show that those works were original literary works of identified authors who were qualified persons. PHC claimed that each referral letter was an original literary work, and that each patient's consultation notes comprised an original literary work (or, in the alternative, that the consultation notes comprised separate original literary works).

With the exception of the medical records from one doctor, all of the records contained contributions by a number of different persons. In some cases, the receptionists and clerical staff had made entries in the records. The court determined that although the consultation notes could be seen as forming a continuous narrative, the individual entries were separate and distinct, not the result of collaboration between doctors. This meant that the consultation notes could not be regarded as works of joint authorship. If copyright could be claimed over the consultation notes, it would have to be claimed in relation to each separate entry.

The court determined that the prescriptions and health summaries of the patients were not substantial enough to qualify as original literary works. In many cases, they consisted only of the names of medications, dosages and directions, or in the case of health summaries, lists of previous illnesses. Similarly, the court held that the consultation notes did not form original literary works in which copyright subsisted because the entries were 'largely restricted to notations of the names of medical conditions and medications as well as physiological and pathological data'. The notes did not show independent intellectual effort by the practitioners, which is necessary for copyright protection. The court made one exception to this determination in relation to the records of a particular doctor. In this case, the records were written by only one doctor, so it was possible to regard the consultation notes as a single work. This allowed the court to see a continuous narrative with independent intellectual effort, and therefore, copyright was determined to exist in relation to these records.

The court also found copyright to exist in the referral letters. The sample letters provided to the court showed 'independent intellectual effort of some substance' which satisfied the court that copyright would subsist in those letters.

## Victoria

### Castles v Secretary of Dept of Justice [2010] VSC 181

The plaintiff, Kimberley Castles, was a low security prisoner at Tarrenpower Prison. Pursuant to s 6A of the Corrections Act 1986 (**Act**), the plaintiff was under the legal custody of the first defendant, the Secretary of the Department of Justice.

In 2008, she began a course of in vitro fertilisation (IVF) that was interrupted by her imprisonment. The plaintiff was advised that she will be unable to receive the treatment when she turns 46 on 9 December 2010 and that her chances of success were diminishing with time.

Under the Act the plaintiff is confined to the prison subject to some express provisions. Part 8 of the Act provides for custodial community permits, which include corrections administration permits for purposes relating to the health of a prisoner. Further, s 47 of the Act gives prisoners the right to access reasonable medical care and treatment necessary for the preservation of health.

The plaintiff requested the right to attend the IVF clinic under the provisions of the Act, however had failed to obtain the permission. In this case, she sought an injunction until the hearing and determination of the proceeding or until further order, restraining the defendants from 'continuing to neglect, fail or refuse to grant the permits and approvals necessary to allow the plaintiff to have access to the treatment'. The plaintiff's case for an injunction was based on the argument that she had an enforceable right to IVF treatment, founded both under the Act, the Charter of Human Rights and Responsibilities Act 2006 (Charter) and the common law and fiduciary duties owed to her as a prisoner.

Justice Osborn rejected the application for an interlocutory injunction for the following reasons:

- The Secretary had 'accepted that the plaintiff is entitled to determination of her application for permit in accordance with law' and the defendants had identified factual considerations that were relevant to the exercise of that discretion.
- The plaintiff is not presently entitled to receive IVF.
- The discretion to grant the permit was that of the defendant and not of the court.
- The operational consideration raised, including prisoner safety and security and the provision of adequate facilities, were 'matters of serious importance'.
- The operational considerations, on face value, fell within s 38(2) of the Charter which provides that a public authority is not bound to act in a way that is compatible with human rights if 'the public authority could not reasonably have acted differently or made a different decision'.

Due to the nature of the proceedings, Justice Osborn ordered that her trial be expedited and fixed a date for trial.

## ABOUT US



### Michael Regos

Michael practices primarily in the areas of health law, insurance law, medical negligence, Coronial Inquiries and public liability matters. He represents Victorian Public Hospitals in litigation and advises them on a wide range of Health Law issues. He is retained by many

hospitals to represent them and regularly appears as their counsel at Coronial Inquests.

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## LEGISLATION

### New South Wales

Health Practitioner Regulation Amendment Bill 2010 - 20/05/2010 Introduced to Legislative Assembly

### Queensland

Health Legislation Amendment Regulation (No. 3) 2010 No. 81 - commenced on 14 May 2010.

### South Australia

Health Practitioner Regulation National Law (South Australia) Bill 2010 - House of Assembly second reading 11 May 2010.

### Victoria

Pharmacy Regulation Bill 2010 - Legislative Assembly second reading speech on 6 May 2010.

## REPORTS

### Australia. Department of Health & Ageing

Media releases

- 20 May 2010-Soliris: Minister Asks for Further Advice on New Drug- The Minister for Health and Ageing, Nicola Roxon has made an urgent request for further advice from the Pharmaceutical Benefits Advisory Committee (PBAC) on the potential benefits of adding Soliris® (eculizumab) to the Government's Life Saving Drugs Program (LSDP).

- **20 May 2010-Sue Macri Appointed as Associate Commissioner to Productivity Commission Aged Care Inquiry**-Assistant Treasurer, Senator Nick Sherry, and Minister for Ageing, Justine Elliot MP have announced the appointment of Sue Macri AM as Associate Commissioner to the Productivity Commission inquiry into aged care in Australia.
- **19 May 2010-Role of Social Workers and Occupational Therapists in Providing Coordinated Mental Health Care Packages**-The Government has had constructive discussions with the Australian Association of Social Workers and Occupational Therapy Australia on how to best introduce coordinated mental health care packages for people with severe mental illness in primary care and better use of fee-for-service Medicare items.
- **18 May 2010-\$7.6 Million for Lyell Mcewin Hospital in Northern Adelaide** -The Australian Government will invest \$7.6 million to provide additional radiotherapy facilities and equipment at the Lyell McEwin Hospital, under the regional cancer centres initiative to deliver improved cancer services for rural and regional patients.
- **18 May 2010-\$84.8 Million for New and Enhanced Regional Cancer Services in Whyalla and Regional South Australia**-The Australian Government and the South Australian Government will invest a total of \$84.8 million to provide new and enhanced cancer facilities and equipment for Whyalla and regional South Australia, under the regional cancer centres initiative.
- **18 May 2010-Eleven New Chemotherapy Units for Country SA** -The Australian Government will provide \$5.4 million to establish chemotherapy units in ten country South Australian hospitals: Gawler, Mt Barker, Mt Gambier, Port Augusta, Victor Harbor, Clare, Murray Bridge, Northern Yorke Peninsula, Naracoorte and Port Lincoln.
- **18 May 2010-More than \$8 Million for Services to Help Older People and People with Disabilities in Queensland** -Minister for Ageing Justine Elliot and Queensland Disability Services Minister Annastacia Palaszczuk announced \$8.9 million for Home and Community Care (HACC) Services in Queensland.
- **17 May 2010-Coordinated Mental Health Care**-This years' Budget is redirecting funding to provide packages of care for up to 25,000 people diagnosed with severe mental illness.
- **17 May 2010-Eye Care Boost for 106 Remote Indigenous Communities**-Minister for Indigenous Health, Warren Snowdon, announced new or expanded services will be delivered to 106 rural and remote Indigenous communities under a \$6.5 million boost to an Australian Government eye health program.
- **17 May 2010-Funding to Upgrade Forster Aquatic and Leisure Centre**-The Australian Government will provide \$1.8 million to expand the Great Lakes Aquatic and Leisure Centre in Forster in New South Wales.

- 17 May 2010-**Interphone Mobile Phone Study**-Parliamentary Secretary for Health Mark Butler noted the results of the international Interphone study into the link between mobile phone use and brain cancer.
- 17 May 2010-**Port Stephens GP Super Clinic Officially Opened**-The Minister for Health and Ageing, Nicola Roxon, has officially opened the \$2.5 million Port Stephens GP Super Clinic – to be known as the Nelson Plaza Clinic.
- 17 May 2010-**Record Numbers Hold Private Hospital Insurance**-The number of Australians with private health insurance has hit a 27 year high with a total of 9,912,887 covered in the March quarter of 2010.
- 14 May 2010-**Investing in the Future of Health in and Around the Australian Capital Territory**-Up to \$2.2 million will be committed to support additional clinical training places for students at local universities which will encourage more health students to study and work in and around the ACT.
- 14 May 2010-**March Quarter Medicare Statistics**-In the March quarter 2010, a total of \$3.7 billion was paid in Medicare benefits for 73.9 million services. This represented 3.3 services and about \$165 in benefits for every Australian.
- 14 May 2010-**National Call for New Clinical Training Proposals**-Proposals are being sought to drive a new wave of clinical training opportunities throughout Australia.

#### Private Health Insurance Circulars

- PHI 33/10 – *Review of Health Technology Assessment in Australia: Update on Implementation of Continuous Application Process for the Protheses List*
- PHI 32/10 – *Release of Final Data Specifications 2010-11 for HCP and PHDB Data Collections*
- PHI 31/10 – *Review of Neonatal Facilities Under the Health Insurance Act 1973 subsection 3(2) – South Australia and Western Australia*
- PHI 30/10 – *Administrative Arrangements for the Second Tier Default Benefits for Overnight and Day Only Treatment*

**Consumer Directed Care (CDC) in Australian Government Funded Community Aged Care** - The Australian Government is funding Consumer Directed Care (CDC) in Australian Government community aged care programs. Under the initiative, the Government will fund selected community aged care providers to deliver innovative service models, which will provide care recipients and their carers with greater control over the design and delivery of the care and services they receive.

**Australian Health Survey** - The Australian Health Survey – the most comprehensive study of Australia's health ever undertaken - will commence in 2011. It was announced in May 2010 as part of the Government's response to the National Preventative Health Taskforce's final report. For more information on the Survey email the Department [aushealthsurvey@health.gov.au](mailto:aushealthsurvey@health.gov.au)


### **Australia. Productivity Commission**

Caring for Older Australians - The Commission released an **Issues paper** on 21 May 2010 to assist those preparing submissions to the inquiry.

### **Australian Bureau of Statistics**


12/05/2010 **Biggest ever Australian Health Survey announced today**

### **Australia. Pharmacy Board of Australia**

Tuesday 18 May 2010 - Consultation Paper on Guidelines - The Pharmacy Board of Australia, under the authority of Mr Stephen Marty, Chair, has released a consultation paper on guidelines comprising; - Guidelines on dispensing medicines, Guidelines on specialised supply arrangements & Guidelines on practice specific issues. - 

**Consultation paper on guidelines (pdf, 170kb)** - If you wish to provide comments on this paper, please lodge a written submission in electronic form, marked 'Attention: Chair, Pharmacy Board of Australia' to [natboards@dhs.vic.gov.au](mailto:natboards@dhs.vic.gov.au) by close of business on Monday 14 June 2010. Unfortunately, late submissions cannot be accepted. Please note that your submission will be placed on the Board's website unless you indicate otherwise.

### **Australia. Physiotherapy Board of Australia**

Monday 17 May - Consultation on Limited Registration - The Physiotherapy Board of Australia, under the authority of Glenn Ruscoe, Chair, has released a consultation paper on a Standard and Guidelines for Limited Registration of Physiotherapists. This consultation process will close on Wednesday, 9 June 2010. The Board seeks submissions from interested parties by the close of business on this date. - 

**Standard and guidelines on limited registration (pdf, 2880kb)**

### **Australia. Psychology Board of Australia**

Tuesday 18 May 2010 - Consultation on Guideline: Approved training programs in psychology supervision - The Psychology Board of Australia, under the authority of Associate Professor Brin Grenyer, Chair, has released a consultation paper on the draft Guideline: Approved training programs in psychology supervision. If you wish to provide comments on this paper, please lodge a written submission in electronic form by email to [chair@psychologyboard.gov.au](mailto:chair@psychologyboard.gov.au) by close of business on Monday

14 June 2010. -  **Guideline for Approved Training Programs in Supervision (pdf, 1290kb)**

### **Australia. Therapeutic Goods Administration**

**Training for IVD industry on use of TGA eBusiness Services (new)**

**Bill for Biologicals framework passed (new)**

**Advisory Committee on Non-prescription Medicines (ACNM) - appointment of new members: expressions of interest (extension of closing date)**

**Consultation: Adoption/non-adoption of European Union guidelines in Australia (17 adoption/1 non-adoption)**

**Consultation: Requirements for the prescription medicine streamlined submission process** (added summary of issues raised in submissions and copies of submissions)

**Statement on Rotavirus vaccines** (updated)

**Revised medicines and chemicals scheduling arrangements** (new)

**Australian Public Assessment Report (AusPAR) for prescription medicines** (added Etanercept)

**Advisory Committee on Non-prescription Medicines (ACNM) - appointment of new members: expressions of interest** (new)

### **Australia. Private Health Insurance Administration Council**

10/11 20 May 10 Industry Consultation – Proposed Standard Operating Procedure for private health insurers - Current Edition 10/11

10/10 17 May 10 Industry Consultation - Proposed Disclosure Standard for Private Health Insurers - Current Edition 10/10

### **Australian Institute of Health & Welfare**

**Primary carers of people with arthritis and osteoporosis** - Family members provide significant assistance to people with disability associated with arthritis and osteoporosis, to help them cope with their restrictions and continue independent living. Published 21 May 2010.

**Asthma among older people in Australia** - Over 92% of the 402 asthma deaths in 2006 were among people aged 45 years and over. Asthma in older Australians is distinct in many ways. The presence of comorbid ... Published 20 May 2010.

**Asthma, chronic obstructive pulmonary disease and other respiratory diseases in Australia** - In 2004-05, Australia spent \$3.3 billion directly on the management of respiratory conditions. In 2007-08, general practitioners managed respiratory problems more than any other condition and in 2006. Published 20 May 2010.

### **Australian Capital Territory. Department of Health**

Media releases

- **ACT Health building the capacity of allied health** Katy Gallagher, MLA  
May 19 2010
- **Workers' Compensation Act changes to benefit private sector employers** Katy Gallagher, MLA  
May 19 2010
- **Teaching Incentive Payments: Supporting GPs** Katy Gallagher, MLA  
May 19 2010
- **State-of-the-art neurosurgery suite a step closer** Katy Gallagher, MLA  
May 19 2010
- **Walk-in Centre opens to the public as nurse practitioners awarded prescribing rights** Katy Gallagher, MLA  
May 18 2010



- **Women's and Children's Hospital plans open for comment** Katy Gallagher, MLA May 17 2010

### **New South Wales. Department of Health**

#### **Conflict Resolution in End of Life Settings Project Working Group Report** 20/05/2010

##### Media releases

- **Improving Healthcare Delivery For Kids In NSW** [20 May 2010]
- **Hepatitis Awareness Week - Act Now and Seek Health Advice** [18 May 2010]

##### Policy directives & Guidelines

- **Movable Heritage within the NSW Public Health System** PD2010\_029  
20/05/2010
- **Influenza Pandemic - Providing Critical Care** PD2010\_028 20/05/2010
- **Oral Health Specialist Referral** PD2010\_027 18/05/2010
- **Influenza - Guidelines for the Intensive Care Unit 2010** GL2010\_005  
14/05/2010

##### Information bulletin

- **Salary Increase Staff Specialists NSW Public Health System - Staff Specialists (State) Award** IB2010\_023 17/05/2010

### **Northern Territory. Department of Health & Community Services**

##### Media releases

- **Kon Vatskalis - CLP Must Say If They Support Scrapping Of E Health And Superclinics** - The CLP must tell Territorians if they support their Liberal bosses' plans to scrap a northern suburbs superclinic and the vital health care initiative E Health.
- **Kon Vatskalis - Renal Care Boost For Central Australia** - Capacity to treat patients with advanced renal disease has been significantly boosted with the official opening of the \$16.7 million, 12-station dialysis unit in Alice Springs.

### **Queensland. Department of Health**

##### Media releases

- 19/05/2010 **New register to combat Rheumatic Heart Disease**
- 14/05/2010 **Latest report shows Queensland hospitals continue to treat more patients**
- 10/05/2010 **Preliminary KPMG report released**
- 10/05/2010 **New helipad opens at Princess Alexandra Hospital**
- **Immunisation program and Sexual Health authorisations**

- **Quarterly Public Hospitals Performance Report - March Quarter 2010**  
(PDF, 989 KB)

### **Tasmania. Department of Health & Human Services**

#### Media release

- **\$48 Million to Deliver New Services for Cancer Patients Minister for Health** 19 May 2010

### **Victoria. Department of Health**

#### Media releases

- **Revamped Better Health Channel Website Goes Live** - Thursday, 20 May 2010 - Australia's top health website has undergone a modern revamp to make it even easier to access expert health and lifestyle information at any time and any place.
- **Andrews Welcomes 222 New Paramedics at Annual Event** - Thursday, 20 May 2010 - More paramedics are operating throughout Victoria than ever before, Health Minister Daniel Andrews said today, at an annual function to welcome new graduate paramedics to Ambulance Victoria.
- **Australian-First Cancer Treatment To Save More Lives** - Sunday, 16 May 2010 - In an Australian first, cutting edge new radiotherapy technology at the Alfred Hospital will ensure cancer patients receive even better treatment and improved chances of survival.
- **Important \$3.2 Million Boost for Aboriginal Health** - Friday, 14 May 2010 - Aboriginal Victorians in Gippsland will have even better access to vital health services thanks to a \$3.2 million Brumby Labor Government boost to close the life expectancy gap.
- **Doors Open On \$1.4 Million Wonthaggi Ambulance Station Published :** - 14/05/2010
- **Important \$3.2 Million Boost For Aboriginal Health Published :** - 14/05/2010
- **Hepburn Health Service Volunteer Team Honoured Published :** - 14/05/2010
- **Bass Coast Community Health Volunteer Team Honoured Published :** - 14/05/2010
- **Wimmera Healthcare Group Volunteer Team Honoured Published :** - 14/05/2010
- **Upper Murray Health Volunteer Team Honoured Published :** - 14/05/2010
- **Swan Hill District Health Volunteer Team Honoured Published :** - 14/05/2010
- **Western Health Volunteer Team Honoured Published :** - 14/05/2010

- Frankston Hospital Pink Ladies Volunteers Honoured Published : - 14/05/2010
- Hamilton Volunteer Transport Team Honoured Published : - 14/05/2010
- Royal Children's Hospital Volunteer Splint Team Honoured Published : - 14/05/2010
- St Vincent's Hospital Volunteer Honoured Published : - 14/05/2010
- Kooweerup Regional Health Service Volunteer Honoured Published : - 14/05/2010
- Merri Community Health Volunteer Honoured Published : - 14/05/2010
- Darebin Community Health Volunteer Honoured Published : - 14/05/2010
- Royal Children's Hospital Volunteer Honoured Published : - 14/05/2010
- Goulburn Valley Health Volunteer Honoured Published : - 14/05/2010
- Barwon Health Volunteer Honoured Published : - 14/05/2010
- Southern Health Volunteer Honoured Published : - 14/05/2010
- Colac Area Health Volunteer Honoured Published : - 14/05/2010
- Edenhope And District Memorial Hospital Volunteer Honoured Published : - 14/05/2010
- Nillumbik Community Health Volunteer Honoured Published : - 14/05/2010

### **Victoria. Medical Practitioners Board of Victoria**

May Bulletin Out Now - The Board's final newsletter is now available

### **Western Australia. Department of Health**

17 May 2010 - Subacute Care

18 May 2010 - The burden of disease and injury attributed to preventable risks to health in Western Australia, 2006 (PDF 302KB)

Media releases

- 20 May 2010HamesState Budget 2010-11: Nickol Bay Hospital to be rebuilt
- 20 May 2010HamesState Budget 2010-11: New ambulances and staff for emergency care
- 20 May 2010HamesState Budget 2010-11: More than 45 child health specialists to cut waiting times
- 20 May 2010JacobsState Budget 2010-11: First ever budget for new approach to mental health
- 20 May 2010HamesState Budget 2010-11: Major spending boost to deliver better Budget certainty



- 19 May 2010 Hames \$120 million for new medical equipment
- 17 May 2010 Hames Third wave of hospitals join Four Hour Rule
- 16 May 2010 Jacobs Alcohol-caused cancer focus of new State Government campaign

### Western Australia. State Budget 2010-11

#### Materials

### New Zealand. Ministry of Health

Health Targets 2009/10 - Quarter three report - An overview of the performance of DHBs in each target area for quarter 3

### United Kingdom. General Medical Council

Press Release: **More support for patients to plan end of life care** - 19 May 2010 - New guidance for doctors from the General Medical Council

Press Release: **GMC signposts doctors through research maze** - 13 April 2010 - New guidance from the General Medical Council (GMC) will help to guide all doctors involved in research.

### United States of America. Department of Health & Human Services

World Health Assembly - Statement by the Surgeon General on Prevention and Control of Noncommunicable Diseases

FDA Transparency Task Force Unveils Draft Proposals on Agency Disclosure Policies - The U.S. Food and Drug Administration's Transparency Task Force today released 21 draft proposals for public comment aimed at helping consumers and others understand how the agency operates and makes decisions.

### Canada. Health Canada

Canada Plays Key Role in Strengthening Global Health [2010-05-18]

### Australian Medical Association

**Urgent attention must be paid to high rates of respiratory illness in Indigenous infants** 16 May 2010 - MJA media release - Rates of severe pneumonia in hospitalised Northern Territory Indigenous children are among the highest reported in the world, and reducing this burden of disease should be a national health priority, according to research published in the *Medical Journal of Australia*.

**High rate of periodontal disease may be putting young Indigenous adults at risk of chronic diseases** 16 May 2010 - MJA media release - Young Aboriginal adults have 2-11 times higher adverse clinical oral health outcomes than young Australian adults generally, according to research published in the *Medical Journal of Australia*.

**NT intervention unlikely to improve long-term health of Aboriginal people** 16 May 2010 - MJA media release - The intended health outcomes of the Northern Territory intervention – improved health and wellbeing and, ultimately, longer life expectancy – are unlikely to be fully achieved, according to research published in the *Medical Journal of Australia*.

GP Network News Issue 10, Number 16 - 14 May 2010 14 May 2010 - GP Network News Issue 10, Number 16 - 14 May 2010: Health Budget 2010-11: how primary health fared; Kidney health awareness; Support Family Doctors.

### British Medical Association

**GMC offers clarity on end-of-life care - BMA welcomes new good practice guidelines**

**BMA doubts standard of revalidation training - Doctors ask how appraisers will be able to maintain consistent standards**

**Call for choice on pregnancy night shifts - Medical Women's Federation seeks OOH exemptions for doctors in advanced stages of pregnancy**

#### MORE INFORMATION

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#### ABOUT DLA PHILLIPS FOX

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