

Spring Report

Celebrating a South Australian Icon



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CLIENT PROFILE

The Royal Agricultural & Horticultural Society of SA Inc



With the fun, competition and pageantry of the Adelaide Show over for another year, we take a peek behind the scenes at the Society that makes it all happen...

From kids, to parents and even grandparents the Royal Adelaide Show has relevance and meaning for every generation.

Every family can relate to the yearly frenzy of kids deciding which show bags to buy when the Show Magazine comes out. Some of us can even remember the good old days, when the show bags were known as “sample bags” and were free!

How times have changed. But change they have had to, to ensure that the crowds keep coming – just under half a million this year alone – making the Adelaide Show one of, if not, the major event on the State’s calendar.

According to Chief Executive, John Rothwell, “This makes the event the highest attended pro-rata of population nationally and attracts nearly one third of the State’s population.”

And that’s not all. John explains “With a total of 242 shows presented by The Royal Agricultural and Horticultural Society of South Australia (RA&HS) since 1840, we’ve held more shows than any other society in the world, even surpassing the Royal Bath & West of England Society which was formed in 1777!”



Not surprisingly this has been the charter at the RA&HS since its 1839 inception, making it one of the oldest organisations in the state, second only to the South Australian Police.

Clearly proud of the Society’s achievements, John continues, “Considering the short number of years a new business will statistically survive today, it is quite a feat for the Society to still be relevant and trading viably, 178 years on from its beginning.”

As a not-for-profit member based association, the Society receives no ongoing government funding, so

has had to adapt, forecast and seek professional advice from credible professionals like DW Fox Tucker. In fact DW Fox Tucker has proudly worked with the Society for many years.

“The Society and the Royal Show, having started only three years after the State’s settlement, have been part of what South Australia has experienced during those years.”



John told us how the Society has continually coped with challenges and obstacles including economic, political, competitive, social and financial.

“We have a well

defined long term strategic plan that we continue to update and refine as circumstances change. Whilst managing day to day operational challenges, we always keep our long term strategic goals in mind.”

So how is the Society planning for the future? The primary goal is ensuring the continuing success and relevance of the Royal Adelaide Show to both industry and the community.

“The Show is affectionately known as the State’s largest class room, with many educational elements presented and almost all schools providing a day off for students to attend the Show.”

As a major source of revenue for the Society, and with the Adelaide Show occurring over only 10 days each year, John explains that planning is a big part of ensuring viability.

“We are continuing to research and investigate options to diversify our revenue stream to ensure the Society can continue as a going concern and focus on the objects of its charter, including supporting agriculture and related industries in South Australia.”

And one of the more creative ways they’ve started to do this is by introducing new competitions. In 2016, the Society introduced the Australian International Drone Championships, the first Royal Show to do so. This proved to be very successful and extremely popular and with the advice and assistance of DW Fox Tucker the Society was able to secure their position

by trademarking the Championships.

The Royal Adelaide Show continues to grow. This year the competitive section received 31,650 entries, the second highest number of entries nationally when compared to other Royal Shows.



It’s the only State event that truly brings together urban and country Australia, so the next time you enter the gates at the Show, spare a thought for the Royal Agricultural & Horticultural Society and all the hard work they do behind the scenes.

Why not become a member – Show tickets are included – and help the Society that not only showcases our primary industries, but is an integral part of their success.

FOR MORE INFORMATION ABOUT THE ROYAL AGRICULTURAL & HORTICULTURAL SOCIETY OF SA AND TO INQUIRE ABOUT MEMBERSHIP:

Visit: <http://rahs.com.au>



ROYAL AGRICULTURAL &
HORTICULTURAL SOCIETY OF
SOUTH AUSTRALIA INCORPORATED

FIRM NEWS

DW Fox Tucker & Cleartitle Conveyancing Join Forces to Enhance Client Support



With DW Fox Tucker's acquisition of Cleartitle Conveyancing, comes a new league in conveyancing expertise.

The team at Cleartitle Conveyancing have long been a leading light in the South Australian property space, so it's with great pleasure we announce that the entire suite of impressive Cleartitle Conveyancing expertise has moved under DW Fox Tucker's wing.

What this means for you, other clients and the South Australian property market as a whole is a truly exceptional, entirely comprehensive service offering across all stages of the conveyancing process... with the help of some of the best property and legal minds in the state.

"The key to success in this exciting change, is perfect consistency in conveyancing services."

This is how Rod Hammond, former owner of Cleartitle Conveyancing and new head of the restructured conveyancing team, sums up the core objective behind this significant coming together. Rod had been on the lookout for the right law firm to partner with for some time, but he wasn't prepared to compromise in any way on the superb value and service for which Cleartitle Conveyancing has become renowned.

"The benefits Cleartitle Conveyancing clients will enjoy with a law firm partnership are significant" added

Rod, "the boost in resources, expertise and legal know-how to name just a few. But things like our customer focussed service model and very competitive fees were non-negotiable... so it was an absolute delight to find DW Fox Tucker, who share our vision on every level."

DW Fox Tucker Managing Director confirms Cleartitle Conveyancing will continue to grow its own unmistakable brand.

DW Fox Tucker Managing Director, Joe DeRuvo, warmly welcomed the new team members and the enhancement to services they will help deliver. "The Cleartitle Conveyancing acquisition is yet another expansion of DW Fox Tucker's professional capabilities in the property sector and it underpins our relentless search to provide the best support possible for our clients." Joe continued. "The only change our current clients will notice is that their conveyancing work will now take place under the Cleartitle Conveyancing brand, building our scope of services in this space to a level which is, quite simply, unrivalled by most other firms in the state."

Joe explained the decision to keep the Cleartitle Conveyancing name. "We were really impressed with Rod's business model, plus the proven success and flawless reputation which surrounds the Cleartitle Conveyancing brand tells us there's no need to reinvent a wheel that's already running so smoothly."

So if you're in need of first class property settlement services, call the DW Fox Tucker number and ask for "Cleartitle Conveyancing"... our newly combined powerhouse of conveyancing expertise.

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DISSECTING DECISIONS | By Briony Hutchens & Joanne Cliff

Broadening the CGT Relief for Separating Couples

Beware the tax man!

In Family Law, it is not a new concept for separating couples to attract CGT exemption (roll-over relief) when disposing of certain assets to achieve a property settlement. While the transfer of real estate, shares, leases and other assets would normally attract CGT, provided that transfer is to the other spouse, no tax liability will arise.

The requirements for roll-over relief are contained in s126-5 of the Income Tax Assessment Act 1997 (ITAA 97), for individual transferors, and s126-15 of the ITAA 97, for company or trustee transferors. In its simplest form, it requires that there be a transfer or creation of an asset by an individual, company or trustee to the former spouse because of an order, financial agreement or arbitration award made under the Family Law Act 1975.

It has generally been considered that the roll-over was limited to transactions in which the transferee of the asset was the former spouse in their individual capacity. That is, it does not apply where the transfer is to an entity controlled by the former spouse, not to the former spouse themselves. However, the decision in *Sandini Pty. Ltd. & Commissioner of Taxation* decided in March 2017 appears to extend the roll-over relief - or has it? The Commissioner of Taxation appealed the decision which was heard in August. Judgment has not yet been handed down.

The facts of the case can be summarised as follows:

On the 23rd of September 2009 the Family Court ordered, as part of property proceedings between Mr and Ms Ellison, that Sandini Pty. Ltd., as trustee for Karrath Rigging Unit Trust (KRUT), which was wholly controlled by Mr Ellison, transfer 2,150,000 shares in Mineral Resources Ltd. to Ms Ellison.

Following these orders, however, Ms. Ellison provided a written direction to Mr Ellison requiring the shares to be transferred to her family trust. The Commissioner of Taxation later audited Mr Ellison and assessed him for the capital gain made on transferring the shares on the basis that the roll-over did not apply because, in this case, the shares were not transferred personally to Ms. Ellison but to her family trust.

Sandini Pty. Ltd. issued proceedings in the Federal Court of Australia seeking a declaration that it was entitled to roll-over relief. In support of this position, three arguments were raised:

1. Firstly, that the Court order transferred beneficial ownership in the shares to Ms Ellison and, therefore, CGT event A1 happened as a result of the Court order and the requirements of s126-15 of the ITAA 97 were satisfied.
2. Secondly, in the alternative, Ms Ellison is deemed to have received the shares under s103-10 of the ITAA 97 because they were applied for her benefit and at her direction, again



resulting in the satisfaction of the requirements of s126-15.

3. Thirdly, as a further alternative, the requirements of s126-15 of the ITAA 1997 did not require Ms Ellison to be the transferee, but simply required her to be "involved" in the transaction.

In response, the Commissioner argued that roll-over relief did not apply on the basis that:

1. A change in beneficial ownership was not enough to trigger CGT event A1 and, therefore, the making of the Court order did not result in a capital gain arising. Instead, there needed to be a change in both legal and beneficial ownership.
2. Section 103-10 does not operate in the context argued by *Sandini*, but rather is concerned only with capital proceeds.
3. The provisions of s126-15 require the transferee to be the former spouse themselves. A transfer to another entity, even if at the direction of the former spouse, does not, therefore, meet the requirements of the section.

The Court held that Mr Ellison could rely on the marriage breakdown roll-over provisions in respect of the transfer of the shares to the trust.

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Relevantly, they held that:

1. The Court order resulted in beneficial ownership of the shares being vested in Ms Ellison and that this was enough, without a change in legal ownership, to trigger CGT event A1. Accordingly, Sandini triggered a capital gain at that time, which was eligible for roll-over relief under s126-15.
2. Alternatively, s103-10 applied to deem Ms Ellison to have received the shares because they were transferred for her benefit and at her direction, thereby satisfying any requirement of s126-15 that the transfer of the shares be to the former spouse.
3. Finally, even if transfer of beneficial interest was not enough to trigger CGT event A1, the requirements of s126-15 were nevertheless satisfied on the transfer of the shares to the family trust as Ms Ellison was "involved" as a transferee by reason of her giving the direction that the shares be so transferred.

The decision was considered surprising, with many practitioners having differing views as to whether the decision is correct, and it raises a number of interesting issues.

From a tax perspective, the position that CGT event A1 occurred as a result of the Court order passing beneficial ownership of the property to the person named in the order raises the question of whether a second CGT event occurs when the asset is subsequently transferred pursuant to the Court order. If the transfer is made to the same person as is named in the order, then no second CGT event will occur – the transfer will simply be a change in legal ownership with no change in

beneficial ownership and, therefore, will not trigger CGT event A1.¹

However, if the asset is transferred to a different person or entity to that named in the order, as was the case in Sandini, there would, on the face of it, be a second CGT event occurring on the subsequent disposal of the beneficial ownership of the asset from the person named in the order to the person or entity to whom the asset is transferred. As one of the consequences of the roll-over is that the transferee (in this case the person named in the Court order) inherits the transferor's cost base for the asset, this subsequent transfer could result in a significant, and taxable, capital gain being made. The Court did not consider this issue and caution should therefore be exercised before seeking to replicate this arrangement.

Secondly, there is speculation that the Court's decision has significantly expanded the scope of the roll-over relief to allow all transfers of property to a family trust to be exempt. However, this may not in fact be the case. The court's decision that Ms Ellison was "involved" in the transfer seems dependent upon her being named in the Court order as the person to whom the shares were to be transferred. As she was the person entitled to the shares, she was necessarily "involved" when she directed that they be transferred to someone else. If instead of proceeding in this manner the Court order instead simply required that the shares be transferred to her family trust, it would seem, on the Court's reasoning, that she may not be considered to have been sufficiently "involved" for the purposes of s126-15. The wording of the Court order therefore appears very important in the conclusion made by the Court

¹ As it will fall within the exception in s104 -10(2) of the ITAA 97.

and the same conclusion may not be able to be made in all circumstances.

As noted above, the Commissioner has appealed the decision with the decision on appeal expected to be handed down in the coming months. In the meantime, taxpayers should be cautious if considering transferring assets to a family trust or company as part of family court settlement as there remains significant risk of this resulting in potentially substantial tax liabilities.

If you are experiencing a relationship breakdown, talk to us about the tax pitfalls to ensure that orders and documents are correctly drafted so tax relief is achieved.

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NEWS & VIEWS | By Brett Zimmermann

It can be a Crime to not Lodge Your Returns!

Don't let it happen to you.

Another financial year has ended and it is that time of year again when taxpayers start turning their minds to lodgement of income tax returns. For taxpayers that don't have a tax agent, the deadline for lodgement is 31 October. If a tax agent has been appointed, this date may be extended until March or, in some cases, May of the next calendar year.

While lodgement of income tax returns is a necessary evil, it is common for taxpayers, and in particular self-employed persons, to fall behind in their obligations. This can be for many reasons. In some cases, the task of organising all of the relevant records is too daunting. While in others, the everyday duties and responsibilities of running a business, or just dealing with other life events, take priority. Before you know it, taxpayers can easily find themselves behind in their tax obligations.

It is generally understood, appreciated and perhaps even accepted by taxpayer's that a consequence of non-lodgement of their return is the imposition of an interest liability on any tax payable as well as a fixed 'failure to lodge on time' penalty. However, from a legal perspective what taxpayers in our experience fail to fully appreciate is that a failure by a taxpayer when required to give to the tax office an income tax or GST return is a taxation offence, and the tax office can prosecute the taxpayer before the Magistrates or District Court.

Failure to lodge tax returns is a strict liability offence. That is, liability does not depend on actual negligence

or an intent by the taxpayer, and circumstances such as health, wellbeing and other personal circumstances which might have impacted on a taxpayer's ability to lodge their return will not constitute a satisfactory defence. It might, however, mitigate any Court imposed sanction.

In the last six months, we have seen an increasing trend with the tax office heavily targeting taxpayers who have consistently failed to lodge their income tax returns and/or their Business Activity Statements. Further, it is our understanding that the Commissioner is planning to further increase the number of actions in the next calendar year.

There is no statute of limitations for these offences, meaning that the tax office can prosecute taxpayers for non-lodgement of returns going back any number of years. For example, in recent times we have seen the tax office target individuals who have returns outstanding from as far back as 2007.

For individuals, prosecution can mean a maximum penalty available to the Court per offence of \$9,000 and/or 12 months imprisonment.

Further, even if the penalty is reduced by reason of mitigating circumstances, prosecution can result in the taxpayer having a criminal offence recorded against their name. Consequently, this can have a real impact in circumstances where a criminal history check is ever later required for that taxpayer (for example, by a prospective employer, bank or foreign travel official).

That all being said, a custodial sentence and the imposition of the maximum penalty is unlikely if there are bona fide reasons in mitigation of such penalty, and there may indeed be an opportunity to have the offence not recorded against your name.

If you find yourself in a position where you have fallen behind in your tax obligations, the best course of action is to take immediate steps to lodge the relevant returns. If you have received a court attendance notice or correspondence to indicate that the ATO is seeking to prosecute you, it is important for you to seek legal advice and representation.

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INSIGHT | By Mark Minarelli & Russell Jones

So You've Been Appointed as an Executor.....Now What?

After a relative or close friend dies, many people are surprised to find out that they have been appointed as the executor of the estate. Often, the new executor will have had no previous experience in the role or even have a basic understanding of what the role entails.

The information in this article is aimed at providing an introductory background to the role and responsibilities of an executor under a Will.

What is an executor?

In short, an executor is the person nominated under a Will, who is responsible for seeing that the terms of the Will are carried out.

What are my duties as an executor?

It is the executor's role to collect the assets of the deceased, pay the debts and distribute the estate to the beneficiaries under the Will.

While this may sound rather simple on the surface, it can be quite a complex and time consuming process.

As each estate is different, the actions required by the executor will vary. However, as a general guide most executors will be required to perform the following tasks in fulfilling their duties:

1. locate the current, original and signed Will;
2. make the necessary funeral arrangements;
3. arrange for the disposal of the remains of the deceased;
4. apply for the death certificate from the Registrar of Births, Deaths and Marriages;
5. confirm and collect all of the assets of the estate;
6. confirm all of the debts of the estate;
7. apply for a grant of probate (if required);
8. close, sell or transfer any assets as required (such as bank accounts, shares, property, etc);
9. finalise the deceased's taxation affairs (including income tax for the deceased up until the date of death, and any taxation on the sale or transfer of any assets of the estate)
10. pay all of the debts of the estate;
11. distribute the left over assets of the estate to the beneficiaries;
12. keep full and accurate records of all dealings with the estate from the deceased's date of death until the conclusion of the administration; and
13. handle any potential claim for provision made against the estate by aggrieved beneficiaries (or other eligible persons under the Inheritance (*Family Provision*) Act 1972 South Australia) if and when they arise.

In addition to these general tasks, an executor will have a duty to the beneficiaries to administer the estate diligently and in accordance with the provisions of the Will. If an executor does not act diligently, the beneficiaries may complain to the Court. This is the only right of a beneficiary before distribution, as the beneficiary does not own the property until the executor distributes the estate.

Will I get paid for being an executor?

It is not uncommon for the deceased to specifically state in their Will that their executor receive remuneration for the work involved in administering the estate.



If an executor breaches their duties an action can be brought against them in the Supreme Court.

However, while this is a perfectly acceptable practice in the right circumstances, beneficiaries can often become disgruntled very quickly where an executor receives a benefit from the estate.

As the executor is in charge of distributing the assets, they are effectively authorising the payment to themselves. In circumstances where there is little transparency between the executor and beneficiaries during the administration of the estate, the beneficiaries can often become suspicious that the executor is abusing their power and overpaying themselves for their work – and in turn reducing the ultimate benefit the beneficiaries receive from the estate.

It is therefore important that executors tread carefully in these situations, and should always seek professional advice from a lawyer.

What if I want to cease being an executor or do not want to be an executor?

An executor that is named in a person's Will does not have to accept the office of an executor.

The executor can renounce their position and the Will is read without that executor. If a person is appointed as a trustee and an executor then they can renounce both, just the trustee position or just the executor position.

An executor can also renounce their position after they have accepted their office by making an application to the Probate Registry. An executor may withdraw their renunciation at any time before the application for probate is filed with the Probate Registry.

Can I be personally liable?

Yes, an executor can be personally liable if they use the assets of the estate to pay their own liabilities, do not administer the estate according to the Will or breach any trust created by the Will.

An executor may also be liable if they are appointed as a trustee in accordance with the Will, if any beneficiary is dissatisfied with their performance as trustee.

If an executor breaches their duties an action can be brought against them in the Supreme Court.

Why would I want to be an executor?

There are no two ways about it, being an executor is likely to be a laborious, time consuming and stressful task. So why would anybody willingly take on the role?

In most circumstances, an executor will be someone close to the deceased, who they trust to sort out their affairs following their death. As such, there is a certain level of honour attached to the position. However, outside of that there is no overly compelling answer other than the simple fact that someone has to do it.

Regardless, it is very important to have a clear idea of exactly what the role entails before formally accepting the position of executor.

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NEWS & VIEWS | By Sandy Donaldson

Company Contracts

Is the company on the hook?



It is now 16 years since the *Corporations Act 2001 (Cth)* came into force on 1 July 2001. Those of us who can remember will recall that, prior to that, if a company had an important contract or document to sign, there was often a frantic search to locate the company seal to affix to the document. The *Corporations Act* changed all that.

Now a company may have a common seal (section 123), but it is not required to have one and few companies now do have a seal or, if they do, use it.

Section 127

Section 127 of the Act is the section that has led to the substantial demise of the common seal. It provides, in subsection (1) that a company may execute a document, including a deed, without a common seal if a document is signed by:

- two directors of the company; or
- a director and a company secretary of the company; or
- for a proprietary company that has a sole director who is also the sole secretary, that director.

Subsection (2) of section 127 provides that if the company has a common seal it may (but does not have to) execute a document by affixing the seal if it is witnessed by the same individual(s) specified in subsection (1).

The effect of section 127 is that a document signed in accordance with the section is executed by the company itself. The signatories sign as officers of the company, not as agents of the company.

Section 127(4) expressly provides that section 127 does not limit the ways that a company can execute a document, which leaves open the ability of individuals with express or implied authority to sign on behalf of the company.

Relying on assumptions

Notes to section 127 advise that if a document is signed in accordance with the section, a person dealing with the company may rely on assumptions in section 129 (but these assumptions are not limited to execution of documents under section 127).

The entitlement to make assumption arises under section 128.

If assumptions can be made:

- the company cannot deny the assumptions in proceedings (subsection 128(11)); and
- the company and another person who purports to have acquired title to property from the company cannot deny the assumptions (subsection 128(2)).

The assumptions apply even if there is fraud or forgery (subsection 128(3)) but not if the person seeking to rely on them knew or suspected that the assumption is incorrect (subsection 128(4)).



Section 129 assumptions

The assumptions set out in section 129 which affect the execution of contracts or documents are that:

- the company's constitution and applicable replaceable rules have been complied with (subsection 129(1));
- anyone who appears from information obtained from ASIC to be a director or secretary has been appointed and has authority to exercise powers and perform duties customarily exercised or performed by a director or secretary of a similar company (subsection 129(2));
- anyone held out by the company to be an officer or agent of the company has been appointed and has authority to exercise powers and perform duties customarily exercised or performed by that kind of officer or agent of a similar company (subsection 129(3));
- officers and agents properly perform their duties to the company (subsection 129(4));
- a document has been duly executed by the company if it appears to have been signed in accordance with subsection 127(1), or the seal has been affixed under subsection 127(2) (subsections 129(5) and (6)); and

- if the document has been signed by a person with a statement that they are the sole director and sole secretary of the company under subsections 127(1) or (2), they hold both offices (subsections 129(5) and (6)). Perhaps somewhat oddly, this only relates to a sole director and secretary. There is not a presumption in relation to other directors and secretaries.

Contract by agents

As noted above, section 127 does not limit the ways a company can sign a document or enter into a contract. Section 126 provides that a company's powers in relation to contracts "*may be exercised by an individual acting with the company's express or implied authority and on behalf of the company*". This section also provides that it is not necessary to use a common seal.

This reflects the general law of agency. An agent may act on behalf of a principal with authority, which can be actual or implied, or may have ostensible authority to act on behalf of the principal.

Many day-to-day contracts of a company will not be signed under section 127 by directors or secretaries. The assumptions that may be made under sections 128 and 129 make it easier for parties dealing with companies by removing the need to establish actual or ostensible authority.

Customary powers

There are still, however, degrees of uncertainty. The assumptions in relation to due appointment of officers and exercise of powers by directors, secretaries, officers and agents apply where these are "*customarily exercised*" for "*a similar company*". It will be a matter of fact and degree in each case to determine this. A CEO of a company will obviously have more authority than a mere employee. An IT Manager of a company may have customary authority to purchase a computer, but not necessarily an entire new management system. Even a CEO may not have customary authority to contract on behalf of the company in substantial matters such as a contract to sell or transfer substantial assets such as real estate.

Section 127, agent or officer?

A case which illustrates some of the requirements for execution of a contract that is enforceable against a company is ***Knight Frank Australia Pty Ltd v Paly Properties***¹. A contract for purchase of a property for \$1.5 million by a company was signed by only one director of the purchaser company, which had two directors. The director signed in a clause which stated that it was signed under section 127(1), and a note that the director was signing as sole director and shareholder was crossed out. There was an alternate signing clause for a duly authorised officer to sign as agent of the company which was not signed.

The Court held that it was clear that there was more than one director of the company and that, accordingly, the contract was not executed in accordance with section 127(1).

¹ Supreme Court of South Australia [2014] SASCFC 103.

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... a CEO may not have customary authority to contract on behalf of the company in substantial matters such as a contract to sell or transfer substantial assets such as real estate.

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There was no evidence of any actual authority for the director to sign as agent of the company and the contract was not enforceable against the purchaser.

Warranty of authority

The case also raised the issue of warranty of authority. It is a well-established principle that if a person purports to act as an agent for a party, and to have the authority of the party, and this is relied on by another party, the person who purports to act as agent is taken to warrant that there is authority and the purported agent can be liable for damages for breach of the warranty.

In this case, however, as the execution was specifically under subsection 127(1), although deficient under the section, the signature was as an officer, not as agent, and the director signatory was not liable for breach of warranty.

To avoid potential liability for breach of warranty of authority:

- For a director or a secretary signing a document on behalf of a company, it may be prudent to ensure that the document is signed under section 127 and that the requirements of the section are complied with.
- An individual acting as agent should ensure that there is a clear authority to act.

Powers of attorney

A company has the legal capacity and powers of an individual (section 124) and can appoint attorneys. A power of attorney may be useful to avoid any doubt as to authority of the attorney.

An individual acting as agent should ensure that there is a clear authority to act.

Powers of attorney may be general, to do all things the company may do or, more often, limited to specific matters.

A general power of attorney may be required to be made by deed under some State legislation (such as section 5 of the *Powers of Attorney and Agency Act 1984 (South Australia)*) and it is generally advisable that all powers of attorney be a deed.

As the grant of a power of attorney is an act by the company itself, the deed granting the power should be executed by signing under subsection 127(1) or by signing and affixing the seal under section 127(2).

A few practical tips

There are a few practical safeguards that a party looking to enter into a contract with a company, or a company wishing to ensure that a document is validly signed, may observe having regard to the *Corporations Act*:

- Signing under subsection 127(1) (or sealing it under subsection 127(2)) is the safest way to ensure a valid execution, allowing reliance on the assumptions in section 129.
- A signing clause for a company which is intended to take advantage of subsection 127(1) or (2) should state expressly next to the signature of each person signing whether the person is a director and/or secretary, or sole director and secretary.

- As subsections 129(5) and (6) only provide assumptions in relation to a sole director and secretary for the purposes of subsection 127(1) and (2), it may be prudent to search ASIC to confirm the appointments of other directors or secretaries, so as to rely on section 129(2) where a document is signed under subsections 127(1) or (2) by more than one director/ secretary, or for purposes other than section 127.
- If a company has a sole director but no secretary, a company, or any person dealing with the company, will not be able to rely on subsections 127(1) or (2). It may be worth considering the appointment of the sole director as the sole secretary.

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DISSECTING DECISIONS | By Sarah Annicchiarico & Marianna Danby

Succession Law: Tiburzi v Butler¹

What seems grossly unjust at first glance, is often more complicated than we think.

A tale often told, a dear father passes away, leaving to each of his children (a son and a daughter) a sum of money (\$50,000.00) amongst other gifts. In this case other beneficiaries were included in the testamentary wishes of the will. This included his sister, two close friends and the children of one of the close friends. The residue of his estate was also left to his close female, yet not romantically involved, friend rather than to his children.

The difference in this story, however, was that the residue of the estate came to the sum of \$1.4 million.

So how did someone who is not the next of kin of the deceased end up with the "lotto"? Alas, this fortunate friend also happened to be the executor of the estate. Coincidence? With this tone, proceedings were commenced by the deceased's daughter under the *Inheritance (Family Provision) Act 1972* (SA) s 7, seeking an order that further provision be made for her out of her father's estate.

However what unravelled was a history of estrangement for 8 years between the daughter and the deceased, a difficult relationship throughout the time when they did play a substantial role in one another's lives, the vying testamentary wishes of a deceased man and moreover the competing moral claim of a friend who had showed the same love and support as a loving child would.

The daughter was highly educated, had a rich and fulfilling life, with stints of overseas residency and the luxury of being a property owner and a Director with shares in her own Company.

The estrangement was instigated by the daughter on the premise that she was through with the deceased belittling her mother. However at the time of the deceased's death, the prospects of the daughters' company had taken a turn and she was dipping into her superannuation to supplement her living requirements and owned no real property. Her health was also declining and she was having to take a more sedentary role in the business. At this time she had reconnected with the deceased and had been seeing him on a weekly basis.

In the first instance, the daughter received an order that a further \$725,000.00 be paid to her from the residuary of the estate for provision of proper maintenance, education and advancement (which was just over half of the estimated residual amount).

However, this order did not satisfy the daughter who felt that her financial circumstances and the period of estrangement between herself and the deceased was not adequately taken into consideration in the original judgment. The daughter appealed the first decision of the Court.

The appeal was subsequently dismissed, reinstating the award for \$725,000.00 as it was held to be within a reasonable range.

The strained relationship the daughter previously had with the deceased and the rekindling of the relationship only after he was diagnosed with cancer was given due weight but not considered to be a course or a reason to change the original judgment when scrutinised in the Full Court.

The take away messages are:

1. always be nice to your parents; and
2. real friends are as good as family.

If it's too late for this we can show you how to navigate the way forward - where there could be similar issues of testamentary freedom, adult children claims and estrangement, which continue to be contentious issues in relation to the current interpretation of law.

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¹ [2017] SASFC 89 (28 July 2017)

INSIGHT | By Joe DeRuvo, Vasilios Marinos & Jarrad Napier

The Risks of Acting for/as Trustee Companies

The trustee has been quoted to be the 'archetype of a fiduciary'.¹ The trustee and beneficiary relationship is the most traditional fiduciary relationship that exists. As a fiduciary, the trustee undertakes or agrees to act for or on behalf of or in the interests of a beneficiary in the exercise of a power or discretion, which will affect the interests of that beneficiary in a legal or practical sense.²

One of the corporate trustee's most fundamental duties is to ensure that it is aware of the terms of the trust instrument (commonly a deed) creating the trust and of the obligations under the *Trustee Act 1936* (SA). Often when we have acted for a trustee or against a trustee, the trustee has not had a copy of the trust deed, nor were they aware of its terms.

Trustee duties

The trustee must keep the original and stamped copy of the trust deed, including all amendments to that deed. A trustee must also, amongst other things, keep written records of any decisions made about the trust's property and ensure that any distributions made out of the trust are recorded through a resolution of the trust. In the event advice is sought regarding distributions, they must have a copy of the trust instrument to ensure that they are aware of what distributions can be made pursuant to the trust deed.

However, above and beyond the terms of the trust instrument, trustees have a broader duty to maintain documents in relation to the administration of the trust.³ This is where many trustees fail in their duties and is the precursor to an application to remove the trustee.

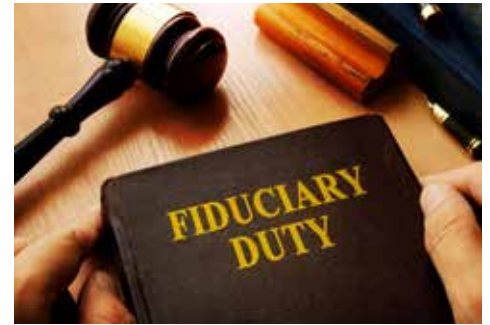
Statutory duty to keep records

Section 84B(1) of the *Trustee Act 1936* (SA) (**the Act**) prescribes generally that:

*"a trustee shall keep such records relating to the administration of the trust property as may be prescribed."*⁴

For the purposes of section 84B, Regulation 5 of the *Trustee Regulations 2011* (SA) (**the Regulations**) provides an extensive and onerous list of what records a trustee must keep with respect to the administration of the trust property. This list includes keeping (amongst other things):

- each document authorising the trustee to act as trustee;
 - all letters sent and received by the trustee;
 - a copy of each statutory declaration and each affidavit made in the course of the administration of the trust;
 - each deed, agreement or other instrument varying distribution of the trust property or a stamped duplicate of any such deed, agreement or instrument;
- all returns made as to any form of duty, charge or tax imposed on the trust by the Commonwealth or any State or Territory of the Commonwealth;
 - all written instructions for the sale or transfer of any trust property or any asset which forms or formed part of the trust property and any independent valuations obtained in relation to those assets;
 - all minutes of the proceedings of all meetings relating to administration of the trust at which the trustee was or was entitled to be present;
 - a record of any insurance cover in respect of the assets which form or formed part of the trust property;
 - a record of all reviews of investments;
 - other records that would enable the receipt and disposition of trust property to be conveniently and properly audited, including the following:
 - a register of securities received and disposed of;
 - a property register;
 - a register of all investments of income and capital funds;
 - a cash receipt book recording;



¹ *Maguire v Makaronis* (1997) 188 CLR 449 at 463, quoting *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 68 (Gibbs CJ).
² *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96-7 (Mason J).

³ *Trustee Act 1936* (SA) s 84B.

⁴ *Trustee Act 1936* (SA) s 84B(1).

Beneficiaries have a right of access to documents that are kept by the trustee ...

- o a cash payments book;
- o each ADI statement and passbook issued in relation to trust ADI accounts;
- o trust statements, prepared not less than annually; and
- importantly, all financial documents.

You must know who is doing what

A trustee ought to clarify with its legal and financial advisers who is responsible for maintaining each document because pursuant to section 17 of the Act, a trustee may delegate its duties and powers to any person in South Australia.⁵ However, it is the trustee's ultimate duty to ensure all of those documents set out in Regulation 5 of the Regulations are maintained.

Why is this important?

Beneficiaries have a right of access to documents that are kept by the trustee and may examine and make copies of those records.⁶ In circumstances that a beneficiary does exercise its rights to examine the records of the trust and there are either no records being kept or those records that are being maintained amount to misconduct, a beneficiary may apply to the Court to appoint an inspector. An inspector is appointed to investigate the administration of the trust.⁷

In the event that an inspector is appointed, he/she has broad powers that enable him/her to investigate and demand information relevant to the administration of the trust from any person.⁸

In *Oxer v Astec Paints Australia Pty Ltd* [2005] SASC 192, Oxer sought, amongst other things, an order that the Court appoint an inspector to investigate the administration of the Unit Trust due to allegations that the director of the Defendant had not acted impartially between the unit holders. The Court said that the appointment of an inspector under section 84C of the Act to investigate the affairs of the trust will be expeditious and economical to achieving the objective of obtaining information and documents necessary to see whether there is a proper basis for some claim for substantive relief against a trustee.⁹

Conclusion

In light of the above, it is important that:

1. The original of the trust instrument and its variations are maintained by the trustee and copies are provided to its legal and financial advisers.
2. The trustee is aware of the records that must be kept.
3. The trustee instructs his/her legal and financial advisers of which documents they must maintain.

In circumstances where trustees have been asked to provide documents pursuant to section 84B of the Act, there are some documents that do not need to be provided to beneficiaries as they may be confidential.

It is recommended that a trustee and/or beneficiary seeks legal advice in relation to any request or application that is made regarding the inspection of records relating to the trust to avoid a possible application by the beneficiaries to remove you as trustee.

TO LEARN MORE PLEASE ENQUIRE ABOUT OUR TRUST PRESENTATIONS.

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⁵ As long as the trust instrument permits the delegation.

⁶ *Trustee Act 1936* (SA) s 84B(2).

⁷ *Trustee Act 1936* (SA) s 84C.

⁸ *Trustee Act 1936* (SA) ss 84D-84E.

⁹ *Oxer v Astec Paints Australia Pty Ltd* [2005] SASC 192 at [10].

DISSECTING DECISIONS | By Sandy Donaldson & Russell Jones

Copyright Infringement

The imitation game: the perils of copying a developer's code.

How much pre-existing source code can a software or firmware developer use before their new work is deemed to infringe copyright? A recent decision by the Federal Court tackles this very question.

Introduction

Using pre-existing code that performs similar or identical functions can be a big time saver for developers and an even bigger cost saver for their employers.

However, as outlined by the Federal Court in *IPC Global Pty Ltd v Pavetest Pty Ltd (No 3)* [2017] FCA 82, even copying a small amount of code without authority from the owner can lead to significant financial and legal consequences.

Background

IPC Global Pty Ltd ("**IPC Global**") develops equipment for testing materials such as asphalt and other construction supplies. The equipment includes custom programming to enable the user to test the materials and view the results.

In 2012, two high ranking employees of IPC Global resigned and established a rival company, Pavetest Pty Ltd ("**Pavetest**"). Pavetest immediately began producing a range of testing equipment which directly competed with IPC Global.

One of the resigning employees had been involved in the creation of the testing software at IPC Global, and was still in possession of a copy of the software at the time of their resignation.

The employee provided a copy of the software to a programmer engaged by Pavetest. The employee claimed this was to provide the programmer with some background in relation to the application of the software in order to develop a different and better system for Pavetest.

When creating the new Pavetest software, the programmer referred to IPC Global's software in writing a first version of Pavetest's software.

It was found that the Pavetest software contained some identical and some similar lines of code to IPC Global's software.

Claim against Pavetest

IPC Global brought an action against Pavetest, alleging that:

1. Pavetest had infringed IPC Global's copyright in the source code of the software;

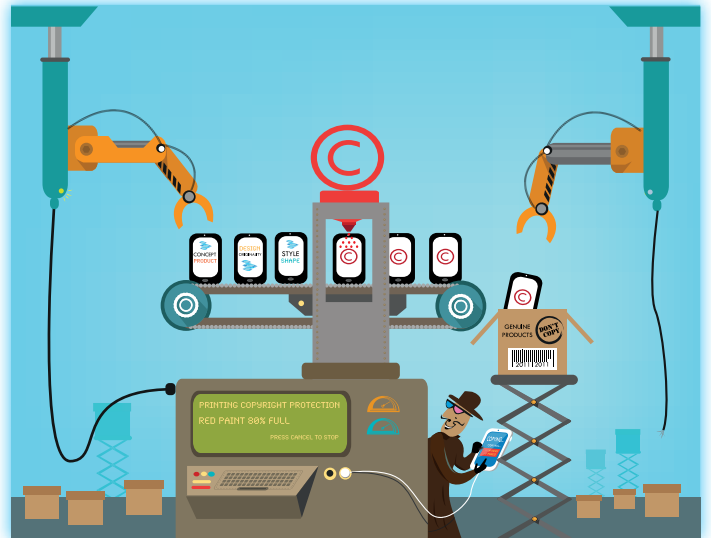
2. The two employees had authorised the infringement;
3. Both employees had breached duties of confidence towards IPC Global; and
4. The two employees had breached contractual duties of good faith and fidelity owed to IPC Global.

In order to be successful in their claim for infringement of copyright, IPC Global had to establish that Pavetest had reproduced a '**substantial part**' of the copyright work (i.e. the IPC Global software source code) in the Pavetest software source code.

Pavetest argued that the software copied was "common code", and supporting infrastructure for the software as opposed to forming a key part of the functionality and operation of the software.

It was also established on evidence that only approximately 800 lines of Pavetest's source code were identical to the IPC Global source code, which contained approximately 250,000 lines of code in total.

... care that must be taken ... to ensure that they do not rely too much on existing code when developing their own programs...



Findings

The Federal Court found that:

- Pavetest infringed IPC Global's copyright in the software by the act of the former employee copying the software and providing it to the programmer.
- The former employees were liable as they authorised this infringement by Pavetest.
- Pavetest infringed IPC Global's copyright in the software by reproducing a '*substantial part*' of IPC Global's software as, although the amount of source code copied was relatively quite small, the parts of the software that were copied constituted a functionally significant part of the software as they related to the interface or communication between the software and firmware.
- The two employees breached duties of confidence towards IPC Global relating to the software. The software was found to be confidential, and the employees misused the information by disclosing it to the programmer.

Orders

The Federal Court ordered that:

- Pavetest be permanently restrained from offering to sell the versions of the infringing software;
- the employees be permanently restrained from offering to sell the infringing software;
- Pavetest destroy the copies of the infringing software;
- an inquiry be held to quantify the damages (including any additional damages) or, at IPC Global's election, to take an account of profits; and
- Pavetest and the individuals pay IPC Global's costs of and incidental to the proceeding.

Takeaways

This case emphasises the care that must be taken by firmware and software developers to ensure that they do not rely too much on existing code when developing their own programs unless they have obtained all the relevant licences.

Even copying only a small proportion of an existing code can have significant consequences if that source code constitutes a functionally significant part of the software.

The findings in this case can be relevant for copying of other forms of copyright works. It is often an issue as to whether a "*substantial part*" of a work has been copied in

cases relating to many artistic works (such as building plans), literary works or musical works (see for example the well-known case of *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd [2010] FCA 29* where Australian band Men at Work were found to have copied the riff from popular children's song "Kookaburra sits in the Old Gum Tree" and reproduced it in their famous song "Down Under").

The lesson to be learnt is that it is not merely the amount of a part of a work that is copied, but the importance of the part to the work as a whole that may make it "substantial". It is quality, not quantity, that counts.

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NEWS & VIEWS | By Briony Hutchens & Linda Scalzi

2017-18 State Budget Changes for Acquisitions of Property in South Australia



The 2017-18 South Australian State Budget, handed down on 22 June 2017, contained a number of changes that have implications for persons acquiring property in South Australia.

Relevant changes are summarised as follows:

Measure	Commencement Date
The off-the-plan stamp duty concession will be extended until 30 June 2018 but will be re-targeted so that it no longer applies to foreign purchasers	22 June 2017
A \$10,000 grant will be provided to eligible off-the-plan apartment purchases where the contract is entered into between 22 June 2017 and 30 September 2017	22 June 2017
A five year land tax exemption will apply to eligible apartments bought off-the-plan where the contract is entered into between 22 June 2017 and 30 June 2018	Midnight 30 June 2017
A stamp duty surcharge of 4% will apply to foreign purchasers of South Australia residential property	1 January 2018

Off-the-plan stamp duty concession

The off-the-plan stamp duty concession has been extended for a further 12 months to 30 June 2018.

However, foreign persons who enter into a contract on or after 22 June 2017 are no longer eligible for the concession.

The off-the-plan stamp duty concession was introduced in 2012 and currently provides a partial stamp duty concession on a transfer of new or substantially refurbished apartments located anywhere in South Australia pursuant to contracts entered into between 1 July 2014 and 30 June 2018. The concession applies to anyone, regardless of whether they are a first home owner, and is available in addition to the first home owners grant.

Pre-construction grant

In addition to the off-the-plan stamp duty concession, purchasers that entered into an eligible off-the-plan apartment contract between 22 June 2017 and 30 September 2017 may be eligible to receive a \$10,000 grant, provided the contract was entered into before construction of the apartment complex commences. This grant is not available to foreign purchasers.

Five year land tax exemption for eligible apartments bought off-the-plan

A land tax exemption has been introduced for apartments that are purchased off-the-plan where the contract for purchase is entered into between 22 June 2017 and 30 June 2018. The exemption applies for the first five financial years after purchase but will cease to apply if the apartment is sold before the end of this period. The exemption does not apply to foreign purchasers.

The eligibility criteria for the exemption are the same as those that apply to the off-the-plan stamp duty concession.

Stamp duty surcharge for foreign purchasers of South Australian residential property

One of the most significant announcements in the 2017/18 South Australian State Budget was the introduction of a surcharge on stamp duty for foreign purchasers. Following in the footsteps of the eastern states, dutiable instruments entered into on or after 1 January 2018 pursuant to which a foreign purchaser acquires residential property, or an interest in residential property, in South Australia will be charged with a 4% surcharge in addition to the duty that is otherwise payable on the instrument. The amount of the surcharge is 4% of the value of the interest acquired by the foreign person. The surcharge applies to both acquisitions of direct interests as well as acquisitions of indirect interests (through the land holder provisions), however does not apply if the acquisition is otherwise exempt from duty.

Foreign person includes individuals, corporations and trustees of foreign trusts. A foreign natural person is any individual who is not an Australian citizen, Australian permanent resident or New Zealand citizen who holds a special category visa.

A corporation will be foreign where it is incorporated outside Australia or where foreign persons, companies or trusts hold, or hold between them, 50% or more of the shares in the corporation or are entitled to cast, or control the casting of, 50% or more of the maximum number of votes at a general meeting of the corporation.

A trust will be a foreign trust where, if the trust is a fixed trust, one or more foreign persons hold 50% or more of the beneficial interests in the capital of the trust, or if the trust is a discretionary trust, any of the trustees, a person who has the power to appoint under the trust, an identified object under the trust or a person who takes capital of the trust property in default is a foreign person. While not clear from the draft legislation, in practice it is expected that "a person who has the power to appoint under the trust" will be limited to persons who have the power to appoint a new trustee of the trust, and that an identified object under the trust will be limited to persons specifically named in the trust deed.

The provisions only apply to residential land. The definition of residential land includes not only land being used for residential purposes, but can also include land that has improvements of a residential character, even if not being used for residential purposes at the relevant time, and even vacant land if the land is zoned for a residential purpose.

A refund of the surcharge will be available where the foreign person or trust ceases to be a foreign person or trust as defined within 12 months after acquiring the interest in the residential property, provided they still hold the interest in the property at the time that they cease to be a foreign person or foreign trust.

Conversely, the surcharge will be retrospectively imposed where a person or trust becomes a foreign person or trust within three years of the acquisition of the interest in the residential property, provided the person or trust still holds the interest in the property at that time.

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INSIGHT | By Vasilios Marinos & Jarrad Napier

Oppression Claims by Minority Shareholders

Have you or are you being oppressed?

Companies are, more often than not, controlled by a single shareholder or a group of shareholders. Those shareholders who hold the majority of shares are able to elect directors of their choosing and also control the company's activities. Therefore, the shareholders who hold a minority of the votes, may have little, if any, control and/or influence over the direction and development of a company.

As a result, the courts and Parliament have identified this as an issue and sought to provide protection to minority shareholders and by virtue of enacting section 232 of the *Corporations Act 2001* (Cth) (the Act), members (which includes shareholders) are able to seek numerous remedies under section 233 of the Act. This article will examine the processes and identify the issues for members who may be subject to oppressive conduct and their recourse where oppressive conduct is made out.

Who can bring an oppression claim?

Section 234 of the Act sets out who may apply for an order under section 232 of the Act. Those people are:

- a member of the company, even in circumstances where the application relates to an act or omission that is against the member, it may also relate to an act or omission that lies against another member in their capacity

as a member¹;

- a person who has been removed from the register of members because of a selective reduction²;
- a person who has ceased to be a member of the company, if the application relates to the circumstance in which they ceased to be a member³;
- a person to whom a share in the company has been transmitted by will or by operation of law⁴;
- a person whom ASIC thinks is appropriate, having regard to investigations it is conducting or has conducted into the company's affairs or matters connected with the company's affairs.⁵

There is authority which suggests that a member must be registered in order to apply under section 232 of the Act for an order. However, this issue is still unclear and must be assessed in relation to the matters of the individual case. For example, in *Niord Pty Ltd v Adelaide Petroleum NL* (1990) 54 SASR 87 a purchaser of shares was not registered as a member before it initiated proceedings (under the predecessor of section 232 of the CA) and it



was found that a transferee under a contract for the sale of shares in a company should not generally be treated as a member before the contract is completed and prior to the purchaser's name being recorded on the share register as the holder of the shares.⁶

In circumstances where a member's name has been removed from the register, remedies under section 232 of the Act are also available for those members.⁷

What requirements must a Court consider to make an order for oppression?

In order for a members' oppression claim to succeed, it must be proven that the company's affairs were conducted in a manner that was in all the circumstances oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members.⁸ However, something more than just a dissatisfied shareholder is required to establish a claim under section 232 of the Act. Oppression connotes a lack of

¹ *Corporations Act 2001* (Cth) s 234(a).

² *Corporations Act 2001* (Cth) s 234(b).

³ *Corporations Act 2001* (Cth) s 234(c).

⁴ *Corporations Act 2001* (Cth) s 234(d).

⁵ *Corporations Act 2001* (Cth) s 234(e).

⁶ See also *Re Treadtel International Pty Ltd (No 2)* [2016] NSWSC 791, cf *Re Independent Quarries Pty Ltd* (1994) 12 ACLC 159.

⁷ If members are removed from the register, the unregistered member must seek a correction of the share register under section 175 of the CA prior to seeking an order under section 232 of the CA.

⁸ *Corporations Act 2001* (Cth) s 232.

Minority shareholders should not remain idle to actions of the majority shareholders, in numerous circumstances where the majority shareholders may be acting unfairly or oppressively.

probity and fair dealing.⁹ It needs to be somewhat '*burdensome, harsh and wrongful*'.¹⁰ Yet a claim need not demonstrate that the conduct was illegal.¹¹

The conduct complained of must be in relation to the affairs of the company, which includes, amongst other things¹²:

- the promotion, formation, membership, control, business, trading, transactions and dealings, property, liabilities, profits and other income, receipts, losses, outgoings and expenditure; and
- internal management and proceedings of the body.

Therefore, when determining what is oppressive or unfair, the Courts will look to the interests of the majority and minority shareholders and in particular identify the company's background and the reasonable expectations of its shareholders.¹³ This is somewhat a balancing exercise undertaken by the Courts.

Oppressive or unfair conduct

Some examples that have triggered minority protection remedies include:

- excluding a minority shareholder from involvement in the affairs of the company;¹⁴

- denial of information; and/or¹⁵
- the diversion of a legitimate corporate opportunity to themselves or associates.¹⁶

In *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* [2007] NSWSC 153, the Lagerlow family owned 60% of the shares and the Bradfield family owned the remaining 40% of the shares in a company that both families controlled. There were three directors of the company, two (2) of whom were of the Lagerlow family and the other of the Bradfield family. The Bradfield family's director had resigned and the Bradfield shareholders (the minority shareholding group) made an application pursuant to section 232 of the Act making the allegations that the Bradfield director was forced to resign and was not included in the management of the company.

In this matter, the Court found that the allegations under section 232 of the Act have been made out and that the exclusion from the management of the company is an example of oppressive or unfair conduct. It also acknowledged that the company operated as a quasi-partnership between the two families. Therefore, where a company is a quasi-partnership, it may be oppressive or unfair to exclude one of the investors (such as the Bradfield director) from the day-to-day management of the company's affairs.

Remedies

In circumstances where oppressive or unfair conduct can be established, then the Court, in exercising its discretion, may grant a remedy appropriate to the circumstances pursuant to section 233 of the Act. The objects of section 233 of the Act are to compensate the injured party or parties and, of course, bring the conduct that is causing the oppression or unfair conduct to an end.¹⁷ Some examples of the orders that may be appropriate for a court to make are as follows (see section 233 of the Act generally for a list of remedies):

- the company be wound up¹⁸;
- the constitution of the company be modified or repealed¹⁹;
- the purchase of shares of any member by other members or a person to whom a share has been transmitted by Will or by operation of law²⁰; or
- appointing a receiver or a receiver and manager.²¹

It is accepted that the most common remedy a plaintiff will seek is an order that either the company or a member (generally the majority shareholders) buy the oppressed members' shares. Whilst this remedy is most common, the Courts often are met with arguments as to what

9 *Scottish Co-operative Wholesale Soc Ltd v Meyer* [1959] AC 324 at 364.

10 *Ibid* at 342.

11 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304.

12 *Corporations Act 2001* (Cth) s 53.

13 *Wayde v NSW Rugby League Ltd* (1985) 180 CLR 459.

14 *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97.

15 *Re Back 2 Bay 6 Pty Ltd* (1994) 12 ACSR 614; *Shum Yip Properties Development Ltd v Chatswood Investment and Development Co Pty Ltd* [2002] NSWSC 13.

16 *Re Bright Pine Mills Pty Ltd* [1969] VR 1002; *Scottish Co-operative Wholesale Soc Ltd v Meyer* [1959] AC 324.

17 *Re Hollen Australia Pty Ltd* [2009] VSCC 95.

18 *Corporations Act 2001* (Cth) s 233(1)(a).

19 *Corporations Act 2001* (Cth) s 233(1)(b).

20 *Corporations Act 2001* (Cth) s 233(1)(d).

21 *Corporations Act 2001* (Cth) s 233(1)(h).

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value is to be ascribed to the shares and/or how the value of the shares will be determined. It is accepted that the Court has a wide discretion in making this determination.

In some circumstances, the Court has ordered that the majority shareholders are to purchase the shares at a price that would be reflective of the value of the shares in the event that the oppressive conduct had not occurred.²²

The case law regarding the valuation of shares in the context of a 'buy-out order' makes it clear that the usual date at which the valuation should be made is the date of the buy-out order. That is, the present day, and not the date that the alleged oppression began.

In *Profinance Trust SA v Gladstone* [2002] 1 BCLC 141, the Court held:

"... The starting point should in our view be the general proposition stated by Nourse J in In re London School of Electronics Ltd [1986] Ch 211, 224: 'Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased.' That is, as Nourse J said, subject to the overriding requirement that the valuation should be fair on the facts of the particular case.

The general trend of authority over the last 15 years appears to us to support that as the starting point, while recognising that there are many cases in which fairness (to one side or the other)

requires the Court to take another date. ..." (emphasis added).

In *Dynasty Pty Ltd v Coombs* (1995) 59 FCR 122, the Full Court of the Federal Court approved of the statement of Justice Nourse in *Re London School of Electronics Ltd* [1985] 3 WLR 474 at 484, and held that, if there were such a thing as a general rule, it should be the date of the order rather than the date of presentation of the petition or the occurrence of the acts of oppression. That statement was subsequently followed by Justice Young of the NSW Supreme Court in *Short v Crawley (No 30)* [2007] NSWSC 1322.

The Court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out.²³

Only in special circumstances should an earlier date, such as the date that the alleged oppression began, be used.

As foreshadowed above, the Courts will be reluctant to order the winding up of a company, particularly one that is solvent. However, there have been circumstances where the Court has ordered the winding up of a company. In particular in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 the High Court of Australia found that it would be inappropriate to make an order for the buy-out of shares when the company is already in provisional liquidation and, therefore, no other order aside from the winding up of the company would be appropriate.

Conclusion

Minority shareholders should not remain idle to actions of the majority shareholders, in numerous circumstances where the majority shareholders may be acting unfairly or oppressively. The minority shareholders should take steps to ensure that the company is operated appropriately and that the interests of the minority shareholders (which are just as important) are protected at all times.

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²² *Scottish Co-operative Wholesale Soc Ltd v Meyer* [1959] AC 324.

²³ *In re Elgindata Ltd* [1991] BCLC 959.

NEWS & VIEWS | By Ben Duggan & Jonathan Ikonomopoulos

Weatherill State Government to Regulate Labour Hire



Background

The Weatherill State Government has followed Queensland's lead in seeking to regulate the labour hire industry.

On 10 August 2017, the State Government introduced the *Labour Hire Licensing Bill 2017* (SA) ("**Bill**").

The stated objects of the Bill are to:

- Protect workers from exploitation by providers of labour hire services.
- Protect licensed labour hire businesses from predatory business practices that may be engaged in by persons unsuitable to be licensed to provide labour hire services.
- Promote the integrity of the labour hire industry.

South Australian Attorney General the, Hon. John Rau, in his Second

Reading Speech before the House of Assembly, explained that the Bill was announced in response to an *ABC Four Corners* report titled '*Slaving Away*', that focused on the alleged exploitation of migrant workers which aired during 2015.

The primary "*objective*" of the Bill is to protect vulnerable workers.

In practice the primary objective is achieved through the establishment of a regulatory scheme whereby persons who provide a labour hire service will be lawfully required to obtain a licence.

A labour hire service provider and those who engage workers through an unlicensed provider will be liable for a pecuniary penalty under the newly proposed Bill.

Scope of the Bill

A clear disconnect exists between the noble primary objective to protect vulnerable workers and the

practical operation of the proposed regulatory licensing scheme under the Bill.

The reason for the disconnect is the ambit of the Bill which because of the scope of section 6 is so broad that in its current form it would establish a regulatory licensing scheme that applies to all South Australian industries that operate to provide varying levels of skilled labour, rather than only targeting those who are exploiting vulnerable workers.

Section 6 of the Bill defines a person as providing labour hire services if, in the course of carrying on a business, they supply to another business a worker to perform work who is then subject to the proposed regulatory licensing scheme.

All legitimate traditional labour hire operators who are subject to existing Federal and State workplace laws and other laws would be required to be licensed under the Bill.

continued overleaf...

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Critics of the Bill have also made the point that the broad nature of the scope of section 6 will mean that the proposed regulatory licensing scheme applies beyond traditional labour hire operators to those who supply labour as an incidental part of their business, such as accountants and lawyers who regularly provide in-house support to their clients.

The Labor Government has not provided a proper justification for the encroachment of a new regulatory licensing scheme beyond traditional labour hire.

Licensing Scheme

A person who is covered by the scope of the proposed regulatory scheme will be required to apply for a licence with the State regulator, who will be the Commissioner for Consumer Affairs.

The licence will be granted subject to the applicant and the responsible person¹ satisfying a “**fit and proper person test**” that includes consideration of their reputation, honesty and integrity and that the applicant has sufficient financial resources for the purpose of carrying on business under the licence.

In the case of the applicant being a company, it must satisfy the fit and proper person test as well as all current directors of the company.

The Commissioner, must in granting a licence, specify the number of responsible persons for the licence.

A ‘person’² who is granted a licence is required to:

1. pay an annual fee to the Commissioner; and
2. lodge an annual report that contains the reporting information as prescribed by the Bill with the Commissioner.

¹ who following the model of earlier State safety laws shall be the person required to ensure compliance of the licence holder with the obligations under the proposed Bill.

² which is defined to include a company.

The proposed prescribed information that must be contained in an annual report includes the following:

- The full name and contact details of the holder of the licence.
- The business name, ABN and address, of the business that is the subject of the licence.
- Full name and contact details of each of the responsible Persons for the licence.
- The number of workers supplied by the holder of the licence to another person during the reporting period.
- A description of the arrangements entered into between the holder of the licence and the relevant workers.
- Details of the industry in which the work was carried out by the relevant workers.
- If the holder of the licence provided accommodation to the relevant workers in connection with the provision of the labour hire services:
 - o the address of the accommodation;
 - o whether the relevant workers paid a fee for accommodation; and
 - o the number of relevant workers that use the accommodation.
- If the holder of the licence is aware that accommodation was provided by another person to the relevant workers to the best of the knowledge of the holder of the licence:
 - o who provided the accommodation;
 - o the address of the accommodation;



- o whether the relevant workers paid a fee for accommodation; and
- o the number of relevant workers that use the accommodation.
- Whether any other services were provided to the relevant workers by the holder of the licence, or to the best of the knowledge of the holder, of the licence, by a person to whom the relevant worker was supplied.
- Information about compliance with relevant laws for the reporting period by the holder of the licence.
- Disclosure of any disciplinary action taken against or started against the holder of the licence by a regulatory body under relevant law during the relevant reporting period.
- To the best of the knowledge of the holder of the licence the number of notifiable instances involving a relevant worker notified under section 38 of the *Work Health and Safety Act* 2012 during the reporting period.
- To the best the knowledge of the holder of the licence the number of applications for compensation made by relevant workers under the *Return to Work Act* 2014 during the reporting period.
- Other information prescribed by the regulations to the proposed Bill.

We expect that for many in the labour hire industry who are not used to preparing annual reports, the preparation of an annual report which contains all of this information (as well as other information prescribed by the regulations) will be an onerous task.

Other requirements under the Bill include the need for the licence holder to advise of changes in its circumstances and comply with requests for information from an authorised officer appointed by the Commissioner.

Penalties under the Bill follow the trend of significant penalties under State safety laws such that they have caught the undivided attention of South Australian recruitment and staffing organisations (and their clientele), who may be potentially at risk of significant

penalties for non-compliance with obligations as follows:

- A maximum of \$140,000.00 (or imprisonment for 5 years) for a *natural person* and
- A maximum of \$400,000.00 for a body corporate.

Future of the Bill

The Labor Government is awaiting the outcome of the deliberations of the proposed Bill in the Legislative Council, having used its superior numbers to ensure its successful passage through the House of Assembly.

We will keep you informed of the passage of this important Bill.

In the meantime, if you wish to discuss the Bill, including whether its scope means that it could apply to you or other concerns that you have about the Bill, please do not hesitate to contact us.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:



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SUITS OFF | Staff Profile

A Friend of the Family

Joanne Cliff Director



There are always two sides to a story... and being a good listener has always been one of Joanne's strongest skills.

As a new member of the team at DW Fox Tucker, Joanne Cliff brings not only her expertise in commercial and civil litigation, but also her extensive experience in Family Law.

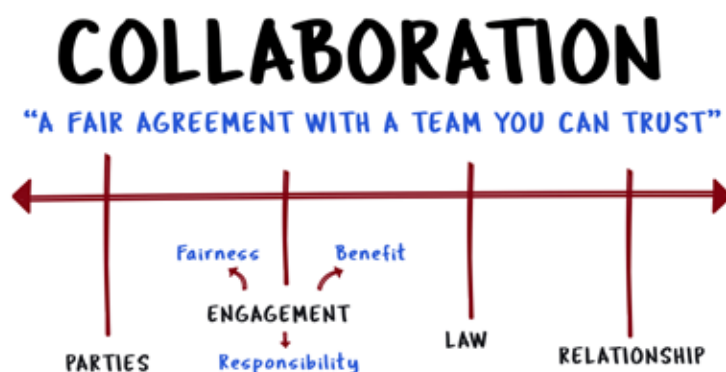
As a former partner at Mouldens, a highly respected and officially one of the oldest firms in the State, the new partnership enables DW Fox Tucker to offer Family Law services for the first time.

"Practicing Family Law has improved my communication skills and made me more patient, because the man or woman in the street does not have the understanding of how the legal system works, so it is vital to ensure I explain both the law and process to them."

Joanne says Family Law is about much more than being a lawyer. "There is no doubt that the scenarios in Family Law cases mean that the practice of law is never dry. Each case is different, with personalities of the parties being a big factor. When I'm acting for big companies and government, I am a lawyer. With Family Law I could also be a psychiatrist, social worker and accountant, too."

Often other factors like domestic violence come into play, and as a member of the Family Law Section of the Law Council of Australia, Joanne is behind reforms to protect the vulnerable.

"Those areas are in the spotlight and will remain there for some time, as there are proposed reforms



Plus, her litigation skills are becoming a real asset in the Family Law arena.

"You have to be prepared for conflict as many parties cannot even agree on what day of the week it is, but the skill is to assist the client to find a way forward so resolution can be reached."

In fact, with her Family Law clients, Joanne has gone that extra mile – after all, it's everyday people, families and children that are affected.

in the pipeline to do away with cross examination of a spouse by a former abusive spouse who is not legally represented."

Apart from being a good listener, Joanne prides herself on being efficient.

"Efficiency means less cost for the client and listening skills in Family Law are important to gain a complete understanding of the client's life."



In Joanne's spare time she's either reading to improve her skills or unwinding with yoga – it gives her a different perspective and balance in her life.

As an avid reader she has gained great knowledge, expanding her negotiating skills and strategies. Joanne recommends two insightful books, "Getting to Yes" and "Getting Past No", and has herself penned an article on Negotiated Settlement via collaborative law, which you can read on our website at <https://www.dwfoxtucker.com.au/2017/07/collaborative-law/>.

On the future of Family Law, Joanne says, "As the Family Law courts are clogged with more and more cases causing significant delays, it is only a matter of time before we have to seriously consider using more mediation, collaborative practice and arbitration to resolve cases promptly. These are alternatives to the traditional court system and will become an accepted part of the process in the near future."

As her future with DW Fox Tucker unfolds, Joanne can already see the benefits of the new partnership.

"Working in a large firm with many other lawyers is stimulating and allows me to draw on expertise from other areas, such as tax and property law, which helps me provide an integrated service to my clients."

A cracking multi-talented lawyer, committed to good causes, service excellence and caring for families in need... we're delighted to welcome her to the fold!



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