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2020

Summer Report

Issue 14

Progressive. Diverse. Agile. Collaborative.

inside this issue

PAGE 2 | Client Profile Eldercare

PAGE 5 | The Covid-19 Outbreak and Contract Relief in the Form of Force Majeure

PAGE 7 | The Issue of Capacity

PAGE 9 | Land Tax Reform – What Does it all Mean?

PAGE 12 | Who owns Intellectual Property? Employer or Employee

PAGE 16 | "Confidential" Means Confidential

PAGE 18 | On the Hook: Directors in the Tax Firing Line

PAGE 20 | The Long Reach of Spousal Maintenance

PAGE 21 | Modern Issues in Business Succession Planning

PAGE 24 | Residence Issues for Trust Estates with Foreign Corporate Trustees

PAGE 28 | Suits Off Staff Profile: John Walsh, Director

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CLIENT PROFILE

In Aged Care, High Profile Scrutiny Means Staying Ahead of the Game is a Must.

Progressive. Diverse. Agile. Collaborative. These are not normally the buzzwords you would expect to hear said about any aged care provider, let alone an old-school operator with religious roots and an organisational ancestry tracing back to the 1950s. But as Eldercare's CE, Jane Pickering, tells us, embracing such leading-edge ways of doing things is the only route to the right culture for truly best practice aged care.

There are certainly lots of topical subjects to talk about in aged care, at a time when there is high profile scrutiny across the sector, including numerous news stories involving hidden TV cameras and an ongoing Royal Commission. How does a leader in the field like Eldercare keep on top of these almost daily developments?

"Well, we have to be incredibly agile", explains Jane, *"which to start with means keeping a very, very close eye on what's going on in and around the sector. We have a multi-layered approach to information gathering and monitoring, with people scanning all major and local news networks, including all social media platforms. We also subscribe to a plethora of industry related publications, newsletters and alerts, including a legislation monitoring system which notifies us the moment any legislation around aged care is changed, so we can immediately assess the impact. And yes, we have a detailed daily update from the Royal Commission."*

"Of course, much more important than the information itself," adds Jane, with fervour, *"is what we do with it. How we react. Using this information to ensure we adapt and improve. So, we are constantly testing and enhancing new ideas, engaging focus groups and practical research to ensure we stay ahead of the game, with a model of care that is fit for purpose to serve our dearly valued consumers with leading-edge best practice, long into the future. Future-proofing what we do and how we do it is by far the biggest challenge we face."*

Eldercare
peace of mind

In the news: Exceptional achievements set Eldercare apart in aged care.

You don't have to dig very deep into Eldercare's history to find bright shining examples of progressive ideas from an innovator in its space. Just look

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at their news feed from the last few months.

Eldercare given ‘tick of approval’ for LGBTI inclusive practice

“We’re very, very proud of this achievement,” says Jane with a beaming smile. *“It’s a very exclusive club, and we are the only residential aged care provider in South Australia to be a member of it. But as much as I love the notoriety, I really do wish more organisations in our sector made more effort in this direction. Inclusivity is key in best practice aged care.”*

Australian Government’s Aged Care Quality Standards & Charter of Aged Care Rights

To spotlight how Eldercare works so well within this framework, Jane points us towards a testimonial from Mavis Smith, a proud resident and the Social Club President at Eldercare’s Seaford facility:

“The managers are good at keeping us informed and involved. We had a visit from a manager at Eldercare’s head office last week to talk to us about continuous improvement. She asked if we’d seen the Charter of Rights and whether we understood the new Aged Care Quality Standards.

“We then had a residents’ meeting about them. Some people are reluctant to say things, but the Charter of Rights stresses that they must feel free to do so. So as a resident, I can encourage other residents to say whatever they like. I can then take their feedback to management who can make the necessary changes.”

$15,000 donation to domestic violence good cause

A $15k donation is just the start of Eldercare’s dedication to good causes. As Jane explains, in this organisation charity really does begin at home.

“Supporting any of our staff who have been victims of domestic violence, and doing whatever we can to prevent it in the first place, is incredibly important to us, both as an organisation and as a collection of individuals. So it’s no surprise we chose a prominent domestic violence charity to receive the bounty of this fundraising effort - through activities supporting one of our senior managers undertaking a 10-day Mawson Trail Epic bike ride from Adelaide to Blinman in May. In fact, Eldercare has its own good cause, a safety net in place for when our staff need urgent help as a result of domestic violence, or any other serious life event that leads to financial hardship. Our 'Staff Emergency Relief Fund' receives voluntary contributions from our employees and is on standby to offer financial assistance and support when our people need it. This fund has helped our staff in many ways… rehousing a staff member who was left homeless following domestic violence… covering rent for another employee when their spouse suddenly lost his job… arranging pro-bono legal support for a single dad of three when floods ruined his house and the insurers wouldn’t pay up. The list goes on… this fund really does make a huge statement about the culture and compassion that flows through Eldercare.”

When it comes to the quality of service at Eldercare, Mum’s the word. (And Dad.)

Jane has been at the helm of Eldercare for six years, and by the time you’re reading this she will have notched

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...from previous page

up 40 years in professional healthcare. She started as a nurse and midwife, studied education and management, specialised in community engagement and research across rural and remote regions, then made her way to Eldercare via a number of senior roles – including the chief executive position at another aged care provider, and St Andrews hospital.

When asked to summarise what the organisation's consumers think of the service they receive, Jane simply replies with an anecdote or two, about mum and dad.

"My father in law just recently passed away in an Eldercare home. He spent 18 months at Acacia Court in Hendon under our care with dementia. And while I'm obviously very across any feedback we get from families and I know what a great job our staff do, it was still an incredibly heart-warming experience to see them in action as a consumer. He was beautifully looked after and we as a family could not have been happier with the relentlessly brilliant service."

"Conversely, my mother is still fighting fit with all her faculties, and at the age of 84 living alone has developed a tendency to be 'naughty'. When she plays up, I joke around threatening her that unless she starts behaving I'll put her in a home. And her comeback is a delight… she says 'Oooh you mean that lovely home round the corner where my friends are? I love it there, can you get me a room with a garden view?"

"The home my mum's referring to is Cottage Grove, another Eldercare residence. And the thing is, if the time ever arises that a care home is the right answer for my mum, I know she'd be genuinely happy there. And I'd be really happy about it too, which I think just about says it all."

Jane and her team at Eldercare are longtime clients and dear friends of DW Fox Tucker. We look forward to many more years supporting them in their mission to offer leading-edge best-practice care to every single South Australian senior under an Eldercare roof… a population that at some point in the future may, or may not, include Jane's 'naughty' mum.

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Jane Pickering
CE, Eldercare

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INSIGHT | **By Kate Bickford & Marianna Danby**

The Covid-19 Outbreak and Contract Relief in the Form of Force Majeure

Introduction

The new lunar year of the Metal Rat has regrettably commenced amidst an abundance of wretched disasters. Whether flood, fires and most distressingly, the global pandemic of the Covid-19 outbreak.

There seems to be no shortage of devastating events affecting people's lives and their ability to do business.

In the context of contract law, "*force majeure*" may be able to provide a party with some relief from contractual obligations that it cannot perform. Force majeure clauses are common features of commercial contracts and are designed to suspend any obligations (and associated liabilities) which cannot be performed as a result of an event beyond the contemplation and control of the parties.

What is a force majeure event?

Force majeure comes from the Latin meaning "*superior force*" extending to definitions of "*chance occurrence or unavoidable accident*". As the concept arises as a feature of contract law and not under the common law, its meaning in any particular contract must be defined or risk the potential of the concept being held void for lack of certainty.

Definitions of force majeure commonly refer to "*circumstances beyond the control of the parties*", "*acts of God*", (which has been judicially considered to cover events such as hurricanes, floods, and earthquakes[1]), and other disruptive events such as global pandemic, war, terrorism, civil unrest, strikes and even the threat of such events.
The meaning of the phrase "*circumstances beyond the control of the parties*" has been interpreted broadly by the courts to cover events which neither party could prevent.[2]

The rules of contractual construction will apply to the interpretation of the meaning of a force majeure definition within a contract. If there is any ambiguity in the definition, the rule of *contra proferentum* will apply, unless the parties have expressly excluded it, meaning that the clause will be interpreted against the interests of the party responsible for drafting the definition. Also when general wording follows a list of specific events, the rule of *ejusdem generis* will apply so that a catch-all phrase like "*any event beyond the reasonable control of the parties*" will take its meaning from the events listed before it.

Force majeure may be triggered under a contract at the point in

[1] *Matsoukis v Priestman & Co* [1915] 1 KB 681, 685-7; Sharp *v Batt* (1930) 25 Tas LR 33 at 49–50

[2] *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419.

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...from previous page

time that a party apprehends that it will not be able to undertake, continue or complete its contractual obligations because of a force majeure event.

Force majeure clauses

Proper drafting should ensure that any definition of force majeure is clear. A seller or provider seeking an expansive definition should insist on a meaning which prefaces examples of particular events with the words "including but not limited to..." to not limit the interpretation of the term. On the other hand, a party who is a buyer or receiver should seek to keep the clause as narrow as possible to avoid the possibility of non-compensable interruption to completion or supply as the case may be.

There are generally three essential elements to force majeure:

1. it can occur with or without human intervention;
2. it cannot have been reasonably foreseeable by the parties; and
3. it was completely beyond the parties' reasonable control, and they could not have prevented its consequences.

It should be noted that force majeure cannot extend to cover a party's own acts or omissions and further, a force majeure event must be a legal or physical restraint and not merely an economic one.[3]

Most force majeure clauses will not excuse a party's non-performance entirely and will only suspend it for the duration of the force majeure event. However, some force majeure clauses will also provide the parties with a right to terminate the contract in the event that the force majeure is not remedied within a specified amount of time.

The clauses will also commonly require a party relying on force majeure to notify of it promptly, to mitigate the loss of the other party and to attempt to remedy the event, to the extent that it is reasonable in the circumstances to do so.

What if there is no force majeure clause?

In the absence of a force majeure provision, a party to a contract faced with an event which makes it impossible to perform its obligations will need to resort to the common law concept of frustration.

The doctrine of frustration provides for an automatic mutual discharge of the contract where performance becomes impossible, with neither party being at fault, and the obligations under the contract being "radically different" from those contemplated by the parties to the contract. This may be helpful, but these conditions are more limited than those which may be agreed between parties to define force majeure, meaning that sometimes a party will be left with no relief. Additionally, as frustration is not a creature of contract and a mutually agreed definition, it means that the party claiming it may carry a greater burden to establish its application. South Australia has enacted legislation specifically designed to soften the limitations of the doctrine[4].

Conclusion

Force majeure is an important drafting consideration in the negotiation of any commercial contract, particularly for parties involved in agribusiness and or international trade of some form. For existing contracts which contain the term, it is a significant provision for its ability to deliver convenient relief from the pressures of performance in the face of an uncontrollable disruptive event.

Force majeure provisions cannot in their own right save a business from a devastating event. However, they may reduce the liability and the stress on the parties suffering from it.

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[3] *Yrazu v Astral Shipping Company (1904) 20 TLR 153, 155; Lebeaupin v Crispin [1920] 2 KB 714, 721*

[4] *Frustrated Contracts Act 1988 (SA)*

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INSIGHT | **Mark Minarelli**

The Issue of Capacity

Although most people over 65 will not suffer cognitive impairment, for a large minority, dementia and other age-related conditions will enter their lives at some stage.

According to statistics gathered by the National Centre for Social & Economic Modelling, currently, 250 people are diagnosed with dementia every day, and this is likely to increase to 318 people per day by 2025. Among Australians aged 65 and over, almost 1 in 10 has dementia, and among those aged 85 and over, 3 in 10 have dementia.

The term dementia is an umbrella term used to refer to a collection of symptoms which are caused by disorders affecting the brain. Dementia affects thinking, memory, behaviour and the ability to perform everyday tasks. Although most people with dementia tend to be in the older age bracket, it is not a normal part of ageing but rather a manifestation of some underlying disease.

Some of the underlying diseases are:

- Alzheimer's Disease;
- Vascular Dementia;
- Parkinson's Disease; and
- Fronto-temporal lobe degeneration.

In any discussion of capacity or its loss, it is important to understand that:

> *"... currently, 250 people are diagnosed with dementia every day, and this is likely to increase to 318 people per day by 2025."*

POWER OF ATTORNEY

- because a person has been assessed as having dementia, this does not mean that they cannot make a decision about a particular issue. Mental capacity has to be assessed in the context of a particular transaction;
- at law, a medical diagnosis or absence of diagnosis will not determine whether a person is considered to have the capacity to make decisions; and
- a medical diagnosis is useful evidence, but it is for a Court or Tribunal of competent jurisdiction to make declarations of capacity or incapacity, as the case may be.

From a legal perspective, mental incapacity is a more far-reaching life event than death. It could be considered to be a Clayton's death – the death you have when you don't have a death because life continues after this "death". The complexity of incapacity is illustrated by the fact that a person's death instrument, their Will, is a direction for their executor to transmit their assets to beneficiaries. The Will is therefore prescriptive in this transfer of assets and normally does not require decision making on behalf of the executor in that transfer. By comparison, a person's incapacity instrument, their Enduring Power of Attorney, is not prescriptive, but the delegation of discretion

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...from previous page

"... it is an instrument that gives a third party the right to control your financial affairs and therefore deal in, manipulate, enhance or damage your wealth assets, care should be taken in deciding who to appoint and what directions are to be given to that person in the care of your financial affairs."

to someone else, namely their attorney. This discretion is exercised during the life of a mentally incapable person and will impact on the ultimate death of that person and the disposition of that person's wealth.

The discretion is only controlled by three factors, as follows:

1. fiduciary duties;
2. statutory restrictions; and
3. the terms of the Enduring Power of Attorney instrument.

The first two controls are of limited impact when it comes to the ambit of the attorney's discretion and the ability of an EPA to re-engineering estates during the life of the donor as a consequence of the donor's death. It is common for the third control to be overlooked or disregarded in the drafting of an Enduring Power of Attorney. The consequence of this is that the potential for abuse of the power by an attorney is enhanced in the wrong hands. The rise in the number of cases coming before the Courts on this issue is demonstrative of the problem. It is also probable that the vast number of attorney maladministration, if not fraud, goes undetected.

It is to be hoped that in most cases, an attorney will do the right thing. However, because it is an instrument that gives a third party the right to control your financial affairs and therefore deal in, manipulate, enhance or damage your wealth assets, care should be taken in deciding who to appoint and what directions are to be given to that person in the care of your financial affairs. After all, in what other situation would we give a third party an untrammelled discretion to manage your financial affairs?

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NEWS & VIEWS | **By Briony Hutchens & Damon Nicholson**

Land Tax Reform – What Does it all Mean?

The Land Tax (Miscellaneous) Amendment Act 2019 (SA) (**the Amending Act**) has now been enacted and introduces progressive changes to the *Land Tax Act 1936* (SA) (**the Land Tax Act**) between 30 June 2020 and 1 July 2022. The changes will affect, among other things, the rates of land tax, the relevant site value thresholds, the introduction of trust land tax rates and wider aggregation provisions, and the expansion of certain land tax exemptions.

From 1 July 2020, there are to be new land tax rates and increased thresholds. For non-trust held land, those changes are as follows:

- the top standard land tax rate, previously set at 3.7%, will be reduced to 2.4% as of 1 July 2020;
- the reduced top land tax rate will apply to sites valued at $1.35M and above from 2020/21 and will subsequently apply to sites valued at $2M and above in 2022/23;
- the land tax rate applicable to sites valued between $1.098M and $1.35M will be 2.0% as of 1 July 2020 and will subsequently apply to sites valued between $1.098M (indexed) to $2M as of 1 July 2022;
- the land tax rate applicable to sites valued between $755,000 and $1.098M will be 1.25% as of 1 July 2020 and will subsequently decrease from 1 July 2022 onwards to 1.0%; and
- in the 2020/21 financial year, the tax-free threshold will increase from $391,000 to $450,000.

Trustees that hold land on trust may be subject to higher surcharge rates of land tax. In some circumstances, the trustee of a trust may be able to nominate a beneficiary or unitholders of the trust, thereby resulting in the lower, standard, land tax rates applying to the trustee. The nominated beneficiary/unitholders will also be taxed in respect of the land, with a rebate available for tax paid by the trustee. Importantly, if the nominated beneficiary or unitholders are the owner of any other land, land tax will be calculated on the aggregated site value of all land legally owned by that individual. Importantly, nominations can generally only be made once, therefore careful consideration should be had to whether they make a nomination and, in the case of a discretionary trust, who to nominate.

If no beneficiary or unitholders are nominated, the trustee may be subject to higher trust rates of land tax as follows:

- the top land tax rate of 2.4% will apply to sites valued at $1.098M and above from 1 July 2020;
- the land tax rate applicable to sites valued between $755,000 and

"land held in trust will be assessed at higher rates unless the trust makes a nomination of a beneficiary or unitholders ..."

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...from previous page

$1.098M will be 1.75% as of 1 July 2020 and will subsequently decrease from 1 July 2022 onwards to 1.5%; and

- the land tax rate applicable to sites valued between $450,000 and $755,000 will be 1% as of 1 July 2020 and will not change in subsequent years;
- the tax-free threshold for trust land will be $25,000; and
- if the site value of the land exceeds $25,000, the tax-free threshold will be lost, and land tax at a rate of 0.5% is imposed on value up to $450,000.

The effect of the increased rates is to impose a surcharge on land held in trusts. In the 2020/21 financial year, the maximum surcharge for trust land is $6,498. From the 2022-23 financial year, the maximum surcharge for trust land will increase to $9,165.

The Amending Act also amends the aggregation provisions contained in the Land Tax Act to function similar to the aggregation laws in the Victorian land tax legislation. The amended aggregation provisions are intended to collate all land (including interests in land) that is owned by the same taxpayer and combine their site value to calculate a combined total land tax liability for that taxpayer.

Where land is held jointly, land tax is assessed to the owners jointly in the first instance, with each owner then being taxed again on their proportionate interest in that land in addition to any other land or interest in land owned by that taxpayer, subject to a rebate for the taxpayer's proportionate liability for land tax assessed to the owners jointly.

The existing trust aggregation provisions have been removed, and land held in a trust will only be aggregated with other land held in the same trust, i.e. land held in 2 or more separate trusts will not be aggregated. As noted above, however, where the trust nominates a beneficiary or unitholders, the beneficiary or unitholder's resulting interest in the trust land will be aggregated with any other land, or interest in land, held by that beneficiary or unitholder.

Much broader aggregation provisions apply for companies with land held in different companies now subject to aggregation if the companies are related or otherwise controlled or deemed to be controlled by the same person or group of persons. As a result, land that is owned by corporations deemed related will be jointly assessed for land tax as if the land were owned by a single corporation and all of the related corporations are jointly and severally liable for the tax so assessed.

The changes to the aggregation provisions are likely to catch out many taxpayers, and therefore careful consideration is required when determining whether these provisions apply.

Land that was previously exempt from land tax, e.g. under the principal place of residence and primary production exemption, will remain exempt, with the Amending Act actually expanding the principal place of residence exemption to allow it in circumstances where the land is held in a trust and is the principal place of residence of the nominated beneficiary or unitholders. To get the benefit of this exemption, the trustee must make a nomination of beneficiary or unitholders.

Procedurally, one of the major impositions of the Amending Act is the notification requirements set out in the Land Tax Act. All existing trusts that have not previously done so must give the Commissioner a notice that land is held on trust by 31 July 2020. In addition, as mentioned above, the trustee of a trust may be able to nominate a beneficiary or unitholders, thereby deeming that beneficiary or those

"Procedurally, one of the major impositions of the Amending Act is the notification requirements set out in the Land Tax Act. All existing trusts that have not previously done so must give the Commissioner a notice that land is held on trust by 31 July 2020."

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"It is essential that you receive properly considered advice and do calculations in respect of alternative options to determine the most tax-effective outcome for your land holdings."

unitholders to be an owner of the land in addition to the trustee. The timing of this nomination is different depending on the type of trust involved.

Going forward, notifications must be given to the Commissioner in various circumstances, including where:

- a person becomes a trustee of land in South Australia;
- a trustee of a deceased estate has been granted probate or letters of administration;
- the administration of a deceased estate is complete;
- a person’s circumstances change, and they no longer have proper grounds for an exception or exemption;
- a trustee stops holding land on trust but otherwise remains the legal owner of the land;
- a trust that holds land changes from being one type of trust to another;
- the beneficial interests in a fixed trust change;
- there are changes to a unit holding of a unit trust; and
- a corporation or related corporation becomes the owner of more than 50% of:
    - the total beneficial interest in a fixed trust that holds land; or
    - the total number of units in a unit trust that holds land.

In summary, the Amending Act effects a number of important changes to the way land tax is imposed and administered. Of particular note are:

- land held in trust will be assessed at higher rates unless the trust makes a nomination of a beneficiary or unitholders, effectively resulting in a surcharge of up to $6,498 per trust in the 2020/21 financial year, and increasing to $9,165 per trust in the 2022/23 financial year;
- nominations can only be made once, and therefore careful consideration should be had as to whether to make a nomination and, in the case of a discretionary trust, who to nominate;
- company structures that previously were not aggregated may now be aggregated under the new provisions, resulting in potentially significant increases in land tax; and
- It is essential that you receive properly considered advice and do calculations in respect of alternative options to determine the most tax-effective outcome for your land holdings.

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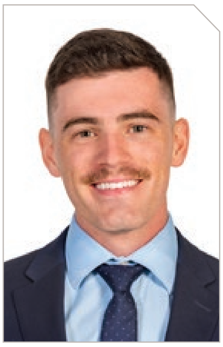

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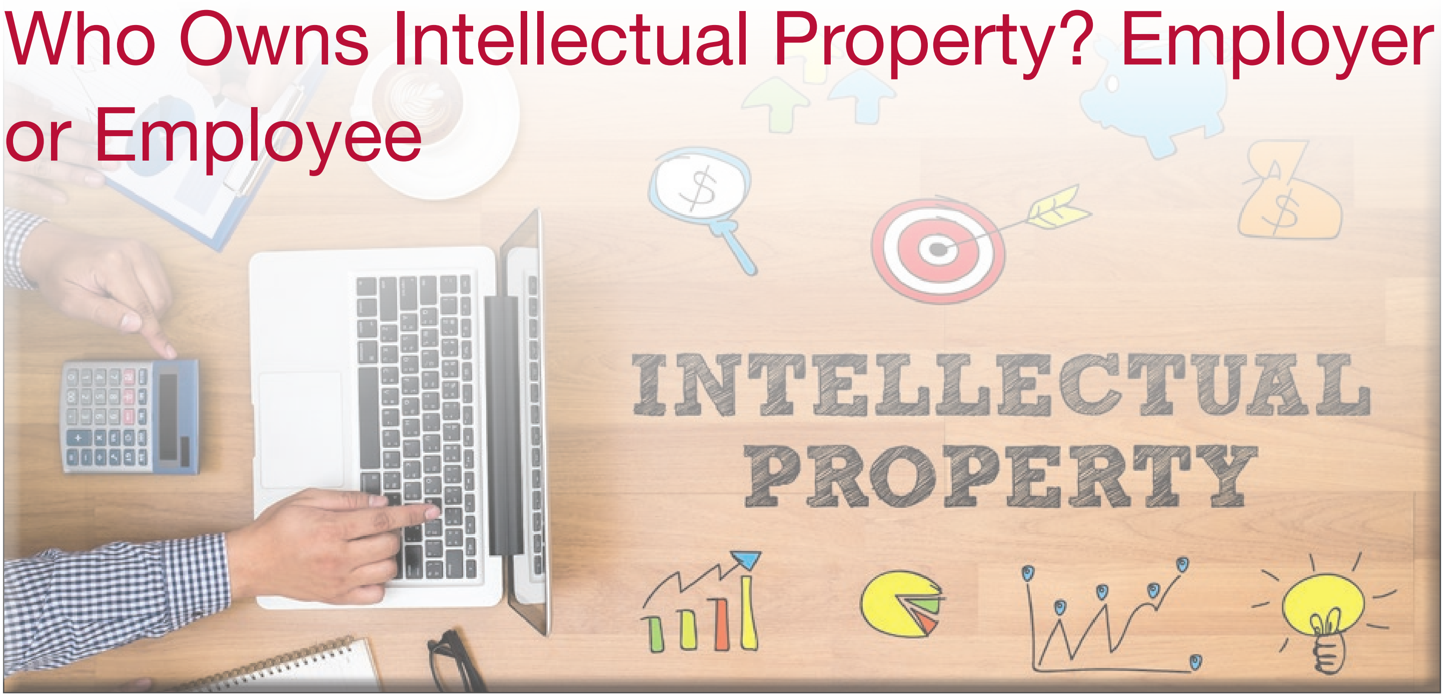
INSIGHT| **By Sandy Donaldson**

Who Owns Intellectual Property? Employer or Employee



Disputes between employers and employees as to who owns the intellectual property ("IP") developed by an employee have been frequent causes for litigation in Australia and elsewhere.

Some general principles emerge from the cases but, like most areas of the law, each case depends on its own facts.

Types of IP

The types of IP that may be developed by an employee, and which can be the subject of claims by an employer, can include all forms of IP. The IP is commonly:

- rights arising from an invention, particularly the right to apply for a patent for the invention; or
- copyright, which can subsist in written materials, artistic works, such as plans or drawings or illustrations and computer software and designs which may be registrable.

Other forms of IP may also be:

- confidential information or "trade secrets";
- plant breeder's rights (PBR);
- trade marks; and
- circuit layouts.

Principles of IP ownership

Some of the main principles relating to the ownership of IP rights are, in brief summary:

1. The owner of IP will, initially, normally be the creator of the IP, such as the inventor of an invention or author or artist for a copyrighted work.
2. If IP is created by an employee in the course of their employment, the employee will hold the IP on trust (termed a "constructive trust") for the employer.
3. An employee may be in what is known as a fiduciary relationship with the employer and be obliged to hold the benefit of IP developed by the employee for the employer. Whether the employee owes fiduciary duties, and the extent of these duties, depends on the nature and seniority of the position.
4. An employee may agree to assign IP to the employer or to hold IP on trust for the employer, by contract. This is usually in an employment contract, but can also be in a specific IP contract, or deed or other contract. If there is a contract, the terms of the contract, if clear, should determine ownership of the IP.
5. An employee can assign IP to an employer when it has been created, or for future copyright prospectively before it comes into existence, by a written assignment document.

The contentious issues

The issues that cause the most difficulty for determination by courts

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are typically whether IP is created in the *course of employment*, or whether there is a *fiduciary* obligation on the employee in relation to IP.

These issues and litigation relating to them can be very complex. In one of the leading cases in Australia *University of Western Australia v Gray,*[1] the trial lasted 50 days with 4,586 pages of transcript and over 1000 documentary exhibits. The Judgment of the Trial Judge, Justice French (later the Chief Justice of the High Court) was 374 pages, and one of the parties incurred costs of $5,633,996. The case then went on appeal to the Full Federal Court, where the Judgment of French J was upheld.[2]

A selection of some of the Australian cases illustrates the principles to be applied and the difficulties that arise in the different circumstances of each case. Obviously, because of the complexities of the cases and the judgments, this summary can only be incomplete and not deal with all of the issues.

University of Western Australia v Gray

The *University of Western Australia v Gray* case involved inventions made by Dr Gray, who was Professor of Surgery of the University of WA relating to microspheres to be used in radiation treatment, for controlled drug releases and for carrying ferromagnetic material for thermal treatment of cancer.

As a professor, the contract of employment of Dr Gray by the University required him, among other things:

> *To undertake research and to organise and generally stimulate research among the staff and students.*

As well as the contract of employment of Dr Gray, there was a possibility that ownership of IP could have been vested in the University by Regulations, but, for various reasons, these were held to be ineffective, so the question of whether the IP relating to the inventions of Dr Gray vested in the University or was retained by him depended on the construction of his contract and the general law.

Whether the inventions were made by Dr Gray in the course of his employment came down, in the view of the Trial Judge and the Full Court, to whether there was "*an obligation to invent*". The Full Court approved the conclusion of Justice French, saying:

> *Dr Gray had no duty to invent anything. He had a duty to undertake research and to stimulate research amongst staff and students at UWA. He was working for a University.*

French J and the Full Court both indicated that the position of an academic at a university might be different from an employee in a commercial entity. The Full Court said:

> *In this important respect his employment obligations differed from those of a person employed by a private commercial entity whose inventions in the course of employment could benefit or affect the business of the employer.*

It was also held that there was no breach of any fiduciary duty or any misappropriation of any opportunity or benefit of the University by Dr Gray.

Victoria University of Technology v Wilson

The *UWA v Gray* case can be contrasted with *Victoria University of Technology v Wilson,*[3] a matter in the Supreme Court of Victoria relating to a patentable invention and related computer programs for an electronic trading exchange system. The first defendant Professor Wilson was a professor in the Graduate School of Business in the faculty of Business and Law of the University and headed the School of Applied Economics. Another defendant, Donald Feaver, was a senior lecturer in the School of Applied Economics.

The inventions and the software were developed as a result of a request to Professor Wilson and Dr Feaver for development of such a system by a company World Trade On-line Holdings Ltd ("WTO").

Professor Wilson and Dr Feaver commenced the design of the trading system and later a third individual, a Mr Astill, who was not a university employee, became involved. Sometime later, WTO ceased to be involved and another company, IP3 Systems, became interested in the project.

There were disputes as to whether an IP Policy of the University existed. Although Professor Wilson and Dr Feaver may have had obligations to research, the Judge held that the sort of research which Professor Wilson and Dr Feaver undertook in developing the system was not sufficiently related to the fields of economics and international

[1] *University of Western Australia v Gray (No 20) [2008] FCA 498.*

[2] *University of Western Australia v Gray [2009] FCAFC 116.*

[3] *Victoria University of Technology v Wilson (2004) 60 IPR 392.*

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trade in which they were expected to conduct research so as to be treated for that reason alone as research which they were retained to perform. In other words, it was not within the course of their employment.

The Judge also observed:

> *That the mere existence of the employer/employee relationship will not give the employer ownership of inventions made by the employee during the term of the relationship. And that is so even if the invention is germane to and useful for the employer's business, and even though the employee may have made use of the employer's time and resources in bringing the invention to completion. Certainly, all the circumstances must be considered in each case, but unless the contract of employment expressly so provides, or an invention is the product of work which the employee was paid to perform, it is unlikely that any invention made by the employee will be held to belong to the employer.*

However, Nettle J found that Professor Wilson and Dr Feaver did owe fiduciary duties to the University, including an obligation not to profit from an opportunity that comes to an employee through his fiduciary position unless the employee has made a full disclosure to the person to whom the duty is owed and has obtained their consent. The Judge found that the opportunity to design the trading system was presented to Professor Wilson and Dr Feaver in their capacities as employees of the University. He would have held that the interests of Professor Wilson and Dr Feaver in the provisional patent application that was lodged and software developed for the trading system were held on a constructive trust for the University but for the fact that other parties, including Mr Astill, had been involved and had made contributions to the development of the technology.

The Judge accordingly ordered that Professor Wilson and Dr Feaver and their respective companies were to be held to account either by imposing a constructive trust on their shares in IP3 Systems, and payment of proceeds of the sale of any other shares, rather than a direct interest in the application for patent and the software.

Spencer Industries Pty Ltd v Collins

In another case in the Federal Court of Australia *Spencer Industries Pty Ltd v Collins*[4] a claim was made by Spencer Industries Pty Ltd as the employer of the defendant Mr Collins that Spencer Industries was entitled to be the applicant for a petty patent for an invention for a rasp hub for the removal of tread from worn tyres. The application was made under the *Patents Act* and Branson J in the Federal Court, affirming the decision of the Delegate of the Commissioner of Patents, rejected the claim of Spencer Industries and found that Mr Collins was entitled to be the applicant for a patent for the invention.

Mr Collins was employed by Spencer Industries as Sales Manager, but was a qualified first-class machinist and had considerable technical skills. He had worked with other employees of Spencer Industries to design new products, and a previous application for a patent for a tyre rasp hub had been filed by Spencer Industries but was allowed to lapse.

Mr Collins thought about designing a more efficient and effective rasp hub and presented designs to Spencer Industries, which were initially not accepted. Subsequently, he was asked by Mr Pincott, who was described as the controller of Spencer Industries, to prepare some more detailed drawings in his spare time, and Mr Collins attended a meeting with a patent attorney instructed by Spencer Industries, resulting in the filing of the petty patent application. The application was prepared in the name of Spencer Industries, but when Mr Collins was asked to sign an assignment of the rights to apply for the parent as the inventor, he refused to do so unless Spencer Industries agreed to pay royalties to him for the commercialisation of the invention.

The Judge held that as Sales Manager, his responsibilities were principally in relation to sales. Although he could be given specific directions to use his technical skills in areas outside his ordinary duties, the Judge found that:

> *It was no part of Mr Collins' ongoing duties to invent products for Spencer Industries. Mr Pincott, the evidence discloses, on more than one occasion reminded Mr Collins that his ongoing duties were exclusively sales-related. Nor was the invention the outcome of a direction given to Mr Collins within what I had described as the residual area in which he could be directed to perform tasks other than sales tasks. Mr Collins was not directed by Mr Pincott, or anyone, to invent a new rasp blade or to undertake*

[4] *Spencer Industries Pty Ltd v Collins [2003] FCA 542.*

> *any inventive activities which resulted in the invention. Mr Collins advised Mr Pincott of the Invention, which he had conceived and developed on his own time, only when the inventive steps concerning it had been completed. The invention was not, in my view, a product of the work which Mr Collins was paid to do.*

The Royal Children's Hospital v Robert Alexander

Another case illustrates the fine line between developments of IP which may fall within, or outside, the course of employment of an employee. In a decision of the Australian Patent Office in Royal Children's ***Hospital v Robert Alexander,***[5] the Hospital argued that it was entitled to be the applicant for two inventions for which applications for patents had been filed by Dr Alexander. Dr Alexander was the Senior Scientist in charge of the Virology Laboratory of the Hospital. The inventions claimed in the two applications were for a viral recovery medium and a well device for use in a viral assay.

The delegate of the Commissioner for Patents found that the Hospital was beneficially entitled to the patent application for the viral recovery medium, but that Dr Alexander was solely entitled to the application for the well device.

The issue was whether Dr Alexander had a ***duty to invent***, following the reasoning in ***UWA v Gray***, in his position as Head of Virology.

The delegate found that there would be a duty to invent where ***"there was a clear motivation which arose in the course of his employment"***. This would include:

> *Where there was a recognised problem which he would have been reasonably expected to resolve.*

In relation to the viral recovery medium, it was held that the invention:

> *Addressed a recognised problem in the art and was the product of research which a virologist would undertake when trying to optimise the techniques used at the hospital.*

In contrast, the well device did not address any known problem with prior art well design, and there would have been no motivation to improve the well device in the course of the employment of Dr Alexander.

The importance of contracts

The cases mentioned above are only a small selection of those in Australia and elsewhere relating to the often contentious issues of ownership as between employers and employees. What these cases do illustrate is that if there is to be certainty as to the ownership of IP developed by an employee, then an appropriately drawn contract, whether a contract of employment or another form of contract, is essential. This is the case from the point of view of both the employer and the employee.

As noted above, the contract may define IP that is developed by an employee and which is to be held on trust by the employee for the employer, and assigned, if required, by the employee to the employer.

A properly drawn contract may make it clear that IP which is developed by an employee and which arises out of, or is suggested by, work which is performed by the employee for the employer will be the property of the employer, and that the employee must inform the employer of the development of the IP. This may include IP which is not necessarily within the course of employment of the employee, but there may be questions about the enforceability of a condition which is drawn so widely as to require all IP developed by an employee during the period of employment to be held for the employer.

From an employee's point of view, the conditions of a contract relating to IP should be carefully considered. Often, concerns of an employee will arise not so much in relation to the ownership of IP but rather for fair remuneration, by way of royalties or otherwise, for any commercialisation or use of the IP.

Just as the cases in this area can be complicated, so too can the provisions of contracts dealing with IP development and ownership. It is strongly recommended that these contracts should be drawn or reviewed by legal practitioners with experience in this area.

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[5] *The Royal Children's Hospital v Robert Alexander [2011] APO 94.*

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DISSECTING DECISIONS | **By Sandy Donaldson**

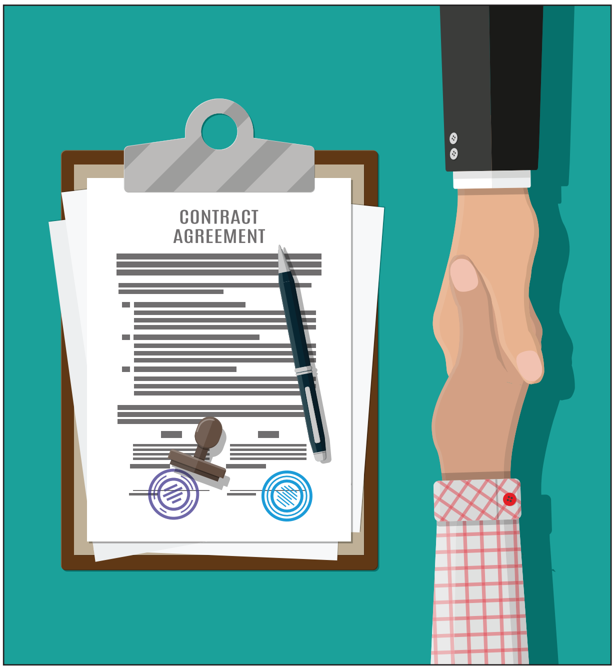
"Confidential" Means Confidential

Crown Resorts V Zantran

Clauses requiring parties to keep information confidential are frequently found in contracts. These may typically be contracts of employment, but also many other contracts.

Generally, obligations of confidentiality in contracts have been held by Courts to be effective and enforceable in accordance with their terms. However, in 2016 in a case in the Victorian Supreme Court ***AS v Minister for Immigration and Border Protection,***[1] it was held that there might be exceptions to the enforceability of confidentiality provisions.

The decision of *AS v Minister for Immigration and Border Protection* involved an application by solicitors (Maurice Blackburn) on behalf of an asylum seeker on Christmas Island to interview a former employee of Serco in relation to an action against the Minister and Serco and others claiming damages for allegedly failing to take proper steps to protect the asylum seeker from self-harm.



Maurice Blackburn wished to interview the former Serco employee before trial to avoid having to call him as a witness ("cold") in the proceedings when they came to trial. The Judge, Forest J, held that there were confidentiality provisions in the contract of employment of the former employee which, on their face, required the employee to keep information confidential and which would have precluded any discussion with Maurice Blackburn prior to trial.

However, the Judge found that:

> *An obligation of confidentiality (whether contractual or equitable) will not be enforced by a Court, or will be treated by a Court as void, if it has an adverse effect on the administration of justice*

and that …

> *This principle is applicable to both criminal and civil proceedings.*

CONFIDENTIAL
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The Judge also found that for the protection of a confidence to be lost:

> *There must be some 'public element' relevant to the administration of justice that is affected.*

In these circumstances, the Judge found that in his view the public interest in the administration of justice outweighed the maintenance of commercial confidence and that Maurice Blackburn was able to interview the Serco employee prior to trial. He said:

> *I am conscious of the need to protect contract bargains and accept that this conclusion is a departure from the determinations in other cases but this is a different case in a different legislative paradigm.*

Crown Resorts v Zantran

The judgement in *AS v Minister for Immigration and Border Protection* has recently been reviewed by the Full Federal Court in a judgment on 22 January 2020 in ***Crown Resorts Limited v Zantran Pty Limited***[2]. That

[1] *AS v Minister for Immigration and Border Protection & Ors (Ruling No 6) [2016] VSC 774.*

[2] *Crown Resorts Limited v Zantran Pty Limited [2020] FCAFC 1.*

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case involved an application, also by Maurice Blackburn, that certain former employees of Crown Resorts should be relieved of obligations of confidence and allowed to confer with Maurice Blackburn in relation to a class action involving security holders of Crown Resorts. The allegations were that Crown had engaged in misleading and deceptive conduct in relation to risks of conducting its business and operations in China. A number of former employees of Crown were convicted in China of gambling offences.

Some of the former employees were said to be willing to speak to Maurice Blackburn. There were, however, obligations of confidence both in employment contracts and Finalisation Deeds entered into on the termination of their employment.

The primary Judge in the trial followed the decision in *AS v Minister for Immigration* and held that the former employees were relieved of their contractual confidentiality obligations for the limited purpose of conferring with Maurice Blackburn and to provide witness statements prior to the initial trial.

On appeal, the Full Federal Court reversed this decision and held that the approach of Forest J in *AS v Minister for Immigration* was in error.

The Full Court, Allsop CJ, White and Lee JJ, was unanimous. Judgments were delivered by the Chief Justice (with whom White J agreed) and by Lee J. These judgments indicated that the error in the approach of Forest J, and in the Court at first instance in *Crown Resorts v Zantran*, was to accept a proposition that a Court possesses a discretionary power to relieve a person of an obligation of confidence. Allsop CJ said:

> *The error was in applying the approach of J Forest J in AS v Minister for Immigration and Border Protection (Ruling No 6) [2016] VSC 774; 53 VR 631. That approach involved the proposition (reflected in the terms of the relief sought and granted in the proceeding below) that the Court possessed power, discretionary in character, to relieve a person of a subsisting and otherwise enforceable obligation of confidence owed to a party to the litigation if to do so, on balance was in the interests of the more convenient of the litigation and so in the administration of justice.*

And, further:

> *[The] protection or vindication of rights and enforcement of duties and obligations according to principle and by legitimate judicial technique and methods marks out the nature of judicial power. Any proposition that, in aid of more efficient exercise of such power, a Court has authority to set to one side, revoke or suspend a party's legitimate right to call for confidence or silence in another so as to "relieve" that other from the burden of the obligation calls into question the legitimacy of such authority, and whether it could properly be seen as an incident of judicial power.*

"*Following the Crown Resorts v Zantran decision, parties may feel more comfort in the certainty of enforcement of obligations of confidence in their contracts.*"

Following the *Crown Resorts v Zantran* decision, parties may feel more comfort in the certainty of enforcement of obligations of confidence in their contracts. Some sympathy may be felt for the circumstances of the asylum seeker in the *AS v Minister for Immigration and Border Protection* decision, but this may perhaps be regarded as an instance of the old adage that *hard cases make bad law.*

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NEWS & VIEWS | **By John Tucker & Damon Nicholson**

On the Hook: Directors in the Tax Firing Line

The personal responsibilities of company directors are getting more and more stringent with new laws proposed to extend directors' penalty notice regimes to GST. This article identifies what personal liability a director holds for tax liabilities of a company and considers the potential defences available to a director that is issued with a director penalty notice (**DPN**).

Background

A DPN will be issued when a company fails to meet its pay-as-you-go (**PAYG**) withholding or superannuation guarantee charge (**SGC**) obligations.[1] The DPN is one of the most effective and feared tools at the ATO's disposal against non-compliant companies. A DPN creates a parallel liability with the corresponding company and creates a joint liability between two or more company directors (i.e. a DPN creates a personal liability on a company director in the same amount of the liability of the corresponding company). The DPN must outline the relevant company, income year and the amount of the non-compliance tax the individual must pay.[2] Additionally, the DPN will also provide remission options available to the recipient.

Period of liability

Prospective directors must check for any unpaid or unreported PAYG withholding or SGC liabilities before becoming a director of a company. If a company has outstanding PAYG withholding and/or SGC liabilities, you should cause the company to lodge the relevant statement/s and pay those liabilities to avoid personal liability. During your directorship, you will generally avoid director penalties if you take steps to ensure that the company lodges and pays its:

1. PAYG withholding amounts to the ATO in time; and
2. SGC to an employees' nominated super fund by the due date (or, if that doesn't occur, lodge a SG statement and pay the resulting SGC liability to the ATO).

The cut-off points for liabilities to be attributable to you as a director are slightly different for PAYG and SGC. For PAYG, you are liable for unpaid amounts for reporting periods that had commenced while you were a director of the company. However, if you resign from your directorship before the first withholding event within the relevant period, you will not become liable for that amount or subsequent amounts. For SGC, you are liable for unpaid liabilities that started while you were a director. However, if you resign before the last day of the quarter, you will not become personally liable for amounts after that period.

Introduction of GST

Relevantly, the *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019* (**Bill**) was introduced on 4 July 2019. The Bill amends the *Taxation Administration Act 1953* (Cth) to authorise the Commissioner to collect estimates of anticipated GST liabilities and make company directors personally liable for their company's GST liabilities in certain circumstances.[3]

Defences

There are certain defences under the *Taxation Administration Act 1953* (Cth) that may be arguable by a director.[4] Generally, the application of the defences has

[1] *Taxation Administration Act 1953* (Cth) Sch 1 s 269-10.

[2] *Taxation Administration Act 1953* (Cth) s 18-140(4).

[3] Parliament of Australia, 'Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019', ***Parliamentary Business***, <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6325>.

[4] *Taxation Administration Act 1953* (Cth) s 269-35.

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> *"Although DPNs pose as a significant concern to past, present and future directors, there are a number of compliance strategies and tools that mitigate a director's personal liability that should be understood and complied with."*

been narrowly applied by the Courts, limiting their application to only exceptional circumstances. This does not mean that they are not arguable, but that caution should be taken when relying on them.

A director may have a defence in proceedings against them if they are able to prove that because of illness, or some other good reason, it would be unreasonable to expect that the director 'at any time' took part in the management of the company.[5]

Alternatively, in circumstances where a director has taken all reasonable steps to ensure the company's compliance, the director may have a defence. To establish an all reasonable steps defence, the director must be able to provide evidence that they took all reasonable steps to cause any of the actions set out above to happen. The director does not have to evidence that the actions were actually undertaken by the company, the director merely has to evidence that he or she took all reasonable steps available to them to ensure that the steps were undertaken by the company.

Alternatively, a defence may be available in circumstances where 'there were no reasonable steps [the director] could have taken to ensure that' the company complied with its obligations.

To establish a 'no reasonable steps' defence, evidence must be provided to support the argument that there were no reasonable steps that the director could have taken during the period to which the liability relates and is provided for in the DPN. That is, during the director's directorship with the relevant company, evidence would need to be provided to support the argument that they were (at all times) unable to take any reasonable steps to:

1. cause the company to comply with its obligations;
2. cause the administration of the company; or
3. cause the company to begin to be wound up (within the meaning of the Corporations Act 2001 (Cth)).

Finally, a defence may be available in circumstances where a company has treated the *Superannuation Guarantee (Administration) Act 1992* (Cth) as applying in a particular way that is reasonably arguable if the company took reasonable care when applying that Act to the relevant matter.

Conclusion

Although DPNs pose as a significant concern to past, present and future directors, there are a number of compliance strategies and tools that mitigate a director's personal liability that should be understood and complied with. The importance of compliance has been illustrated in this article and shows the risks of liability that will result from non-compliance and the strict approach the courts have taken in applying the legislative defences available to directors. Finally, the potential addition of GST amounts expanding the tax obligations covered by a DPN increases the level of diligence required when acting or considering appointment as a director of a company.

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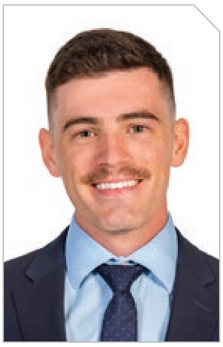

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[5] *Income Tax Assessment Act 1997* (Cth) s 269-35(1).

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INSIGHT| **By Joanne Cliff**

The Long Reach of Spousal Maintenance

It is not often that a particular Family Law case receives media attention, but that happened last year with the case of *Blevins and Blevins*. It concerned a claim for spousal maintenance made 23 years after the parties had separated.

Spousal maintenance is a form of financial support following a break up of a marriage or relationship. The party that is seeking assistance with spousal maintenance has to prove to a court that they are unable to support themselves and correspondingly the other party has to have the capacity or ability to pay.

Spousal maintenance is generally awarded on an interim basis if, for example, a mother and children have to vacate the family home and have to pay rent. It is used to allow a person time to find stability and perhaps employment after separation. The Court, therefore, considers a person's age and health, their ability to work, and care of children etc.

When a property settlement takes place, an order to pay spousal maintenance may cease or a lump sum may be paid and it is expected then that the lump sum will end the other party's responsibility to pay spousal maintenance.

However, in the *Blevins* case, a former husband was ordered to pay his ex-wife spousal for the third occasion, some 23 years after their separation.

In 1999, the original Spousal Maintenance Order was made in favour of the ex-wife for a payment of $750 per month and that Order was in place until 2008. The Order also stated that she had a right to seek further spousal maintenance payments.

In 2009, 9 years after the Divorce Order was made and upon expiry of the Spousal Maintenance Order, she brought a further Application seeking a lump sum for spousal maintenance as she had been unable to support herself. At that time she was solely reliant on a Disability Pension.

Final Orders were made in 2009 by consent which provided for the ex-husband to pay his ex-wife a lump sum of $275,000 by way of spousal maintenance. There was a notation to the Orders that the Order would finally sever the financial relationship between the parties. The husband complied with the Order and paid the lump sum of $275,000.

In 2014, the ex-wife turned 65 years of age and was no longer legally able to receive the Disability Pension, so she became reliant on an Aged Pension.

In January 2017, the asset test for pensioners changed, which made her ineligible to receive the Aged Pension, so she became solely reliant on her savings and superannuation.

In March 2019, she issued a third Application seeking spousal maintenance on the basis that her savings and superannuation were not sufficient to meet her reasonable financial needs. She was seeking an ongoing payment of $400 per week. By this time, she was aged 69, and the ex-husband, who had since remarried, was 71 years of age. He opposed the Application, stating it was causing significant distress to him and his current wife and that property proceedings had been finalised and substantial sums by way of spousal maintenance had already been paid.

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According to the *Family Law Act*, spousal maintenance applications have to be issued within 12 months of a divorce or 24 months of a de facto relationship ending. Section 81 of the *Family Law Act* states:

> "[The Court] makes such orders as will finally determine the financial relationship between the parties to the marriage and avoid further proceedings between them."

However, Section 83 of the Act allows a Court to revive or vary a spousal maintenance application provided the person applying can satisfy the requirements of making an order. In this case, the Court decided that the current Application was essentially a revival of the previous one and ordered that the ex-wife could proceed. The matter will now return to Court to determine if the ex-wife can establish a need for spousal maintenance and whether her former husband has the capacity to pay it.

Matters such as these are complicated, so legal advice should always be obtained to maximise the best outcome. There are limited options, but if the person seeking spousal maintenance is not in receipt of Centrelink payments, a binding financial agreement can be entered into if the parties agree to prevent further maintenance applications.

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INSIGHT| **By Briony Hutchens**

Modern Issues in Business Succession Planning

Business succession planning is critical in ensuring that any transition of the business, whether during your lifetime or following your death, is a smooth as possible. In recent years, family dynamics have changed, with more and more people now entering into their 2nd, or even 3rd, marriage or relationship, leading to competing interests between children of a former marriage and a new spouse. It is also increasingly common for some or all of the children to want to forge their own careers rather than take over the family business. Without careful planning, these more complex family dynamics can lead to significant disputes.

The strategies and tools that can be used in planning for a business succession will depend on the structure in which the business is being carried on. Most commonly, businesses will be carried on via a company or via a discretionary trust with a corporate trustee.

Relevant issues that need to be considered are:

- passing of decision making control and how to protect the outgoing parties against unintentionally losing control in respect of business decisions to the incoming parties during the period of transition;
- balancing the interests of each party to protect against two or more parties acting in a way that is disadvantageous to the other or others, while not enabling one or more of the parties to unduly frustrate decision making processes;

continued overleaf...

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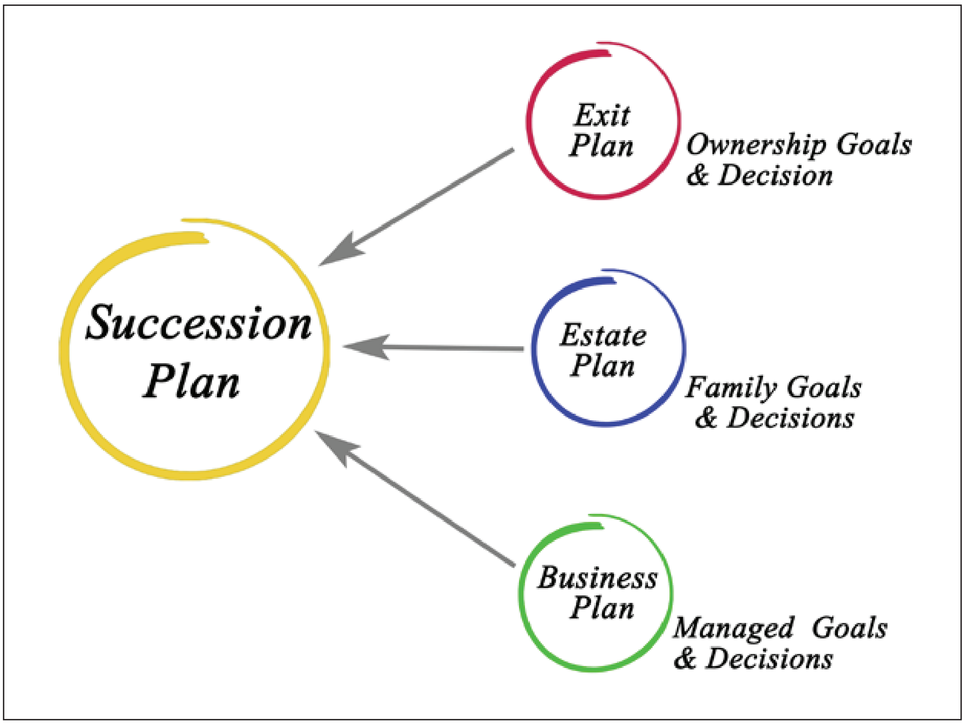
- protecting against the unintended passing of decision making control upon the unforeseen death or incapacity of existing directors or shareholders;
- if ownership of the business is to pass under a Will, protecting against an inheritance claim by a new spouse or other member of the family;
- adequately providing for the repayment (or other satisfaction) of amounts either owed to the business by - or owed by the business to - the outgoing parties without triggering unexpected tax liabilities;
- balancing any wishes of the outgoing parties to realise the value of their ownership interest in the business with little, or no, tax implications against any future tax implications for the incoming parties as a result of inheriting historical (lower) cost bases of assets; and
- ensuring income or profits from the business are distributed equitably amongst the parties.

While the strategy adopted in each case will be different depending on the family dynamics and the objectives of each of the parties involved, there are a number of tools that are commonly used in these situations to navigate through the issues. These include:

- granting powers of attorney to ensure that appropriate persons have the right to exercise rights attached to shares in a company (whether conducting the business in its own right or as trustee of a trust) during any period of incapacity and, if desired, at other times. Consideration should also be given to whether the powers conferred on the attorney should be restricted or limited in some ways, and also whether, where 2 or more persons are appointed as attorney, they must act jointly;
- ensuring the provisions of each person's Will have been updated to properly reflect and accommodate that person's wishes with respect to business assets or interests in entities that conduct the business. This includes not only ensuring that any specific bequests of property are set out in the Will, but also ensuring that appropriate persons are appointed as executor under the Will, given that this person or persons will have control over the estate assets during administration of the estate;
- using a Shareholders Agreement or Company Constitution to customise the rules relevant to the conduct of the particular company to suit the specific needs and objectives of the parties. These are useful both where the company



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"While business succession planning can be a daunting task and present a number of unique challenges for most families, the consequences of not having a proper plan in place can be significant."

carries on the business in its own right, and where it does so as trustee of a trust. Issues that are commonly addressed in these agreements include:

- the right to appoint and remove directors;
- specifying decisions that can be made by directors and those that must be made by shareholders and the percentage of votes that are required for the resolution to be passed in each case (e.g. 50%, 75% or 100%);
- whether any shareholder or director will have a casting vote or right of veto in respect of any decisions;
- rules around the issue of new shares and prohibitions against diluting the shareholding of any shareholders;
- exit strategies and rules and procedures that must be followed if any of the shareholders wish to dispose of all or part of their shareholding or in the event of certain events such as death, incapacity or retirement;
- policies as to declaration and payment of dividends;
- rules around borrowings to be undertaken by the company and/or contribution of capital by shareholders; and
- dispute resolution procedures.

- granting of call options to secure the right of another party to acquire ownership interests in an entity that conducts the business in the event of certain events such as incapacity or death of the existing owner; and
- where the business is carried on by a discretionary trust, inserting into the trust deed for the trust distributor provisions whereby the income and capital of the trust is notionally divided into portions, and a nominated person has the ability to direct the trustee as to how a particular portion is to be distributed.

While business succession planning can be a daunting task and present a number of unique challenges for most families, the consequences of not having a proper plan in place can be significant. It is strongly recommended that business owners put in place a properly considered succession plan, and review and update it regularly to take into account changing circumstances, to ensure a smooth transition of the business and to protect against unintended consequences in the event of unforeseen death or incapacity.

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INSIGHT | **By John Tucker & Damon Nicholson**

Residence Issues for Trust Estates With Foreign Corporate Trustees

The notional taxpayer described in Australian law as a 'trust estate' is required to calculate its net income as if it was a resident. 'Resident trust estate' is defined in s 95(2) of the Income Tax Assessment Act 1936 (**ITAA 36**). It is relevant to determining whether liability exists under s 99 or 99A of the ITAA 36 and whether accruals taxation applies under Division 6AAA of the ITAA 36.

A trust estate is a 'resident trust estate' for the purposes of Division 6 if either:

1. a trustee of a trust estate was a resident at any time during the year of income; or
2. the central management and control of the trust estate was in Australia at any time during the year of income.

Note that this differs from a 'resident trust for CGT purposes' which is defined in s 995-1 of the Income Tax Assessment Act 1995 (**ITAA 97**) as a trust that at any time during the income year has:

1. for a trust that is not a unit trust, a trustee that is an Australian resident or the central management and control of the trust is in Australia; or
2. for a unit trust, either;
    a. any of the property of the trust is situated in Australia, or the trust must carry on a business in Australia; and
    b. the central management and control of the trust is in Australia, or Australian residents hold 50% of the beneficial interest in the income or property of the trust.

Therefore, the central consideration is to whether the trustee of a trust estate is a resident of Australia for tax purposes. This note dominantly focuses on trust estates which operate with a corporate trustee rather than an individual trustee.

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Individual residence

Briefly, to determine the residence of an individual, s 6 of the ITAA 36 provides a definition of 'resident' for Australian tax purposes:

A. a person, other than a company, who resides in Australia and includes a person:

   a. whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside of Australia;

   b. who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia;

   c. who is:

      iii. a member of the superannuation scheme established by deed under the Superannuation Act 1990;

      iv. an eligible employee for the purposes of the Superannuation Act 1976; or

      v. the spouse, or a child under 16, of a person covered by subparagraph (A) or (B); and

B. a company which is incorporated in Australia, or which, not being incorporated in Australia, carries on business in Australia, and has either its central management and control in Australia or its voting power controlled by shareholders who are residents of Australia.

Therefore, an individual will be treated as a resident of Australia for taxation purposes if they:

1. are a resident under the ordinary meaning of the term;

2. spend 183 or more days in Australia;

3. are domiciled in Australia (unless their 'usual place of abode' is outside of Australia); or

4. are an eligible employee as defined in certain Government superannuation schemes.

As mentioned above, this note does not consider the amassed case law and Tribunal decisions or Australian Taxation Office (**ATO**) guidance regarding the above factors in their determination of whether an individual is an Australia resident. The above factors are provided to indicate a general starting point and demonstrate what tests are considered when determining the residence of an individual. Ultimately decisions about individual residence are made from an exhaustive examination of all relevant facts, and acute distinctions can arise as between one set of facts and another.

Corporate residence

Corporate residence of a trust estate will be established by a foreign corporate or resident corporate trustee being found resident in Australia at any time during a year of income through the exercise of central management and control in Australia at any time during that year. Specifically, the term 'at any time' indicates that a foreign corporate entity is not required to reside in Australia for a specified period of time, it merely has to be resident at any given time during the year of income for the trust estate to be considered an Australian resident. There are a number of considerations when determining where the central

> *"a foreign corporate entity is not required to reside in Australia for a specified period of time, it merely has to be resident at any given time during the year of income for the trust estate to be considered an Australian resident."*

continued overleaf...

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...from previous page

management and control of the trust estate or a corporate entity is operated.

The several Landmark cases provide guidance for determining the location where a corporate trustee has exercised its central management and control and whether the company is consequently considered to be an Australian resident for taxation purposes. In *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation* (1941) 64 CLR 241 the High Court considered the location to be where the exercise of management and control decisions of the company made at the highest level in the company. Alternatively in *Malayan Shipping Co v Federal Commissioner of Taxation* (1946) 3 AITR 258, where the company's board was not in fact the highest level decision-maker of the company, the impact of that factor had a major effect in determining on the residence of the company.

More recently, in the case of *Bywater Investments Limited & Ors v Commissioner of Taxation; Hua Wang Bank Berhad v Commissioner of Taxation* [2016] HCA 45; 2016 ATC 20-589, the taxpayers had argued that because all of its directors were non-residents, and all of the directors meetings here held abroad, the central management and control of the company could only be determined to be outside of Australia. The High Court unanimously disagreed, stating that the question is one of degree and requires a determination of where the management and control is actually exercised, rather than merely looking to what the constituent documents say.

TR 2018/5 was released by the ATO following the decision in Bywater Investments. It sets out the ATO view on how to apply the 'central management and control test of residency' following that decision. The Ruling appears to have reversed the previous ATO view of *Malayan Shipping* by now taking the position that if a company's central management and control is exercised in Australia, then it necessarily carries on business in Australia. In this regard, the ATO contends that the central management and control of a business is factually part of carrying on that business.

Additionally, the ATO issued Practical Compliance Guideline 2018/9 (**PCG 2018/9**) which considers the 'Central management and control test of residency: identifying where a company's central management and control is located'. PCG 2018/9 provides ATO guidance to assist foreign incorporated companies and their advisors to apply the principles set out in TR 2018/5, to help them determine whether they are resident under central management and control test of company residency in s 6(1) of the ITAA36. PCG 2018/9 states that generally the board minutes are the starting point for determining this.

At paragraph 16 Taxation Ruling of TR2018/5, acts of central management and control of a company are considered to include:

1. setting investment and operational policy including;

   1.1. setting the policy on disposal of trading stock, and/or the use and development of capital assets;

   1.2. deciding to buy and sell significant assets;

2. appointment of officers and agents and granting them power to carry on the company's business (and the revocation of such appointments and powers);

3. overseeing and controlling those appointed to carry out the day-to-day business of the company; and

4. matters of finance, including determining how profits are used and the declaration of dividends.

The Ruling has generated concerns for multi-national corporates, including that decisions made through communications with one or more board members in Australia may be deemed an exercise of management and control and the conduct of business in Australia. The Board of Taxation is reviewing such concerns with a view to possibly making recommendations for law reform.

For a trust estate with a corporate trustee, the time perspective concerning residence may be

"... a trust estate cannot be a resident trust estate for part of the year and a non-resident trust estate for the remainder of the year, the status of the trust estate is definite."

momentary rather than judged across a more extensive period. For example, if the sole director of a foreign corporation takes a holiday for a few weeks in Australia and during that time makes management decisions concerning the trust investments, will that period of management and control constitute the trustee a resident at the time of the decisions or will the trustee, looked at from a broader perspective, remain a non-resident. In TR 2018/5, the ATO contends that activities consisting of passive receipts from investments and their distribution are likely to amount to carrying on a business for the purpose of the central management and control criteria.

Also, if resident beneficiaries delegate to a foreign corporate trustee, the investment decisions to be made by that trustee TR 2018/45 suggests that the central management and control criterion would be satisfied.

There are a number of consequences which may arise where a corporate trustee is determined to be an Australian resident for taxation purposes for any part of a taxation year. Notably, a trust estate cannot be a resident trust estate for part of the year and a non-resident trust estate for the remainder of the year, the status of the trust estate is definite.

If a trust estate is determined to be a resident trust estate, consideration may need to be given to a variety of other provisions of taxation laws along with any relevant Double Taxation Agreement to determine the net income of the trust estate and liability of beneficiaries presently entitled or in receipt of amounts derived from the trust estate. Additionally, CGT events I1 and I2 (i.e. when the trust estate becomes and ceases to be a resident trust for CGT purposes) will also need to be considered along with any withholding obligations arising upon the trustee.

Foreign resident beneficiaries may have Australian taxation obligations and liabilities even though the trustee is a foreign incorporated corporate considered outside of Australian taxation law to be a foreign resident and in receipt of foreign-sourced income.

In summary, determining the residency of a trust estate with a foreign corporate trustee has received a different emphasis as a result of the Bywater Investments discussion and TR2018/5. It is important for foreign corporate trustees and foreign beneficiaries of trust estates where decisions about their activities are made in Australia to understand what can result in a period of residence in Australia for the trustee and consequently the trust estate and what is now required for such entities to appropriately manage this tax residency risk.

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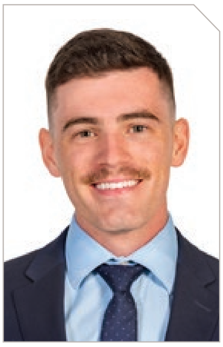

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SUITS OFF | **Staff Profile**

A Life-Changing Year

John Walsh Director

In January 2014 John, as Managing Partner of Donaldson Walsh, was looking forward to continuing to guide his firm through the challenges of the rapidly evolving legal industry. Donaldson Walsh had, for the previous 18 years, been a proudly South Australian based law firm providing the South Australian business community with expert legal services.

A chance meeting in December the previous year led to John being invited by Joe De Ruvo to catch up for a coffee in January to discuss the prospects of a merger with Joe's firm, Fox Tucker.

Initially hesitant about the proposal, John quickly saw the benefits that the merger would bring.

"Both firms exhibited similar cultures and practice areas. Importantly, I was heartened that a merger would allow greater opportunities for the progression of the young people at Donaldson Walsh and indeed the merged firm."

The initial talks gave way to the planning necessary to effect the merger and John was extremely busy supervising the planning as well as maintaining his own busy workers compensation and employment practice. And then it all came crashing down. In September 2014, a month before the planned merger date, John's loving wife, Janet, was diagnosed with a terminal illness.

Starting again

Losing his wife was devastating, but with the love and support of family, friends and clients, John began to slowly rebuild his life.

At work, John stepped back from managing the business. His focus became the development of the workplace practice he had been immersed in since the early '90s and particularly his passion for self-insurance in the workers compensation scheme.

Personally, he made more time for family; enjoying family holidays, simple family catch-ups, watching his sons get married, and most of all, spending time with his much-adored grandchildren, Sean and Matthew. He renewed old friendships, and through his passion for the arts and (eclectic) music developed new ones.

But, one constant in his life has been the unconditional love and devotion of his little dog, Digger. His companionship brings tremendous joy, keeps John fit with long walks and evokes happy memories of times shared with his loving wife, who adored Digger.

Port Adelaide Football Club and new horizons

John has supported the Port Adelaide Football Club all his life. He was a player advocate for the Club through most of the '90s and has been a proud Chairman's Club member for some time. Janet too was a passionate supporter and knowing how much she would have loved to have been part of the first historic game in Shanghai played a significant role in John's decision to travel to Shanghai for the game.

That journey reignited John's passion for travel first experienced in 1977 when he backpacked through much of Asia, India and the Middle East to London, Eastern Europe, Spain and Italy. Since that first trip to Shanghai, John has gone on to visit the tribal areas of the northern and central highlands of Vietnam and other places like Beijing, Xian, Southern China and Shangri La, Phnom Penh and Siem Reap in Cambodia and Luang Prabang in Laos.

All of these experiences have contributed to John developing a certain calmness, positivity and empathy, which is now evident in John's role as the head of workers compensation at DW Fox Tucker.

Love of the law

John's love for his job, his close-knit team, most of whom have been with him for five years or more, and his clients, together with a reputation for no airs, graces or ego and a no-nonsense commercial approach has resulted in John being recognised as pre-eminent in his field.

Throughout his career, there have been some enormous changes in workers compensation:

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"The biggest change has seen mental health claims overtake physical claims. In the first half of my career and, through the 1990s, I was mostly dealing with claims for physical injuries from physical repetitive tasks, labouring and the like. Now, it is mental health issues with depression and anxiety resulting from the impact of physical injuries or an inability to cope with the demands of the job."

John has also seen the impact of the terrible increase in illicit drug use and the increased use of prescription opioid medication to treat symptoms of pain:

"Research over nearly 20 years shows there is a crisis with more and more people suffering effects of long-term opioid-based painkiller abuse. People are becoming addicted and not considering the secondary effects which give rise to their own associated health problems. It makes a return to work very problematic and, at worst, destroys lives."

Away from the challenges of workers compensation in legal practice, John is rediscovering a new love of exploring other countries and engaging with different people, understanding their culture and experiencing humanity on its most humble level.

The kindness of strangers

Throughout his travels, John has experienced the very best of humanity, and he recounts two special moments:

"One of the best experiences of my life was wandering through Baghdad back in 1977 in over 50-degree heat looking for the National Museum. No one else was stupid enough to be out, apart from myself and my mate Craig. As we walked past a cottage, a door opened, and a bloke beckoned us inside. He took us down a long hallway into his kitchen and sat us down. He spoke no English, and we spoke no Arabic, but he took a jug of iced water out of the refrigerator and insisted that we drink it all before allowing us to go on our way again."

The other:

"One night in October last year I was wandering around Buon Ma Thout in the central highlands of Vietnam when I came across a large family group sitting on a rug on the footpath outside their home. A little girl was singing karaoke and everybody looked as if they were having a fantastic time. I asked if I could take a photo and the next thing I knew, I was being pulled down onto the rug, given a can of beer and some chicken and asked to join the party. I don't speak Vietnamese, and they didn't speak English, but it was a beautiful moment I'll never forget."

Experiencing humble acts of kindness of complete strangers has left an indelible mark on John. It is a trait that he has adopted and embraced and now brings to the table – be it in Asia while travelling or at work with a client. It's a trait he encourages us all to embrace!

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