DWFoxTucker Lawyers

Winter Report

Issue 13

Real Time Earth Ground Station Lands at Alice Springs

inside this issue

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CLIENT PROFILE

Nurturing 50,000 Years of Indigenous Culture with 21st Century Technology. All in a Day's Work at CfAT.

Since its inception in 1980, the Centre for Appropriate Technology (CfAT) has been a brightly shining beacon in remote Australia, relentlessly striving to unlock choices to live on country, connect with country and develop economic opportunity for Aboriginal and Torres Strait Islander peoples. Through the provision of modern life's essential building blocks - adequate water supplies, accessible energy services, affordable housing, and reliable telecommunications infrastructure to name but a few - CfAT has proudly led the way in helping people in remote communities lead better lives.

When government funding was withdrawn in 2014, CfAT faced the start of a huge ongoing challenge in transitioning, and downsizing, from an NGO to a commercial not-for-profit company… but the size of that challenge didn't stop this incredibly innovative, utterly driven organisation securing one of its most significant successes on behalf of the communities it represents.

Real Time Earth ground station lands at Alice Springs

A Real Time Earth ground station (RTE) forms part of a hybrid space and ground network being developed by the US multinational company Viasat Inc., that brings increased affordability and

efficiency to earth observations and remote sensing applications, typically used by low earth orbit satellites providing data to environmental, shipping, oil, gas, government and other industries, giving them vital information on demand without the need to invest in dedicated antenna systems.

"Put simply", explains CfAT CEO and committed campaigner, Dr Steve Rogers, *"an RTE's fundamental value proposition is to reduce the time it takes satellite images and data to get from space to the customer. A technological development which is strongly aligned with priorities of the new Australian Space Agency, which is seeking to increase opportunities within Australia's space industry and develop world-leading core infrastructure."*

Exciting stuff indeed. But how it did come to be that CfAT is involved in this project and, more importantly, what are the benefits to the communities it represents?

Dr Rogers explains: *"Viasat, the ground station network operator, was looking for an RTE site in Australia. They approached CfAT for a number of reasons. Firstly, we already host a Commonwealth Government Geoscience Australia, Ground Station facility on our 38 hectare site in Alice Springs, which has all the necessary infrastructure needed, such as high-speed high-capacity fibre, plus we have our own wholly owned engineering subsidiary, Ekistica Pty Ltd, so we were perfectly placed to project manage the satellite antenna installation. And Alice Springs itself has the ideal environmental conditions*

CfAT's Core Commitments to Remote Australia

Promote technology innovation and application…

…such as the CfAT mobile phone hotspot. A low cost, passive technology that extends mobile phone signals from an average of 10km from a transmission tower to up to 100km. The technology requires no power, has no moving parts and requires minimal maintenance - ideal for remote locations. So far 46 hotspots have been installed in the Northern Territory, along major highways, at tourist attractions and in remote Indigenous communities… the technology has won engineering awards and is patent pending.

Applied project design, infrastructure, engineering and professional services…

…such as the establishment of Koongarra Outstation, a new traditional Owner outstation on a 'greenfield' site within Kakadu National Park. This project involved design and construction of a three bedroom house, installation of a solar water bore and reticulation infrastructure, design and construction of a renewable power system with solar, battery storage and generator back up, not to mention design and installation of bush ecotourism campsite infrastructure.

Community engagement, planning and facilitation…

…such as a Telstra Digital Inclusion Survey, engaging in remote communities across remote Northern Australia and recording satisfaction levels with Telstra service provision.

Place-based accredited training, skills development and capacity building…

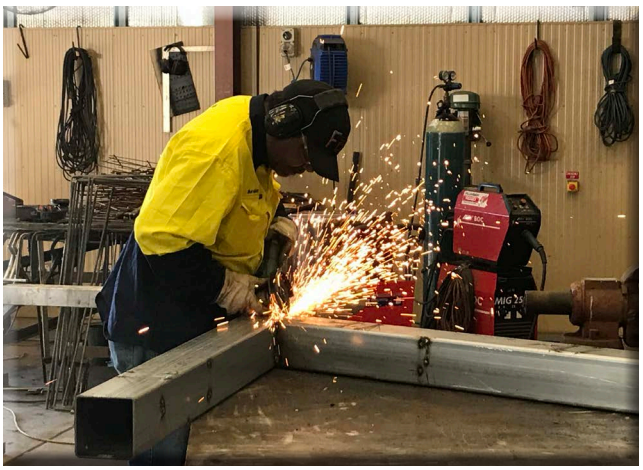
…such as accredited Registered Training Organisations, delivering job related vocational training in construction, plant operation and automotive to Indigenous trainees in remote communities.

Aboriginal and Torres Strait Islander enterprise and jobs…

… Aboriginal and Torres Strait Islander employment participation is currently at 54%. Initiatives to improve this figure include commercial metal fabrication workshops, and commercial facility management teams which exclusively employ Indigenous staff.

for ground station satellite communications, like low cloud cover, low radio frequency interference, and low aerosol pollution. In other words, we ticked all the boxes."

This multi-million dollar RTE investment, supported by an Indigenous Business Australia investment loan ticks all the boxes when it comes to community benefits, too. Dr Rogers states proudly that, *"The Alice Springs RTE makes Central Australia a key player in the burgeoning global satellite and space industry, with Indigenous Australians as leading participants in the sector. The project will create jobs in construction, facilities management and maintenance contracts, plus of course the significant income that CfAT receives will be fully re-invested back into our core business of providing infrastructure solutions to remote Indigenous communities."*



With the Alice RTE ready for lift off, what's next for CfAT initiatives?

"The RTE project is undoubtedly an immense success," says Dr Rogers, *"which will go a long way towards achieving CfAT's core objectives. But there is still much work to be done. Remote and regional Australia is facing many challenges… declining population, stagnant economy, and significant infrastructure issues. But the good news is that over decades CfAT and our corporate subsidiaries have developed an innate understanding of this unique environment, so we're very well*

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placed – and very determined – to meet those challenges."

Dr Rogers added: *"In particular, we see significant future commercial opportunities, which in turn means more money for our core causes. Since going public with the Viasat deal we have been approached by a number of other multi-national commercial satellite businesses, all of which are interested in establishing ground station infrastructure at our Central Australia site. There are exciting times ahead… monetising our assets to help realise our vision of creating a whole new narrative for the Indigenous peoples in remote Australia, seeing them work at the cutting edge of 21st century technology and commerce, whilst still maintaining their 50,000 years of culture."*

After an impressive career in roles such as MD and CEO of international mining technology innovation centres, and 13 years with CSIRO as an environmental microbiology and biogeochemistry research scientist, in 2015 Dr Rogers sought out a challenging role that used his commercial and leadership skills to deliver social benefit, instead of better corporate bottom lines. And along with the dedicated staff and Board of Directors he's certainly done that, leading an incredible organisation doing incredible things.

Plus, as he openly admits, there are other worthy reasons for taking this CfAT role in the Territory: *"The people, culture*

and landscape are stunning… and my daily commute to work is eight minutes."

The fact that Dr Rogers has found such a good work-life balance is a testament to the strong culture at CfAT and the wonderful communities they represent. Dr Rogers' hunger for a challenge ensures CfAT is in safe hands as the organisation continues to transition to its new life as a not-for-profit commercial company. The RTE ground station in Alice Springs is the first major success in this strategy, and it's a big one, but CfAT has a truly national focus and is determined to nurture many other current projects to bear similar fruits in remote regions of the Northern Territory, Western Australia, Queensland and South Australia, that ultimately deliver benefit to indigenous people.

As CfAT is one of DW Fox Tucker's longest standing clients, we know they have what it takes to deliver… so, watch this space!

FOR MORE INFORMATION ABOUT CfAT:

Phone: (08) 8959 6100

Visit: https://cfat.org.au

Centre for Appropriate Technology Limited

COMMUNITY

Good to Give

DW Fox Tucker Firm and Employee Giving Program

The DW Fox Tucker Charity Committee has recently undergone a revamp, and we are up and running with a raft of new faces who bring with them lots of enthusiasm and new ideas. We are proud to play an active role in giving back to the local community. Whether it be through monetary support or voluntary commitment, we are determined to do our bit to help build a better community.

The Committee consists of 12 staff members from a broad range of cultural backgrounds and age groups. Our new mix provides the perfect balance for determining the types of charities and causes that will gain the greatest benefit from our support.

The new program launched in August and it was a huge month! We proudly got behind the Hutt St Centre, RSPCA and R U OK? day and we welcomed a new partnership with Foodbank Australia. We couldn't be prouder of our staff for embracing all the various causes and initiatives.

Foodbank

We are proud to announce our new partnership with Foodbank Australia, a not-for-profit organisation operating in every state and territory in Australia.

Foodbank is Australia's largest food relief organisation, operating on a scale that makes it crucial to the work of the front line charities that are feeding vulnerable Australians. Foodbank provides 77 million meals a year (210,000 meals a day) to more than 2,600 charities around the country, accounting for 79% of all food received by charities from food rescue organisations.

Our new partnership with Foodbank is a year-round commitment by the firm and staff to donate funds and much-needed food items to those in need.

Hutt Street "Walk a Mile in My Boots"

On 9 August 2019 a group of staff gathered bright and early to participate in the Hutt Street 'Walk a Mile in my Boots'. The group, led by our Managing Director Joseph De Ruvo, walked from Victoria Park/Pakapakanthi to South Park Lands/ita Wirra Park to show support for the 6,000 homeless people within our community.

We would like to congratulate everyone that was involved in the planning, fundraising and running of this terrific event.

RSPCA

On 19 August 2019 we celebrated RSPCA 'Cupcake Day' by selling baked goods donated by our employees. The sale was an enormous success, and our staff enjoyed showing off their culinary skills for bragging rights. In addition to the bake sale, the RSPCA was our 'charity of the month' and received all of the cash donations generated from our weekly casual day charity collection.

R U OK?

In September the Committee chose to embrace the topic of mental health. On Tuesday, 12 September 2019 the firm held a morning tea fundraiser to recognise R U OK? day and staff were encouraged to wear something yellow to embrace the cause. R U OK? day is a great initiative that reminds us that having meaningful conversations with our family and friends could save a life. In addition to the morning tea, R U OK? was selected as our 'charity of the month' and received all of the cash donations generated from our weekly casual day charity collection.

We look forward to updating you on our achievements next quarter.

IF YOU WOULD LIKE TO KNOW MORE ABOUT THESE CHARITIES AND THE FANTASTIC WORK THEY DO, PLEASE VISIT THEIR WEBSITES VIA THE LINKS BELOW:

www.foodbank.org.au

www.huttstcentre.org.au

www.rspca.org.au

www.ruok.org.au

NEWS & VIEWS | **By Patrick Walsh & Tiffany Walsh**

Whistleblower Protection Laws

We have previously reported[1] on the new whistleblower protection laws which came into operation on 1 July 2019 through the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth).

In the Second Reading Speech for the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (Cth) it was stated that:

> "… these reforms will help protect whistleblowers who often expose themselves to significant personal and financial risk in order to help play a critical role in the early detection and prosecution of corporate or tax misconduct."

It was also stated that an aim of the reforms was to "*improve practices within Australian businesses*" given that there is a "*significantly higher likelihood that misconduct will be reported*".

From 1 July 2019 the new laws require that certain organisations implement whistleblowing policies. The organisations that must implement whistleblowing policies are:

- public companies; and
- a proprietary company:
  - i. where that company has been a large proprietary company for any given financial year must have a whistleblower policy in the following financial year; and
  - ii. that is the trustee of a registerable superannuation entity.

A company is considered a large proprietary company if it satisfies at least two of the following criteria, set out in Section 45A(3) of the *Corporations Act 2001* (Cth):

- the consolidated revenue for the financial year of the company and the entities it controls (if any) is $25 million or more;
- the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is $12.5 million or more; and/or
- the company and the entities it controls (if any) have 50 or more employees at the end of the financial year.

The matters that a whistleblower policy must address are:

1. information about the protections available to whistleblowers;
2. information about to whom disclosures that qualify for protection may be made, and how they may be made;
3. information about how the organisation will support whistleblowers and protect them from detriment;
4. information about how the organisation will investigate disclosures that qualify for protection;
5. information about how the organisation will ensure fair treatment of employees of the organisation who are mentioned in disclosures that qualify for protection, or to whom such disclosures relate; and
6. information about how the policy is to be made available to officers and employees of the organisation.

Since the Act has come into effect a number of organisations have implemented and published

1 https://www.dwfoxtucker.com.au/2019/05/whistleblower-protection-laws

their whistleblower policies. Some examples are Commbank[2], nib health funds[3], and ANMF[4].

Businesses that are required to have a whistleblower policy ought to consider ensuring appropriate resources and policies are also in place to encourage internal reporting and allow the business to remedy the issue before it becomes a regulatory problem.

It is also important to understand that the *Work Health and Safety Act 2012* (SA) ("**WHS Act**") lists a variety of matters that need to be addressed with respect to work health and safety, and so it is important that any whistleblower policy aligns with the due diligence obligations in Section 27 of the WHS Act. Section 27 of the WHS Act requires officers of entities conducting a business or undertaking to exercise due diligence to ensure that the person conducting the business or undertaking complies with any duties and obligations under the WHS Act, and this includes them taking reasonable steps:

a. to acquire and keep up-to-date knowledge of work health and safety matters; and

b. to gain and understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and

c. to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and

d. to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and

e. to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and

f. to verify the provision and use of the resource and processes referred to in paragraphs (c) to (e).

Affected businesses should strive to create a culture that embraces the whistleblower protections and encourages employees to report any concerns internally as a first point of call. Not only is this likely to result in a better organisational culture in general, it may in turn lead to fewer matters that need to be reported in the first place as employees self-regulate any dishonest, illegal, and/or unethical behaviour in an environment which encourages reporting.

Regardless of the size of your organisation, we recommend that you contact us to discuss whether your organisation needs a whistleblower policy and if you need any assistance in developing your own policies. If you don't have a whistleblower policy then now is the time to put one in place.

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2 https://www.commbank.com.au/content/dam/commbank/assets/about/opportunity-initiatives/commbank-whistleblower-policy.pdf
3 https://www.nib.com.au/docs/whistleblower-policy
4 https://www.nswnma.asn.au/wp-content/uploads/2019/05/ANMF-NSW-Branch-Whistleblower-Policy-final_7-May-2019.docx.pdf

INSIGHT | **By Marianna Danby**

Modern Slavery in the Supply Chain

Slave is defined in the Macquarie Encyclopaedic Dictionary as:

1. /sleiv/ n. someone who is the property of, and wholly subject to another **2.** Someone who works for and is the prisoner of another; someone who works under duress and without payment. **3.** someone entirely under the domination of some influence: *a slave to cigarettes*. **4.** a drudge. *v*. (**slaved, slaving**) – *v.i*. **5.** to work like a slave; drudge. – *v.t* **6.** To enslave.

Not a new word and (contrary to popular belief) far from being eradicated in the new world. Recent statistics reveal that there were an estimated 40.3 million people living in modern slavery in 2016.[1]

The word 'slave' is taking on a new meaning both economically and legally. It is time for companies, associations and organisations alike in this era that are trading in supply and demand, to take notice.

New legislation

New Commonwealth and New South Wales legislation has passed to deter trade-slave and illegally sourced labour from countries most commonly known to be targeted by large conglomerate companies for mass production of cheap products and services.

The *Modern Slavery Act 2018* (Cth) ("**the Commonwealth Act**") came into effect on 1 January 2019 and the *Modern Slavery Act 2018* (NSW) ("**the NSW Act**") is yet to come into effect but goes one step further than the Commonwealth legislation as it also imposes monetary penalties. The legislative instruments are similar, so this article will focus on the Commonwealth statute at first instance.

Modern Slavery Reporting Requirement

Section 16 of the Commonwealth Act establishes a Modern Slavery Reporting Requirement. Large companies and businesses are to produce an annual modern slavery statement,[2] and submit it within six months of the end of the relevant reporting period.[3] (see the timeline later in the article).

Reporting requirements are mandatory for entities that have an annual turnover of $100 million under the Commonwealth Act and $50 million under the NSW legislation. Entities can also make voluntary statements if the organisation does not meet the turnover threshold. Voluntary statements are encouraged as good practice and social governance.

The definition of modern slavery is broad and includes modern slavery practices which are major violations of human rights and serious crimes such as trafficking in persons, slavery, slavery-like practices (including forced labour), the worst forms of child labour (including using children for prostitution or in hazardous work), removal of organs, debt bondages and forced marriage.

The need for transparency

The Royal Banking Commission revealed the activities and questionable trade techniques of large corporations and banks. This legislation is an example of government placing curbs on the improper practices of large entities as compared to expectations, standards, values and attitudes of modern Australians.

The Explanatory Memorandum for the Commonwealth Act recognises that:

> *"Over half of these victims are exploited in the Asia-Pacific region, in which the supply chains of a significant number of large businesses operating in Australia are based. Modern slavery can occur in any sector or industry, and at any point in a supply chain. Internationally, high-risk industries include agriculture, construction, electronics, extractives, fashion and hospitality."*

1 Global Slavery Index, accessed at https://www.globalslaveryindex.org/ on 17 August 2019.

2 *Modern Slavery Act 2018 (Cth), s 13(1).*

3 *Modern Slavery Act 2018 (Cth), s 13(2)(e).*

And that:

> *"There is a high risk Australian businesses are exposed to modern slavery risks and that Australian goods and services are tainted by modern slavery. This risk may be heightened for large companies and other entities with extensive, complex and/or global supply chains."*

The need for action

The Explanatory Memorandum states that the Commonwealth Act is to:

> *"assist the business community in Australia to take proactive and effective actions to address modern slavery. This will help mitigate the risk of modern slavery practices occurring in the supply chains of goods and services in the Australian market."*

The objective of the Commonwealth Act as stated is to:

> *"require some entities to report on the risks of modern slavery in their operations and supply chains and actions to address those risks, and for related purposes",*

in order to increase transparency in supply chains, specifically in commercial organisations.

The need for accountability

Under the Commonwealth Act, entities can be assured that:

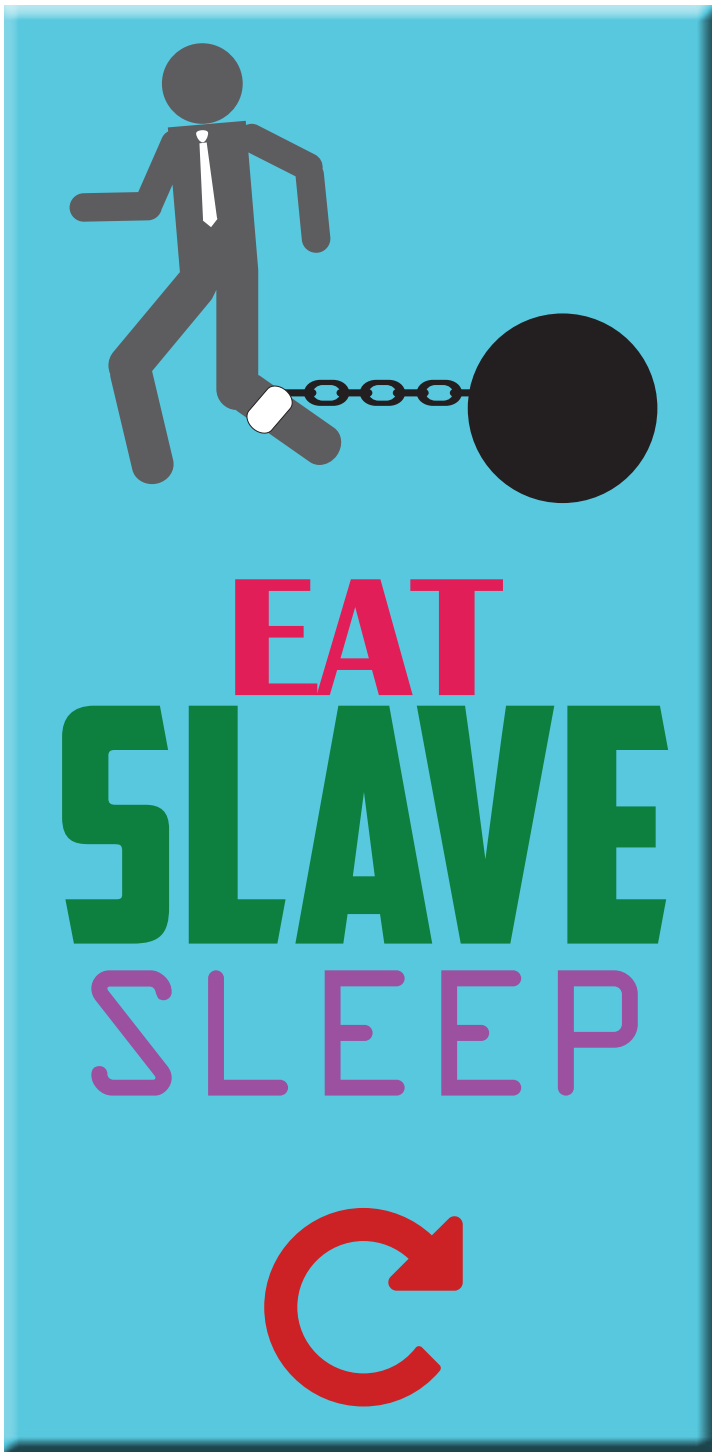
> *"reports are kept by the Minister in a public repository known as the Modern Slavery Statements Register. Statements on the register may be accessed by the public, free of charge, on the internet."*

There is also power for the Minister to send "please explain" letters to non-complying entities, to require certain acts of remediation by non-complying entities, and to publish the list of names of entities that have not complied with the legislation.

Impact

Why does this matter to you? Even if your business is not large enough to be caught by the legislation, you may be indirectly affected if your company contracts to a large company or you have entered into or are entering into contracts with larger corporations.

Smaller entities (including non-corporate Commonwealth entities) that trade in supply of goods and or services should be aware of the risks at every level of the supply chain of organisations, people and activities that bring a service or product from inception to sale and delivery to the end user.



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This may involve:

1. agency, distribution or franchise;
2. procurement of goods and services, outsourcing and subcontracting;
3. suppliers, trade-unions or other bodies representing workers;
4. licencing agreements and supply contracts both nationally and internationally;
5. contract workers or seasonal workers; or
6. outsourcing of manufacturing and warehousing.

All areas may be exposed to the risks and can be caught up in the fallout of the Acts.

Smaller entities may be obliged to provide contractual warranties or to participate in audits for large organisations attesting to the "health" of the supply chain.

The penalties for an entity found to be engaging in modern and illegal slave labour hire may not present a financial burden (at first) but rather may be social or reputational. The public shaming and social impact on an entity's reputation is considered likely to be significant and there may be consequential financial repercussions from this alone.

Timeline

TIMELINES TO TAKE NOTE OF FOR (CTH) FIRST MODERN SLAVERY STATEMENT			
Reporting Year Type	**Start**	**End**	**Slavery Statement Due**
Financial-year-reporting	1 July 2019	30 June 2020	31 December 2020
Calendar-year-reporting	1 January 2020	31 December 2020	30 June 2021

What should you do?

You will need to identify any risks, assess the level of risk, and put steps in place to monitor and manage any risk. You or your entity may need to engage in employee training, due diligence and remediation processes.

Contracts and policies should be reviewed and updated appropriately to commit to combatting modern slavery and manage risks. This will also be reflected by:

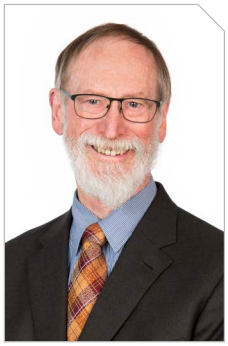
1. revising and updating warranty and indemnity provisions; and
2. inserting clauses to address further obligations to:
   a. hold annual audits;
   b. report breaches of policies and improper maintenance of records;
   c. replace restrictions; and
   d. have the right to terminate an agreement if an entity is engaging in modern slavery.

Seeking assistance

There is a Guide that has been released by the Commonwealth Government to explain in plain language what entities need to do to comply with this reporting requirement. This Guide may include helpful information for your entity's procurement, legal, compliance, and finance teams.

However, if you are concerned that your business risks being affected either legally, ethically or socially, then speak to one of our legal experts for an initial consultation and to see how you can identify and assess any risk, improve your supply due-diligence and, if required, prepare an annual modern slavery statement to ensure that your new and continuing contractual obligations address the new legislative requirements.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:



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The Modern Slavery Reporting Requirements cannot be deferred.

NEWS & VIEWS | **By Debra Lane**

Insurers to be Barred from Using Unfair Contracts

As widely reported in the press, the Morrison Government is set to scrap exemptions to the rules against unfair contract terms for insurance companies, acting on one of the 76 recommendations to come out of the Hayne Royal Commission. A new draft Bill has been produced relating to recommendation 4.7 which is to apply to Unfair Contract Terms (**UCT**) in insurance contracts, as well as to contracts in other sectors.

The UCT laws were introduced in 2010 and applied to sectors of the economy and business which used standard contracts; however, they have never been applied to insurers. The Royal Commissioner concluded that they should be.

Examples of "unfair" insurance contract terms which were considered included:

- Home building insurance contracts that allow the insurer to decide not to repair a building, but rather pay a cash amount equivalent to the costs that the insurer anticipated incurring in rebuilding or repairing the building, as opposed to the actual costs of the repair (which may well be higher if the insured had the work done independently of the insurer);
- Home building insurance contract provisions that permit an insurer to require the insured to pay an excess before paying the claim; and
- Provisions in car insurance policies which require the insured, when making a claim, to provide the name, registration number and contact details of an uninsured at-fault driver.

It is anticipated that Treasurer Josh Frydenberg will boost public scrutiny of financial service providers by expanding the scope of chief executives who must appear at least once a year before the Parliament's Standing Committee on Economics. As well as executives of the big four banks, executives of insurance and superannuation companies will be required to update the Committee on how they are going about implementation of the changes recommended by Commissioner Hayne.

We encourage businesses to review their current insurance contracts and contact us if you have any queries.

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INSIGHT| **By Amy Bishop**

Top Tips for Creating your Trade Mark

A trade mark can be a valuable asset for any business. Google's trade mark, for example, is worth an estimated $167.7 billion, while Facebook's trade mark, ranking only fifth, has an estimated value of $88.9 billion![1] Even if your business is not aiming to be the next Google or Facebook, your branding is still important and valuable and can be more so if you can create a good trade mark.

A trade mark is a sign or symbol used to identify a brand. If you can obtain registration of your trade mark you will have exclusive use of that trade mark, and anyone who uses a substantially identical or deceptively similar sign or symbol in relation to goods or services that are the same or similar to yours will be infringing your trade mark.

This article outlines some important considerations in creating your trade mark to give it the best chance of registration and afford it the best protection.

Create a 'distinctive' trade mark

Although there is an obvious temptation to use a word or words that are suggestive of the product or service to which a trade mark will relate, in order to be capable of registration, your trade mark needs to be distinctive and not obviously related to the goods or services for which it is to be used. To put this another way, it must distinguish your goods or services from those of your competitors, and it cannot describe your services.

For example, Apple was initially denied a trade mark for the words 'APP STORE' as this phrase would be understood by consumers to be descriptive of a store which sells Apps.

Not only will a descriptive trade mark be at risk of rejection for registration by IP Australia, but there is also a danger that others will want to use the same sort of description. Where close variations to your trade mark are used in a describing way they may be able to be used by others without infringement.

What marks are distinctive?

So, what sort of trade marks will be distinctive?

Invented words make the best trade marks, as do unique combinations of words. Also, using a common word which is entirely unrelated to your product, such as VIRGIN in relation to an airline or credit card, can create a distinctive trade mark in relation to those goods or services.

Trade marks which include a graphic element (a logo or device) can assist to create distinctiveness, in some cases even if a descriptive word or words are contained in the logo. However, this is not a failsafe; if the word or words are the main distinctive part of a composite word and device mark, this may still not overcome problems of distinctiveness. It will also not prevent infringement, or

1 According to Forbe's World's Most Valuable Brands 2019 - https://www.forbes.com/sites/kurtbadenhausen/2019/05/22/the-worlds-most-valuable-brands-2019-apple-on-top-at-206-billion/#3eaaba8e37c2

overcome problems with getting your mark registered if there is a prior registered mark with the same or substantially the same word(s).

It is, however, possible that a mark that is not inherently adapted to distinguish can in fact come to distinguish goods or services if it is sufficiently used. This is how even relatively poor trade marks, if they have substantial capital backing and use to make them well known, can be registered and enjoy a monopoly, restricting other traders from using the descriptive terms. A good example of this is Choice Hotels International Inc's registration of CHOICE HOTELS even though on its initial application it was refused registration on the basis that is was not inherently adapted to distinguish.

Ensure your trade mark is not similar to others

If your trade mark is substantially identical or deceptively similar to an existing trade mark it is likely to be rejected by IP Australia or, if initially accepted, might face opposition by the owner of the similar mark. A trade mark will be deceptively similar where the impression of the imperfect recollection of a consumer which is carried away and retained might lead to a mistaken belief that the trade marks are from the same source. To determine whether a trade mark is substantially identical a side by side comparison needs to be made, looking at the visual and aural aspects of two marks and how these aspects are similar or dissimilar.

It is also possible that if your trade mark is similar to an existing one you could be found to be engaging in misleading or deceptive conduct or passing off your brand as that of another.

This is why undertaking availability searches is so important. It is of no benefit to build value in a trade mark only to find you have always been infringing another or were never likely to obtain the protection afforded by registration.

Be aware of the prohibitions & restrictions

A trade mark will be rejected if it is scandalous or contrary to law.

A scandalous mark is one which has an element of personal abuse or incorporates racial or ethnic abuse. Trade marks which indicate religious intolerance or abuse will also be rejected as being scandalous. This was highlighted in an American case in which six trade mark registrations of the word REDSKINS were cancelled, despite long term use by the applicant, the Washington Redskins American football team, as they were perceived as being disparaging or offensive to Native Americans.

Trade marks that are likely to deceive or cause confusion will be contrary to law and not accepted. Aside from the obvious confusion that might be caused by similar trade marks, using a geographical indication on a product when it does not come from the location represented by the geographical indication may also be a ground for invoking this ground of rejection. Another example is a trade mark which uses a famous person's name or image to connote a connection between the goods and services and that person where there is no such connection.

While an uncommon surname can make a good and unique trade mark, common surnames are quite the opposite. The more common the surname the less inherent adaption to distinguish it will have. Where the goods or services to which the surname is to be applied as a trade mark are also common there is little chance that the trade mark will be accepted by IP Australia.

There are also specific prohibited signs to consider such as flags, the Geneva cross, official signs and emblems.

Make your application with confidence

There is little point in creating a trade mark which is not registrable or might be able to be used by other businesses. So, make sure your mark is distinctive and does not describe your goods or services. With the help of a professional you can obtain comprehensive searches to ensure that your trade mark is as unique as you think and doesn't contravene any prohibitions.

Then, you can feel more confident in making an application to register your trade mark and, if the need arises, enforcing it.

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DISSECTING DECISIONS | **By Debra Lane**

Damages for Disappointing Holiday

Can you sue if a package holiday does not go as planned? In some circumstances, you can. Read on…

Scenic Tours v Moore [2018] NSWCA 238 was a class action in which various people sued the tour company because they had not received what they had bargained for, i.e. *"a luxury 5 star experience of a (European) river cruise in accordance with the itinerary which would include highlighted events and destinations"*.

Mr and Mrs Moore had booked a European river cruise with Scenic from Amsterdam to Budapest. In the months leading up to the cruise, Europe's rivers were affected by high water levels on account of extensive rainfall and melting snow. This resulted in the flooding of waterways and the damaging of locks on the river, rendering them inoperative. Consequently, the cruise was not as advertised and Mr and Mrs Moore travelled around Europe mostly by coach and changed ships on two occasions.

A class action was commenced against Scenic in 2014 with Mr Moore the representative for a group of passengers from 13 different Scenic cruises who claimed compensation and damages arising from an alleged breach of the consumer guarantees for services under the Australian Consumer Law ("**ACL**") found in Schedule 2 of the *Competition & Consumer Act 2010 (Cth)* (formerly the *Trade Practices Act*).

Under the ACL there is a distinction between a "major failure" and a "minor failure" of the service guarantees. Minor failures are those that can be rectified within a reasonable time.

There will be a major failure of services where:

a. the customer would not have engaged the service if s/he had known the nature and extent of the problem;

b. the service does not meet the reasonable expectations a customer would have had (i.e. a failure to meet the due care and skill guarantee) and the problem cannot be rectified within a reasonable time;

c. the services do not meet the "purpose" and "result" guarantees and the problem cannot be rectified within a reasonable time; or

d. the supply of services creates an unsafe situation.

Where there is a major failure of the service, the customer can choose to cancel the contract and seek a full refund, pay a reasonable sum for the work already done, or keep the contract and negotiate a price for reduction in value of the services as a result of the failure.

Mr Moore argued Scenic's breaches were a major failure to comply with the consumer guarantees and

sought compensatory damages under the ACL.

Scenic argued that the poor weather and flooding which caused the problems with the cruises were circumstances entirely beyond its control. Scenic also said that such occurrences of the weather were an ordinary incident of river cruising and should have been anticipated by passengers.

Not surprisingly perhaps, the plaintiffs and Scenic had differing views as as to what the "services" actually comprised. The Court disagreed with Scenic's position and accepted that the advertising brochure would be the appropriate starting point as this constituted the "offer" of services (which were described in detail) which the customers accepted by paying their deposit.

The Court said if Scenic's view had been accepted, that would have allowed it to take its guests from Amsterdam to Budapest by coach, staying at hotels along the way without there being any breach of contract or failure to fulfil the consumer guarantee. However, that said, the Court acknowledged that there must be some latitude as to things occurring outside Scenic's control and which the terms and conditions provided for which might cause some short term changes to the itinerary. However, Scenic's approach, i.e. that it should be allowed to provide something entirely different from what was offered, which could not be accepted.

There was a substantial amount of evidence submitted to establish Scenic's level of awareness of the river conditions leading up to the departure date including internal emails, weather reports, comments made by the Cruise Directors to passengers or reports compiled by the Cruise Directors as to what was happening on individual cruises as they unfolded. It was clear that the itineraries would be substantially interrupted and Scenic would not be able to provide the services promised.

The New South Wales Court of Appeal found that:

a. Scenic Tours has breached its consumer guarantees in that it had failed to exercise due care and skill in the provision of the services;

b. Section 275 of the ACL operated to pick up the *Civil Liability Act 2002* (NSW) as a surrogate federal law;

c. damages for disappointment and distress constituted personal injury; and

d. Section 16 of the *Civil Liability Act 2002* (NSW) applied so that Mr Moore was unable to recover damages for disappointment and distress as he did not meet the minimum 15 per cent threshold.

This decision makes it clear that where a business is unable to provide the services in substantially the same form as that which has been promised or advertised, it has an obligation to make its customers aware of this as early as possible and offer remedies as provided for under the ACL, such as alternative services, a refund, or negotiate a reduced price for the drop in value.

Both parties in *Scenic Tours v Moore* have made application for special leave to appeal to the High Court.

This recent decision is not new law as such, however.

More than 25 years ago in *Baltic Shipping v Dillon* (1993) 176 CLR 344, the High Court found that damages for disappointment and distress are recoverable for breach of contract if the object of the contract is to provide enjoyment, relaxation or freedom from molestation. Ms Dillon had suffered physical injuries and emotional trauma, as well as disappointment and distress because she had not received her planned happy holiday experience.

There was a clear distinction drawn between emotional trauma and damages for disappointment and distress. Emotional trauma was treated as personal injury whereas disappointment and distress were not, constituting a separate head of damage to damages for personal injury.

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DISSECTING DECISIONS | **By Sandy Donaldson**

Direct Marketing and Data Sharing: Shahin v BP Australia

Direct marketing is a prevalent and ever-increasing aspect of life in this digital age. Direct marketing does not, of course, have to be digital but that is generally the method used to get marketing material out to the widest audience in the quickest and easiest way.

Direct marketing can only happen if a business that wants to market products or services has contact information for potential customers that it wants to market to, and it will be more effective if it is targeted to the potential needs or preferences of potential customers.

So, data with contact details and useful information about habits, needs and preferences of individuals can be very valuable to a business seeking to use direct marketing.

Can businesses use direct marketing?

Given the prevalence of direct marketing, it may seem an odd question to ask whether a business can market directly to individuals. The question is really whether the business can use *personal information*, particularly names, addresses or other contact details, or personal information to do this. This is governed by the *Australian Privacy Principles* ("**APPs**") in the *Privacy Act 1988* (Cth) ("**the Privacy Act**").

The APPs apply to personal information of *individuals*, that is real people, so information about firms, companies or other entities is not *personal information* and the APPs do not apply to marketing to them.

APP 7

The starting point is APP 7, which deals expressly with direct marketing. APP 7.1 prohibits an organisation that holds personal information about an individual from using or disclosing the information for the purpose of direct marketing. This absolute prohibition, however, is qualified by some exceptions in APPs 7.2-7.5.

The exceptions that will most commonly apply are those in APP 7.2 and APP 7.3 relating to the use or disclosure of personal information, other than sensitive information, about an individual for the purpose of direct marketing. APP 7.4 deals with sensitive information about an individual and requires consent of the individual for use or disclosure of the sensitive information for direct marketing.

APP 6

APP 6 also deals with use or disclosure of personal information by an organisation, and APP 6.1 prohibits use or disclosure of the information that was collected for a particular purpose (the ***primary purpose***) for another purpose (the ***secondary purpose***) unless the individual has consented or (for an organisation) exceptions in APP 6.2 apply. The main exception in APP 6.2 for information, other than sensitive information, is that the individual would reasonably expect the APP entity to use or disclose the information for the secondary purpose and the secondary purpose is related to the primary purpose.

Shahin Enterprises v BP Australia

A recent judgment of Justice Blue in the Supreme Court of South Australia has clarified the operation of some of the

PRIVACY POLICY

provisions of APP 7, and the interaction of APP 7 and APP 6.[1]

For those who may have had some difficulty understanding APP 7 and APP 6, it may be some comfort that Justice Blue has observed that:

> *"…Principle 7 is unhappily drafted: the draftsperson has not adequately grappled with the various dichotomies created or sought to be created within Principle 7 or between Principle 7 and Principle 6 or with the situation in which an organisation discloses personal information to another organisation for the purpose of direct marketing by that other organisation."*

In his concluding remarks, the Judge went even further, saying:

> *"I have observed that in several respects Principle 7 is unhappily drafted. It is desirable that the Commonwealth review whether Principle 7 should be comprehensively redrafted to manifest more clearly the legislative intention sought to be effected by it".*

The issues in Shahin v BP Australia

The litigation between Shahin Enterprises and BP Australia arose out of an agreement between these companies entitled "*BP Branded Privately Owned Sites Agreement*" ("**the agreement**"). This Agreement was completed following the acquisition by Shahin Enterprises from BP Australia ("**BP**") of 25 service stations operated by BP in South Australia.

"The APPs apply to personal information of individuals, that is real people, so information about firms, companies or other entities is not personal information and the APPs do not apply to marketing to them."

The litigation involved the construction of clauses of the Agreement relating to the branding of sites operated by Shahin as BP service stations and, in relation to direct marketing, clause SC21 which provided that:

> *Subject to relevant privacy legislation, BP will regularly provide to the Dealer information reasonably requested about BP cardholders who visit Dealer sites so that the Dealer may market goods and services to these customers.*

Relying on clause SC21, Shahin made a written request to BP requesting personal information about BP Plus card customers who visited Shahin petrol stations in the previous 24 months. Shahin said expressly that its purpose in making the request was to market goods and services at its service stations directly to the BP cardholders.

BP refused the request of Shahin on the basis that it would breach the applicable privacy legislation referred to in clause SC21, which was acknowledged to be the Privacy Act and the APPs. In the proceedings, BP contended that the disclosure by it to Shahin of the requested information would have been a breach of the legislation, and that the use by Shahin of the information, if disclosed, for direct marketing would also have been a breach of the legislation.

Shahin asserted that the refusal of BP to provide the information was a breach of clause SC 21, and asserted that the disclosure of the information by BP would not have been contrary to the legislation. The Judge found that the disclosure of the information by BP would have been contrary to the APPs, and that BP did not therefore breach clause SC 21 by this refusal, but this was not a straightforward conclusion because of the wording of the APPs.

Some of the findings of the Judge in relation to the direct marketing and privacy issues are:

- **Disclosure by an organization (primary organisation) to another organisation (secondary organisation) for the purpose of direct marketing by the secondary organisation is governed by solely by**

continued overleaf...

1 *Shahin Enterprises Pty Ltd v BP Australia Pty Ltd* [2019] SASC 12.

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APP 7, not APP 6. As APP 6.7 provides that APP 6 does not apply to the use or disclosure by an organisation of personal information for the purpose of direct marketing, this may have seemed obvious. However, this is one of the areas in which the Judge observed that APP 7 is *"unhappily drafted"*.

- BP argued that APP 6, not APP 7, applied to any disclosure of personal information by BP to Shahin for the purposes of direct marketing by Shahin (not BP). The Judge thought that the construction advanced by BP was arguable, but that although the *"various dichotomies"* within APPs 7 and 6 made this position arguable, on the balance, BP's argument did not succeed and APP 6 was held not to apply to the disclosure by BP of information to Shahin for the purpose of direct marketing by Shahin, which disclosure was exclusively governed by APP 7.

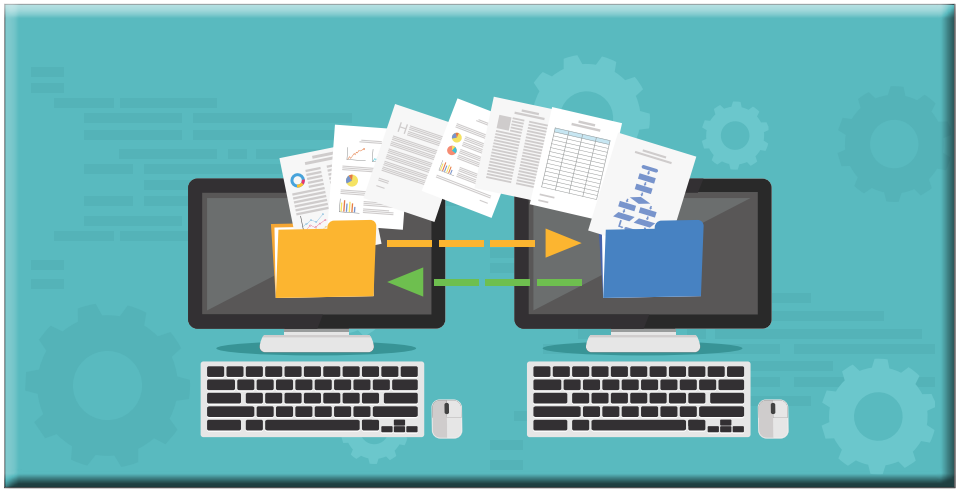
- **APP 7.2 only authorises the use or disclosure of personal information about an individual for the purpose of direct marketing by the organisation which collected the information from the individual.** It does not authorise an organisation that collected information (primary organisation) to disclose personal information to another organisation (secondary organisation) for the purpose of direct marketing by the secondary organisation.

- The Judge considered that this conclusion was reinforced by APP 7.3 which applies (among other situations) to use or disclosure of personal information by a secondary organisation when the organisation has collected information from a source other than the individual.

- **The requirement of APP 7.2(a) that an organisation has collected information from an individual only applies when the organisation collects information from the individual (by the organisation or its agent) and does not apply when the information was collected from someone other than the individual, but the individual was the ultimate source of the information.** The Judge observed that although the text of APP 7.2(a) does not refer to the collection of information *"directly"* from an individual, this is the proper construction of APP 7.2(a).

- **The requirement of APP 7.3(b)(i) that an individual has consented to the use or disclosure of information requires that the consent should be to the use of the information for direct marketing by the organisation seeking to use the information.** BP's terms and conditions and Privacy Policy contained terms which allowed BP to send direct marketing communications. The Judge held, however, that these terms were not a consent by a cardholder to the disclosure of personal information by BP to Shahin for the purpose of direct marketing by Shahin.

- **The requirement in APP 7.3(b)(ii) that it is impractical to obtain the consent of an individual is not satisfied if an organisation holding**



"Perhaps the clearest lesson from this case is that terms and conditions of organisations providing for consent by individuals to the use of personal information for direct marketing should be very clearly expressed ..."

personal information lacks the power to unilaterally change terms and conditions to provide for consent or if it is difficult to do so. If BP was not able to change its terms and conditions for cardholders it could still have obtained consent, even if this was difficult. The Judge observed that "*It is not clear what circumstances the legislature had in mind in obviating the need for consent when it is impracticable to obtain that consent".*

Shahin contended at trial that BP had an implied obligation to amend its cardholder conditions to provide for consent, but as this was not pleaded, the Judge did not make any finding.

- **The primary purpose for which information is held in accordance with APP 6.1 may include more than one purpose, not just a single primary use.** The Judge, however, rejected the contention of Shahin that the primary purpose of information collected by BP was disclosure to Shahin for the purposes of direct marketing.

The reference in clause SC 21 of the Agreement to the *"relevant privacy legislation"* meant that as a matter of construction of the Agreement BP was not in breach by refusing to supply the requested personal information to Shahin. This leaves open the question of what would have been situation if there had been no reference to privacy legislation in the Agreement. The Judge observed, although noting that this was not strictly necessary for the decision, that a disclosure by BP would have been unlawful, and the result would, presumably, have been the same.

Perhaps the clearest lesson from this case is that terms and conditions of organisations providing for consent by individuals to the use of personal information for direct marketing should be very clearly expressed, and that this is particularly the case if data will be shared with other organisations for the purpose of direct marketing by other organisations.

Other legislation

Apart from the *APPs*, there are other requirements which must be considered if direct marketing is to be undertaken. These include:

- Compliance with the *Spam Act 2003* (Cth) ("**the Spam Act**") if the direct marketing is to be undertaken by way of *electronic messages*. APP 7.8 provides that APP 7 does not apply to the extent that the *Spam Act* or the *Do Not Call Register Act 2006* apply. This leaves the interaction of the APPs and those Acts somewhat up in the air, and may be another example of "*unhappy drafting*".
- Section 20G of the *Privacy Act* provides that a credit reporting body holding credit reporting information about an individual must not use or disclose that information for the purposes of direct marketing, subject to some limited exceptions.

Time to review contracts and privacy policies

It may be prudent for organisations to review their terms and conditions and privacy policies to consider the consents that are given by individuals for use of personal information for direct marketing.

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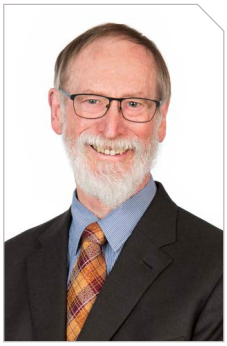

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INSIGHT| **By Joanne Cliff**

Separated but Living Under the One Roof: Together but Apart

You might be surprised that figures from the Department of Human Services in March 2017 show that some 38,629 Australians are registered with Centrelink under a code "separated under the one roof".

This means that a person is registered as a single person, although they are living in the same residence with the former spouse/ defacto partner from whom they are separated. This can occur when couples are awaiting a divorce and/ or a financial settlement.

Given its prevalence, it is not surprising that such an arrangement is recognised in the *Family Law Act 1975 (Cth)* ("**FLA**"). Section 49(2) of the FLA says:

> *"The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding they have continued to reside in the same residence but either party has rendered some household services to the other."*

There are a number of obvious reasons why separated couples may agree to live in the same residence. House prices is one reason as it is difficult to financially support two homes, particularly where there are delays in the Courts in finalising financial settlements. Additionally, couples may consider that it is better for the children. However, there is a difference between couples staying together for the sake of the children and where one parent remains in the matrimonial home for the sake of the children. In the first situation, the marriage is intact but in the second one party remains, even though the couple consider the marriage is over.

Can it be this simple - just to assert that the marriage is over but, for various reasons, live under the one roof? Unsurprisingly, it is not simple. It is not sufficient to just assert in Court documents that the marriage is over. Where there is no visible physical separation, the intention to sever the marital relationship has to be carried out clearly and unmistakeably to convince a Court that separation has happened.

What does the law mean by "separated"?

When parties continue to live under the same roof, regard has to be had to a number of elements to establish whether or not the 'consortium vitae', that is, the matrimonial relationship, has broken down.

The consortium vitae consists of a number of matters which go to make up a matrimonial relationship such as sexual relations, dwelling under the same roof, enjoying each other's society, protection and support and recognition of them as a couple in public and private.

In a 1976 case the Family Court said about this issue:

> *"The most important single component of the marital relationship … all other components are secondary to it is the place where the parties can together find shelter and*

"If you can put evidence before the Court from an independent person such as a counsellor, doctor or social worker that you have separated, this will be given more weight by the Court than affidavits from friends and family members."

protection, where they can procreate their children and rear them in such security and comfort as their circumstances dictate where they can store, use and protect their property, entertain their friends, relax together and enjoy each other's society and support each other in times of sickness or disaster."

In another 1976 case, the Full Court of the Family Court stated:

"In such cases, without a full explanation of the circumstances, there is an inherent unlikelihood that the marriage has broken down, for the common residence suggests continuing cohabitation. Such cases therefore require evidence that goes beyond inexact proofs, indefinite testimony and indirect inferences. The party or parties alleging separation must satisfy the Court about this by explaining why the parties continue to live under the one roof and by showing that there has been a change in the relationship gradual or sudden constituting a separation."

In a sense, what is required is a comparison of the workings of the marital relationship and the current circumstances.

Situations where separated but living under the one roof can happen

An application for divorce has to be based on the grounds that the marriage has broken down irretrievably and that is usually proven if the parties have separated and lived separately and apart from a continuous period of not less than 12 months immediately preceding the date of the application seeking the divorce.

Obtaining a divorce in Australia today is a relatively simple matter. Most people opt for completing documents online on the Family Court's website. However, in addition to establishing a date of separation, if the parties remain separate but are living under the one roof, additional evidence has to be provided which increases the costs of divorce.

An affidavit from the party commencing the divorce proceedings and a corroborating affidavit of a third party are usually required. If the divorce application is made jointly, then both parties have to file an affidavit. This is because the Courts are alert to the fact that parties may try to avoid the *"living separately and apart for a continuous period of not less than 12 months"* requirement by asserting that they have been separated but living under the one roof for 12 months when, in fact, this has not been the case.

Similarly, if parties are seeking a financial split of property/assets accumulated during the relationship, the date of separation needs to be determined if the parties have separated but are living under the one roof.

How to prove you are separated but living under the one roof

While the evidence that needs to be put before the Court in an affidavit and by documents is not finite, the matters to be addressed include the following:

1. the date when it is asserted that the separation took place;
2. evidence that the separation or intention to sever the relationship was communicated to the other party either by words or conduct, such as delivering a dated written document to the spouse or partner stating that separation has occurred;
3. reasons as to why the parties still live under the same roof but consider themselves separated;
4. the accommodation arrangements that have been organised for once a divorce is granted and a financial settlement has been reached;
5. that sleeping arrangements have changed with parties sleeping in separate bedrooms;
6. that there has been a separation of financial interests. For example:
    - that joint bank accounts have been closed;

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- there have been changes to beneficiaries for superannuation and life insurance. For example, the husband or wife may have completed a Binding Death Nomination with their superannuation fund to allow, in the event of a death, for the superannuation to be paid to the estate rather than to the former spouse/partner;

- that each person is truly responsible for their own financial needs and they have utilised their income on an individual basis to demonstrate a lack of common financial goals; and

- there have been appropriate notifications to Centrelink and other Government agencies, such as the Child Support Agency;

7. that communal space is shared differently. For example:

    - whether each party is occupying space at different times;

    - how and in what way domestic chores have been split between the parties;

    - whether each party does their own shopping, cooking, cleaning and laundry;

    - that you both no longer eat meals together; and

    - how bills are being paid;

8. cessation of sexual relationship. Occasional sexual activity between the couple is not necessarily definitive to decide whether parties are separated but living under the one roof, but it is a factor to be considered;

9. that the couple have announced that they have separated to family and friends, which can be demonstrated by:

    - not spending time together on special occasions such as birthdays, Easter and Christmas and social occasions;

    - not attending each other's work functions;

    - family outings no longer occurring; and

10. whether either of the parties have formed a new relationship;

11. that the parties no longer give gifts to each other for birthdays and Christmas;

12. that the parties no longer use the same computer and have different telephone numbers and email addresses; and

13. that the parties have asked the school that information and notifications be sent to each of them separately.

If you can put evidence before the Court from an independent person such as a counsellor, doctor or social worker that you have separated, this will be given more weight by the Court than affidavits from friends and family members.

Summary

For couples who want to separate but live under the one roof until divorcing, dividing assets and liabilities between them, it is not as simple as just living under the same roof. A Court has to be satisfied that the parties are actually separated, even though they are physically together and that can only be achieved by satisfying the Court that the marital relationship has significantly changed.

Couples will need to satisfy a Court that they truly live independently and there is no financial interdependence.

Unless these matters can be proved satisfactorily to the Court, a divorce may be refused and a trial may be ordered where evidence needs to be put before the Court which is an additional financial expense. Similarly, a property settlement may also be refused if the Court is not satisfied that the parties' marriage is over. The legal costs of these applications are increased because of the nature and amount of evidence that needs to be put before the Court.

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INSIGHT| **By Amy Bishop**

Using the PPSR to Protect your Deposit

How PPSR usually works

The most common use of the *Personal Properties Securities Act 2009* ("PPSA") is for entities to register a 'security interest' in property over which they have taken security for repayment of a debt. It may also be used to register an interest in property which has been sold, importantly, where the seller has a retention of title until payment for the property has been made (a purchase money security interest or "PMSI"). In either case, properly registering the security interest will ensure notice of the security and, for a PMSI, give priority should a borrower or customer not pay or go broke.

The register can be searched by would-be purchasers, so they can ensure any valuable goods they are to purchase are free from registered security interests and therefore not likely to be repossessed after their purchase.

Purchaser is usually an unsecured creditor

If you are a purchaser of goods who has paid a deposit to a supplier of goods or services and this supplier, before delivering your goods or services, is put into liquidation, in the usual course you will be an unsecured creditor for your deposit, required to line up behind all the secured creditors, employees and payment of the liquidator's own costs. If there are insufficient funds left to pay all the unsecured creditors after this, you will be paid on a pro-rata basis and not receive back the full amount of your deposit, or may not receive anything.

A search of the Personal Properties Securities Register before you pay a deposit will assist by showing if, any and how many, secured creditors currently claim interests in the property of the supplier. What a search will not indicate is whether the seller is close to or in default with those creditors, so you will not know whether the asset you are about to purchase is at a real risk of repossession. Indeed, there may not be a specific asset in existence, but you may enter into a contract requiring payment of a deposit, a contract for services or an agreement to manufacture and supply goods. Often such arrangements require a substantial deposit to be paid before the goods are to be delivered or the services received.

Thus, whilst searching remains something to consider doing before making any large purchases, there may be a unique way of using the PPSA to better secure your position where you have paid a deposit to a supplier.

Obtaining a 'security interest'

If you can procure a charge from the supplier you can obtain a 'security interest' in its property.

The definition of 'security interest' under the PPSA is quite broad and means:

> *"an interest in relation to personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property)."*

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The property charged by the supplier could be specific to the cash comprised in the deposit paid and when appropriated to the contract, the goods being purchased. However, this will not be effective where a contract for services is involved, as there are no specific goods to be charged. A better approach would be to obtain a security interest by procuring a charge over all present and after-acquired property of a supplier (**Supplier's Property**) as security for performance of the contract and delivery of goods ordered or receipt of services or, in default, return of the deposit. The charge can subsist until such time as the goods are delivered free and unencumbered or the services have been satisfactorily provided.

Obtaining a charge will ensure that there is an interest in personal property (the Supplier's Property) securing performance of an obligation (supply of the goods or services) or payment of money (return of the deposit).

A perfected security interest will mean you are a secured creditor of the supplier ... Accordingly, you will be ahead of any unsecured creditors and have a greater chance of recovery in the event of a liquidation of a supplier.

Enforcing and perfecting your 'security interest'

Once you have a security interest it needs to be perfected and able to be enforced. In order to enforce your security interest against third parties[1] there needs to be:

1. Attachment of the security interest to collateral (i.e. the Supplier's Property), which will in part be satisfied by the supplier having the power to transfer rights in such collateral to a secured party as current owner. Attachment also requires either: [2]

   - value to be given for the security interest; or
   - the supplier to do an act by which the interest arises.

Arguably, if a deposit is

1 *Section 20 of the PPSA.*

2 *Section 19 of the PPSA.*

paid, this will constitute value given for the security interest. However, to be certain that attachment of the security interest to collateral is achieved we recommend having the supplier sign the purchase order containing the charge, or provide a signed acceptance of the purchase order (or the General Security Deed, if this is preferred); and

2. A security agreement that provides for the security interest covering the collateral which is evidenced in writing and that is signed by the supplier.[3] This could be a specific contract or agreement for the sale of goods or supply of services which contains a charge over the Supplier's Property. If there is no written contract, this requirement can be satisfied by having a charge over the Supplier's Property in terms and conditions for your purchase of goods or engagement of services contained in a purchase order you provide the supplier, which is signed or accepted by the Supplier. Alternatively, where you have an ongoing relationship with a supplier, a General Security Deed could be entered into to cover each contract for the supply of goods or services and each payment of a deposit.

3 Instead of signing, the security agreement is able to be adopted or accepted by the grantor by an act, or omission, that reasonably appears to be done with the intention of adopting or accepting the writing, but the safer course is to have it signed.

If you satisfy paragraphs 1 and 2 above, you can perfect your security interest in the Supplier's Property by registering it on the Personal Properties Securities Register for a small fee. Where a General Security Deed has been entered to cover ongoing supplies of goods or services only one registration would be required on the Personal Properties Securities Register.

When the goods are delivered or the services are provided the registration of the security interest will need to be discharged (unless this is a General Security Deed for further transactions).

Improved position

A perfected security interest will mean you are a secured creditor of the supplier. There may, however, be other creditors of a supplier with prior security interests which cover the Supplier's Property and which may be PMSIs and have a greater priority to the other secured creditors.

Even though you may not have priority over these interests, you will still be a secured creditor, as opposed to an unsecured creditor. Accordingly, you will be ahead of any unsecured creditors and have a greater chance of recovery in the event of a liquidation of a supplier.

So, if you do pay deposits, or make part payments, for the supply of goods or services, you may want to consider taking security for the return of your deposits or payments if the goods or services are not delivered.

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SUITS OFF | **Staff Profile**

Early Adopter. Adoring Grandfather. Guitar Playing Poet.

Sandy Donaldson Director

Alastair "Sandy" Donaldson is a very special presence around the DWFT office. As lead of our Corporate & Commercial and Intellectual Property (IP) practices, with 50 years under his belt and a penchant for helping budding lawyers learn, Sandy is the go-to for clients and associates across a vast range of business areas… including technology, intellectual property, wine, agribusiness, acquisitions, privacy, private health insurance and taxation to name but a few.

To anyone who knows Sandy, it's no surprise at all that there are numerous professional awards and accolades to his name, including recognition in ***Best Lawyers Australia*** and acknowledgement as the "patriarch" of South Australia's IP market in ***Doyle's Guide to the Australian Legal Profession***. But what is surprising, is how humble he is by nature and how, in spite of being in such high demand, he finds time to enjoy the little things in life… the little things that truly make him tick.

The nippers

A tiny scratch of the surface of Sandy's life outside work reveals a number of true loves, and top of that list is his grandkids. His lawyer son John has two daughters, his lawyer / scientist daughter Anne has two sons, and all four of the nippers are between four and eight years old - which Sandy describes with dry humour as ***"pretty interesting ages"***.

Sandy quite candidly admits that he and his wife would much prefer all the family be here with them in Adelaide – and we quietly suspect they will always be subtly campaigning to make that happen eventually – but for the present all the grandkids are in Melbourne. So, in true devoted grandparent style, Grandad and Grandma maintain a small unit in Melbourne and spend as much time as possible interstate.

"Us grandparents are in high demand", beams Sandy. ***"Having our little Melbourne unit means we are able to have the grandkids with us for sleep-overs, which is lots of fun. We then spend our days doing things like the zoo, museums and science works… which secretly I enjoy as much as them. My daughter and her husband also have a little property at Marysville, a gorgeous town in the Yarra Valley, so we love getting the whole clan together up there whenever we can. We're very lucky."***

The nips

To say Sandy's interest in wine and spirits extends beyond the professional realm is, by his own admission, an understatement to say the least. Sandy elaborates: ***"I have a particular interest in fortified and desert wines, which probably stems from years ago with winemaker friends who were fond of producing them."***

Sandy has done a lot of work over the years in the wine industry. He is a regular attendee at the Winestate magazine awards, where DWFT is a proud sponsor of the fortified wine award. ***"In fact"***, smiles Sandy, ***"it's a***

standing joke at Winestate tastings that I head straight for the fortifieds when I come in!"

"As for my passion for malt whiskey, as I always tell everyone, that interest is purely scientific", Sandy says with yet another smile. *"Although I must admit I continue to enjoy my membership of the Gilles Club, a national network of malt whiskey tasting groups, which I joined about 20 years ago. Our group is a small but very interesting collection of characters and, as the South Australian contingent, we pointedly call ours the 'Gilles Free Settlers Club', to distinguish ourselves from convict descendants in other states."*

The tech

Sandy is well known around the office for being extremely tech savvy, but he humbly insists that while very interested in technology, he *"does not pretend to have any particular expertise"*. Although he does confess to being an early adopter of IT, confirming he's had a computer at home since the clunky days of the Commodore64, and that he bought the very first iPad to be released.

"I think IT is a great enabler. Advances in genetics and Artificial Intelligence are leading to some amazing places. However, I don't think all technology developments are positive… with so much reliance on IT, social media and connectivity, I'm concerned that information overload often compromises quality of thought and work as a result. And don't get me started on the flood of emails I now receive, which is a massive bane of my life!"

The people

In Sandy's line of work, being a people-person is arguably a prerequisite, and there's no mistaking his love of the job in that respect. He's a gifted problem solver, and a gifted explainer of solutions to personalities from all walks of life in ways they find easy to understand. He also clearly enjoys working with other people, particularly young lawyers who are eager to learn.

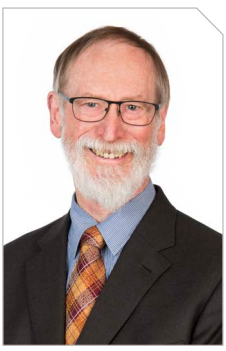
There are plenty of entertaining stories about colourful personalities Sandy has met along the way. He chuckles particularly hard describing a client he represented for many years. *"He was often described as a 'likable rogue', although some of the creditors behind his failed companies may not have agreed with the 'likable' bit"*, Sandy muses. *"He was, however, a great enthusiast who tried many things, and I particularly remember his delight when he took over an ice making business, at the fact that people would actually 'pay for some frozen water"*.

The pipe dream

When asked what he'd do for a living if he could choose any profession, anywhere in the world, Sandy says resolutely, *"I like being a lawyer in Australia",* which is a comfort for his clients to hear, many of whom openly admit they wouldn't know what to do without him. Indeed, one of his longest standing clients suggests he could be a "cat herder", in recognition of his incredible ability to effectively organise a multitude of mutually-exclusive moving parts, that to most people would prove impossible.

But what if he didn't have to work, perhaps following a big lottery win? *"I have no idea"*, confesses Sandy. *"Possibly an involvement in some creative, constructive or productive enterprise, using technology to make things which are ground-breaking and ecologically friendly. Alternatively, maybe I could just play my guitar and read and write poetry."*

Well, until that day arrives, Sandy's colleagues and clients hope he stays right where he is.



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