DW Fox Tucker Lawyers

Autumn Report 2015

A Vintage Australian Success

One of the world's most famous wine critics has given Barossa Valley's Torbreck a flawless 100 point rating, for its "perfectly balanced" Shiraz. Is Torbeck's "The Laird" set to rise as high as Penfold's "Grange"?

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inside this issue

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CLIENT PROFILE

"The name 'The Laird' means 'Lord of the Manor' in Scottish terminology, and it certainly deserves that title."

Torbreck Vintners

When it comes to truly great, internationally recognised Australian wine, Penfold's iconic "Grange" has long stood alone at the top of the tree, with perhaps only Henschke's "Hill of Grace" approaching its reverential status. But after some big news on the worldwide grapevine, it seems that another local drop could join them at the top.

"The Laird" is the crowning achievement of Barossa Valley winery Torbreck Vintners. Described as a perfectly balanced, elegant, powerful and yet mellow Shiraz, *The Laird's* 2005 and 2008 vintages both received a flawless 100-point rating from arguably the world's most respected wine critic, Robert Parker.

It's also met with incredible commercial success. The recently released 2010 vintage – as yet not reviewed, but again tipped to be outstanding – sold out in less than a month at the price of $750 per bottle, making it Australia's most expensive current-release table wine.

According to Torbreck General Manager Peter Perrin, *The Laird's* rise is the satisfying result of around two decades' tireless work in the pursuit of establishing the South Australian producer as one of the world's finest wine estates.

"We're very proud of it," says Peter. "The name 'The Laird' means 'Lord of the Manor' in Scottish terminology, and it certainly deserves that title."

Established in 1994, the winery now produces and exports over 20 different wines, including the classic Barossa red varieties of Shiraz, Grenache and Mataro, as well as whites Viognier, Semillon, Marsanne and Rousanne. It owns and manages several high quality vineyards in the world-renowned region, but *The Laird* comes from perhaps the most special of all.

"Our *Laird* vineyard is as close to perfect as it gets," says Peter. "Previously known as 'Gnadenfrei', it's southeast facing in the Marananga area, with cool gully breezes reminiscent of France's famous Mistral wind, which blows through the Rhone Valley.

"It's planted with one of the original Barossa Shiraz clones, dry grown, hand tended and traditionally farmed and pruned. The berries are small and concentrated, but they also possess an 'x-factor' that no-one can fully explain."

With the assistance of DW Fox Tucker, Torbreck purchased the vineyard outright (it had previously been held under contract) in 2014 from legendary South Australian wine figure Malcolm Seppelt.

According to Peter, the acquisition was important not just in terms of securing a valuable asset, but also as a long-term strategic move.

"We saw it as a fantastic opportunity for both Torbreck and the Barossa to continue its fine-wine story, and to further explore the detailed journey from regional to site-specific wines," he says.

"It goes hand-in-hand with the installation of our own on-site bottling facility a few years ago, which gives us complete quality control throughout the winemaking and production process.

"It just goes to show what's possible with hard work and patient capital accumulation, allied to an informed, long-term vision."

For further information on Torbreck Vintners and their wines visit www.torbreck.com or call +61 8 8562 4155.

Front cover
Torbreck's *Laird* vineyard, Barossa Valley

"Our Laird vineyard is as close to perfect as it gets ... It's planted with one of the original Barossa Shiraz clones, dry grown, hand tended and traditionally farmed and pruned."

"The berries are small and concentrated, but they also possess an 'x-factor' that no-one can fully explain."

TORBRECK

BAROSSA VALLEY

NEWS & VIEWS | **Joe DeRuvo**

Grocery Retailers Agree to Self-Regulation

The Food and Grocery Code of Conduct

In 2013 the Australian Food and Grocery Council (**AFGC**) and its members commenced engaging in discussions with Coles and Woolworths to improve the standards of business conduct in the food and grocery sector and in particular in the retail environment where the balance of power was heavily weighted towards the Retailer.

The Food and Grocery Code of Conduct ("**the Code**") was in response to concerns raised in public debate in recent years.

The explanatory memorandum to the Code indicates that the purpose is:

- To help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain;
- To ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect to the commercial terms agreed between parties;
- To provide an effective fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between Retailers or Wholesalers and Suppliers; and
- To promote and support good faith in commercial dealings between Retailers, Wholesalers and Suppliers.

The Code is a voluntary Code which was submitted to both the lower and upper houses for approval in March 2015. It is expected that the Code will pass into law in May 2015. By November 2015 Retailers must have offered all Suppliers a right to review and alter their Grocery Supply Agreements (**GSA**) to comply with the Code. By May 2016 all Code compliance Supply Agreements are to have been agreed and signed off by both parties.

Coles and Woolworths have signed the draft Code and have indicated that they will re-sign the Code when it is passed by Parliament.

The Code includes provisions setting out certain standards of conduct that cover the life cycle of the relationship between Retailers or Wholesalers and Suppliers. It seeks to address the potential imbalance between Retailers and Suppliers with respect to the allocation of risks. It also recognises Suppliers' need for certainty in order to plan appropriately for their business, invest, innovate and expand capacity or develop new product lines.

The Code is based on the UK experience which created a similar Code to govern the Retailer Supplier relationship. However, unlike Australia the UK Code is mandatory. The Code covers Retailers, which means those corporations that carry on supermarket business in Australia for the retail supply of groceries or carry on a business of purchasing groceries from a Supplier for the purpose of resale to persons carrying on a supermarket business in Australia for the retail supply of groceries. It does not cover Coles or Woolworths liquor, Coles or Woolworths petrol convenience stores, Wesfarmers or Woolworths other stores.

It will be mandatory for Retailers who have signed up to the Code to enter into GSAs with each of their Suppliers. This is designed to create visibility and clarity around the trading relationship. This will become the most important trading document between the parties. The GSA cannot be unilaterally changed by the Retailer and it will be a breach of the Code if the Retailer conducts business with the Supplier without a GSA in place.

The GSA will cover things such as:

- Terms of Agreement;
- Quality Standards;
- Delivery Criteria;
- Payment Terms;
- Categories of Products;
- Promotional Terms;
- Wastage;
- Ordering;
- General Warranties;
- Private Labels;
- Criteria for Termination;

The Code will set a new standard for relationships between Retailers and Suppliers and will be beneficial to harmonising the industry.

- Date/Systems Access;
- Merchandising Support;
- Provision of Data Requirements and Confidential Information; and
- Price Increases.

There are some basic behaviours that the Code seeks to enforce in paragraph 28 of the Code, namely an obligation to deal lawfully and in good faith. This clause is key to setting the tone of the Code. There are also obligations of reasonableness and timeliness enacted into the Code dealing with a number of facets of the Retailer Supplier relationship.

The Code deals with a number of specific areas as follows:

- Supplier and Retailer payments;
- Waste and Shrinkage;
- Listing and Delisting;
- Shelf Space and Location;
- Promotions;
- Other Payments;
- Product and Supply Chain Issues; and
- Intellectual Property and Confidential Information.

In relation to each of these areas the Code sets out what is acceptable behaviour and what is unacceptable behaviour.
There are a number of key changes throughout the areas listed above which will change the nature of the relationship as compared to the present position. Those changes are:

- A Retailer may not deduct payments from a Supplier's invoices without explicit agreement from the Supplier.
- Retailers may not make unsubstantiated claims against a Supplier and demand payment.
- Retailers may not withhold legitimate payments due to a Supplier.
- Retailers may not challenge historical payments going back further than 2 financial years excluding the current year.
- The Supplier cannot be required to pay for any damage caused by the Retailer unless the damage is due to the Supplier's negligence.
- Retailers will be required to publish their Range Criteria which should set out the hurdle rates and their selection criteria and standards.
- Suppliers will have the right to have any decisions made through a range review process reviewed by a senior buyer and request the basis for the decisions.
- A new line fee can only be levied if it reflects a reasonable estimate by the Retailer of the costs and risks to the Retailer in stocking, displaying or listing the grocery products.
- There need to be legitimate commercial reasons for a product delist.
- A Retailer must publish the Ranging and Shelf Allocation Principles and be seen to be acting in accordance with them.
- A Retailer must apply the Ranging and Shelf Allocation Principles fairly and equitably to all brands including private label.
- There are restrictions around rejection of products for quality.
- The Retailer must not directly or indirectly require a Supplier to make material changes to the supply chain for the duration of the GSA.
- The Retailer is contractually obligated not to share confidential information beyond the internal audience that has a 'need to know'.
- Retailers need to identify what their internal procedures are for protecting confidentiality.

The Code also sets out a complaint resolution process which is firstly a formal written letter to the buyer outlining the Code compliance issue. Secondly, a formal written summary of the issue to the senior buyer. Thirdly, a formal written request for the issue to be reviewed by the Retailer's independent code of compliance officer and fourthly, a complaint to the ACCC.

The Retailer must consider all complaints as long as they are submitted in writing with the appropriate level of detail and they must make all reasonable efforts to investigate the complaint within 20 business days. On completion of the investigation the Retailer (Code Compliance Manager) has 5 days to provide the Supplier with a summary of the investigation and the proposed actions. The Retailer has obligations to keep records for a minimum of 6 years and to report to the ACCC every 6 months in relation to the complaints received and what action has been taken to remedy the complaints.

The Code will set a new standard for relationships between Retailers and Suppliers and will be beneficial to harmonising the industry.

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NEWS & VIEWS | **Sandy Donaldson & Eddy Nehme**

Are You Ready to Have a Go?

Start-up and small business incentives

The Treasurer, Joe Hockey, said in his 2015 Budget speech that he would like small business to "*have a go*". A lot has already been written about concessions and incentives that are on offer for both existing small businesses and start-ups but, as with many budget announcements, legislation is not yet in place and further details are emerging.

With the Budget package and other recent announcements it seems that now is a good time to take the plunge into the start-up pool.

Tax concessions are the main game

For a start-up venture, benefits on offer may not provide any immediate benefit as the majority are tax concessions which will not result in a saving until the venture starts earning taxable income. The concessions, however, will mean that reduced tax liabilities will assist cash flow when income is earned. In any event, if deductions are available for a business which has no or little income in start-up phase, business losses may be carried forward to set-off against taxable income when it is derived in the future.

What are the incentives?

The pre-budget measures which may assist start-up ventures include:

- changes to employee share schemes;
- low interest rates (this is a Reserve Bank, not a Government, measure, but is in the mix);
- crowd-sourced funding.

The Budget package includes, for *small businesses*:

- a 1.5% tax cut for companies;
- a 5% tax discount for other businesses;
- the $20,000 immediate asset write-off;
- removal of FBT on small electronic devices;
- deductions for start-up professional costs;
- a CGT roll-over for changes in business structures;
- red tape reduction – reduced compliance costs and "one-stop-shop" registrations.

Some of the proposed changes are summarised below.

Employee share schemes

Changes to the taxation treatment of employee share schemes were announced by the Government on 14 January 2015. The changes are to take effect on 1 July 2015. Legislation is in draft form, but has not been introduced.

The new system may help start-ups in technical and other areas by making it more attractive to remunerate employees with shares or options when cash is not available to pay sufficient salaries to attract the right employees.

The changes are intended to provide relief from measures introduced in 2009 by making some changes applicable to all companies. For example, discounted options for shares issued by all companies will generally be taxed in the year they are exercised (not when the options are issued).

Further concessions are available for eligible start-up companies, which are those which are unlisted private or public companies registered for less than ten years, with an annual turnover less than $50 million. The start-up company must also be an Australian resident taxpayer. For these start-up companies, both options and shares issued at a 'small discount' (15% or less) from market value will not be taxed up-front so long as the employee holds the shares, or options, for at least three years. Options under certain conditions will have taxation deferred until they are exercised. Shares (issued at a small discount) will have that discount exempt from taxation. The Government will also extend the maximum deferral period to 15 years (extended from 7).

Lower interest rates

As we said above, interest rates are not a budget or a Government initiative, but the current lowest cash rate of the Reserve Bank should mean that loans are available for businesses at competitive rates. For start-ups, however, without cash flow or security, loans may remain too fickle to obtain.

Crowd-funding

The budget announcement re-affirmed previous statements that the Government is looking at *crowd-sourced equity funding* (**CSEF**) for start-ups. This could be a significant advantage for start-up enterprises, but there is little detail other than a commitment to provide $7.8 million to ASIC to implement and monitor a regulatory framework for CSEF.

With the Budget package and other recent announcements it seems that now is a good time to take the plunge into the start-up pool.

Currently, regulation of fund raising is strict and complicated with requirements in both the *Corporations Act* and the *Financial Services Regime*. Although draft legislation for CSEF has been foreshadowed to come mid-year, the issues are complex, and it is likely to be sometime before any real direction is known.

If a user-friendly system for CSEF is introduced, perhaps along the same lines as New Zealand, to allow the raising of funds on internet platforms from small investors, this would provide a real opportunity for start-ups to source funding which would not otherwise be available.

The budget announcement however only indicates that the Government is considering making it easier for *public companies* to access crowd-sourced equity funding. It appears this will not be available to proprietary limited companies or non-company entities.

Tax cuts for companies and small businesses

The budget announcement proposes that for a *small business* that is:

- a company - a 1.5% cut in the tax rate will apply so that the new company tax rate will be 28.5%;
- that is not a company (a partnership, sole trader or a trust) - a 5% tax discount will apply, reducing the amount of tax on business income by up to 5%, capped at $1,000 each year.

The tax cut/tax discount will apply from 1 July 2015.

The $20,000 write-off

The budget announcement that has perhaps caused the most excitement in the press and elsewhere is a proposal to allow a *small business* to depreciate any asset costing less than $20,000 immediately. There is to be no limit on the number of assets which may be acquired costing less than $20,000.

This incentive applies immediately, from budget night (7.30pm AEST, 12 May 2015) until 30 June 2017.

There is no doubt that the ability to depreciate a range of assets of $20,000 or less immediately will be a substantial cash-flow benefit to small businesses.

The popularity of the $20,000 immediate asset write-off may have prompted the ATO to act quickly to issue some guidance and words of caution. A media release of the ATO on 15 May 2015 and a guidance note have been issued. The media release makes the following points:

- a small business which acquires assets over $20,000 will need to pull these assets to be depreciated at a rate of 15% in the first year and 30% thereafter;
- small businesses must keep records of their purchases to claim the deduction;
- "*the ATO will be working with small businesses looking to use the immediate deduction to ensure they are appropriately claiming it… We will be monitoring claims of this nature and following up on higher risk cases*".

FBT for portable electronic devices

A further concession to *small businesses* will be the ability to provide portable electronic devices, such as mobiles, laptops and tablet computers, to employees for work purposes without incurring fringe benefits tax.

This concession, like the employee share scheme proposals, is likely to be popular and to encourage more innovative employment packages.

Deductions for start-up professional costs

Currently professional costs relating to the establishment of a small business, such as legal and accounting fees, must be written-off over a five year period. The budget proposal is that these professional costs for a small business may be written-off in the year that they are incurred.

This is likely to assist cash flow for start-up small businesses which have taxable income.

The rules relating to this write-off are not clear at the present time. Legislation will be introduced.

CGT roll-over relief for changes in business structures

A small business will be able to change the business structures, and the entities carrying on the business, without incurring capital gains tax on transfers of business assets to a new entity. Currently, a roll-over is available if the new entity is a company, but this will, apparently, apply to transfers to all forms of entity.

Again, the rules and limits for the roll-over will not be known until legislation is introduced.

What is a small business?

Most of the taxation-related incentives that have been announced will be available only to a '*small business*'. A '*small business'* is one which has a turnover of less than $2 million per year. The business may be carried on by any entity.

Reduced compliance and registration costs

The Government intends to provide funds for the *Digital Transformation Agenda* which is meant to '*drive innovation and make it easier for individuals and businesses to access Government services*'. This is to include a *Streamlined Business Registration* system to be completed by mid-2016 to permit a range of business registrations in a single transaction on a Government website with a single identifier (the ABN of a business).

continued overleaf..

Are You Ready To Have a Go?

Start-up and small business incentives

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Another red-tape related reduction is an announced review of regulatory requirements for small companies with the aim of reducing compliance costs. Little is known of the proposals and a consultation paper is proposed to be released by Treasury in the second half of 2015.

Just how much benefit is achieved for business by these measures remains to be seen.

Time to have a go?

Although some benefits from the budget and other initiatives may not be felt immediately, and although details for many of the measures are yet to be announced and legislated, it does seem that the climate for a start-up small business may be warming sufficiently to encourage people who are thinking of this to take the plunge.

Because of the lack of detail in some of the proposed measures, anyone contemplating a start-up venture should obtain legal and accounting advice to ensure that they are able to take advantage of the new regimes.

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CASE IN POINT | **Liam McCusker & Sarah Annicchiarico**

To Err is Human

Could lawyers be mere mortals after all?

Sarah Annicchiarico

Liam McCusker

A recent District Court case http://www.austlii.edu.au/au/cases/sa/SADC/2015/66.html has held that expert witnesses are entitled to be paid for services rendered – even when those services are not ultimately required.

The facts

- An accountancy firm brought an action in the Adelaide Magistrates Court against a Melbourne based law firm for unpaid professional fees on account of services it rendered to the law firm for the preparation of an expert report.
- The accountancy firm was engaged by the law firm pursuant to a letter of engagement dated 16 November 2012 in which it was requested to prepare an expert accounting report for use in proceedings in the County Court of Victoria.
- The letter of engagement from the lawyers was silent as to the issue of fees, the required date for completion of the report and the date of the trial in the County Court. Importantly, however, the letter concluded with the sentence "*We look forward to your report … in due course.*"
- Following receipt of the letter of engagement, the accountancy firm proceeded to prepare the requested expert report and forwarded that report to the lawyers on 24 May 2013.
- As it transpired, the County Court action had been listed for trial on 28 February 2013 and was settled before the report was received by the lawyers. However, there had been no contact between the parties between the letter of engagement in November 2012 and the delivery of the report in May 2013.

The issues

- The lawyers' position in the proceedings was that there had been no concluded agreement to perform the work as there had been no agreement as to the method by which the accountancy firm would be paid for its services. Further, the lawyers asserted that the accountants had not conveyed their acceptance of its offer in the letter of engagement and, after a reasonable amount of time had lapsed, the lawyers were entitled to treat the accountants' silence as a rejection of its request. In the event the Court considered that a contract existed, the lawyers argued that the accountants' failure to deliver the report prior to the date fixed for trial constituted a fundamental breach of that contract such that it was entitled to reject the report and refuse to make payment of their fees.
- The accountants' argument was that a retainer was entered into with the lawyers on 16 November 2012 and, as such, there was no need for any further contact. Further, once it had been instructed to proceed with the work requested by the lawyers, it was the lawyers who were obliged to inform them of any time constraints, or any restriction as to the quantum of fees for the work.

Ultimately, the Court held that the nature of the letter of engagement (in as much as it was an instruction to prepare a report and not an offer made to accept instructions to prepare a report) was sufficient evidence of the lawyers' waiver of any requirement to receive a formal acceptance.

It also found that there was a concluded and enforceable retainer and although the report was ultimately not used by the lawyers (as it arrived after the matter had been settled), it was none the less a report which complied with the request made by the lawyers.

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INSIGHT | **Mark Gowans, Lisa Harrington & Isabel Miller**

The Final Report is Out - Where to Now?

The *Personal Property Securities Act* ... 3 years on

Unless you have been living under a rock, every person in business has probably heard of the *Personal Property Securities Act 2009* (Cth) ("**PPS Act**") and has an opinion about the implementation and use of the national register. It was one of the biggest and most complex changes regarding legal entitlement to ownership of personal property.

The PPS Act, which was first passed in 2009, was finally implemented in January 2012, with the introduction of the Personal Property Securities Register ("**Register**"). The PPS Act was used to reform over 70 different Commonwealth and state statutes regarding personal property and the Register replaced over 40 different Commonwealth and state registers, with the policy line being that it would become a "one stop shop".

But how successful has it been?

On 4 April 2014, the Attorney-General announced a review of the act would be undertaken by Mr Bruce Whittaker as required by section 343 of the PPS Act. Mr Whittaker's brief included undertaking consultation with stakeholders, considering the operation and effect of the PPS Act with a particular emphasis on the impact on and experience of small businesses.

After an interim report on 15 August 2014, the final report was released to the public on 18 March 2015 ("**Final Report**"). Although the Final Report found that the PPS Act had provided improved consistency for transactions dealing with personal property in Australia, it also recommended **394** amendments to the Act and highlighted the need for a renewed focus on educating the public about the PPS Act.

While the Final Report stopped short of requiring a full redraft, it proposed the removal of the following concepts which would in turn lead to the removal of a significant number of the sections, including:

1. the removal of all references to "chattel paper" and "bailments";
2. the deletion of the references to fixture, land and interest in section 10, the Dictionary of the PPS Act; and
3. the limitation of collateral classes to only six, these being:
    a. serial numbered property;
    b. other goods;
    c. accounts;
    d. other tangible property;
    e. all present and after acquired property; and
    f. all present and after acquired property with exception(s).

The Final Report found that consideration needs to be given as to whether fixtures to land should be brought within the scope of the PPS Act.

Complexity

Given that the PPS Act constituted a significant shift in the law with respect to ownership and rights of priority, it is curious that the public has not embraced the change and ensured compliance.

While the business community is aware of the existence of the PPS Act, the complex concepts it contains have made it difficult for the vast majority of users to positively engage with the Act and the Register to ensure that they are appropriately (and legally) protected.

As set out in paragraph 3.2.3 of the Final Report:

> *"the lack of awareness and understanding of the Act among users is also the primary reason why businesses are failing to comply with it.*
>
> *A person who is not aware of the existence of the Act, or of the fact that it could apply to them, is most unlikely to be operating in a manner that is consistent with the rules set out in the Act, particularly as those rules are very different in some critical respects to the law that preceded them.*
>
> *Similarly, even people who are aware of the Act and of the fact that it affects them are often failing to comply with its rules because they do not understand those rules properly".*

An example of the complexity inherent in the PPS Act is the provision in section 153 which, together with the *Personal Property Securities Regulations 2010* ("**Regulations**"), prescribes a scheme that requires a grantor to be identified by a single identifier at any time in a financing statement.

continued overleaf..

The Final Report Is Out - Where to Now?

The *Personal Property Securities Act* ... 3 years on

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Section 153 of the PPS Act in conjunction with Regulation Schedule 1, 1.3 prescribes that, for a body corporate that has an ACN, the prescribed details are "*the ACN from the National Names Index maintained by ASIC*". Specifically, section 153 of the Act states:

> *"(a) if the collateral is **consumer property**, and is required by the regulations to be described by serial number—no grantor's details;*
>
> *(b) if the collateral is consumer property, and is not required by the regulations to be described by serial number—the grantor's name and date of birth, as evidenced in accordance with the regulations, and no other details;*
>
> *(c) in any other case—the grantor's details as prescribed by the regulations."*

Schedule 1, Regulation 2.2 provides that:

> "*(a) the following classes of collateral, when described as consumer property, **must be** described by serial number:*
> …
> (iii) motor vehicles; .. and …
>
> (c) *the following classes of collateral, when described as commercial property, **may be** described by serial number:*
>
> (i) motor vehicles;"

A further layer of complexity is added when one considers the definitions contained in the PPS Act for consumer and commercial property. Commercial property is defined by exclusion as "*personal property other than consumer property*". Consumer property is defined for the purposes of the PPS Act as, "*personal property held by an individual, other than personal property held in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated*".

The interaction of these sections and regulations means that if:

1. a body corporate which has an ACN grants a security interest requiring registration on the Register which is not consumer property which is required by the regulations to be described by serial number; and
2. a search of that body corporate's ACN does not result in the registration appearing in the results,

THEN this defect renders the security interest ineffective pursuant to sections 164(1)(b) and 165 of the PPS Act.

In *Future Revelation Ltd v Medica Radiology and Nuclear Medicine Pty Ltd* (2013) NSWSC 1741 ("**the Case**"), the key issue considered was the defect in describing the secured party by ABN rather than ACN (as required by the PPS Act).

In determining the Case, Brereton J considered Canadian case law (as the PPS Act is modelled on the Canadian legislation) which suggested that the test for whether a defect is seriously misleading is "*whether it will result in the registration not being disclosed on a search*."

In the circumstances, the Case turned upon whether the registration was invalid pursuant to section 164(1) of the Act by reason of it being "seriously misleading". While the Case provided in its judgement that an error in the ACN or name of a secured party, (where the serial number of the collateral was not required), will not be fatal as the registration will show on a search and will not be misleading. However, the Canadian case law states that an error in the name of a grantor where the serial number of the collateral is not required, will be fatal as it is misleading; see *KJM Leasing Ltd. v. Granstrand Brothers Inc.*, 1994 CanLII 9153 (AB QB).

Therefore, the fact that an ACN search would not and does not result in the security interest appearing in the search results in circumstances where the Regulations provide that the grantor must be identified by its ACN, renders such registration of the security interest ineffective.

This position is clearly inconsistent with the position that a grantor *may* register an interest in a motor vehicle, where that motor vehicle is commercial property, *by serial number*.

The Final Report identified the additional and unnecessary complexity added by the definitions of consumer and commercial property and recommended the removal of the distinction. However, the Final Report did not consider the implications such removal would have on the other provisions of the PPS Act.

There are many other examples of how the interaction of the sections of the PPS Act and Regulations, as well as the interaction with other legislation, may create significant complex problems which the public struggle to deal with and instead choose not to register, or register ineffectively.

Register

While the PPS Act and its single national register were touted as being a great move for business and one which would do away with the issues created by the multiple existing registers, the Final Report clearly outlines numerous issues with the functionality of the Register and related website.

The Final Report advised that a priority should be to simplify the Register and the processes.

Unlike the old ASIC register, the Register does provide an ability to partially release security interests and experience has shown that lending entities are simply providing one page release forms on the sale of personal property subject to a security interest and not amending their interest. The implication of this is self-explanatory – what is the use of a register which has incorrect or out of date information contained on it?

Further, the Final Report recommended the review of time frames provided for the classes of personal property, noting that the options can include 7 years, under 25 years and indefinite periods.

What happens now?

As the Final Report was just that, a report, the 394 recommended amendments are not automatically included and implemented in the PPS Act.

For the amendments to be adopted a bill will need to be prepared and passed by Government and as this report is being printed such completed bill has not yet been released for comment.

However, the Final Report strongly recommended a collaborative approach when drafting the bill. Let's hope the final outcome is a bill which addresses the current uncertainty created by the complex and often unclear use of language in the PPS Act and provides a clearer piece of legislation which is more certain, consistent and provides more effective (and cheaper) ability to register to protect a party's interest.

DW Fox Tucker continue to monitor the progress of the PPS Act and will provide further updates as they arise.

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NEWS & VIEWS | **Lisa Harrington & Tim Duval**

Cheers!

Would everyone please be upstanding

Patrons may no longer need to be seated when consuming alcohol outside licensed venues.

After a nine month review of selected venues, Consumer and Business Services has now changed the standard condition regarding the consumption of alcohol outside licensed venues.

Consumer and Business Services will now permit licensees to apply for the removal of the condition that patrons must be seated whilst drinking alcohol in outside designated licensed areas. This move will permit patrons to consume alcohol while standing in outdoor areas where they were previously required to be seated.

Licensees will need to pay a fee of $111 to apply to Consumer and Business Services for this condition to be removed from liquor licences. This is substantially less than their standard fee of $518 for the variation of licence conditions and the ongoing penalties for breaches of this condition.

Licensees need to note that applications to remove the condition on licences will be individually reviewed, and Consumer and Business Services will consult with the local government and the South Australian Police as a part of this review process before removal is granted.

For further information or assistance to apply, please contact our Hospitality team.

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INSIGHT | **Mark Minarelli & Russell Jones**

Setting up an Online Business

Steps & tips

When creating a new business, many entrepreneurs are initially attracted to the online business model as an easy way to enter the market and begin bringing their aspirations to life. The lack of a requirement for a physical presence, and therefore lower overheads, can be an easy idea to fall in love with for the cash strapped start up. However, while an online business may be free of some of the more cumbersome obligations of a traditional business, there are still certain requirements and regulations that must be complied with in order to run it successfully.

As with any business, what you will need depends greatly on the type of business and the industry it operates within. With that in mind, below is an explanation of some of the more common legal documents and requirements.

Registering a business name

A business name is the name or title under which an entity or person conducts a business. When starting an online business your major concerns should be that:

- The name is not already taken;
- The domain and business name are both available;
- The name is available on social media platforms (such as Twitter, Facebook, etc);
- The surrounding domain names (".com" ".com.au" ".net" etc.) and misspelled or hyphenated versions are available – it is recommended that these all be registered or purchased to avoid competitors attempting to poach online traffic.

Unless you plan on operating as a sole proprietor under your own name, or you fall under one of the other exemptions, you will need to register your business name with the Australian Securities and Investments Commission ("ASIC").

It is important to note for the purposes of intellectual property protection that the registration of a business name is separate to registering a trade mark over the business name.

Website design

A website is the most crucial aspect of an online business as it is the interface between the business and its customer base, so it is important that all of the key legal issues surrounding it are resolved early on.

Depending on the skill set of the proprietor, most of the time a website developer will need to be engaged to create the website for the business. A Website Development Agreement is used to outline the terms and conditions under which a website developer is engaged. When entering into a Website Development Agreement your major concerns should be that:

- The developer is clear on what you require for your website;
- You are clear on who owns the intellectual property – it is highly recommended that you retain the intellectual property rights and own the content that has been developed;
- You are indemnified for the work on your site – that is, you are not liable if the developer uses anything that already appears on another site.

Once your website is up and running you will then need to determine which legal documents should be included on your website. While this may differ depending on the type of business you are running, generally most websites will have Website Terms and Conditions, a Privacy Policy, and a Disclaimer.

A website is the most crucial aspect of an online business as it is the interface between the business and its customer base, so it is important that all of the key legal issues surrounding it are resolved early on.

Website Privacy Policy

A Privacy Policy is a document outlining how you collect, store and use a customer's personal data. If your website collects any form of information from a customer then it is a requirement under the Privacy Act 1988 that you have a Privacy Policy. With a Privacy Policy your major concerns should be that you have properly informed customers of:

- What personal information you collect;
- How you intend to use the information;
- How you will store the information collected, and what security measures you have in place to protect it.

Website Disclaimer

A Website Disclaimer is a short notice that outlines to customers the general terms of the website that must be agreed to before entering (e.g. asking for confirmation that the customer is over 18, etc.). The purpose of a disclaimer is to limit your liability as the owner in relation to the use and content of the website. With a Website Disclaimer your major concerns should be that your liability is limited with regards to:

- Defamation;
- Copyright infringement;
- Viruses and malware;
- Content accuracy.

It should be noted that a Website Disclaimer will not completely free you of any liability, however, it is still an important document as it limits the scope in which you may be found liable for any damage, and deters customers from making frivolous claims against you.

Website Terms and Conditions

While a Website Disclaimer will go some way to limiting your liability and informing customers about the general terms of the site, it is important that you have clear and detailed Terms and Conditions accessible. Terms and Conditions are more personal between you and the specific customer, and will outline in more detail the rights, responsibilities and rules governing your business practices and the use of the website. Australian Competition and Consumer Law states that all businesses providing goods and services must warrant to their customers that the goods and services are as described, and provide a refund if they are not. The details of how a business will comply with this requirement should be outlined in the Terms and Conditions accessible for customers and displayed on the site.

With Terms and Conditions your major concerns should be that you properly inform customers about:

- Your business practices;
- Your terms of service; and
- The use and limitations of the website.

It is also important that through your Terms and Conditions you address other areas such as your intellectual property (in order to protect from theft) and any regulatory standards you may have to meet in order to limit your liability in relation to your services or products.

For advice and assistance with setting up your online business or for further information regarding the requirements and issues surrounding starting and operating an online business please contact us.

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NEWS & VIEWS | **Julie Van der Velde**

Tax on Earnouts

New draft law means new issues for sales of businesses

Anyone who ever bought a business knows a vendor always wants more than the business is worth. Anyone who ever sold a business knows a purchaser always undervalues the business they want to buy. As a solicitor involved in negotiation of business sales and purchases I often deal with questions of value. The value of a business relates to future performance which may be subject to unknown factors; markets, weather, even federal budgets. Balancing risk between the parties is key to negotiating a sale.

An earnout is a commercial means of dealing with this risk. Essentially, a purchaser is reluctant to pay for profits which may or may not be derived and a vendor is reluctant to sell without reward for profits they believe will be derived. An earnout gives the purchaser the opportunity to restrict payments if profit does not eventuate and enables the vendor to receive the value if it does.

Earnouts also align the interests of the vendor with those of the purchaser where the vendor remains in the business for a period after acquisition. The most common form of earnout is for an agreed payment to be made on settlement with a further payment or payments later on - the quantum of which is dependent on the profitability of the enterprise during the relevant time period.

In 2007 the ATO published a draft ruling[1] accepting that an earnout is a legal right or collection of legal rights and so should be valued as an asset provided as part of the consideration for the business. In May 2010 the previous Government announced[2] that they would change the law to put in place a 'look through' approach that taxed amounts received in respect of an earnout as if those cash amounts were themselves the consideration for the original acquisition. This was never enacted although it was stated that the change would be backdated to 10 May 2010 (when the announcement was made).

In 2013 the current Government said it would implement the 2010 announcement by the end of 2014[3], but the measure would only be backdated to the date of the announcement made in 2013 (with some unspecified transitional provisions from 10 May 2010). On 23 April 2015, eight years after the ATO's 2007 draft ruling, an exposure draft of legislation to change how these common commercial arrangements are taxed was finally published.

How the earnout is taxed matters especially if the vendor can use capital gains tax ("CGT") concessions on the amount received. If the earnout is taxed separately from the transaction the concessions generally cannot be used in relation to the earnout, whereas if all the payments are taxed as part of the initial transaction the concessions may be available. Equally, if amounts received under the earnout arrangement are small the vendor could be taxed on a capital gain in the year the business is sold and make capital losses in subsequent years that cannot be used.

Importantly, the base position in the draft law remains that an earnout is a legal right or collection of legal rights and as such should be valued as an asset provided as part of consideration for an acquisition. Only if an earnout meets specific conditions is the cash received (or not received) later to be taxed as part of the original transaction. These conditions are:

- the entire arrangement is concluded within four years of the initial transaction;
- earnout amounts are contingent on 'unascertainable' economic performance;
- the assets or business being sold meet the technical definition of an 'active asset' under the tax legislation; and
- the capital gain under consideration is from a transfer of an asset rather than any other type of transaction.

Not all business sales will meet this definition. Some earnout arrangements extend over more than four years and often the asset being sold (particularly if it is shares in a company) may not meet the technical definition of an 'active asset' in tax legislation. Both the draft legislation and the explanatory documents published with it are unclear on what is to be considered 'unascertainable' and what qualifies as 'economic performance'. For example, whether a mining company finds minerals is not considered to relate to its 'economic performance'.

If an earnout meets all the conditions the vendor can go back and amend income tax returns each time an amount is received under the earnout to include that amount in the initial transaction. Apart from a lot of administrative work (and accounting fees) this will solve many of the tax problems involved in an earnout for those lucky enough to meet the criteria.

Although tax returns can be amended there seems to be no way that amounts paid into superannuation can be taken out again if the vendor ceases to be entitled to the small business concessions. Potentially, such amounts might even be subject to penalty tax if the vendor has already made other superannuation contributions in that year or in previous years.

[1] TR 2007/D10 *Income tax: capital gains: capital gains tax consequences of earnout arrangements.*

[2] Assistant Treasurer Nick Sherry 12 May 2010 Media release no. 098/2010 *Look-Through Treatment for Earnout Arrangements to Simplify Sale of Business Assets.*

[3] Assistant Treasurer Arthur Sinodinos 14 December 2013 Media release no. 008/2013 *Integrity restored to Australia's taxation system.*

An earnout gives the purchaser the opportunity to restrict payments if profit does not eventuate and enables the vendor to receive the value if it does.

Several organisations with which members of the DW Fox Tucker Tax team are involved, including the Taxation Institute and the Law Society of South Australia, are making submissions on this draft legislation to try to improve the operation of the law before it is passed by parliament and we will keep you informed of any changes.

Meanwhile, if you are negotiating the sale of a business, ensure you get advice before agreeing to an earnout arrangement so you know just how much tax you may have to pay.

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CASE IN POINT | **Thea Birss**

The Employer Strikes Back

Taking action against errant employees

Most employers who suffer loss as a result of the wrongful actions of an employee take the loss on the chin and if the employee suffers anything at all it's the loss of a job. In *Amponsem v Laundy (Exhibition) Pty Ltd* [2014] FCCA 2206 the employer struck back after an employee who was fired for serious misconduct tried to sue.

Mr Amponsem was head chef in his employer's hotel and he used that position to acquire produce via his wife's company without informing his employer of the potential conflict. The deal was struck on terms more beneficial to the chef's wife than his employer. When the employer discovered this breach of the chef's duty of good faith it summarily dismissed him and refused to pay his accrued entitlements on the basis that he had dishonestly caused the business to suffer loss.

Mr Amponsem commenced proceedings under the *Fair Work Act 2009* to recover his unpaid accrued annual leave. Unusually, the employer went on the offensive and filed a cross-claim of more than ten times the value of the employee's claim. The employer claimed that the head chef had breached both contractual and equitable duties of good faith to his employer but Mr Amposem argued that section 90 of the Fair Work Act does not allow an employer to withhold employee entitlements.

Judge Manousaridis noted that Federal Circuit Court Rules allow the Court, in the event of a successful cross-claim, to give one judgement for the balance of the two claims. Mr Amponsem's claim for unpaid leave was recognised, but deducted from the total amount of compensation he owed his employer, leaving a balance of $73,000 to be paid to his former boss.

Although the employer in this instance appears to have done quite well, before taking a similar approach to claims by wayward employees there are some cautionary issues to consider:

1. Judge Manousaridis was clearly aware that the Court had jurisdiction to fine Laundy for its breach of the Fair Work Act. Although the Court chose not to do so on this occasion, such penalties are not without precedent. Maximum fines for non-payment of annual leave entitlements are currently $51,000 for a company and $10,200 for an individual;
2. Keeping in mind the accessorial liability provisions of the Fair Work Act, penalty and compensation orders may be pursued against those knowingly involved in a contravention - not just the legal employer;
3. Laundy did not succeed in every aspect of its claim - an employer will require evidence to prove an employee's breach of contractual and equitable duties in order to successfully cross-claim;
4. Legal costs are generally not recoverable for proceedings brought under the Fair Work Act; and
5. Receiving judgement is one thing – recovering compensation from an employee is another. Does the worker have funds to pay a judgement debt?

Accordingly, we recommend that employers take legal advice prior to withholding payments from employees and when considering the pros and cons of filing a cross-claim against an errant employee.

If you have a similar story of 'striking back' against employees who have caused a business loss, we would like to hear about it. Any such stories may form the basis of a paper or seminar regarding recourse against employees.

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INSIGHT | **Liam McCusker**

Disputes and Litigation

Mitigate your potential exposure

I recently, together with DW Fox Tucker colleagues Mark Minarelli and Girish Rao, presented to the Australian Institute of Landscape Architects on the age old topic of what is best termed "risk management". As the broad concept of risk management is not a topic that mutates – but rather evolves over time – the content of that talk could not be said to have touched upon a lot of new ground.

Having said this, the discussion was a timely reminder (at least to me) that one of the best risk management tools is the periodic review of businesses practices to ensure that, to the extent possible, they are in line with recommended practice. To enable (or perhaps encourage) our clients to review their risk management practices, I have reproduced the body of that talk below.

What is risk management? Risk management is not about excluding your exposure to liability. That is only possible in the event you can selfishly control human nature. Most times, disputes arise at the hand of those who are disingenuous and who merely seek to gain an unfair benefit at the cost of others. Those people are the most damaging because for them litigation (as distinct from the law) is a tool to be used for commercial prosperity. They tend to be experienced litigants who, if you are particularly unfortunate, do not perceive that commercial dishonesty is tantamount to criminality.

Litigation is extremely time-consuming, stressful and expensive. More often than not, litigation does not run to a final judgement – as parties eventually agree to a compromise of the dispute. However, too often litigation is capitulated by one party who simply cannot afford the toll it takes on their time and finances. As was said by the former Irish Judge Sir James Mathew "*In England, Justice is open to all, like the Ritz hotel*". Unfortunately, such a sentiment is perhaps even more accurate today than it was in the late 19th century.

It is with this in mind that I describe risk management as a concept of reducing exposure to potential liability by implementing practices in everyday business dealings to ensure that, if a dispute does arise, you are placed in the best possible position to prosecute or defend your case.

As was said by the former Irish Judge Sir James Mathew "In England, Justice is open to all, like the Ritz hotel". Unfortunately, such a sentiment is perhaps even more accurate today than it was in the late 19th century.

So what is the key to reducing risk? The answer is a solid paper trail. Why? Well, as was said by Abraham Lincoln: "*no man has a good enough memory to be a successful liar*". But given an absence of documentary evidence, some people have enough acting talent that, when combined with a lack of honesty, it can cause history to become skewed in the eyes of the Court and, at times, in your own memory.

If I take what I would assume to be a common scenario to you, being the entering into of an agreement with a client for work, too often I see the scenario in which parties subsequently fall into dispute – each party claiming (whether honestly or not) that the other has failed to perform his or her obligation. However, the negotiations surrounding the entering into of the agreement, the day-to-day performance of the agreement, and indeed the agreement itself, have never been documented.

In the absence of a well drafted agreement, it can be difficult to advise a party on their rights and obligations under an agreement and, more importantly, the prospects of successfully prosecuting or defending the dispute.

It is my experience that the time, stress and expense of litigation is often directly caused by having to establish the existence of an agreement, establish what its terms are, what the effect of an agreement is, and establish what did or did not happen prior to or during the course of the agreement giving rise to the dispute.

Where these matters are not documented, a lawyer (and subsequently a court) will be required to consider the merits of a dispute largely on the basis of oral evidence. In that event, the most credible witness will be preferred. This is not necessarily the person who is the most truthful. I have seen impressive, educated and honest clients fall under the pressure of a good cross-examination largely because their honesty permits them to give concessions that they're somewhat less honest opponent is not prepared to give.

It is much harder to discredit a document which appears to be a document created by a person or business in the course of the operation of that business.

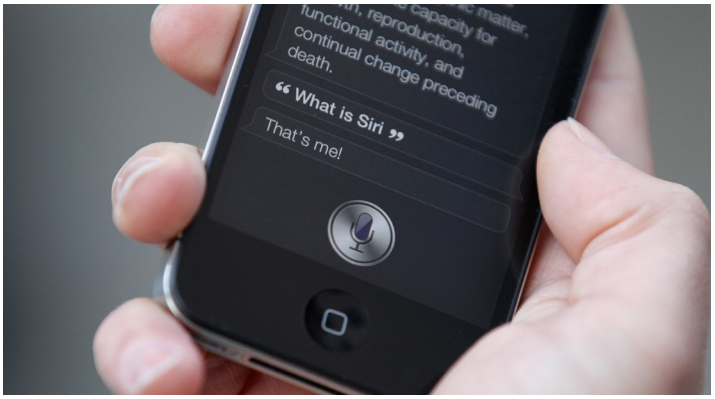
Combining oral evidence with supporting documentary evidence will put you in the best possible position to be successful in stemming a dispute before it becomes actively litigious and, in doing so, you successfully mitigate your potential exposure.

Combining oral evidence with supporting documentary evidence will put you in the best possible position to be successful in stemming a dispute before it becomes actively litigious and, in doing so, you successfully mitigate your potential exposure.

To this end, I encourage the following to become a common practice in your day-to-day business operations:

1. Take contemporaneous file notes of all telephone conversations you have which are business related (which file note should record the names of the parties to, the date and time of, and the matters discussed during, the conversation).

   This is where technology has largely removed any tenable excuse for failing to properly record conversations. For example, my iPhone now allows me to verbally dictate a file note into a draft email (which Siri converts into text as I talk) which I can then send to myself to form part of my records.



2. Take contemporaneous file note of all meetings recording the parties in attendance at, the date and time of, and the matters discussed during, the meeting.
3. Ensure that all conversations where new business arrangements and agreements are formed, or where business dealings are clarified or amended, are followed up with a letter to all other parties setting out what was discussed and agreed – even before any agreement is concluded. That way, if there is to be disagreement as to what was discussed and agreed, that will come to light quickly and hopefully before any harm is caused to the relationship.
4. Keep a printed or electronic (or both) database of emails (and other electronic forms of communications) and letters sent to you which is logically organised and easily accessed.

   In this respect, it should also be remembered that email communications are formal means of communication which can be relied upon in litigation proceedings. It is inadvisable to think that emails are less formal means of communication and, therefore, that you can include something in an email that you would not include in a letter. Everything is capable of being critiqued by a court.
5. Keep a record of when all communications are received and sent – such as a mail book recording the date on which correspondence was actually sent and received (as timing is a very important issue in a lot of disputes and the date printed on a letter may predate the actual date the letter was received by a considerable amount of time).
6. Speak with your solicitor (or such other professional advisers as may be appropriate) as soon as you think an issue has arisen or may arise so that steps can be taken to avoid the issue escalating.
7. Seek legal advice (or such other professional advice as may be appropriate) prior to concluding any agreement so that you can be assured that all matters which should be dealt with in the course of your negotiations are covered.
8. Most importantly, have your agreements in writing and drafted by an appropriately competent solicitor.
9. And as a ‘gold star’ tactic, invite your legal advisors to learn the intricacies of your business and its practices. Have them review your current contracts (such as, for example, employment contracts, contractor arrangements, leases etc.) and allow them to point out where you may be exposed to potential risk and/or liability (either now and/or in the future) and give suggestions as to how those risks can be ameliorated or eliminated. That way, you will have a trusted advisor (a surrogate in-house counsel) proactively looking to protect your business and put you in the best possible position to reduce your exposure to future events that may adversely affect your business in years to come.

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INSIGHT | **Liam McCusker**

Disputed Progress Payment Claims

The processes under the *Building and Construction Industry Security of Payment Act 2009* (SA)

The *Building and Construction Industry Security of Payment Act 2009* (SA) ("*the Act*") is often referred to as a 'pay now, argue later' procedure entitling contractors and subcontractors to progress payments and quick resolution when disputes arise. However, there remains unfamiliarity with the processes, and key timing for those processes, when dealing with disputed payment claims made under the Act. Here's a quick (as opposed to complete) list of the events (and associated timing) that unfold following receipt of a progress payment issued pursuant to the Act.

Progress payments

1. A progress payment can be a:
   - Final payment;
   - One-off payment; or
   - Milestone payment.
2. The amount of a progress payment is determined in accordance with the contract, but if the contract does not specify the amount it will be assessed in terms of the value of the work carried out.

Payment claim

3. To invoke the Act the person entitled to a progress payment must serve a payment claim on the person responsible for payment. That claim must:
   - identify the work to which the progress payment relates;
   - indicate the amount of the progress payment claimed to be due; and
   - state that they are doing so under the Act. For example:

"This is a payment claim under the Building and Construction Security of Payments Act 2009 (SA)…"

Payment schedule

4. A person served with a payment claim may respond by providing a payment schedule either **within 15 business days** or the period specified in the contract, whichever comes first.
5. The payment schedule must:
   - identify the relevant payment claim;
   - identify the amount the person served with the claim proposes to pay; and
   - if the amount proposed to be paid is less than the payment claim, indicate why it is less and the reasons for withholding payment.

Payment

6. Where a person fails:
   - to respond to a payment claim within the earlier of the time required by the contract or 15 days; and/or
   - to pay the amount due and payable in accordance with either the progress claim or the payment schedule;

the progress claim can be recovered as a due debt in a court.

If proceedings are commenced, the recipient of the progress claim is not entitled to bring a cross-action (i.e. for defective works) or raise a defence (other than that the progress claim does not comply with the Act and therefore, no liability to make payment has arisen). Remember, it is a 'pay now, argue later' scheme.

Adjudication

7. Where:
   - a payment claim is disputed and a payment schedule is provided; or
   - payment is not made in accordance with a payment schedule by the due date; or

- no payment schedule is provided, but the claimant otherwise decides, (as an alternative to proceedings)

the claimant can serve a notice of intention to apply for adjudication. The adjudication application must be made either:

- where a payment schedule is provided that proposes to pay less than the claimed debt, within 15 days of receiving the payment schedule; or
- where a payment schedule is provided, but the payment is not made by the due date, within 20 days after the due date of the payment.

8. Where no payment schedule is provided in response to a progress claim, the claimant can make an application for adjudication provided the claimant has notified the other party of his/her intention to make such an application:
   - within 20 business days immediately following the due date for payment of the progress claim; and
   - the other party was given an opportunity to provide a payment schedule within 5 business days of being notified by the claimant.
9. Following this, the people involved will be notified of the adjudicator's appointment.

Response

10. The person served with an adjudication application claim can lodge a response within **five business days** of receiving the application or within **two business days** of receiving notice of the adjudicator's appointment.
11. The response:
    - must be in writing;
    - must identify the relevant adjudication application;
    - may contain submissions relevant to the response; and
    - must be served on the person making the payment claim.
12. However, you cannot submit a response if you did not provide a payment schedule following receipt of the payment claim, or, alternatively, following receipt of notice of the claimant's intention to refer the matter to adjudication.

The Act is often referred to as a 'pay now, argue later' procedure entitling contractors and subcontractors to progress payments and quick resolution when disputes arise.

13. The response cannot introduce new reasons for withholding payment, which further highlights the importance of preparing a payment schedule.

Obligations

14. The adjudicator is required to make a decision generally within ten business days of the response.
15. If the adjudicator determines an amount is payable, it must be paid **within 5 days of the adjudicator's decision**.
16. If the adjudicated amount is not paid in the timeframe, the person claiming payment may request an adjudication certificate and serve notice of their intention to suspend the work (or supply of goods) to which the adjudicated amount relates.
17. The person owed the payment can file an adjudication certificate with the Court as a judgment which is enforceable.
18. If the person against whom a judgment is entered chooses to challenge that judgment, that person:
    - cannot bring a cross claim against the person seeking judgment;
    - cannot raise a defence in relation to matters arising from the construction contract;
    - cannot challenge the adjudicator's decision; and
    - is required to pay the unpaid amount into the Court as security pending the final determination in those proceedings.
19. Once the adjudicated amount is paid, the aggrieved person can institute court proceedings to claim against the other party for any set off (by way of repayment) and/or costs of the defective works in the ordinary course.

For further information or advice on disputes under the Building and Construction Industry Security of Payment Act 2009 (SA) contact our Dispute Resolution & Insolvency team.

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CASE IN POINT | **Mark Gowans & Leesa Simons**

Share it Fairly but don't Take a Slice of My Pie!

Consequences of insolvency in the context of claims under the *Building and Construction Industry Security of Payment Act 2009* (SA)

This has been a key theme in the building and construction industry over recent years. The *Building and Construction Industry Security of Payment Act 2009* (SA) ("***the Act***") was introduced to implement a quick and inexpensive system for the building and construction industry to enable subcontractors and suppliers to claim money which is allegedly owing to them on a "pay now, argue later" scheme. But what happens if the entity making the claim becomes insolvent, ceases trading and has insufficient assets to pay back the amounts paid to it? The Act necessitates payment being made when claimed, with the payee able to later argue whether the payments are in fact payable. As Pink Floyd said – share it fairly but don't take a slice of my pie. This particular issue was discussed in the recent case of *Hamersley Iron Pty Ltd v James* [2015] WASC 10.

The issue

Earlier this year, the Western Australian Supreme Court considered whether an adjudication determination made under the *Construction Contracts Act 2004* (being the Western Australian equivalent to the Act) could be enforced by an insolvent company. Hamersley Iron Pty Ltd ("***Hamersley***") objected to the enforcement of an adjudication determination made under the Act on the basis that:

1. it had a counterclaim against Forge Group Construction Pty Ltd (In Liquidation) ("***Forge***") which exceeded the amount awarded to Forge in the determination; and

2. it was entitled to set off this amount against monies that it owed to Forge under section 553C of the *Corporations Act 2001* (Cth) (which relates to set offs in the context of insolvent companies).

Factors considered and the ultimate determination

The Western Australian Supreme Court noted that the existence of a counterclaim against the party seeking to enforce an adjudication determination will not be a basis for the Court to refuse leave to enforce the same under section 43 of the *Construction Contracts Act 2004*. However, due to the insolvency of Forge, His Honour Justice Beech considered the relationship between the purpose of the *Construction Contracts Act 2004* (which is similar to the purpose of the Act) and the *Corporations Act 2001* and found that the purpose and object of section 553C of the *Corporations Act 2001* required the Court to do "substantial justice" between the parties. In contrast to the finding made by the adjudicator, Justice Beech was satisfied that Hamersley's evidence in relation to its counterclaim established that it had an arguable case against Forge.

With reference to the High Court Authority of *Gye v McIntyre* (1991) 171 CLR 609, the Western Australian Supreme Court held that it would be unfair for the Liquidators of Forge to recover the full amount of Hamersley's debts to Forge in circumstances where Hamersley was left to prove in the liquidation in respect of the debts owed by Forge to Hamersley due to the counterclaim.

This position has also been adopted in Victoria and New South Wales..

How does this affect you?

A Court is likely to refuse leave to enforce an adjudication determination given under the Act when:

1. the successful adjudication applicant is insolvent, and in liquidation, at the time that it applies for adjudication of the relevant payment dispute; and
2. an adjudication respondent is able to establish that it has an arguable counterclaim against the applicant that exceeds the amount of the adjudicated sum.

If you are a Liquidator of an insolvent company, or you work in the building and construction industry and have received correspondence from a Liquidator which seeks to make a claim (or enforce an adjudication) pursuant to the Act, please contact our Dispute Resolution & Insolvency team for assistance.

But what happens if the entity making the claim becomes insolvent, ceases trading and has insufficient assets to pay back the amounts paid to it? The Act necessitates payment being made when claimed, with the payee able to later argue whether the payments are in fact payable.

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SPECIAL FEATURE: THE *RETURN TO WORK ACT 2014* (SA)

NEWS & VIEWS | **John Walsh**

Transforming Workers Compensation in South Australia

The *Return to Work Act 2014* (SA) & the South Australian Employment Tribunal

The workers compensation landscape in South Australia will change from 1 July 2015 when the ***Return to Work Act 2014*** (SA) (**RTW Act**) comes into effect and jurisdiction in relation to disputes under the Act is assumed by the South Australian Employment Tribunal (the SAET).

In a policy statement circulated by the Attorney General's Department in April, the Government also announced plans to "*confer additional jurisdiction on the SAET as a key step in this reform process, ensuring that South Australia has a contemporary approach to resolving a range of employment-related disputes*".

The policy statement refers to "*inconsistencies, duplication and the potential for confusion and complexity for users across jurisdictions*" in the current environment of employment related dispute resolution in South Australia.

The Government intends to roll the functions of the following jurisdictions into the SAET:

- the Industrial Relations Court;
- the Industrial Relations Commission;
- the Dust Diseases Jurisdiction; and
- the Return to Work Scheme.

The intention is that all jurisdictions dealing with employment and industrial matters are consolidated within the SAET and supported by the delivery of "*consistent and efficient resolution of employment-related disputes for workers and employers*".

SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL

... the vesting of jurisdiction in the SAET is intended to achieve an outcome that is "based on quick and efficient decision-making that resolves disputes expeditiously and fairly".

The Government is also "*considering the transfer of employment-related jurisdictions to the SAET which were originally planned to move to the South Australian Civil and Administrative Tribunal (SACAT)*", including:

- the Health Practitioners' Tribunal;
- the Teachers' Appeal Board; and
- employment-related functions of the Equal Opportunity Tribunal.

The process of dispute resolution in relation to the Return to Work (Workers Compensation) Scheme is broadly similar to the current processes and procedures of the Workers Compensation Tribunal and the members of the SAET are the current presidential members of the WCT. Interviews are presently being conducted for the Conciliation Officers, but appointments are yet to be made.

What does this mean for workers compensation disputes?

The *Return to Work Act* specifically provides that the vesting of jurisdiction in the SAET is intended to achieve an outcome that is "*based on quick and efficient decision-making that resolves disputes expeditiously and fairly*". There is an emphasis upon mediation and alternative dispute resolution processes whilst keeping conciliation within a tight timeframe (6 weeks).

Conciliation Officers have increased powers and are required at the conclusion of the conciliation process to provide an assessment of the merits of the dispute and make recommendations for resolution.

The *Return to Work Act* contains cost provisions which are designed to encourage a culture of expeditious decision-making and genuine conciliation. They include the imposition of a cost liability on professional representatives acting for a party to the proceedings where the representative is shown to have caused costs – "*to be*

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incurred improperly or without reasonable cause; or to be wasted by undue delay or negligence or by any other misconduct or default". The intention of the cost provisions is clearly, in part, directed towards effecting cultural change to ensure that the process of resolution of disputation in the SAET is not unreasonably delayed.

Summary

The SAET allows for a similar process as existed in the Workers Compensation Tribunal, but with a greater emphasis upon mediation and alternative dispute resolution methodology. There appears to be a desire to depart from the usual adversarial approach to one which is more like an investigative process which is directed by SAET rather than the parties.

Conciliation Officers will have greater powers and will be expected to use them, while Presidential members will speed up the process of dispute resolution and make directions accordingly.

Parties to proceedings can expect adverse costs orders if there is any unreasonable delay or obstruction of the conciliation process.

Clearly the combination of the RTWA and the SAET together are intended to have a transformative effect upon employment related dispute resolution in South Australia.

The need for claims managers, return to work coordinators and HR professionals to work closely to achieve the best outcomes in workers compensation disputes has never been greater.

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SPECIAL FEATURE: THE *RETURN TO WORK ACT 2014* (SA)

NEWS & VIEWS | **Caroline Knight & Jonathan Ikonomopoulos**

Financial Benefits for Injured Workers

Details of employee entitlements under the *Return to Work Act 2014* (SA)

The *Return to Work Act 2014* (SA) (**RTW Act**), which commences on 1 July 2015, makes a significant change to the very premise on which workers compensation is to operate in South Australia. At the heart of the new scheme is a focus on returning injured workers to work. The financial benefits operate as a safety net to support that objective.

The RTW Act also introduces the concept of a *seriously injured worker* in section 21. Establishing whether a worker is seriously injured will be a threshold issue that determines whether only the safety net financial benefits will apply or whether more traditional compensation and indeed additional benefits, will be available.

A seriously injured worker is one who has a permanent impairment assessed at 30% Whole Person Impairment ("WPI") or greater taking into account:

1. Any physical injury must be assessed separately from any psychiatric injury.
2. Consequential mental harm or psychological sequelae is not to be considered.
3. To qualify the assessment must be 30% WPI for a physical injury or 30% WPI for a psychiatric injury.

For injured workers, there are now four categories of financial benefits available under the RTW Act:

1. Weekly payments of income support;
2. Medical expenses;
3. Economic lump sum payments; and
4. Non-economic lump sum payments.

Weekly payments of income support

Weekly payments of income support will cease after 104 weeks from the date the worker was incapacitated, unless the worker is seriously injured pursuant to section 21 of the RTW Act.

The first 52 weeks of income support payments will be based on 100% of the worker's notional weekly earnings ("**NWE**"). An injured worker is then entitled to a further 52 weeks of income support at the rate of 80% of NWE.

Up to a further 13 weeks of supplementary income support may be approved for incapacity resulting from surgery which takes place after 104 weeks of incapacity has elapsed.

Seriously injured workers are entitled to income support payments until they reach their normal retirement age, or the date at which they are entitled to receive the age pension.

In a practical sense, this means that injured workers who have not fully recovered and are not able to perform their pre-injury normal hours after 104 weeks will no longer be entitled to "top-up" payments of income support.

Medical expenses

An injured worker is entitled to be compensated for medical expenses reasonably incurred in consequence of a work injury.

The entitlement to medical expenses is largely the same as that under the current scheme. However, an injured worker's entitlement to medical expenses under the RTW Act will now cease 12 months after their entitlement to weekly income support ceases.

The only exceptions are:

1. Pre-approved surgery which occurs after the entitlement to medical expenses ceases; and
2. Seriously injured workers who will be entitled to medical expenses for life.

Furthermore, Section 33(17) of the RTW Act allows an injured worker to apply for pre-approval of payment of certain medicines, therapeutic appliances, services or materials rather than having to make payment in advance.

Economic lump sum payments

As an offset for the cessation of income support payments after 104 weeks of incapacity, a new entitlement has been established.

Section 56 of the RTW Act provides an entitlement to a lump sum payment for economic loss for those injured workers who have a permanent impairment of between 5% and 29% WPI due to their work injury. That is, those who are not seriously injured.

While this entitlement provides compensation for economic loss it is not designed to take into account all of the individual specific features that make up each injured worker's economic loss. Rather, it compensates for the fact of the loss and is calculated using a formula.

The amount of the compensation is calculated by the prescribed sum that applies to the injured worker's degree of WPI, their age and the proportion of full-time work performed at the time of the injury.

Only one claim for a lump sum for economic loss may be made per trauma (or event).

There is no entitlement for psychiatric injury, consequential mental harm and noise induced hearing loss.

Non-economic lump sum payments

What is currently section 43 lump sum compensation will become section 58 lump sum compensation under the RTW Act.

An injured worker will be entitled to compensation calculated as a proportion of the prescribed sum for the degree of WPI caused by their work injury.

However, a very signiificant change is that section 22(10) of the RTW Act allows only one assessment of the degree of permanent impairment caused by the one trauma.

Practically, this means that injured workers will wait to ensure that all of the injuries sustained during a trauma are known to them and stable to maximise their entitlement lump sum compensation for non-economic loss.

Significantly, any injury that subsequently manifests itself or develops after the assessment of impairment is made will not be assessed and will therefore not be compensable.

Again, there is no lump sum entitlement for psychiatric injury or consequential mental harm. Further, the degree of permanent impairment must be at least 5% WPI before compensation is payable.

Common law claims

Part 5 of the RTW Act provides seriously injured workers only with a limited ability to claim damages at common law against a negligent employer, which includes vicarious liability. This is the case regardless of whether the injury is physical or psychiatric.

However, as stated above the entitlement to claim damages at common law is limited.

- The injured worker cannot commence common law proceedings until the degree of WPI has been assessed, and it is clear they are seriously injured.
- Any claim for damages does not extend to treatment, care or support services. Only economic loss can be claimed.
- An injured worker cannot claim both a redemption of a liability to make weekly payments and common law damages for future economic loss.
- An injured worker cannot commence an action for damages or enter into a Redemption Agreement unless or until an election has been made, in accordance with the Regulations.
- Regulation 39 provides that the election must be in writing and provided to Return to Work SA before common law proceedings are commenced or redemption negotiations are commenced.
- The injured worker must confirm that he or she has received advice about the consequences of the election and the election must be accompanied by any claim for the cost of obtaining advice.
- A claim for common law damages cannot proceed to trial without mediation.

Common law claims are therefore likely to form a small subset of claims only.

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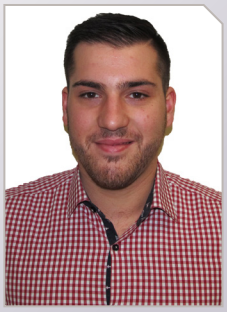

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SPECIAL FEATURE: THE *RETURN TO WORK ACT 2014* (SA)

NEWS & VIEWS | **Ben Duggan**

Employers Take On More Under New Scheme

"*Suitable*" employment for injured workers

A key aim of the State Government's new workers compensation scheme is to contain the costs of the Compensating Authority.

The Government seeks to achieve this aim through several measures, including the enhancement of provisions directed towards return to work.

The current return to work obligation imposed on the employer under section 58B(1) is retained under the new scheme.

Additionally the new scheme enables an injured worker to formally seek *suitable* employment from their employer.

ReturntoWorkSA

The injured worker's right to seek *suitable* employment

Section 18(3) of the new scheme provides for the right to apply for new work which involves the following:

- The injured worker providing written notice of their request to return to work;
- The confirmation by the injured worker that they are ready, willing and able to return to work with the employer; and
- The provision by the injured worker of information about the type of employment that they are capable of performing.

An employer may respond to a written request from an injured worker that they are able to return to work.

Return to work remedy

An injured worker is also provided with a simple and direct remedy for their return to work.

A failure by the employer to respond, within a reasonable time, to a formal request for a return to work enables the injured worker to apply to the Workers Compensation Tribunal for an order that the employer provide them with suitable employment (section 18(3) of the RTW Act).

The Tribunal will have the power to make an order subject to a reasonable test that the employer provide the injured worker with employment.

Time limit for seeking return to work remedy

No time limit has been set as to when an injured worker must make an application to the Tribunal seeking an order that their employer provide them with employment.

The Tribunal's power is simply enlivened when the employer fails, within a reasonable time, to provide suitable employment to the injured worker.
The Tribunal may order that the employer provide employment, including *after* the first 104 week period when the right to compensation payments may have ceased.

Costs

Significantly, the Tribunal may also order that the employer pay the injured worker's costs of the dispute regarding the provision of employment.

In the absence of such an order the Compensating Authority is liable for the costs of both the worker and the employer.

Implication for employers

An employer of an injured worker will need to be in a position to appropriately respond to a request to return to work with the employer.

The policies and practices of an employer may need to be reviewed to ensure compliance with the enhanced return to work provisions of the new scheme.

In practice, the enhanced return to work provisions can be expected to operate as a cost shifting exercise from the Compensating Authority to employers.

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SUITS OFF | **Staff Profile**

This Just Might Work

Girish Rao Lawyer

Many qualities contribute to success in the broad field of commercial and workplace law. Strategic awareness, high-level organisational skills and the ability to analyse risk are, of course, essential. But there's another characteristic that comes in handy: the ability to identify, in a very practical sense, what course of action will work best for a client's specific objectives.

Fortunately for DW Fox Tucker Lawyer Girish Rao, that comes as naturally as building a charcoal barbecue in a beer keg.

A member of our Workers Compensation, Self Insurance and Employment Law teams, Girish was admitted as a lawyer in the ACT on 12 December, 2014 and in South Australia on 27 January, 2015.

"My father grew up in South India and my mother grew up in Fiji. They met in New Delhi and decided to relocate to Adelaide."

As Girish describes it, he was brought up in a food loving, sporting family.

"Only two things matter in an Indian household… Sachin Tendulkar and food."

So it is little wonder Girish turned into a keen cricketer and a passionate cook.

With parents who worked long hours and with no siblings for distraction, Girish spent a lot of his down time teaching himself how to cook.

"A lot of people assume I'm good at making curries. But ask anyone whose mum and grandma are great cooks, there's no point in trying to replicate their dishes because it will never be as good."

Through this passion, Girish learnt a lot about himself.

"I recognised in myself that I don't like to just accept the way things are but need to test the rules through trial and error. Food is a great outlet for this kind of personality, as long as your family and friends are willing to endure the many failures along the way."

This need to test the rules has taken Girish out of the kitchen and into the backyard, where he has developed a passion for all things barbeque.

"My parents once bought a $6,000 gas barbecue. I couldn't understand how a method of heat application could be so expensive. So I found an empty beer keg and made a charcoal barbecue from it."

To this day his parents have never used that gas barbecue.

And how is it that Girish came to the law?

"I was working in the finance industry through the GFC. It wasn't exactly the most enjoyable industry at that time. My partner was in the final year of her law degree and so I thought I'd give it a go."

"The highlight of my studies was getting the opportunity to spend a semester in Italy at one of the oldest law schools in the world. The town was beautiful and I still remember the smell of the wood ovens being lit each evening."

Girish has relished the opportunity to join the DW Fox Tucker Workers Compensation / Employment Law Team.

"I enjoy the workers compensation/employment area because it demands practical outcomes. Why buy a $6,000 barbeque when a home-made one will work even better?".

Rest assured, when Girish sees the opportunity to find a creative solution, his team's inclined to listen.

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