

Summer Report

Feeding the World

Greenwheat Freekeh has used home grown technology to become the world's biggest supplier of a genuine superfood.

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DW Fox Tucker Lawyers

L14, 100 King William Street, Adelaide, SA 5000

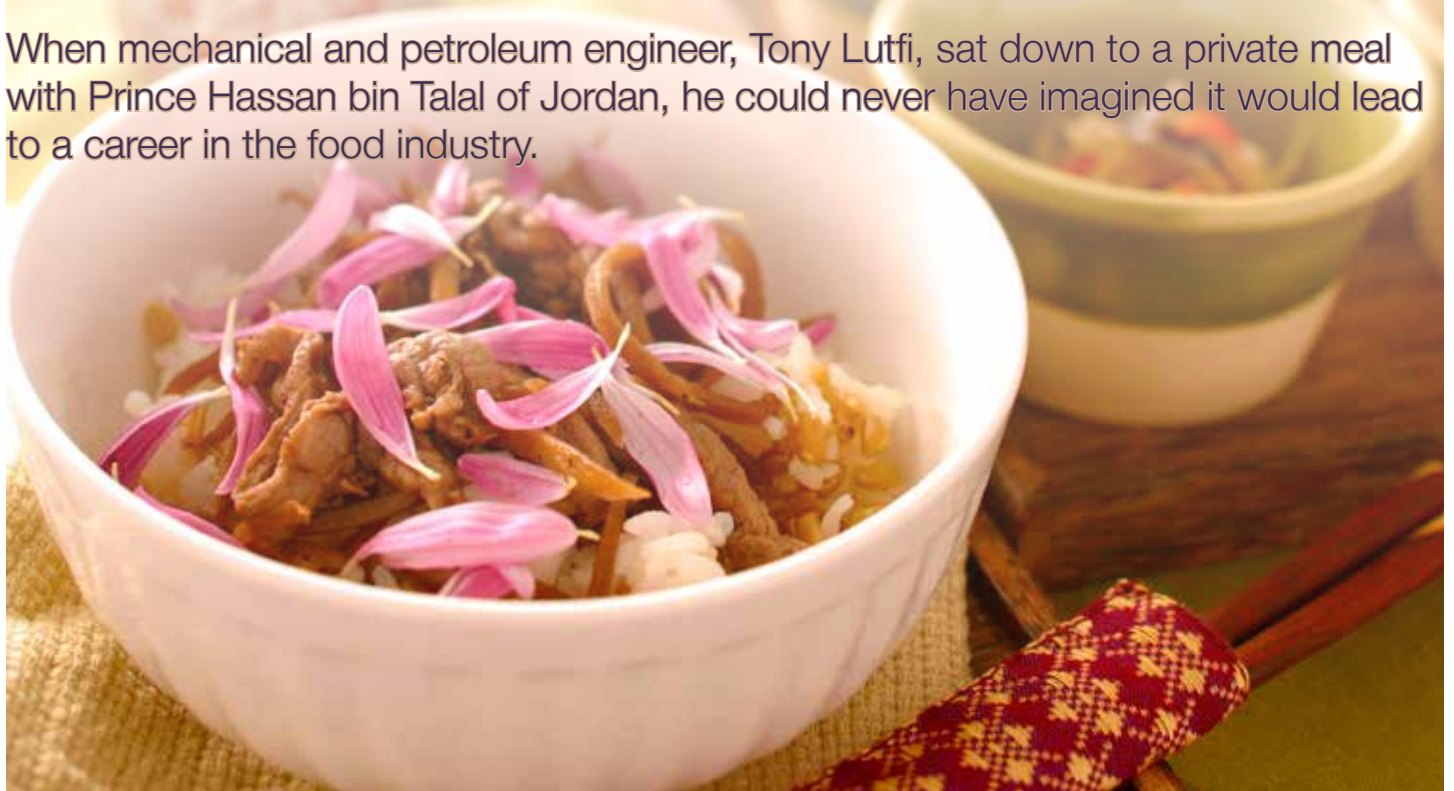
p: +61 8 8124 1811 e: info@dwfoxtucker.com.au

dwfoxtucker.com.au

CLIENT PROFILE

Greenwheat Freekeh

When mechanical and petroleum engineer, Tony Lutfi, sat down to a private meal with Prince Hassan bin Talal of Jordan, he could never have imagined it would lead to a career in the food industry.



The then Crown Prince served freekeh, an ancient grain common in the Middle East. While Tony was taken by the taste, he says it was the nutritional benefits that captured his attention.

“He said to me, they know it’s healthy, but they don’t know why. It’s processed in a very primitive way – the same way they did it many thousands of years ago – and the consequent grain is full of stone and rocks.”

As well as describing it as a boon for Middle Eastern dentists, Prince Hassan saw another opportunity.

Tony continues, “He said to me that if someone ever developed a process to make freekeh by modern automated means, it would be a great commercial opportunity.”

Fast forward to today and the State Government has just awarded Greenwheat Freekeh a \$900,000 Regional Development Fund grant to build a new plant and expand their processing capacity from the current 500 tonnes a year to between 2,500 and 3,000 tonnes by 2018.

“What we have is an understanding that at a precise stage of maturity, the grain – any grain – is far superior in nutritional value and taste than when it matures. We have created a neat process that enables us to capture that and keep it that way.”

Demand for Greenwheat Freekeh is such that until 2011, they could only meet export demand from 12 countries including Dubai, Spain, The Netherlands and Singapore.

Their local growth, from partnering with food manufacturing giants such as McCain, San Remo, McKenzie’s and Safcol, continues to be exponential – making it both a windfall and a challenge.

“All of our partners put our logo on their packaging. This is quite unusual in Australia that a small company can achieve such a cobranding arrangement... but we offer something unique and very substantial... that gives the manufacturer a great competitive advantage in a very crowded market.”



“What we have is an understanding that at a precise stage of maturity, the grain – any grain – is far superior in nutritional value and taste than when it matures. We have created a neat process that enables us to capture that and keep it that way.”

The need for a processing facility is pressing. Freekeh means ‘the rubbed one’ in Aramaic and, as such, applies to the process not the grain. The company has been experimenting here with processing barley, triticale and oats. At the end of this year, Tony is travelling to Malaysia, where he has an agreement in place to begin producing green rice freekeh.



The benefits for South Australia’s farmers and the economy are potentially high, hence the grant.

Freekeh uses green grain harvested relatively early in its growth stage. This means that many of the usual risks are mitigated and spraying costs are also reduced. As well, Greenwheat Freekeh harvests the grain and injects price stability in a volatile commodity market which achieves for the farmer during many years a reasonable premium.



“...we have been developing more automation, computerisation and integration, which will lend a great deal of safety to our IP.”

As the freekeh is considered a processed food, it also opens up markets that are otherwise closed to Australian wheat farmers. These markets – in particular the US, Canada, UK and Brazil – are among the company’s biggest. Tony says the value adding is considerable.

“We take the grain for around \$300 or \$400 a tonne and Greenwheat Freekeh’s value adds to the grain allow us to then sell it at a weighted average price of \$3,400 a tonne. We are so much in demand that we now presell almost all of our production before we make it.”

“DW Fox Tucker has been helpful to us... They have considerable knowledge and that knowledge complements our needs... They’ve also provided introductions to various parties.”

Some of these introductions have been around licensing of the technology.

“At the time we weren’t ready because I was a little reluctant to do things for fear of breach of security of our intellectual property. But it is something I’d like to pursue with Sandy again. The timing is good: we have been developing more automation, computerisation and integration, which will lend a great deal of safety to our IP.”

There has been a clamour for licensing agreements from overseas companies. However, Tony wants to start with Australia before going global.

“Just so we are closer to the action and know what’s going on...”

For more information about Greenwheat Freekeh:

Visit:
<http://www.greenwheatfreekeh.com.au/>

Call:
+61 8 8221 5022

Email:
info@greenwheatfreekeh.com.au



**Greenwheat Freekeh’s
Managing Director, Tony Lutfi**

INSIGHT | Sandy Donaldson & Russell Jones

Copyright in Cyberspace

Read the fine print

With social media's ever expanding presence, and the multitude of content publishing sites popping up, it can be quite daunting to think about just how far our photos and videos reach once the upload button has been clicked - but what is really happening to our content once it's been published online?

Social Media Rules!

Where the masses once worshipped deities such as Zeus, Odin, Jupiter and Ra – the gods of the new era are named YouTube, Twitter, Instagram and Facebook.

Posting, uploading and commenting have become a part of everyday life, as more and more people are sharing their lives with the masses through these sites.

The freedom, ease and accessibility in content sharing has become a godsend for budding artists by providing them with a platform to expose their work to the public. Similarly, the barriers of time and distance have been overcome and people are able to connect or reconnect with each other practically anywhere or at any time.

However, with this comes the issue of constant exposure.

Suddenly we live in a world where personal photos, once relegated to dwell within the dusty covers of a photo album, or videos that may only have been viewed by a small circle of family or friends, are exposed for all the world to see at the simple click of a button.

In turn it has created a bit of a stir amongst parts of society, with many becoming concerned at where content posted on these sites can end up – and what the sites can do with it.

The answer to this partly depends on copyright.

It is important to read the terms of use of a website before uploading anything online to ensure that your content isn't dealt with in a way you're not comfortable with.

What is Copyright?

In brief, copyright is an exclusive right to do things like copying, reproduction, performance or communication of subject matter that qualifies for copyright protection. The right may be exercised by the owner or a licensee of the copyright.



The law of copyright in Australia is dealt with in the *Copyright Act 1968 (Cth)* (“the Act”).

The Act divides subject matter that can have copyright protection into two classes:

1. *Works* - which includes *musical, literary, artistic and dramatic works*; and
2. *Subject matter other than works* – which includes *sound recordings, film, television and sound broadcasts, and published editions of works*.

What comprises a “musical, literary, artistic or dramatic work” can be ambiguous, however, some examples include:

- Musical Works: musical scores and combinations of melody and harmony.
- Literary Works: poems, novels, song lyrics, computer programs, and any other form of writing other than trivial expressions.
- Artistic Works: paintings, photographs and drawings.
- Dramatic Works: plays, film scripts and other works intended to be performed.

In order for something to have copyright protection as a “work” it must fall under one of these classes.

Australian law does not require registration of copyright. A work or other subject matter is automatically covered when it is created, with ownership of copyright generally vesting in the creator.

This means that the content most commonly posted to social media sites (photos, videos, text) are all subject to copyright. The question then is what happens to the copyright in these materials once they're uploaded to these sites?

This is where you need to look at the “fine print”. All sites will have **Terms and Conditions** which affect the way content can be viewed. The Terms and Conditions of sites generally provide that you will retain copyright. However, by uploading content you will grant rights to use and deal with the content.

YouTube

Users who upload content (i.e. videos) onto YouTube will retain their ownership of copyright over the content.

By uploading content onto the site, users agree to grant YouTube a non-exclusive, worldwide, royalty free, sub licensable and transferrable licence to:

- use;
- publish;
- reproduce;
- adapt;
- distribute;
- prepare derivative works of;
- display;
- make available online or electronically transmit; and
- perform

the content in connection with all services provided on the YouTube site (such as YouTube channels and the embeddable player) as well as YouTube's business, which includes using the content for promoting and redistributing part or all of the services provided by YouTube.

The uploading user will also grant other users of the website a non-exclusive licence to access the content through YouTube and to:

- use;
- reproduce;
- publish;
- display;
- make available online or electronically transmit; and
- perform

the content as permitted through the functionality of the services provided by YouTube.

The licences granted by the uploading user will terminate within a commercially reasonable time after they remove or delete the video from YouTube.

Where the masses once worshipped deities such as Zeus, Odin, Jupiter and Ra – the gods of the new era are named YouTube, Twitter, Instagram and Facebook.

Twitter

Users who upload content (i.e. photos, videos, text) onto Twitter will retain their ownership of copyright over the content.

By uploading content onto the site, users agree to grant Twitter a non-exclusive, worldwide, royalty free, sub licensable licence to:

- use;
- copy;
- reproduce;
- adapt;
- publish;
- transmit;
- display; and
- distribute

the content in any and all distribution methods available to Twitter.

This licence extends to allow Twitter to make the content available to other companies, organisations or individuals who partner with Twitter for the syndication, broadcast or publication of content on other media and services (subject to the Twitter Terms and Conditions).

Twitter may also adapt your content in order to distribute, display or transmit your content. They may also make any changes to adapt to any requirements of any networks, devices, services or media.

The licence also allows Twitter to use the content to promote, provide and improve the services of the Twitter website.

The licence continues even after the uploading user has terminated their account.

Instagram

Users who upload content (i.e. photos and videos) onto Instagram will retain their ownership of copyright over the content.

By uploading content onto the site users agree to grant Instagram a non-exclusive, worldwide, royalty free, sub licensable and transferable licence to use the content.

Instagram may also place advertising or promotions on, about or in conjunction with your content. They may also edit your content if it is in breach of their Terms of Use.

Facebook

Users who upload content (i.e. photos, videos and text) onto Facebook will retain their ownership of copyright over the content.

By uploading content onto the site, users agree to grant Facebook a non-exclusive, worldwide, royalty free, sub licensable and transferable licence to use the content in accordance with the privacy settings set by the user.

In agreeing to the Terms of Service, users give Facebook permission to use the content in connection with commercial, sponsored or related content on Facebook. For example, users permit a business to pay Facebook to display their content to businesses without any compensation to the user.

The licence granted by the uploading user will terminate when the user deletes the content from their Facebook account. However, if the content has been shared by another user and has not been deleted by that user it will remain on Facebook.

Read the Terms!

While the ownership of copyright in content posted to all of the sites mentioned above is retained in the user, the terms of the licenses granted to each site, and what they can subsequently do with the content, differs.

It is important to read the terms of use of a website before uploading anything online to ensure that your content isn't dealt with in a way you're not comfortable with.

If you feel that your copyright in anything you've posted online is being mismanaged or infringed, please give us a call.



MORE INFO

Alastair (Sandy) Donaldson Director

p: +61 8 8124 1954

alastair.donaldson@dwfoxtucker.com.au



MORE INFO

Russell Jones Lawyer

p: +61 8 8124 1894

russell.jones@dwfoxtucker.com.au

Australian law does not require registration of copyright. A work or other subject matter is automatically covered when it is created, with ownership of copyright generally vesting in the creator.

Crowdfunding

Striking the balance: A new source of capital and investor protection

Introduction

It is highly likely that you've heard the word 'Crowdfunding' used in relation to a new business concept or start-up venture, often being advertised over the internet. You may have even donated through an online platform to help kick-start a project, or you may be a small-business owner who has considered utilising this form of fundraising in order to jump-start a new venture or raise much needed capital. Crowdfunding is an emerging, innovative and rapidly evolving form of raising capital which allows 'entrepreneurs to raise funds from a large number of investors'¹.

In December 2015, a year after first being approached by the Australian Government, the Productivity Commission released a final report that, amongst other things, highlighted a need for corporate reform to allow small businesses access to crowd funded debt or equity finance². Soon after, the Government presented to Parliament the *Corporations Amendment (Crowd-sourced Funding) Bill 2015* ("Draft Bill") with the aim of reforming the regulatory requirements for 'crowd sourced equity funding' ("**Crowdfunding**") activities. This article will highlight the current regulatory environment and the need for adequate reform. It is clear that there is still a way to go before the implementation of law that can achieve a balance between providing protection to potential investors and creating a space for this new type of capital flow.

What is Crowdfunding?

Crowdfunding is a form of online fundraising whereby large numbers of people invest (relatively) small amounts of money to assist small-business ventures. This is often promoted through a Crowdfunding platform, which acts as an intermediary between the potential investor and the company making the offer. Two of the major platforms in Australia are Pozible and OzCrowd.

Fundraising via this method often involves the investor being provided with a benefit of some kind, including either a future product, shares in the company (equity funding), or a loan to the company (debt funding). The regulatory reform currently taking place in Australia in relation to Crowdfunding revolves around the provision of **equity** finance in return for an allocation of shares.

¹ Australian Government, *Corporations Amendment (Crowd-sourced Funding) Bill 2015- Explanatory Memorandum*, Final Report, 3. Available at: http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5588_ems_b9685ecf-94b6-4209-a42c-7e8c656ed051/upload_pdf/504355.pdf;fileType=application%2Fpdf

² Productivity Commission 2015, *Business Set-up Transfer and Closure*, Final Report 75, Canberra, 120. Available at: <http://www.pc.gov.au/inquiries/completed/business/report/business.pdf>

It is clear that an appropriate balance is needed in order to promote widespread, innovative business ventures, whilst ensuring adequate investor protection.



Current regulatory space

Corporate fundraising is currently regulated by the *Corporations Act 2001* (Cth). Under current Australian law, when raising capital companies are exempt from disclosure requirements (e.g. Prospectus or PDS under the Corporations Act) only if offers are made to 'professional or sophisticated' investors who earn \$250,000 or more in a 12-month period or have \$2.5 million in assets³, or to 'retail investors' where no more than \$2 million is invested by no more than 20 investors in a 12-month period⁴. With the potential of thousands of inexperienced investors making contributions through Crowdfunding platforms, it is evident that current regulation is unsuitable for crowd sourced equity funding.

However, the primary risk associated with the loosening of regulation is the possibility of inadequate protection for inexperienced investors. Crowdfunding is aimed at 'mum and dad' investors who are often investing for the first time and can lack the experience and knowledge required to make informed business decisions. The reforms proposed by the Australian Government are aimed at inexperienced investors being made aware of their investment options and protected from poor investment choices.

³ *Corporations Act 2001* (Cth), s 708(1); *Corporations Regulations 2001* (Cth), r 6D.2.03

⁴ *Corporations Act 2001* (Cth), s 708.

Crowdfunding is a form of online fundraising whereby large numbers of people invest (relatively) small amounts of money to assist small-business ventures.

It is clear that an appropriate balance is needed in order to promote widespread, innovative business ventures, whilst ensuring adequate investor protection.

Legislative Reform

By way of summary, under the Draft Bill, **public** companies that have assets of \$5 million or less⁵ and an annual turnover of \$5 million or less⁶ would be able to raise a maximum of \$5 million⁷ from retail investors in one 12-month period, without the need to comply with the current disclosure required (e.g. Prospectus or PDS under the Corporations Act).

In regards to investor protection measures, investments will be capped at \$10,000 per person⁸ and investors will be provided with a 5-day cooling off period⁹. In addition, investors will be required to complete a risk acknowledgement statement¹⁰; a document that outlines the risks that the investor may face in relation to their investment.

The Pros

- The \$5 million cap in the Draft Bill. This can be compared favourably to the United States Government's *Jumpstart Our Business Startups Act* ("JOBS Act"), which caps the amount that a company can raise at \$1 million per 12-month period.
- Through the introduction of an unconditional cooling-off period and risk acknowledgement statement, the legislation is aiming to ensure shareholder protection, particularly so that 'mum and dad' investors can feel confident in making investment decisions. Some commentators have queried the length of the cooling-off period or its need at all.
- New public companies that are eligible to raise crowd-sourced funds will be also provided with limited relief from corporate governance requirements. In particular, annual directors' report requirements are lessened, certain companies may not need to have their accounts audited, and financial reports to members can simply be made available on a specified website¹¹.

The Cons

- One of the primary concerns with the Draft Bill is that it applies solely to public companies, and not proprietary companies¹². It is more likely that it will be the smaller, proprietary companies that would benefit most significantly from this alternate form of fundraising in order to launch small-scale and first-time ventures.

⁵ Corporations Amendment (Crowd-sourced Funding) Bill 2015, s 738H(2)(b)(i).

⁶ Corporations Amendment (Crowd-sourced Funding) Bill 2015, s 738H(2)(a)(i).

⁷ Corporations Amendment (Crowd-sourced Funding) Bill 2015, s 738G(2).

⁸ Corporations Amendment (Crowd-sourced Funding) Bill 2015, s 738ZC(1)(b)(i).

⁹ Corporations Amendment (Crowd-sourced Funding) Bill 2015, s 738ZD(1).

¹⁰ Corporations Amendment (Crowd-sourced Funding) Bill 2015, s 738ZA(3)(b).

¹¹ Corporations Amendment (Crowd-sourced Funding) Bill 2015, sch 2, ss 1-9.

¹² Corporations Amendment (Crowd-sourced Funding) Bill 2015, s 738H(1)(a).

- The result of the Draft Bill is that smaller businesses will need to establish a public company and, as a result, face increased costs and disclosure requirements in order to partake in the Crowdfunding opportunities. These additional requirements include the preparation of annual directors reports and financial reports¹³, which are audited and must be provided to both ASIC and members¹⁴, as well as the holding of annual general meetings¹⁵.
- The cost of increased compliance, disclosure requirements and 'red tape' may prohibit the majority of smaller companies from using the Crowdfunding route to unlock their business potential.

The Australian Government's draft bill has been highly criticised, in particular by the opposition government and a number of crowdfunding platforms, who have said that the legislation is too focussed on investor protection and lacks opportunity for unlocking growth and fostering innovation in small business.

Where to from here?

The Draft Bill was referred by Parliament to the Senate Economics Legislation Committee on 3 December 2015, and the Committee's report is due on 22 February 2016. We will watch this space for you and provide a full review of the groundbreaking legislation upon enactment and what it could mean for your innovative business ideas or investment prospects.

¹³ Corporations Act 2001 (Cth) ss 292.

¹⁴ Corporations Act 2001 (Cth) ss 298, 307, 314, 319.

¹⁵ Corporations Act 2001 (Cth) ss 250N.



MORE INFO

Brett Thorneycroft Consultant

p: +61 8 8124 1944

brett.thorneycroft@dwfoxtucker.com.au

Unfair Terms in Small Business Contracts

ACL and ASIC Act amendments

Provisions relating to *unfair contract terms* in contracts for consumers have been in the *Australian Consumer Law [ACL]* (in Schedule 2 of the *Competition & Consumer Act 2010*) since the introduction of the law in 2010. Similar provisions are contained in the *Australian Securities & Investments Commission Act 2001 [ASIC Act]* in relation to financial services.

The unfair contract provisions will be extended to contracts with small businesses. An act amending the ACL and the ASIC Act was passed by Federal Parliament in October, but the amendments will not come into effect until **12 November 2016**, 12 months from the day on which the amending Act received assent.

Small Business Contracts

The amendments introduce the concept of a **small business contract** and, in general, apply the existing unfair contract terms provisions to *small business contracts* by inserting in relevant sections “*or small business contract*” after “*consumer contract*”.

A contract is a *small business contract* if:

- a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- (b) either the upfront contract price does not exceed \$300,000 or, if the contract has a duration of more than 12 months, the upfront price does not exceed \$1 million.

A contract entered into before 12 November 2016 (unless renewed on or after that date) will be excluded. Excluded contracts will include some other contracts such as constitutions of companies, certain insurance contracts and shipping contracts.

A *small business contract* may be one for:

- supply of goods or services, or
- sale or grant of an interest in land (in the ACL).

Unfair Terms are Void

An unfair term of a small business contract will be void if:

- the term is *unfair*; and
- the contract is a *standard form contract*.

The whole contract is not void, and will continue to bind the parties, if it is capable of operating without the unfair term.

Some contract terms will not be affected, and cannot be *unfair contract terms*. These include a term that:

- defines the main subject matter of the contract;
- sets the *upfront price* payable under the contract; or
- is a term required or permitted by a law.

A **standard form contract** is not defined, and the expression will have its normal meaning, but this is “*affected*” by section 27 of the ACL and section 12BK of the ASIC Act. A contract is presumed to be a *standard form contract* unless a party to proceedings proves otherwise. A Court, in determining whether a contract is a *standard form contract* will take into account matters that it thinks relevant, but must take into account whether:

- one party has all or most of the bargaining power;
- a contract is prepared by one party before discussions;
- a party was, in effect, required either to accept or reject the contract in the form presented (other than the main subject matter or upfront price);
- a party was given an effective opportunity to negotiate terms; and/or
- the terms take into account specific characteristics of a party or the transaction.



A substantial lead-in time until 12 November 2016 has been allowed to enable businesses to review contracts and terms which may be unfair.

When is a Term Unfair?

A term of a small business contract will be *unfair* if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In determining whether a term is unfair, a Court may take into account matters that it thinks relevant, but must take into account the contract as a whole and the extent to which the term is *transparent*.

Whether a contract term is **transparent** will depend on whether the term is:

- expressed in reasonably plain language;
- legible;
- presented clearly; and
- readily available to any party affected by the term.

A contract term will be presumed not to be reasonably necessary to protect legitimate interests of a party who would be advantaged by the term unless that party proves otherwise.

It will be obvious that the legislation places a heavy onus on a party to a small business contract if another party asserts that a term is unfair. If any party to a contract is a small business (employing fewer than 20 persons) the contract can be a *small business contract* but the party asserting that the term is void need not be a small business.

Less than 20 Employees

It may not be clear in many cases whether or not a business employs fewer than 20 persons. A casual employee is not to be counted unless the employee is "*employed by the business on a regular and systematic basis*" (in the ACL). Nothing in the ACL assists in determining whether a person is employed on a *regular or systematic basis*, but indications in the Explanatory Memorandum for the Exposure Draft for the Act indicate that guidance may be found in the *Fair Work Act*.

Upfront Price

The concept of an **upfront price** is relevant both to determining whether a contract is a *small business contract* and whether a term setting the upfront price is excluded from terms which may be unfair.

An *upfront price* is one which is disclosed at or before the time the contract is entered into. It does not require that the price be paid "up front" or at commencement.

The *upfront price* of a contract will include payments for consideration that are disclosed, including interest and fees, but not, for example, interest in the event of a default or a penalty.

Time to Review Contracts

A substantial lead-in time until 12 November 2016 has been allowed to enable businesses to review contracts and terms which may be unfair. As the contracts which may be affected can include any business to business contract if at least one party is a small business (less than 20 employees), contracts should be reviewed on the basis that the unfair contract terms provisions may apply. Often it will not be possible to know whether or not a party to a contract does employ fewer than 20 employees.

If standard form contracts are used now both for consumers and business to business, terms which apply to consumers may be void and the review should commence as soon as possible.

When the new laws are in effect, they may provide some bargaining power to small businesses negotiating contracts which may contain terms that could be unfair.

If, when the new provisions are in effect, a term is found to be an unfair contract term, this will not incur a penalty, but may be the subject of compensation if a Court determines that a party has endeavoured to enforce the provision.

All businesses, or entities contracting with businesses, should give consideration to the review of their standard and non-standard operating contracts.



MORE INFO

Alastair (Sandy) Donaldson Director
p: +61 8 8124 1954
alastair.donaldson@dwfoxtucker.com.au

The amendments introduce the concept of a small business contract and, in general, apply the existing unfair contract terms provisions to small business contracts by inserting in relevant sections "or small business contract" after "consumer contract".

CASE IN POINT | Catherine Birchall

Spotlight on Sham Contracting Arrangements

Recent High Court decisions

In two recent cases that proceeded to the High Court of Australia it has been found that the companies in each contravened the 'sham contracting' provisions of the *Fair Work Act 2009* (Cth) (FW Act).

The essence of sham contracting is that a company has disguised a relationship with a worker which is truly an employment relationship as an independent contracting arrangement.

Proceedings seeking civil penalties or other orders (such as compensation or an injunction) for alleged sham contracting arrangements can be instituted by Fair Work Inspectors, including from either the Fair Work Ombudsman or Fair Work Building and Construction, not only affected employees or industrial organisations.

The arrangements in each of these cases were very different, but in each it has been found that the company contravened the sham contracting provisions by misrepresenting the nature of workers' employment status. In the first case, the workers were not paid statutory entitlements (such as superannuation or annual leave). In the second case, the employer was found to have contravened the provisions even though the workers were highly paid (well in excess of the award).

Labour hire relationships

Fair Work Ombudsman v Quest South Perth Holdings [2015] HCA 45

The Fair Work Ombudsman commenced proceedings in the Federal Court seeking penalties against Quest, the proprietor of serviced apartments.

Contracting Solutions, a labour hire organisation, purported to engage two housekeepers who had previously been employed directly by Quest as independent contractors by entering into contracts for services with them.

The essence of sham contracting is that a company has disguised a relationship with a worker which is truly an employment relationship as an independent contracting arrangement.

The housekeepers performed precisely the same duties exclusively for Quest in precisely the same manner as they had done before entering into the contract for services.

Quest arranged a meeting between the housekeepers and Contracting Solutions. The Full Federal Court found that Quest represented to the housekeepers that upon entering into the contract for services with Contracting Solutions, they would continue to perform work at Quest, but would do so as independent contractors of Contracting Solutions and not as employees of Quest. The High Court found that this amounted to a representation that the housekeepers remained employees of Quest under implied contracts of employment.

Quest was found by the Full Federal Court not to have contravened the sham contracting provisions of the FW Act.

The Fair Work Ombudsman appealed to the High Court who granted the regulator its application for special leave.

The High Court went on to reject the Full Federal Court's decision that Quest did not contravene the sham contracting provisions. The Full Court adopted a narrow interpretation of these and found that to contravene the provisions, a representation to an employee must mischaracterise the contract of employment that exists between the employer and employee as a contract for services between them. The High Court disagreed and found that contracts for services between workers and other parties (such as labour hire companies) also have the potential to mislead a person as to their employment status. If the prohibition on sham contracting only applied to contracts with employers and not labour hire companies and third parties, this would defeat the object of the provisions by allowing similar labour hire arrangements to continue and deprive workers of their legal entitlements.





The High Court remitted the proceedings to the Federal Court to assess pecuniary penalties (up to \$54,000 per breach).

Labour hire arrangements have become increasingly popular and the High Court's decision should serve as a warning to companies who engage workers who are not running their own business as true independent contractors. Employers should obtain advice as to whether their independent contracting arrangements are compliant with the FW Act.

Overpayments

Linkhill Pty Ltd v The Director of the Fair Work Building Industry Inspectorate [2015] HCA Trans 340

The High Court refused an application for special leave from a decision from the Full Federal Court of Australia in which the Linkhill Pty Ltd was found to have contravened the sham contracting provisions.

Linkhill contended that it paid contractors engaged by it well in excess of award rates, but the Federal Court held that the workers were employees such that it had underpaid them by not paying their legal entitlements as employees and also imposed a significant penalty of \$313,500.

...the High Court's decision should serve as a warning to companies who engage workers who are not running their own business as true independent contractors.

The High Court considered that the circumstances of this case did not warrant the consideration of these issues by a grant of special leave. In declining special leave, the High Court did not take the opportunity to address conflicting decisions regarding the treatment of over award payments in sham contract cases. The issue to be resolved is whether an hourly rate paid to a contractor which is higher than the award, can be offset against the value of the award and/or statutory entitlements. The High Court's approach leaves companies exposed to a liability to compensate workers for entitlements even though the amount they are paid as contractors exceeds their global entitlements under the applicable award/statute.

Companies should carefully review their independent contracting arrangements and obtain advice from an experienced employment practitioner as to whether changes are required, even where the workers appear to be happy with the arrangements, because as is demonstrated by the *Linkhill* decision this may not prevent the risk that Fair Work Inspectors may pursue them for contravening the sham contracting provisions of the FW Act.



[MORE INFO](#)

Catherine Birchall Associate

p: +61 8 8124 1862

catherine.birchall@dwfoxtucker.com.au

Royal Commission into Trade Union Governance and Corruption

Final report delivered to Coalition Government

The final report of the Royal Commission into Trade Union Governance and Corruption was released to the public on 31 December 2015.

Commissioner Dyson Heydon's final report (which consists of some 6 reports) marks the completion of his inquiry into trade union corruption and governance in response to a request from the Abbott Government in February 2014.

The focus of the Abbott Government's original request required Commissioner Heydon to enquire into alleged governance and financial irregularities associated with the affairs of trade unions.

A broad ranging inquiry was conducted by Commissioner Heydon into these matters during sittings that took nearly 190 days over the course of 2014 and 2015.

In the final report, Commissioner Heydon reaches the damning conclusion that *"there is room for louts, thugs, bullies, thieves, perjurers, those who threaten violence..."* in many parts of the world constituted by officials of the union movement.

The conclusion is based upon a widely reported finding that there is a *"widespread"* and *"deep-seated"* culture of lawlessness among many officials of unions.

"[The misconduct is] not the work of a few rogue unions or a few rogue officials. The misconduct exhibits great variety. It is widespread. It is deep-seated. It would be utterly naïve to think that what has been uncovered is anything other than the small tip of an enormous iceberg."

Commissioner Heydon has referred more than 40 individuals and organisations, including former Health Services Union national secretary Kathy Jackson, to various authorities for investigation of conduct the subject of consideration by the Royal Commission.

A total of nearly 80 wide ranging recommendations for reform, many focused on the manner in which trades unions are regulated, are contained in Commissioner Heydon's final report including:

- The creation of a Registered Organisations Commission to operate as a stand-alone regulator from the Fair Work Commission.
- The improvement in the independence of auditors through the adoption of various measures.
- Proposed alterations to the *Fair Work Act (Cth) 2009* to make certain actions a criminal offence.
- Measures to increase the transparency for enterprise agreements.
- Proposed alterations to competition laws.
- The improvement in the procedures for a Royal Commission.

An interesting recommendation (Recommendation 60) that obtained some media attention at the time of the public release of the initial report was the recommendation that the Federal Parliament might be provided with the authority to disqualify officers from the CFMEU from holding office *"in any registered organisation or branch for a specified period."*

In local news, a recommendation (Recommendation 1) was made to the Federal Government and the State Government to give consideration to adopting a national approach to the registration, deregistration and regulation of employee and employer organisations with a single regulator throughout Australia.

Our list of the Royal Commission's top 10 recommendations from the final report, which is focused on those most likely to have a direct impact upon employers if implemented, are contained in the table on facing page.

Comment

The regulation of trade unions is likely to be an issue which divides the major parties in the lead up to the next Federal election.

In response to the final report, the Turnbull Government has indicated that it will re-introduce its failed bill to re-establish the Australian Building and Construction Commission in the first sitting week of 2016 seeking to have it passed by both houses of Federal Parliament by the end of March.

The Labor Party is not likely to support such legislation with Opposition Leader Bill Shorten maintaining his party's long held stance that it does not support it because it creates *"a different set of rules for construction workers to everyone else."*

In addition, the Turnbull Government has also indicated that it will carefully consider all of the recommendations of Commissioner Heydon's final report providing a detailed response in early 2016.

It can be expected that one of the options that the Turnbull Government might consider is the introduction of a separate bill which adopts many of the recommendations of the final report.

The Labor Party and the cross-benches are likely to feel some pressure to support aspects of the bill given many of the damning findings of the final report.

We will keep you informed of developments in the lead up to the next Federal election.



MORE INFO

Ben Duggan Director

p: +61 8 8124 1881

ben.duggan@dwfoxtucker.com.au

Our Top 10 Recommendations from the Final Report

TOPIC	RECOMMENDATION	SUMMARY
Corrupting Benefits	41	Legislation be enacted amending the FW Act [global] making it a criminal offence for an employer to provide, offer or promise to provide any payment or benefit to an employee organisation or its officials. Certain legitimate categories of payment should be permitted, subject to strict safeguards. An equivalent criminal offence should apply to any person soliciting, receiving or agreeing to receive a prohibited payment or benefit. A two year maximum term of imprisonment should apply to the commission of these offences.
Regulation of Relevant Entities	43	The <i>Fair Work Act 2009</i> (Cth) be amended to prohibit any term of a modern award, enterprise agreement or contract of employment permitting an employer to deduct, or requiring an employee to pay, from an employee's salary an amount to be paid towards an election fund.
Enterprise Agreements	48	The <i>Fair Work Act 2009</i> (Cth) be amended to require an organisation that is a bargaining representative to disclose all financial benefits, whether direct or indirect, that would or could reasonably be expected to be derived by the organisation, an officer of the organisation or a related entity as a direct or indirect consequence of the operation of the terms of a proposed enterprise agreement. A short, simple and clear disclosure document should be provided to all employees before they vote for an enterprise agreement.
Enterprise Agreements	49	Section 194 of the <i>Fair Work Act 2009</i> (Cth) be amended to make unlawful any term of an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund (other than a superannuation fund) providing for, or for the payment of, employee entitlements, training or welfare unless the fund is: (a) a registered worker entitlement fund; or (b) a registered charity.
Enterprise Agreements	50	A new civil remedy provision be added to the <i>Fair Work Act 2009</i> (Cth) prohibiting a person from organising or taking (or threatening to organise or take) any action, other than protected industrial action, with intent to coerce an employer to pay amounts to a particular employee benefit fund, superannuation fund or employee insurance scheme.
Enterprise Agreements	51	Sections 32C(6), (6A), (6B), (7) and (8) of the <i>Superannuation Guarantee (Administration) Act 1992</i> (Cth) be repealed, and all other necessary amendments be adopted to ensure all employees have freedom of choice of superannuation fund.
Competition Issues	52	The <i>Competition and Consumer Act 2010</i> (Cth) be amended so that the penalties for breaches of ss 45D, 45DB, 45EA are the same as those that apply to other provisions of Part IV of that Act.
Rights of Entry	73	Section 119 of the <i>Work Health and Safety Act 2011</i> (Cth) and the equivalent provisions of the equivalent State Acts be repealed and replaced with new ss 119 and 119A which provide that prior written notice of entry is to be provided except where the permit holder has a reasonable concern that: (a) there has been or is contravention of the Act; and (b) that contravention gives rise to a 'serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard'.
Rights of Entry	74	The <i>Work Health and Safety Act 2011</i> (Cth) be amended so as to make it clear that the burden of proving that a permit holder has a suspicion that is reasonable for the purposes of s 117(2) or a concern that is reasonable for the purposes of s 119A lies with the person asserting that fact.
Rights of Entry	75	The <i>Fair Work Act 2009</i> (Cth) and <i>Work Health and Safety Act 2011</i> (Cth) and the equivalent State Acts be amended to prohibit the exercise of rights of entry by more than two permit holders of the same organisation on the one workplace at the same time.

NEWS & VIEWS | Sandy Donaldson

Stamp Duty

Bracket creep and the hit on homes and primary producers



The 2015 SA Budget

The South Australian Budget in June 2015 provided some welcome relief from taxes in a number of areas. Some of these included:

- abolition of stamp duty on nonreal property transfers¹;
- abolition of stamp duty on shares and other nonquoted marketable securities²;
- provision of legislative corporate reconstruction relief;
- stamp duty and land tax exemptions for a principal place of residence in a special disability trust; and
- expansion of exemptions for interfamilial farm transfers involving trusts.

These measures, particularly the abolition of stamp duty on nonreal property transfers, mean that it is possible to transfer business and other assets (other than real property) without stamp duty and it is now possible to consider restructuring arrangements which may previously have been unattractive because of potential stamp duty costs.

Phase-out of Duty for Some Land Transfers

As well as removing stamp duty on nonreal property transfers, the Budget announced the intended phaseout of conveyance (transfer) duty on some real property transfers, with a $\frac{1}{3}$ reduction from 1 July 2016, a further $\frac{1}{3}$ from 1 July 2017 and a complete abolition from 1 July 2018. This has been brought forward by an announcement on 7 December 2015, and the first $\frac{1}{3}$ reduction is now in effect from that date.

The phaseout only applies to “*nonresidential, nonprimary production real property*”, which is described in new section 71DC of the *Stamp Duties Act* as “*qualifying land*”.



Information Circular No: 86 of Revenue SA³ indicates that the Commissioner of State Taxation will generally rely on land use codes to determine whether land is residential or primary production land on the one hand, or *qualifying land* on the other. Qualifying land would include land within the following land use codes:

- commercial;
- industrial;
- vacant land (with some exceptions);
- institutions;
- public utilities;
- recreation; or
- mining and quarrying.

Residential and Primary Production Land

The Circular emphasises that conveyance duty will remain on transfers of residential and primary production land. Although in many cases it will be obvious as to whether land is either residential or primary production land or *qualifying land*, there are likely to be “grey areas”, and situations in which transfers include both qualifying land and residential or primary production land.

How is Land Use Determined?

The Circular of Revenue SA indicates that the Commissioner will take into account information from the ValuerGeneral to determine whether the predominant use of land is for residential or primary production purposes. The Commissioner may determine that land is residential, even if not used predominantly for any purpose:

- if improvements on the land are residential in character; or
- if land is vacant (or with only minor improvements) and in a residential zone in a Development Plan.

The Commissioner, however, may determine that land is commercial, and *qualifying land*, even if it is coded residential by the ValuerGeneral, consistent with Local Government zoning, including categories such as hostels, hotels, motels, service departments and short term unit accommodation.

The Commissioner may also consider land that is not currently used for primary production is to be taken to be used for that purpose if that classification has been assigned to the land by the ValuerGeneral.

Because of the disparity in rates of duty between *qualifying land* and residential and primary production land, the Circular draws attention to a new “robust” antiavoidance provision in the *Stamp Duties Act* (section 109) and also emphasises that the relevant date for imposition of duty is the date of a contract, not the date of a transfer of real property pursuant to the contract.

These measures, particularly the abolition of stamp duty on nonreal property transfers, mean that it is possible to transfer business and other assets (other than real property) without stamp duty and it is now possible to consider restructuring arrangements which may previously have been unattractive because of potential stamp duty costs.

Bracket Creep

The Budget changes to stamp duty are clearly of benefit for businesses, but the retention of conveyance duty on transfers of residential and primary production land will, in effect, fund the relief that is provided to business. Stamp duty can be a substantial impost. Currently, the rates of duty for the sale price or value of property conveyed, whichever is higher, are in the following brackets:

(i)	Up to \$12,000.00	1%
(ii)	the excess over \$12,000 to \$30,000	2%
(iii)	the excess over \$30,000 to \$50,000	3%
(iv)	the excess over \$50,000 to \$100,000	3.5%
(v)	the excess over \$100,000 to \$200,000	4%
(vi)	the excess over \$200,000 to \$250,000	4.25%
(vii)	the excess over \$250,000 to \$300,000	4.75%
(viii)	the excess over \$300,000 to \$500,000	5%
(ix)	the excess over \$500,000	5.5%

There has been a lot of discussion recently in relation to the insidious effect of “*bracket creep*” in relation to income tax. The amount of “*creep*” for income tax, however, is insignificant compared to stamp duty. It will be obvious that the very substantial increases in the prices of real estate, particularly residential properties, in recent years will mean that stamp duty will be imposed at much higher bracket rates for most properties than would have been the case when the rates were introduced.

A graph on the South Australian Government web site [<https://www.sa.gov.au/topics/housing-property-and-land/buying-and-selling/advice-for-buyers/median-house-sales-by-quarter>] shows that in June 1998 (where the graph starts) the median house price in the Adelaide Metropolitan Area was a little under \$125,000 and in June 2015 was a little over \$425,000 - an increase in round figures of \$300,000 - or, as a percentage, 340%.

In 1998 there were only six brackets for rates of duty in Schedule 2 of the *Stamp Duties Act*. The sale price of a property of \$125,000 would have been in the second highest bracket and have incurred stamp duty of \$2,830 plus 4% on the excess over \$100,000 - a total of \$3,830. The highest bracket for the excess over \$1 million was then 4.5%.

On a median price of \$425,000, currently stamp duty will fall into the second highest bracket and will be \$11,330 plus 5% of the excess over \$300,000 - a total of \$17,580. The buyer of a median priced house in 2015 would pay \$13,750 more stamp duty than the buyer of a comparable house in 1998. The proportionate increase in the stamp duty is 459%. As a proportion of the median house price, duty in 1998 was 3.06% and in 2015 was 4.14%.

There have been numerous amendments to the rate brackets in Schedule 2 of the *Stamp Duties Act*. One of the most significant was in 2002 when the number of brackets became nine, the upper limit for the top bracket was reduced from \$1,000,000 to \$500,000 and the top rate went from 5% to 5.5%. There has been a clear pattern of amendment of the rates to increase the overall effective rate of stamp duty, which is pretty *creepy*.

Alternative Taxation Systems

Stamp duty has always been an arbitrary and unpopular form of taxation. Many studies, including the *Henry Report*⁴ and more recently the Federal Treasury White Paper *Rethink* have suggested that there should be no role for stamp duties and that a broader based land tax would be a better alternative.

However, the likelihood of any change in the near future is remote and it seems that transfers of residential properties and primary production properties will continue to incur the burden of stamp duty for some time, as will transfers of commercial properties, although at reduced rates.

(Endnotes)

¹ Some goods will be *prescribed goods* and will be included in a dutiable land transaction where the goods have a *significant connection* with land.

² Dealings in interests in *land holding entities* will continue to be assessable.

³ Circulars are an expression of the view of the Commissioner as to the interpretation of the Act and its practical application, but are not law. Issues may arise in relation to the application of these provisions in practice.

⁴ *Australia's Future Tax System*, Report to the Treasurer, December 2009, recommendations 51 - 54.



MORE INFO

Alastair (Sandy) Donaldson Director

p: +61 8 8124 1954

alastair.donaldson@dwfoxtucker.com.au

CASE IN POINT | Mark Gowans & Krystie Miller

Liquidators Beware

Selling assets of an insolvent corporate trustee

Can a liquidator of a Corporate Trustee sell assets previously held in the name of that trustee if the Company is no longer trustee?

Where a corporate trustee is removed upon an insolvency event, the outgoing trustee retains a right of indemnity from the trust assets which is secured by an equitable charge.

Prior to the decision of Brereton J in *Stansfield DIY Wealth Pty Ltd (in liquidation)*¹ (“**Stansfield**”), a liquidator of an insolvent corporate trustee (which was removed as trustee upon liquidation), which had a beneficial interest over trust assets by virtue of an equitable charge, could sell trust assets pursuant to section 477(2)(c) of the *Corporations Act 2001* (Cth) (“**the Act**”) without having to seek approval from the Court.² However, Brereton J in *Stansfield* disagreed with this approach noting that the power of sale under section 477(2)(c) of the Act is limited to where the company has both legal and beneficial interest in the property (which interest is lost upon removal as trustee) as a liquidator cannot sell interests in property that the company does not have. In this regard, Brereton J stated:

“The equitable interest of a trustee that has a charge to secure its right of indemnity extends to all the assets of the trust, but is not co-extensive with them: it is constrained to the limit of the liabilities that it secures. Moreover, it is in the nature of a hypothecation, and does not equate to beneficial ownership. The relevant “property of the company” is the charge, not the assets charged. Accordingly, the liquidator would be authorised by s 477 to sell the company’s interest as equitable chargee, but not the underlying assets to which the charge attached”.

¹ [2014] NSWSC 1484.

² See *Apostolou v VA Corporation of Australia Pty Ltd (2010) 77 ACSR 84, Re Bacchus Distillery Pty Ltd (Administrators Appointed) (2014) 98 ACSR 539 and Kitay, in the matter of South West Kitchens [2014] FCA 670.*

Accordingly, Brereton J found that:

“section 477(2)(c) does not empower a liquidator to sell the beneficial interest in property that the company holds on trust, even if the company has an equitable charge over it, because the property is not itself “property of the company”.

Whilst Brereton J accepted that an insolvent corporate trustee can sell its equitable interest in trust assets, it is only that interest and not the whole asset that a liquidator is entitled to sell. Brereton J gave the example that, if the insolvent corporate trustee holds land upon trust for itself and three others, the liquidator can sell the legal interest of the insolvent corporate trustee and its 25 per cent beneficial interest, but not the other 75 per cent.

Therefore:

1. an insolvent corporate trustee cannot sell trust assets to satisfy liabilities of the company where it holds only legal title to those assets;
2. where an insolvent corporate trustee has a beneficial interest in trust assets, it can sell only this beneficial interest; and
3. an insolvent corporate trustee is not empowered under section 477(2)(c) to sell trust assets where the insolvent corporate trustee has an equitable interest over those assets by virtue of an equitable charge.

However, as identified by Brereton J, this does not leave a liquidator of an insolvent corporate trustee without remedy. In circumstances where an insolvent corporate trustee has been removed from the position of trustee and has an equitable charge over the trust assets for liabilities incurred while acting as trustee, a liquidator can seek appointment as a receiver of the trust assets, by way of enforcement of the indemnity.

...a liquidator of an outgoing corporate trustee looking to sell trust assets should apply to the Court to be appointed as receiver of the trust assets.

It appears that *Stansfield* has set a new precedent in this area of law. Accordingly, at least until this issue is decided by an appellate court, a liquidator of an outgoing corporate trustee looking to sell trust assets should apply to the Court to be appointed as receiver of the trust assets.

If you are a liquidator of an outgoing corporate trustee, contact our Dispute Resolution & Insolvency team for further information and advice.



MORE INFO

Mark Gowans Director

p: +61 8 8124 1953

mark.gowans@dwfoxtucker.com.au



MORE INFO

Krystie Miller Lawyer

p: +61 8 8124 1820

krystie.miller@dwfoxtucker.com.au

INSIGHT | Julie Van der Velde

Legal Capacity

Unfortunately, few deeds are drawn to take into account that in our modern world appointors and trustees may lose legal capacity long before death.

What happens to trusts and companies when officers lose legal capacity?

The penalty of the greater longevity enjoyed in Australian society is that more people will have to deal with loss of capacity; their own or that of a family member. It has been estimated that by 2020 there will be over 330,000 Australians with dementia.¹ Many Australians have family trusts. These trusts hold investments or businesses assets or sometimes entire businesses. Frequently trust deeds have a trustee who manages the trust on a day to day basis who is either one or more family members or else a company of which one or more family members are the directors. In a majority of trust deeds the trustee is chosen by the appointor and the appointor has the power to remove the trustee or replace the trustee or add new trustees as he or she sees fit. The appointor may be one person or several.

Most deeds provide that if the last appointor dies without nominating anyone to take his or her place the trustee can appoint a new trustee. Many provide for automatic replacement when an appointor dies. Unfortunately, few deeds are drawn to take into account that in our modern world appointors and trustees may lose legal capacity long before death. What happens to the trust? Who makes the decisions when the person is still there but does not have the capacity to actually manage the business or investments in the trust structure?

An example: James and Annie were the joint trustees and the joint appointors of the Hacker Family trust. Annie passed away and James was left as sole trustee and sole appointor. The deed, like most deeds, made provision for the appointor to appoint a new trustee and also allowed an appointor to appoint a new appointor in his will or by a deed.

James made provision in his will for his daughter Lucy to become appointor of the trust after his death. Unfortunately, in his eighties James lost capacity. James became confused and could not remember his address or what year it was. He certainly could not manage investments in his family trust. James could not sign documents or make decisions and so was unable to act as trustee. James was also the appointor for the trust, but because he could not sign documents or make decisions he could not appoint anyone else as trustee or appointor of the trust.

The provision for Lucy to become appointor in James' will did not help as nothing in a will has any effect during the life of the testator. There are provisions in the *Trustee Act 1936* which can assist where a trustee becomes incapable of acting as Trustee. However, where the trustee and appointor are the same person the appointor will be unable to appoint a replacement trustee. In this scenario, depending on the deed of the trust the provisions in the Act may not operate or may not result in control passing to the person James would have chosen. Whether and how the Act operates will depend on the wording used in a particular trust deed.

This awkward situation can be avoided by ensuring your trust deed deals with the risk of a lack of capacity. Most deeds, even older deeds, are able to be amended to deal with lack of capacity of the appointors or trustees without any tax or stamp duty consequences.

Where the trustee is a company it is usual to find a clause in a company constitution that automatically retires a director who does not have legal capacity. If that was the only

director then it will be up to whoever holds the shares to appoint a new director. If the shares are all in the name of the person who lost capacity and he or she has a properly appointed attorney, that attorney will be able to make the decision. If there is no power of attorney in place a court must decide who will manage the affairs of the person who has lost capacity and this may well be the public trustee. The public trustee is an expensive and often unwelcome option. The public trustee may not appoint the person you would have chosen as a director of your family company.

If you have concerns about how your family business and investment structures may be affected by a lack of capacity of an office holder, contact Julie Van der Velde to discuss the issues and how the documents might be adapted to ensure your wishes are followed and your family is taken care of in the future.



MORE INFO

Julie Van der Velde Senior Associate

p: +61 8 8124 1958

julie.vandervelde@dwfoxtucker.com.au

The public trustee is an expensive and often unwelcome option. The public trustee may not appoint the person you would have chosen as a director of your family company.

CASE IN POINT | Mark Minarelli & Russell Jones

Family Provision Claims in South Australia

Not quite child's play

Claiming for further provision from a deceased estate has long been thought to be the realm of the dependent child or spouse, but the *Inheritance (Family Provision) Act 1972 (South Australia)* allows for a whole host of other claimants to contest the provisions of a will and lay siege to a deceased's estate.

In South Australia, any of the following are eligible apply for a family provision claim:

- a spouse of the deceased;
- a person who has been divorced from the deceased;
- a domestic partner of the deceased;
- a child of the deceased;
- a child of the spouse/domestic partner of the deceased;
- a grandchild of the deceased;
- a parent of the deceased; or
- a sibling of the deceased.

Some notable examples of successful "alternative" applicants include:

ADULT CHILDREN

Broadhead v Prescott [2015] SASC 34

Facts

The deceased, a widower at the time of his death, passed away on 11 November 2011 leaving behind six (6) adult children.

The deceased's estate was valued at \$333,423.81.

The deceased and his wife emigrated from the United Kingdom in 1973. At the time, four of their children were young adults who had employment in the UK and remained there. Two of the children were young teenagers and moved with their parents to Australia.

The deceased left the entirety of his estate to the two daughters in Australia, citing the lack of contact and relationship with the other four children as the reason for their exclusion. This was expressed in his will.

Claim

Three out of the four excluded children sought provision out of the estate.

The Court found that there was sufficient evidence that the deceased had maintained a relationship with the applicants, leading to the words of the will relating to their exclusion being disregarded.

The personal circumstances of each of the children at the time of the application were:

- **Child #1** was 63 years old and single. He continued to reside in the UK and suffered a number of physical ailments such as diabetes and Reynaud's disease. He was unable to work, receiving a disability pension (and other benefits from the UK government) amounting to £1,000 per month. He had no significant savings or assets.

- **Child #2** was 61 years old, working part time and in a de facto relationship. She and her partner owned a house valued at £110,000 with a mortgage of £60,000. Her income was £700 per month and her partner was on an old age pension. Apart from the house she had no significant assets.
- **Child #3** was 61 years old and single. He came to Australia in 1987 to visit the deceased on a tourist visa. He overstayed the visa and remained in Australia until 2008 when he was deported. He suffered from Parkinson's disease and was no longer able to work. He was in receipt of a disability pension from the UK government. He had no assets or savings of note.

The court declared that, due to the poor financial condition of the applicants, they had not been left with adequate provision for their proper maintenance, education or advancement in life.

Each of the applicants was awarded **\$47,500** from the estate.

SAME SEX DE FACTO COUPLES

Brennan v Mansfield (2013) 29 SASC 83

Facts

The deceased passed away on 10 April 2011 at the age of 90, leaving behind no spouse or children.

The deceased's estate was valued at approximately \$3,500,000.

The applicant and the deceased lived together as a couple for 26 years until the deceased's death. They had enjoyed a luxurious life together, which was mostly funded by the deceased.

In his will, the deceased left the applicant his share in a property at Stirling (valued at approximately \$900,000 to \$1,000,000) and \$100,000 in cash.

From the remainder of the deceased's estate, \$225,000 was distributed to various charities and \$2,500,000 was left to Prince Alfred College Inc.

Claim

The applicant sought further provision from the estate on the basis that he had not been provided with adequate provision for his proper maintenance, education and advancement in life, having regard to his moral claim to a greater share of the deceased's estate.

The applicant himself did not have insignificant assets. At the time of the application the applicant was found to have:

- an income of approximately \$82,000 per year;
- his own car with an approximate value of \$37,000;
- substantial art and collectibles valued in excess of \$100,000; and
- savings in the bank of around \$90,000.

In addition to the bequests of the Stirling property and \$100,000 from the deceased's estate, the applicant was estimated to have assets valued between \$1,560,000 and \$2,110,000.

What the cases now show is that courts are increasingly prepared to interfere with the wishes of a deceased and re allocate assets.

Regardless, the Court found that the deceased had not adequately provided for the applicant in the distribution of his estate. The deceased had intended for the applicant to enjoy the security of the Stirling property as his own, but had failed to provide the means by which the applicant could continue doing so while maintaining the lifestyle he had grown accustomed to over the last 26 years.

The applicant received the sum of **\$1,000,000**, with provision of an additional **\$900,000** from the residue of the deceased's estate.

PARENTS

Parente v Parente (1982) 29 SASR 310

Facts

The deceased passed away on 30 June 1977 leaving behind no spouse or children.

The deceased's estate was valued in excess of \$150,000.

The two applicants were the deceased's parents. The deceased was raised, along with several siblings, by the applicants in a poor part of the country near Naples in Italy.

Early in life the applicants identified that the deceased was quite bright and felt he had the potential to succeed in life. In spite of their impoverished circumstances, the applicants made great sacrifices to advance the education of the deceased above and beyond their other five children. In 1938 the father left his family behind and migrated to South Australia with a view to earning better wages. For three years he sent money home to Italy for the advancement of the deceased's education.

In 1949, the father paid for the deceased's passage out to South Australia, providing him with clothes, shelter without board, and a job.

In 1950, the deceased got into an argument with the father as the deceased wished to marry a girl from his home village in Italy, whereas the father wanted him to marry a girl from South Australia. The son was annoyed and became bitter over the disagreement.

Not long after the argument the father left South Australia and went back home to his wife and other children after a separation of twelve years from them, and with the deceased firmly established in South Australia.

The deceased left his entire estate to charity.

Claim

The applicants sought provision out of the estate.

At the time of the application the father was aged 82 and the mother 87 years old. They lived in Naples in a small flat. They were on a small pension which, after the payment of rent, provided them with \$20 per week to live on.

The Court found that the deceased should have recognised his moral obligations to his aged and impoverished parents, and the great sacrifices they made for the advancement of his life.

Regardless of his wishes to leave his estate to charity, he could have easily left most of his estate to charitable organisations while still providing for his parents.

The father received the sum of **\$20,000** and the mother received the sum of **\$15,000** from the deceased's estate.

Conclusion

As can be seen from the fact scenarios above, there are many different circumstances in which a family provision claim can arise.

The cases tend to demonstrate in each case a failing on the part of the deceased to adequately consider the consequences of the will making decision. Objectively, it is not surprising that family provision claims were made in these cases. Legal costs in these matters will generally be at the expense of the estate thereby reducing the residual value of the estate.

What the cases now show is that courts are increasingly prepared to interfere with the wishes of a deceased and re allocate assets.

There are, therefore, good reasons for seeking advice on these matters in an attempt to protect your estate assets and the future harmony of your family.



[MORE INFO](#)

Mark Minarelli Director

p: +61 8 **8124 1808**

mark.minarelli@dwfoxtucker.com.au



[MORE INFO](#)

Russell Jones Lawyer

p: +61 8 **8124 1894**

russell.jones@dwfoxtucker.com.au

INSIGHT | Julie Van der Velde & Nick Wockel

Self-Managed Super Funds

Is self-managed superannuation right for you?

Superannuation is often the second largest asset for Australians, therefore it's important to make sure your super arrangement is right for you. The current uncertainty surrounding international share markets makes now a good time to review your superannuation structure. Many commercial super funds are experiencing fluctuating returns and people are becoming increasingly interested in the greater control offered by self managed super funds ("SMSFs").

SMSFs give members greater control over their savings than industry or commercial super funds. This includes the freedom to keep commercial or residential property in self managed super funds.

SMSFs provide members with:

- freedom of choice;
- flexibility; and
- a wider range of investments.

One of the major benefits of SMSFs is the ability to gear individual investments. This means you are able to borrow money to purchase an investment such as real property or shares. Remember, the sole purpose of SMSFs must be to provide retirement benefits for the fund's members or their dependants. This means that you cannot misuse the funds to buy a holiday house for your family.

SMSFs also give greater control over succession for assets held in the fund. Binding death benefit nominations can last forever with self-managed super funds. However, such nominations can only last up to 3 years under industry or commercial super arrangements.

SMSFs also give you the ability to tailor exactly how your assets are distributed when you pass on. For example, you could determine that all of your super will go to your partner, but if your partner does not survive you, the family farm will go to your daughter and the balance of your super will be shared equally among your sons.

This is significant as it allows you to cater for your personal situation; whereas commercial funds often place restrictions on who can receive your superannuation.

While managing your own super fund can be very rewarding, it is important that the fund is properly set up and documented each year. You can be fined for breaching certain super laws. In serious cases, your fund may be declared noncompliant and almost half your assets can be lost in penalty taxes. You may wish to engage professionals to assist you in managing the fund.

Is Self-Managed Super right for you?

SMSFs may be right for you if you:

- believe you can outperform your current industry or commercial fund;
- have at least \$250,000 in superannuation to make the annual costs worthwhile (remember you can have up to 4 members);
- have the time, effort and interest to run your SMSF;
- want the ability to properly tailor how your assets are distributed when you pass on; and
- want greater control, independence and flexibility over your superannuation.

To learn more about SMSFs, keep an eye out for our free upcoming superannuation seminar.



MORE INFO

Julie Van der Velde Senior Associate

p: +61 8 8124 1958

julie.vandervelde@dwfoxtucker.com.au



MORE INFO

Nick Wockel Lawyer

p: +61 8 8124 1852

nick.wockel@dwfoxtucker.com.au



CASE IN POINT | Mark Gowans & Krystie Miller

Litigation Funding in Recovery Proceedings

A “make work scheme”?

Can liquidators pursue preference claims which, in isolation, may do no more than pay for the cost of the litigation?

In the recent case of *Marsden v Screenmasters Australia Pty Ltd, in the matter of Cardinal Group Pty Ltd (in liq)* [2015] FCA 1256 the Liquidators of Cardinal Group Pty Ltd (“**Cardinal Group**”) commenced proceedings against Screenmasters for the recovery of uncommercial transactions or unfair preference payments in the sum of \$49,600 plus interest. This was one of many preference claims the Liquidators were pursuing, which collectively had a value of around \$8m.

Screenmasters filed a running account defence and made an application under section 536 of the *Corporations Act 2001* (Cth) (“**the Act**”) seeking an order that an inquiry be made into the conduct of the Liquidators on the basis that:

1. the Liquidators were pursuing the proceedings without any reasonable prospect that any amount recovered would benefit the creditors of Cardinal Group or benefit anyone other than the liquidation; and
2. the Liquidators were influenced to reject Screenmasters’ offer because, having negotiated terms with a litigation funder, the plaintiffs’ costs of the proceedings were not a material concern for the plaintiff in resolving them.

Section 536 – “Sufficient Basis” and the Court’s Discretion

Before a Court will exercise its discretion under section 536 of the Act to order an inquiry into the conduct of Liquidators, it must be satisfied that there is a “sufficient basis” for making such an order, that is, that there is something relating to the conduct of the Liquidators which requires inquiry.

If satisfied that there is a “sufficient basis” for inquiry, many factors will be relevant to the exercise of the Court’s discretion including (inter alia):

- the strength and nature of the allegations;
- any answers offered by the Liquidator;
- other available remedies;
- the progress of the liquidation;
- the likely amounts of money involved;
- the availability of funds to pay for an inquiry;
- the likely benefit to be derived from it; and
- the legitimate interest of the applicant in the outcome.¹

“Make Work Scheme”

Screenmasters submitted, inter alia, that the proceedings were a “make work scheme” for the benefit of the Liquidators and lawyers (it was unlikely there would be any return to creditors) and, further, that the existence of the litigation funding agreement and the insulation from costs it provided the Liquidators were the primary reasons the proceedings were being continued. In particular,

Screenmasters identified the quantum of the claim, relative to the costs of running the proceedings as a “key issue” in circumstances where Screenmasters would likely incur costs in defending the proceedings greater than the maximum amount recoverable by the Liquidators if they succeeded with their claim.

In deciding the judgment, Markovic J considered the case of *Hall v Poolman*² and noted that there is no per se objection to Liquidators entering into litigation funding agreements. In fact, in certain circumstances, Liquidators may enter into litigation funding agreements where there is little or no prospect of recovery beyond their own expenses and those of the funder. Accordingly, Markovic J considered that the fact that any recovery from the proceedings may not add to the pool of funds available to unsecured creditors or may only add negligible amounts, was not of itself a sufficient reason to order an inquiry. However, Markovic J emphasised that it is important that Liquidators do not pursue litigation simply in order to generate fees without any regard for the interests of creditors or the public interest.

Further, despite Markovic J accepting that the quantum of the claim was low relative to the costs of running the proceedings, Markovic J considered that the commencement and continuation of the proceedings could not be viewed in isolation and must be considered in the context of the whole of the liquidation, including the litigation strategy adopted by the Liquidators. Therefore, taking into account, inter alia, that the Liquidators had been thorough in their investigations, had provided regular and fulsome reporting and that any recovery from the proceedings would be added to the overall pool of assets available for creditors, Markovic J opined that the pursuit of the totality of the roughly \$8m of preference claims was proper and the fact that some of the claims were for smaller amounts was not, of itself, a reason to abandon those claims.

Comment/Conclusion

While the totality of the liquidation must be considered, taking into account the overall strategy and concern for creditors, a liquidator can pursue a claim even if that individual claim is unlikely to provide any return to creditors.

² *Hall v Poolman* (2009) 75 NSWLR 99.



MORE INFO

Mark Gowans Director

p: +61 8 8124 1953

mark.gowans@dwfoxtucker.com.au



MORE INFO

Krystie Miller Lawyer

p: +61 8 8124 1820

krystie.miller@dwfoxtucker.com.au

¹ *Hall v Poolman* (2009) 75 NSWLR 99; *Leslie v Hennessy* [2001] FCA 371.

Great Software, Great Idea

But is it patentable?

With the ever-increasing capacity of computers, and the opportunities for communication and information afforded by the Internet, many things are now possible which would not previously have been remotely practical.

The proliferation of software applications to solve problems and perform functions in ways that are often very innovative has led (both in Australia and elsewhere) to applications for patents to provide protection for these innovations. The results, however, have generally been unsuccessful (see the report on some of these developments in the Spring 2014 edition of the *DWR*Report.¹)

Is there an invention?

The threshold question in an application for a patent involving computer software, or in any patent application, is whether or not what is claimed is an *invention* or, put in another way, whether it constitutes *patentable subject matter*. In another area, this threshold issue has recently been considered by the High Court of Australia in *D'Arcy v Myriad Genetics Inc.*² The High Court found that a claim for an isolated nucleic acid was not a claim for a manner of manufacture, and that the existence of a genetic mutation indicating a susceptibility to types of cancer disclosed by the patent specification was a discovery, not a patentable invention.³

The Full Federal Court of Australia late last year delivered its decision in the matter of **Commissioner of Patents v RPL Central Pty Ltd.**⁴ The decision in *RPL Central* has been anticipated for some time following the decision of the Court in **Research Affiliates LLC v Commissioner of Patents** in 2014.⁵

Business Systems

It has long been established that something which can be characterised merely as a “*business system*” or a “*business method*” is not a *manner of manufacture* or patentable subject matter. This was confirmed in Australia in **Grant v Commissioner of Patents.**⁶ Mr Grant had conceived a method or system to protect an individual's assets utilising a trust, a gift, a loan and a security. The Full Federal Court found that, “*This claim is ‘intellectual information’, mere working directions and a scheme. It is necessary that there be some ‘useful product’, some physical phenomenon or effect resulting from the working of a method for it to be properly the subject of letters patent. That is missing in this case.*”

Computer-related Business Systems

The implementation of business systems or methods by use of computers, and software to implement the functions required has led to further endeavours to obtain patents for these systems.

In the United States, in **Alice Corporation Pty Ltd v CLS Bank International**⁷ claims for a patent for a system to facilitate the exchange of financial obligations between two parties using a computer system as a third party intermediary were held not to constitute patentable subject matter and the Court observed that “*the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention*”.

In **Research Affiliates** the Court found a computer-implemented system for investing based on indexes built with metrics other than metrics consisting of market capitalisation weighting, share price weighting or equal weighting was not a patentable invention. The Court set out principles which it said were derived from the High Court of Australia in the **NRDC Case**⁸ and affirmed in **Grant** and **D'Arcy** and other cases, and which it has again affirmed in **RPL Central**. These principles are:

- The right question is: “*Is this a proper subject of letters patent according to the principles which have been developed for the application of s 6 of the Statute of Monopolies?*”
- There is a ‘manufacture’ such as might properly have been the subject of letters patent and grant of privilege under s 6 of the Statute of Monopolies whenever a process produces, either immediately or ultimately, a useful physical result in relation to material or tangible entities.
- The method the subject of the relevant claim must have as its end result an artificial effect falling squarely within the true concept of what must be produced by a process if it is to be held to be patentable.
- There may be a discovery without invention, either because the discovery gives some piece of abstract information without any suggestion of a practical application of it to a useful end, or because its application lies outside the realm of ‘manufacture’.
- To fall within the limits of patentability, the process must be one that offers some advantage which is material in the sense that the process belongs to a useful art as distinct from a fine art and that its value to the country is in the field of economic endeavour.

RPL Central

In **RPL Central**, application was made for a patent for a system which it was said, and accepted by Courts hearing the matter, that the process could not be performed other than by use of a computer. The field of the invention related to assessing competency or qualifications of individuals with respect to recognised standards, particularly recognition of prior learning (**RPL**) conducted with the Australian Vocational Education and Training (**VET**) sector. The patent application pointed out that there was no single point of access to RPL in Australia and that there were currently in excess of 3,500 qualifications and 34,000 units in the

⁷ *Alice Corporation Pty Ltd v CLS Bank International et al* United States Court of Appeals for the Federal Circuit, 19 June 2014.

⁸ *National Research Development Corporation v Commissioner of Patents* [1959] HCA 67.

¹ *DWR*Report Spring 2014, *Further Down the Rabbit Hole, Computer-related Inventions and Alice Corporation*.

² *D'Arcy v Myriad Genetics Inc* [2015] HCA 35

³ See DW Fox Tucker news release *High Court Rules on Gene Patents* 9 October 2015.

⁴ *Commissioner of Patents v RPL Central Pty Ltd* [2015] FCAFC 177 (11 December 2015).

⁵ *Research Affiliates LLC v Commissioner of Patents* [2014] FCAFC 150 (10 November 2014).

⁶ *Grant v Commissioner of Patents* [2006] FCAFC 120.

The trend of authorities in Australia, the USA and elsewhere is, accordingly, very much against the prospects of patentability for software, or computer-related inventions.



Australian VET sector. The system was devised to enable individuals to access the system on-line and to enable information and evidence gathering through automatically-generated questions by use of a wizard. The application for patent was not accepted by IP Australia, and Middleton J in the Federal Court upheld an appeal and distinguished *Research Affiliates*, finding that there was an invention which was the proper subject of letters patent, placing particular emphasis on the fact “that the magnitude of the task performed by the invention (as previously described) and the express terms of the claims themselves mean that the computer is an essential part of the invention claimed, as it enables the method to be performed”.

The Full Federal Court in *RPL Central* has, however, reversed the decision of Middleton J and has concluded “That the claimed invention is to a scheme or a business method that is not properly the subject of letters patent”. As well as reiterating the principles stated in *Research Affiliates* as noted above, the Full Court said:

“A claimed invention must be examined to ascertain whether it is in substance a scheme or plan or whether it can broadly be described as an improvement in computer technology. The basis for the analysis starts with the fact that a business method, or mere scheme, is not, per se, patentable. The fact that it is a scheme for business method does not exclude it from properly being the subject of letters patent, but it must be more than that. There must be more than an abstract idea; it must involve the creation of an artificial state of affairs where the computer is integral to the invention, rather than a mere tool in which the invention is performed. Where the claimed invention is to a computerised business method, the invention must lie in that computerisation. It is not a patentable invention simply to ‘put’ a business method ‘into’ a computer to implement the business method using the computer for its well-known and understood functions.”

The Court noted, as accepted by Middleton J, that the method could not be carried out without the use of a computer but said, “This alone cannot render the claimed invention patentable if it involves simply the speed of processing and the creation of information for which computers are routinely used”. The Court went on to say, “The problem may be one of confronting the ‘maze’ of available information concerning the RPL of different Units of Competency in different institutions, but the solution to that problem, to be patentable, must involve more than the utilisation of the well-known search and processing functions of a computer, for example an invention in the way in which the computer is utilised.”

The trend of authorities in Australia, the USA and elsewhere is, accordingly, very much against the prospects of patentability for software, or computer-related inventions. The Courts, however, do leave the door open to the possibility where some more tangible result, other than the ability of computers to perform complex and rapid functions, is apparent.

This is probably not the end of the story.



MORE INFO

Alastair (Sandy) Donaldson Director

p: +61 8 8124 1954

alastair.donaldson@dwfoxtucker.com.au

Licensee Alert

Changes affecting licensed premises

Late Night Trading Code of Practice

As at 1 February 2016, all licensees should review their procedures as a revised Late Night Trading Code of Practice (**Code**) came into operation.

Previously, the Code only applied to licensed premises which traded past 3.00am. The revised Code now imposes certain obligations and compliance where venues trade past midnight in some circumstances and past 2.00am in others. The outcome being that licensed venues which were not subject to the Code prior to 1 February 2016 may now be caught.

Changes include:

- Prior to 1 February 2016, the code prohibited the supply of liquor free of charge in any venue which operated after 4.00am. The revised Code now provides that any premises that trades later than 12 midnight will be prohibited from supplying, or permitting the supply of, liquor free of charge.
- Any premises trading past 2.00am must:
 - ensure that they have adequate information about public transport displayed from 9.00pm;
 - have queue management at their Premises; and
 - have a “drink marshal” and a staff member on duty who has nationally accredited first aid training from 12 midnight onwards.

Another significant amendment to the Code is that licensees are prevented from selling or supplying shots, doubles (or similar) or any other drink containing more than 45ml of spirits after 2.00am. Again, this provision previously only applied in venues after 4.00am.

Smaller venues need to also review the Code to determine whether the revised Code requirements now impart obligations to use metal detectors and maintain CCTV systems. Previously the code only required compliance where premises which traded past a specific time and had a capacity of more than 200. However, the Code has removed the capacity requirement.

Smoking Ban in Outdoor Areas

As most licensed venues are aware, over the past 12+ months there have been many reviews of the smoking areas. As a result, from 1 July 2016 smoking will be banned in any outdoor dining area at any time that food is being offered for sale or is provided and eaten in the area. This will be regardless of whether or not there is a person in fact dining in the area.

An outdoor dining area is defined as “an unenclosed public area in which tables, or tables and chairs, are permanently or temporarily provided for the purpose of public dining in the area”. Licensees should note, however, that an outdoor dining area does not include a part of the unenclosed public area that is separated from the part in which dining occurs by a wall or other solid barrier of not less than 2 metres in height.



An outdoor dining area is defined as “an unenclosed public area in which tables, or tables and chairs, are permanently or temporarily provided for the purpose of public dining in the area”.

Any licensee proposing to alter their premises to provide an additional area which is separated by a wall or other solid barrier should be aware that it is an offence to alter licensed premises without approval of the Licensing Authority and there may also be planning considerations which trigger the requirement to seek development approval with council where building works are to take place.

If you would like any information on how the revised Late Night Trading Code of Practice or the changes to smoking regulation might affect your business please feel free to contact Alex Bastian or Lisa Harrington.



MORE INFO

Lisa Harrington Senior Associate
p: +61 8 8124 1960
lisa.harrington@dwfoxtucker.com.au



MORE INFO

Alex Bastian Senior Associate
p: +61 8 8124 1910
alex.bastian@dwfoxtucker.com.au

CASE IN POINT | Mark Gowans & Kelly Fussell

A Personally Injured Bankrupt?

Does damage to “*body, mind and soul*” in commercial proceedings amount to “*personal injury*”?

In *Garrett v Mildara Blass Limited* [2015] SASC 176 the Honourable Justice Peek considered an application by Andrew Garrett (“**Garrett**”), an undischarged bankrupt, filed in proceedings commenced by the bankrupt in 1996. The subject application sought 14 orders to be made in that action.

Mr Garrett was bankrupted by sequestration order on 15 May 2015. Prior to Mr Garrett becoming bankrupt, Mr Garrett was a party to numerous proceedings in the Supreme Court of South Australia, which resulted in the declaration of Mr Garrett as a vexatious litigant in 2007.

Section 60(2) of the *Bankruptcy Act 1966* (Cth) (“**the Act**”) provides that an action commenced by a person who subsequently becomes a bankrupt is, upon his or her becoming bankrupt, stayed until the Trustee makes a written election to prosecute or discontinue the action. However, certain exceptions to this general rule exist. Of particular relevance, section 60(4) provides that a bankrupt may continue, in his own name, an action commenced by him before he became bankrupt, in respect of any personal injury or wrong done to the bankrupt, his spouse or a member of his family.

Mr Garrett made submissions that the stay in section 60(2) of the Act did not apply to his application because, amongst other things, his application was filed prior to becoming bankrupt and, in the alternative, the application would not be stayed against Mr Garrett in his capacity as trustee for the Garrett Family Trust. These submissions were rejected.

Of particular interest, Mr Garrett submitted the subject proceedings fell within the personal injury exception contained in section 60(4) of the Act on the basis that “*the finding that he is a vexatious litigant damaged his body, mind and soul*”. The 1996 proceedings were of a commercial nature only. The Court considered previous authorities in respect of what constituted personal injury proceedings and, specifically, *Cox v Journeaux (No 2)* [1935] HCA 48 in which Dixon J stated that the test for whether an action is in respect of a ‘personal injury or wrong’ was “*whether the damages or part of them are to*



Mr Garrett submitted the subject proceedings fell within the personal injury exception contained in section 60(4) of the Act on the basis that “the finding that he is a vexatious litigant damaged his body, mind and soul”.

be estimated by immediate reference to pain felt by the bankrupt in respect of his mind, body or character and without reference to his rights of property”. By reason of these previous authorities, the Court held that Mr Garrett’s declaration as a vexatious litigant did not amount to a personal injury.

It is clear from the decision that the Courts are not prepared to allow adverse orders made in commercial proceedings to be a deemed “*personal injury*” to the bankrupt so as to allow the bankrupt to trigger exceptions under the Act.



MORE INFO

Mark Gowans Director

p: +61 8 8124 1953

mark.gowans@dwfoxtucker.com.au



MORE INFO

Kelly Fussell Senior Associate

p: +61 8 8124 1959

kelly.fussell@dwfoxtucker.com.au

SUITS OFF | Staff Profile

Travelling well

Kate Bickford Director

Equal but endless measures of courage, thoughtfulness and energy bounded by steel plated good humour is a great recipe for life according to Kate Bickford. Although her busy life has been pretty full she says she is only now gearing up.

Kate has never been afraid to travel outside her comfort zone and to challenge the status quo. Normative values, rules and laws which stifle equity, imagination and innovation have been fair game for Kate since she was a small child.

“I challenged my parents persistently on all things from gender, religion to politics. I was fortunate that my parents encouraged me. I became increasingly aware that many of the world’s problems were political which meant that theoretically they could be fixed. I wanted to understand how and still do.”



Armed with a one-way ticket and an overly heavy suitcase packed predominantly with wholly inappropriate shoes, Kate left Adelaide at 18 for London. She spent the next 5 years travelling and working throughout the

UK, Europe, Japan and then tropical Australia before returning to Adelaide to study. Kate’s travels only served to further inspire her desire to better understand the social mechanics of the world.

Kate’s intrepid nature has given her cultural adaptability which she has brought into her professional life. Kate is fluent with difference and core consistencies of people from different places. As a commercial practitioner Kate has spent the majority of 20 years negotiating agreements for development of resources and energy projects, with stints in South East Asia and remote Australian Aboriginal communities. Kate is now also taking on Australia’s agribusiness and the potential offered to it by Asia.

“Although I have travelled and worked overseas, Adelaide provides a great base as it is no longer so solitary and removed from play. Our State politics and economy remains a little behind the pace but as a community we are pretty dynamic for our variation. We punch well above our weight for local talent. Agribusiness in South Australia exemplifies this and our capacity for further technological innovation is helping to overcome many of the hurdles that have historically held us back.”

Kate has always had a deep love and respect for rural Australia and its people. Deriving from childhood holidays, her early impressions of the majesty and magic of the bush have never left her.



“The consistent themes of my life seem to be converging, working with agribusiness, Asian investment, promoting South Australia and creating partnerships in places I know and care about, it’s my perfect storm skill set. At DW Fox Tucker I am also now in an environment where my work can be supported.”

When asked about the most interesting aspect of her work, Kate confirms it’s the people.

“I am fortunate that my clients are determined people with great ideas. For me it is not all about the nature or size of the project but more about the drive of the people behind it.”

Kate views law as a form of social engineering to bring about necessary change. She recognises its many flaws, namely that it is often fatally slow and too narrow in its reach and delivery but holds that it is still the most vital tool we possess for civilized change.

According to Kate the existence of a sophisticated legal system is not, in its own right, reason for us to become complacent about human rights and protection of society’s vulnerable. Law should lead but when it doesn’t it, democracy permits us to challenge it and change it.

There are a number of people and historical figures Kate cites as sources for daily inspiration from Professor Gillian Triggs, Marcia Langton, Yami Lester, Mary McKillop, Elliott Johnston and her fitness coach, Jack Cahill. Kate says these are examples of generous people who have successfully applied courage, thoughtfulness and energy to their lives to contribute to others.

Kate does have a life outside of work although she laughs when questioned about hobbies. When asked to name her favourite place when she is not working, Kate was quick to respond with “any of the white sandy beaches of the Fleurieu with my kids, dog and partner, Nick”.



Fleurieu Peninsula, South Australia





Luang Prabang, Laos

As for favourite travel destinations outside of Australia, Kate’s list is long but she cites:

“For timeless elegance washed with absolute serenity, the former royal capital of Laos, Luang Prabang and the tiny yet mighty island of Kastellorizo, Greece for its breathtaking harbour and indigo waters.”



Kastellorizo, Greece



Kate has made great efforts to travel with her young children to ensure that they have an appreciation of the world beyond the privileges of Adelaide. “Travelling solo with kids through far-flung locations is not for the faint hearted but it is an invaluable way for them to learn perspective, independence, resilience and self-reliance.”

Kate is not a typical suit but this is her strength. She doesn’t equate novelty or difference with difficulty. Her intellectual rigour and creativity give her an enhanced ability to analyse matters and to communicate the best outcomes possible.

Kate shares the Australian Prime Minister’s excitement about the times and believes the opportunities for South Australia are particularly positive. Kate notes,

“It’s the Chinese year of the red fire monkey. It’s time to stop chasing our tails and leap ahead.”



MORE INFO

Kate Bickford Director

p: +61 8 8124 1836

kate.bickford@dwfoxtucker.com.au

DWFoxTucker
Lawyers

DW Fox Tucker Lawyers

L14, 100 King William Street, Adelaide, SA 5000

p: +61 8 **8124 1811** e: info@dwfoxtucker.com.au

dwfoxtucker.com.au

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