DWFoxTucker Lawyers

Autumn Report

Calvary Group Accepts the Challenge

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CLIENT PROFILE

Calvary Group

When Cardinal Moran invited six Sisters of the Little Company of Mary to come to Australia in 1885 to care for the sick, the poor, and the dying, he could never have envisaged the legacy that today is the Calvary Group.

The Calvary Group is a charitable, not-for-profit, Catholic Health Care Organisation responsible for over 12,000 staff and volunteers, 15 Public and Private Hospitals, 17 Retirement and Aged Care Facilities and a national network of Community Care Centres.

Its mission is to provide quality, compassionate health care to the most vulnerable, including those reaching the end of their life.

Since 2011, Calvary has established and refined its WH&S and Injury Management Systems with financial and people benefits. Calvary implemented a single national WH&S and injury Management System for the entire Calvary Group, aimed at reducing injuries in the workplace, improving staff engagement, reducing workers compensation and insurance costs, whilst significantly improving compliance and governance. In 2013, a Microsoft SharePoint intranet system centralised WH&S Action Plans, giving visibility of all WH&S-related activity across all of the group's facilities. It also enabled the efficient assignment of tasks and created accountability to follow through on WH&S actions.

Calvary also created centralised libraries of risk assessments and work instructions, so resources could be shared across facilities – saving time not having to constantly reinvent the wheel.

Calvary's achievements were recognised by SafeWork NSW when Glenn Stewart won the 'Best Individual Contribution to Workplace Health and Safety' award. Notably, the award acknowledged Calvary's reduction in injuries

(40% reduction nationally) and a reduction in workers' compensation premiums.

Calvary has fine-tuned its focus and attention on WH&S and is investing more in WH&S resourcing. As a result, performance is continually improving. The challenge now is to ensure WH&S doesn't stagnate, remains relevant, and that systems are in place to meet what the future holds.

To that end, Calvary now embraces cutting-edge IT to make WH&S management easier, developing apps, digitising forms and automating workflows. In the not-too-distant future, managing WH&S from a smartphone will be the norm and Calvary will continue to lead the way.

Introducing South Australia's Largest Private Hospital

Meanwhile, Calvary has an exciting project underway in Adelaide, with the construction of the new Calvary Adelaide Hospital. This hospital will co-locate the services currently provided at Calvary Wakefield and Calvary Rehabilitation hospitals into South Australia's largest ever private hospital. The construction of the new $300 million facility is well underway with its completion planned in the third quarter 2019.

Calvary has a dedicated project team working on the development and transition from the two existing hospitals to the new site.

The new Calvary hospital in Adelaide is a significant development and an exciting opportunity. There is lots of work to be done, consulting with stakeholders, assessing equipment and fitting out the new facility.

DW Fox Tucker has observed the Calvary story for some time now. We are pleased to see what has been achieved so far, and will watch on with interest the next era of Calvary's safety journey.

FOR MORE INFORMATION ABOUT CALVARY GROUP

Phone: +61 2 9258 1700

Visit: www.calvarycare.org.au

Calvary Group at a Glance (2017)

Hospitals

- 217,674 Admissions
- 462,906 Outpatients
- 121,221 Emergency Department presentations
- 4,277 Births
- 113,561 Surgical procedures

Community Care

- 15,600 individual clients
- 9,400 clients receiving a service at any one time
- 771,500 home visits
- 1.8 million hours of care

Retirement Communities

- 29 residents over the age of 100
- 452 residents over the age of 90, 89 of whom live in ILUs
- 711 new admissions
- 433 admissions to residential aged care (excluding respite)
- 242 respite admissions to residential aged care
- 36 moves to ILUs

PEOPLE

Another Award for one of our Tax "Gurus"

DW Fox Tucker is proud to announce our own Briony Hutchens is the recipient of the 2017 KPMG Prize for 'the best performance by a graduating student in the Master of Taxation.'

The University of NSW is particularly renowned for the postgraduate Master of Taxation (MTAX) course conducted by its School of Taxation & Business Law. An MTAX (UNSW) is a prized qualification among taxation practitioners whether in private practice or the public service. Accordingly the quality of students undertaking the course is consistently high as are the standards of work expected of them.

UNSW has a small awards program through which prizes are bestowed on candidates who have delivered an outstanding performance in a subject, with the ultimate prize being for the person who achieves, among all, the outstanding academic performance for the whole course.

That prize has been awarded to Briony Hutchens, for her work through the course as completed last year. Spectacular! An absolutely fantastic achievement by Briony deserving all our congratulations.

This was achieved while Briony carried on her practice retaining her 'Best Lawyers in Australia Listing: Wealth Management/Succession Planning Practice, since 2017 and Trusts & Estates, 2019' and 'Doyle's Guide to the Australian Legal Profession Listing: Recommended Tax Lawyer – South Australia, 2017' and balancing her work with the life demands including those of motherhood.

As a Legal Practitioner and Chartered Tax Advisor Briony advises on most areas of State and Federal taxes including superannuation, income tax, capital gains tax, goods and services tax (GST), stamp duty, payroll tax, land tax, taxation disputes, but also the structuring of businesses and transactions, inter-generational matters, wealth and succession planning, trusts and estates.

In completing her MTAX Briony joins the firm's fellow MTAX graduates John Tucker, Christopher Knott and Brett Zimmermann in placing the firm among the leading tax, wealth, succession, trust and estates advisors in South Australia.

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ONLINE SERVICES

Business Advisors and Financial Service Providers: Access our Online Incorporations Services Today

DW Fox Tucker offers a range of incorporations services, from a simple company incorporation to specialist trust services. We strive to provide the best, most efficient service possible with a one business day turnaround time and fixed fee prices. Our online Incorporations Services gives you easy, convenient, 24-hour access to a range of legal documents, such as:

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- Adoption of Constitution by Special Resolution
- Self Managed Superannuation Fund Trust Deed
- Discretionary Trust Deed
- Unit Trust Deed
- Class Trust Deed
- Blood Descendant Class Trust Deed
- Change of Trustee/Appointor
- Substitution of Trust Deed
- Amendment of Trust Deed

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- Change of Company Name
- Minutes/Company resolutions
- Deregistration of a Company
- Change to Company Details/Officeholders/ Members
- Business Name registration/Transfer

Please contact our Incorporations Team for more information, or to access the online instruction sheets, expand the “Online Applications” tab and to view the full range of documents available, expand the “Related Documents & Services” tab.

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NEWS & VIEWS | **By Sandy Donaldson**

EU Data Bomb: Australian Collateral Damage

On 25 May 2018 the European Union **[EU or Union]** General Data Protection Regulation **[GDPR]** came into effect. The GDPR is a law directed to the protection of privacy and personal information, like the Australian *Privacy Act 1988 (Cth)* **[Privacy Act].**

Recent examples of substantial data breaches and data misuse, as in the Cambridge Analytical/ Facebook imbroglio, illustrate the need for effective systems to protect personal privacy and data. The GDPR is designed for this, but compared to the regime in Australia under the Privacy Act and the *Australian Privacy Principles*, it is a bit like the 8,000 lb blockbuster bombs that the RAF used in the Second World War, or maybe even the 22,000 lb Massive Ordinance Air Blast bomb (colloquially, "Mother of All Bombs") used by the US in Afghanistan against ISIS. With weapons like that there is always collateral damage.

Many Australian businesses will be affected by the GDPR and compliance will not be a simple matter.

What does the GDPR apply to? Personal data

The GDPR applies to ***"personal data".*** This is a similar concept to personal information in the Privacy Act. It includes any information relating to *"an identified or identifiable natural person" called a "data subject". An "identifiable natural person" is a person who "can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, psychological, genetic, mental, economic, cultural or social identity of that natural person".*

There are special categories of personal data which have additional conditions and protections. Special categories include things like racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic and biometric data and data concerning a person's sex life or sexual orientation.

Who does the GDPR apply to? Processors and controllers

The GDPR applies to a natural person or a legal person (such as a company) that is a:

- *"controller"* or a
- *"processor".*

A *controller "alone or jointly with others, determines the purposes and means of the processing of personal data".* Specific criteria may be provided for by Union or Member State laws. Responsibility for compliance with the Regulation is vested in many cases in the *controller.*

A *processor "processes personal data on behalf of the controller".*

The concept of *"processing"* is key, and:

> *means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not automated by means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.*

Who does the GDPR apply to outside the EU?

Article 3 of the GDPR deals with its territorial scope.

The Regulation applies to the *"processing of*

... the GDPR provides for imposition of penalties by way of administrative fines for infringements of the Regulation which are to be determined by each supervisory authority and which are to be "effective, proportionate and dissuasive".

personal data in the context of the activities of an ***establishment*** *of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not". "Establishment"* is not defined.

The Regulation also applies to the *"processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:*

a. *the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or*

b. *the monitoring of their behaviour as far as their behaviour takes place within the Union."*

The Office of the Australian Information Commissioner **[OAIC]** gives the following examples of Australian businesses that may be affected[1]:

- an Australian business with an office in the EU;
- an Australian business whose website enables EU customers to order goods or services in a European language (other than English) or enables payment in Euros;
- an Australian business whose website mentions customers or users in the EU; or
- an Australian business that tracks individuals in the EU on the internet and uses data processing techniques to profile individuals to analyse and predict personal preferences, behaviours and attitudes.

The requirement that a *controller or a processor* may be taken to *offer* goods or services in the EU in Article 3 does not specifically mention the requirement for the offer to be made in a European language other than English, or payment in Euros. This is deduced from Recital 23 of the GDPR which notes that *"the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to establish such intention (to offer goods or services to data subjects in the Union)".* The Recital goes on to say that factors such as the *"the use of a language or a currency generally used in one or more Member States"* may make it apparent that a controller envisages offering goods or services in the Union.

1 OAIC *Privacy Business Resource X, October 2016*

Does the GDPR apply to all businesses?

The GDPR applies to **all** processors and controllers. There is no limitation, as in the Privacy Act, to businesses with a turnover less than a specified amount ($AU3 million) or any other amount.[2] So, although the Regulation, or many of its provisions, may be aimed at the likes of Google or Facebook, it will affect any Australian business that comes within its scope.

Compliance: new requirements

It is impossible in a short article to mention all of the requirements of the GDPR, or areas where this differs from or extends concepts in the Privacy Act. Many of the obligations imposed by the GDPR are more extensive or different from the Privacy Act and it is not possible for an entity that is required to comply with the GDPR to rely solely on measures taken to comply with the *Australian Privacy Principles.*

Some of the requirements of the GDPR are discussed below.

Principles for processing

Article 5 of the GDPR contains detailed and stringent requirements for *processing of personal data* in summary, these include requirements for:

- processing "*lawfully, fairly and in a transparent manner in relation to the data subject*

2 The *Privacy Act does specify that organisations that are health service providers are required to comply with the Australian Privacy Principles even if turnover is less than $3 million.*

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('lawfulness, fairness and transparency')";

- election for *"specified, explicit and legitimate purposes and not further processed in the manner that is incompatible with those purposes … ('purpose limitation')";*
- only *"adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation')";*
- *"accurate and, where necessary, kept up to date; every reasonable steps must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy')";*
- *"kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed … ('storage limitation')";* and
- *"processed in a manner that ensures appropriate security of the personal data including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality')".*

The *controller* is responsible for demonstrating compliance with these requirements.

Lawful processing: consent

Processing of personal data is only lawful if it complies with at least one of the conditions set out in Article 6. The first and most general requirement is that *"the data subject has given consent to the processing of his or her personal data for one or more specific purposes"*. This may explain why you have received more than the usual amount of emails, from entities in the EU, recently asking you to consent to remain connected.

Individual rights: erasure/portability/objection

The GDPR contains rights of individuals which do not have substantive equivalents under the Privacy Act. These are rights to:

- erasure of data (Article 17);
- portability of data (Article 20); and
- objection to processing of data (Article 21).

Appointment of EU representatives

Where the GDPR applies to a *controller or a processor* under Article 3.2 (processing activities related to offering of goods or services, or monitoring of behaviour) the *controller or processor* must designate in writing a representative in the Union (Article 27). The representative must have authority to be addressed by authorities in all matters relating to the Regulation.

There is, however, a limitation on this requirement as it does not apply to *"processing which is occasional, does not include, on a large scale, processing of special categories of data as referred to in Article 9(1) or processing of personal data relating to criminal convictions and offences referred to in Article 10, and is unlikely to result in a risk to the rights and freedoms of natural persons taking into account the nature, context, scope and purposes of the processing".*

Mandatory data breach notification

Similarly to the Privacy Act, following recent amendments, a controller under Article 33, must *"without undue delay, and where feasible, not later than 72 hours after having become aware of it, notify a personal data breach to the (competent) supervisory authority … unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons".*

Penalties

As may be expected, the GDPR provides for imposition of penalties by way of *administrative fines* for infringements of the Regulation which are to be determined by each supervisory authority and which are to be *"effective, proportionate and dissuasive"*. For infringement of some Articles the administrative fines may be up to 10,000,000 EUR or up to 2% of the total worldwide annual turnover of an undertaking for the preceding year, whichever is higher. For infringements of some other Articles, administrative fines may be up to 20,000,000 EUR or 4% of the total worldwide annual turnover of an undertaking of the preceding financial year, whichever is higher.

Consideration and compliance

As noted above, this brief Article only touches on some of the requirements and issues arising out of the GDPR. Many of the requirements, and terms of the GDPR are not necessarily clear or easy to interpret, and the meaning and effect of the Regulation in many areas may not be apparent until there has been interpretation of the terms of the Regulation.

An Australian business that is caught in the blast from the GDPR should, if it has not already done so, give consideration to the requirements of the GDPR and take steps for compliance as soon as possible.

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NEWS & VIEWS | **By Sandy Donaldson**

Buried in the Budget: Directors in the Firing Line

In the *Harry Potter* books the members of the *Order of the Phoenix* are the good guys struggling against Lord Voldemort and the corrupt Ministry of Magic. To the Federal government and ASIC, however, *"phoenixing"* is an evil to be eradicated.

The Budget papers

ASIC and other agencies of the Government have already made a number of pronouncements on this, and the 2018 Budget Measures papers set out what the Government proposes to do (somewhat quixotically in the section under the heading *Jobs and Innovation).* This is what they say:

> The Government will reform the corporations and tax laws and provide the regulators with additional tools to assist them to deter and disrupt illegal phoenix activity. The package includes reforms to:
>
> - introduce new phoenix offences to target those who conduct or facilitate illegal phoenixing;
> - prevent directors improperly backdating resignations to avoid liability or prosecution;
> - limit the ability of directors to resign when this would leave the company with no directors;
> - restrict the ability of related creditors to vote on the appointment, removal or replacement of an external administrator;
> - extend the Director Penalty Regime to GST, luxury car tax and wine equalisation tax, making directors personally liable for the company's debts; and

"The reforms to combat illegal phoenixing complement and build on the work of the government's Phoenix, Serious Financial Crime and Black Economy taskforces, and other announced reforms"

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- expand the ATO's power to retain refunds where there are outstanding tax lodgements.

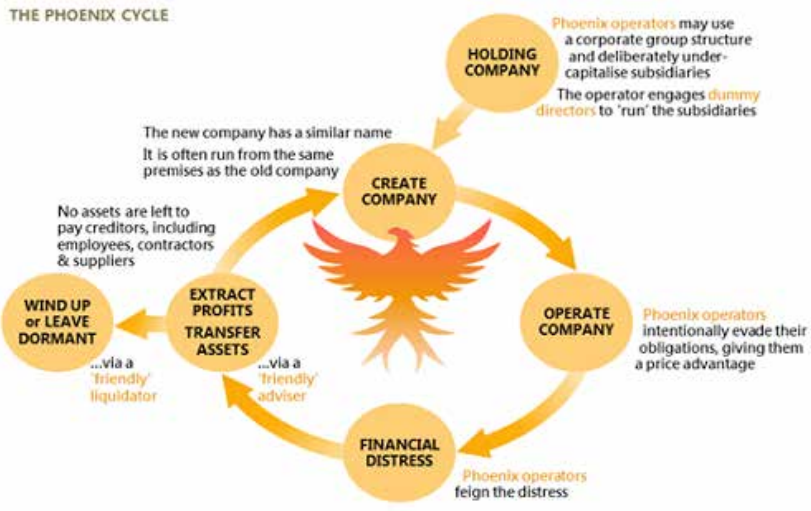
The papers go on to say ***"The reforms to combat illegal phoenixing complement and build on the work of the government's Phoenix, Serious Financial Crime and Black Economy taskforces, and other announced reforms".*** These other reforms include:

- introduction of a Director Identification Number (which would be a similar concept to an ACN or ABN to trace activities of directors with different entities);
- reforms to address corporate misuse of the Fair Entitlements Guarantee; and
- measures to tackle non-payment of the Superannuation Guarantee Charge.

The majority of these measures are clearly directed at directors, although "friendly" advisors and liquidators may also face increased accountability. The lives of directors may potentially become more complicated. ASIC and the Government, however, point out, rightly, that illegal phoenix activity is a serious problem affecting many innocent workers and traders.

This is how ASIC describes illegal phoenix activity:

> What is illegal phoenix activity?
>
> The key difference between a legitimate business rescue and illegal phoenix activity is the director's intentions to avoid paying debts and liabilities.
>
> Illegal phoenix activity severely impacts those owed money and gives these business operators an unfair competitive business advantage.
>
> Not all company failures involve illegal phoenix activity. Genuine company failures do occur. Where directors responsibly manage a business but it fails, that business may continue after liquidation under another corporate entity without, necessarily, involving illegal phoenix activity.



There is no detail in the Budget Measures papers as to how the proposals will be implemented. It does seem likely that the Government will consider increasing criminal penalties for financial and corporate misconduct and possibly creating new accessory offences.

Directors already have duties of care and diligence and good faith and other duties under the *Corporations Act*, and must be very careful, particularly in any situation where it appears that a company may be likely to be trading insolvently.

When more detail is known, or draft legislation is available, it may be prudent for directors to take advice in relation to any increased obligations. Hopefully, the ASIC and the Government will not go so far as to rely on Dementors or incarceration in Azkaban.

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INSIGHT | **By Patrick Walsh**

Looking into the Crystal Ball

What can we expect in Workers Compensation in the near future?

On 16 April 2018 State Treasurer Rob Lucas announced that the average workers compensation premium rate for businesses in the 2018/19 financial year will be 1.7%, down from 1.8% in the 2017/18 financial year. The announcement went on to note that there is more work to be done to bring premium rates into line with Western Australia, New South Wales, Victoria, and Queensland.

The Review mandated by Section 203 **('the Review')** of the *Return to Work Act 2014 (SA) ('***the RTW Act')** will provide an opportunity for the new State Government to make the South Australian scheme more competitive with other schemes nationally.

The Honourable John Mansfield AM QC is due to complete the Review in June this year, and by that stage the Supreme Court of South Australia will have hopefully heard a number of important appeals regarding the interpretation of the RTW Act.

Looking into my crystal ball, I have listed some of the areas I expect the State Government to take a close look at.

The *Martin/Mitchell* conundrum – to combine or not to combine?

The Full Bench of the Tribunal in the decisions of *Martin* and *Mitchell* found that the adverse consequences of surgery and medication (respectively) that arose as a consequence of a compensable injury are to be taken to arise from the same trauma for the purpose of determining the entitlement to a lump sum for non-economic loss pursuant to the *Workers Rehabilitation and Compensation Act 1986* (SA) *("***the WRC Act').**

Although the entitlement to compensation in both cases arose out the WRC Act, the importance of combining the injuries arises because of the potential to be classified as a *seriously injured worker* pursuant to the RTW Act and establish an entitlement to weekly payments until the Federal Retirement Age.

The Actuarial Review of the Scheme for 30 June 2017 states that the legal sensitivity for:

1. *WPI assessment increase by 2% as a result of the higher incentives under the RTW Act, resulting in extra Serious Injury claims and higher lump sum payments is* **$147,000,000;** and

2. *Restrictions on multiple assessments ('top ups') do not work as expected is* **$133,000,000.**

The decision of *Mitchell* is currently under appeal in the Supreme Court of South Australia. Having regard to the potential adverse impact of an unfavourable

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It may be that the State Government will be required to consider a legislative amendment to the RTW Act, such that only a worker's primary injury can be considered for the purpose of determining whether, or not, a worker is a seriously injured worker.

outcome on the viability of the Scheme, in the event that the appeal is not successful, it can be expected that the State Government will consider amendments to the RTW Act to limit the extent to which consequential injuries can be combined with the principle injury to determine a worker's whole person impairment.

In this regard, it is interesting to note the Australian Medical Association (South Australia) Inc.'s submission to the Review which states that, amongst other issues, there is *"…the absurd situation where South Australia now has the most constipated population of workers in the nation – apparently. Similar problems with dry mouth and reflux are being asserted, unchallenged, by impairment assessors. Invariably, the problems are said to arise as a consequence of prescribed medication, most particularly analgesic and antidepressant agents.* ***The arguments are specious and most importantly, do not reflect the wealth of international evidence which suggests that these problems are usually mild, reversible and eminently treatable."***

One of the key assumptions underpinning the funding of the scheme when the *Return to Work Bill 2014* was introduced into the Parliament was the number of claimants expected to be deemed to be seriously injured workers. In 2014 Minister Rau told the House of Assembly that he had been advised that approximately 330 existing claims would be considered *seriously injured workers* pursuant to the RTW Act. Minister Hunter also advised the Legislative Council that he had been advised that of the new claims made each year approximately 35 of those workers will be deemed to be *seriously injured workers.*

At the end of the 2016/17 financial year, the number of claims considered by ReturnToWork SA to be serious injury claims was 119, or 1% of total claims. ReturnToWorkSA's actuarial review for 2016/17 notes that *"If half of the claims who have submitted applications to be accepted as serious injuries but who have been rejected are subsequently overturned, there would be around a $161 million increase to the OSC provision".*

There are still a large number of disputes before the Tribunal with respect to claims made by workers to be deemed *seriously injured workers.* It would be reasonable to assume that as these disputes are finalised, the number of workers deemed to be seriously injured will increase above 1% of the number of total claims, which will exacerbate the impact of any adverse decisions made by the Supreme Court. It may be that the State Government will be required to consider a legislative amendment to the RTW Act, such that only a worker's primary injury (that is the injury that arises directly as a result of the workplace trauma) can be considered for the purpose of determining whether, or not, a worker is a *seriously injured worker.*

Seriously injured workers – a ticket to early retirement

As soon as an injured worker establishes a whole person impairment of 30%, there is a distinct lack of any incentive within the RTW Act for that worker to continue to make any attempts to return to work. Given the key aim of any workers compensation scheme is to return workers to the workplace, this is an absurd situation.

In my experience employer concerns regarding the cost of an injured worker meeting, or exceeding, 30% whole person impairment, are exacerbated by the knowledge that (unless the injured worker wishes to continue working) there is no ability to mitigate the costs of such a claim by providing suitable employment.

It may be still too early to tell, but given that it is widely acknowledged that unemployment leads to increased rates of overall mortality, and poorer physical and mental health[1], it seems reasonable to conclude that *seriously injured workers* who choose to cease engaging in employment will have poorer

health outcomes than those who elect to try and

1 Waddell G, Burton A. Is work good for your health and well being? London, UK: The Stationery Office; 2006.

remain in the workforce.

The removal of Section 25(11) of the RTW Act is one way in which an amendment could lead to both reducing costs and improved health outcomes in the long term.

Number of disputes

The statistics published by ReturnToWorkSA[2] note that the number of disputes open at the end of 2016 was 1,661. At the end of 2017 this number was 2,492. ReturnToWorkSA asserts that this is due to a lengthening of time taken to resolve disputes (as well as an increase in dispute numbers).

The removal of the ability to code an injury as a 'secondary injury' and thus avoid any direct premium impact on a registered employer has removed one of the most important mechanisms by which disputes with registered employers are resolved in the South Australian Employment Tribunal. In my experience, the ability to code an injury as a 'secondary injury' is particularly useful in the context of an ageing workforce in which many people have pre-existing degenerative conditions that present a risk for any potential employer.

The submission of the Law Society of South Australia to the Review states that a greater number of disputes have been generated as a result of a combination of:

1. *The introduction of new provisions which have not been judicially interpreted previously and which are both individually and in the context of the Act as a whole poorly worded and difficult to construe.*

2. *The reluctance of the Corporation to negotiate a settlement of claims involving the construction of a provision of the RTW Act until the provision has been finally construed by the Full Court of the Supreme Court of South Australia.*

3. *The refusal of the ReturnToWork Corporation, generally, to enter into negotiations to resolve disputes by way of a lump sum settlement including a redemption of future liabilities with respect to weekly payments and medical expenses.*

Greg McCarthy in his paper "***Insights for success in work injury insurance"*** makes a number of relevant points including the complacency with which redemptions had been approached for a significant period of time. He does go on to state, however, that ***"… before you draw the conclusion that redemptions should be avoided like the plague. That does not have to be the case… But you have to use redemptions carefully".***

Unfortunately, it appears that the pendulum has swung in the other direction too dramatically and my own observation is that representatives of the claims agents usually have no mechanism by which they can reach a compromise on a claim, other than a "closed period" acceptance; which creates its own difficulty with employers becoming increasingly aware of the ongoing liability they will have to provide suitable employment under Section 18 of the RTW Act.

Anecdotal feedback is that the claims agents have become increasingly bureaucratic and process driven and the perception is that this is as a result of ReturnToWork SA micromanaging their performance.

Interestingly, ReturnToWorkSA manages all claims in which a worker has been determined as a ***seriously injured worker*** and I understand will soon do the same for all claims in which an injured worker has been in receipt of weekly payments for greater than 52 weeks.

It may be time to revisit the relationship between ReturnToWorkSA and its agents to, at the very least, allow them some more flexibility to utilise the settlement mechanisms offered by the RTW Act in an appropriate manner.

Limitation on the time for injured workers to be reimbursed for the costs of treatment and medication.

… there appears to be a general consensus that utilising the Impairment Assessment Guidelines and AMA 5 has led to a number of unfair outcomes …

2 https://public.tableau.com/profile/rtwsa#!/vizhome/ReturnToWorkSA-InsurerStatisticsFY2017/ReturnToWorkSA-InsurerStatisticsFY2017

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Concern has been raised by a number of interested parties about the impact that the cessation of the entitlement to medical and like expenses is having on the health of injured workers.

My own observation is that there is an increased sense of urgency around workers being referred for, and having, surgery within the entitlement "window".

There is also conflicting authority in the Tribunal as to the level of certainty required regarding future surgery for an application to be approved pursuant to Section 33(21) (b) of the RTW Act.

Subject to other changes that may be contemplated with the RTW Act, I would expect the State Government to consider amending the restrictions imposed on the time period for medical and like expenses as a way of improving benefits to injured workers, without placing undue stress on the scheme. The argument for doing so is particularly compelling in circumstances where such medication, or surgery, would have the effect of improving an injured worker's capacity to undertake employment.

Setting the goalposts – who is, and is not, a '*seriously injured worker*'

In reviewing the submissions to the Review, there appears to be a general consensus that utilising the Impairment Assessment Guidelines and AMA 5 has led to a number of unfair outcomes in which some workers who retain significant capacity for employment will receive weekly payments through to their retirement age and medical expenses for life, and some workers who will never re-enter the workforce fall below 30% whole person impairment and therefore lose their entitlement to weekly payments after 2 years.

A number of parties have proposed substituting the current use of whole person impairment with a 'narrative test' to determine which workers will continue to receive weekly payments after 2 years.

Whilst such a test is appealing for its flexibility, the Scheme's experience with trying to bring the entitlement to weekly payments to an end through Section 35B of the WRC Act, suggests that any narrative test will have the result of significantly increasing levels of disputation and result in far more workers being deemed to be ***'seriously injured'*** under the RTW Act.

At this time, Victoria is the only jurisdiction which applies a 'narrative test' in determining which workers should receive ongoing benefits. In Victoria this has become a widely used means by which to obtain access to additional compensation.

ReturnToWorkSA, in its submissions to the Review, refers to a paper by Mr Geoff Atkins ***'Sustainability of Common Law'*** which suggests that the most sustainable model for determining access to additional benefits in time limited schemes is Whole Person Impairment based on the AMA Guides.

Any alternative method of determining which workers should continue to receive weekly payments after 2 years will need to satisfy the Government that it will not only be fairer than the current method, but will not result in a cost blowout to the Scheme.

Summary

Without so many appeals currently before the Supreme Court of South Australia, it is difficult to argue for any immediate changes to the RTW Act. Decisions in cases such as ***Mitchell, Li, Robinson,*** and ***Preedy*** are likely to have significant impacts on the financial status of the scheme, as well as our understanding as to how it operates.

Once these decisions have been handed down and the State Government has been provided with the recommendations of the Honourable John Mansfield AM QC we can expect a lot of debate around making changes to the RTW Act!

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DISSECTING DECISIONS | **By Marianna Danby**

Wills: Greedy v Needy

Swanson v Reis [2018] SASC 20

An Inheritance (Family Provision) claim has been dismissed on the first limb for the first time in South Australia.

The age old question, is there a big pot of gold at the end of the rainbow? You've grown up and seen that for some, it really does exist. People pass away and the ones they leave behind slide down that rainbow and leap right into the beneficiary pool of financial freedom. That's how it is supposed to happen…

That time has come: you're grieving the loss of someone who was dear to you, but the pot is being held by someone else and they are not sharing fairly. If you come within the category of persons who can apply for further provision, then you can claim your fair share through Section 7 of the *Inheritance (Family Provision) Act 1972* (SA) for further provision out of the estate. Hallelujah.

But before you start listing off the maintenance and advancements you need in your life, there is a two stage process that the Court will take into consideration.

The first part of this process, limb one, is to decipher whether the plaintiff was left without "adequate provision for their proper maintenance, education or advancement in life", and if so, then the second part, limb two, is to decide what that provision ought to be. However, as one man recently found out, this is not as easy as ticking boxes. He was entitled to receive one sixth of his late mother's estate, while the defendant was due to receive two thirds, and after litigation, that is how the Court left it.

He was the first claimant in South Australia to be rejected for further provision out of the estate by failing to satisfy the first limb. This is not only unfortunate for him, but also for future persons who wish to claim, as they now face more uncertainty when launching a claim against a deceased's estate.

Here are some of the issues that the Court took into consideration before dismissing the claim:

One-sixth

- The plaintiff was an adult claimant who lived comfortably and held a job with a salary of $150,000.00 per annum. In fact, he had a higher income, greater superannuation, more assets and fewer liabilities than the defendant.
- He had a good childhood and his relationship with his mother (the deceased) was good, except for a 2 year period of estrangement later in their lives (however this was not regarded in reaching her Honours conclusion as it was a comparatively short amount of time).
- The plaintiff was divorced with one child (who he was supporting financially, had living with him, and who had a heart condition which may have required surgery in the near future).
- The plaintiff was in serious motor bike accident in 2017 which he was still recovering from at the time of the hearing, and so his injuries were yet to be determined.

Two-thirds

- The defendant (being the plaintiff's brother) had very little uncommitted income. He had been a carpenter, but due to

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the physical nature of the job could no longer work in that position. The defendant had no children and due to the stress of these proceedings was about to split from his long term partner.

- He had been very supportive to their mother, especially in her later years when she was lonely. He had never endured any period of estrangement with her, unlike his siblings. In fact, the defendant and his mother were arranging for her to move into a granny flat on his property which was being renovated for that purpose at the time of her death.

Evidence is telling

- The defendant had withdrawn over $60,000.00 from his mother's bank account with her written consent, just days before she passed away in order to meet the costs of the renovation.

- The defendant maintained that this money was to assist with renovation and whatever remained was a gift. The plaintiff suggested that it was provided for a specific purpose and that the balance should be paid back into the estate.

- The plaintiff also made several allegations to debunk the defendant's story, however there was no evidence before the Court to support the comments and his Honour accepted the defendant's position that it was a gift.

- Even taking into consideration this gift, the defendant was still financially worse off than the plaintiff.

Moral duty

An observation which made for a potential twist in this story was that the deceased and her husband, the parents of the plaintiff and the defendant, found themselves in financial difficulty in 1990. The plaintiff assisted in preserving the assets of his parents by refinancing the mortgage over their home and lending them $12,000.00 to pay legal fees to prevent the bank from repossessing their property. The money was paid back over 15 years. The plaintiff stated that his mother had said at the time that "it was for the future of all three children" which he took to mean that the property was to be shared equally between them. However the Judge did not consider that it placed a moral duty on the deceased to provide any more for the plaintiff than she did.

The finding

The first limb question is to be determined as at the date of death, by reference to the objective facts then existing including prospective future expectations and contingencies foreseeable as at the date of death. It is not determined by the subjective knowledge, beliefs or intentions of the testator. Paraphrased from previous legal findings - the proper provision must be considered in the light of all the competing claims upon the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a child, his or her need of education or of assistance in some chosen occupation, and the testator's ability to meet such claims having regard to the size of the fortune.

Her Honour in this case stated that the *"provision provided by his deceased mother was adequate as it took into account his lifestyle and dependents, and proper, in that it was regard to the less advantageous providing sufficient funds to allow the plaintiff to pay off some debt, travel if he wished to do so, or afford some other luxury that he might otherwise forego"*.

If you are in a similar position and find yourself asking whether you are eligible to make a claim, what threshold you'll need to reach, what evidence you have, and whether a claim is even worth it, then contact us and we will guide you through the process.

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INSIGHT | **By Sandy Donaldson**

Making Sense of the Personal Property Securities Register

*The operation of the Personal Property Securities Register ("**PPSR**") can be a confusing enough concept for lawyers, let alone the general public. However, having a basic knowledge of the priority rules of scheme can ensure that you don't miss out when it comes to enforcing your security interest.*

What is the PPSR?

The PPSR was created under the *Personal Property Securities Act 2009* (Cth) ("**the Act**"). The intention of the Act and the PPSR was to create a system of registration for security interests in personal property within Australia.

However unlike other registers, such as that maintained by the Lands Titles Office, the PPSR is not a title or document register. Instead, the PPSR acts as a database of currently secured personal property in Australia.

The PPSR provides notice as to whether there is a security interest against property.

The main functions of the PPSR are for an individual or an entity to:

- register their interest or right over another's personal property to secure a debt or obligation that is owing by the other party; and/or
- search the PPSR to see whether there is a pre-existing interest over certain personal property.

What does the PPSR cover?

The PPSR only applies to "personal property".

Under the Act, this includes all property (whether tangible or intangible) other than real property (i.e. land). As such, a security interest may be registered on the PPSR if it relates to things such as:

- cars;
- plants;
- aircraft;
- intellectual property;
- book debts; and
- paintings.

What are the benefits of the PPSR?

As the PPSR is not a register of title, it can be difficult for the average person to see the benefit in registering their security interests.

The importance of registration lies in the resolution of disputes between competing security interests.

Prior to the introduction of the Act and the PPSR, the law was quite complex in relation to resolving priority disputes between competing interests in property. A number of factors would need to be taken into account, such as the nature or location of the debtor, the legal form of the transaction or whether the security holder had knowledge of other security interests.

The introduction of the PPSR simplified this process to a degree, creating a hierarchy of priority. As such, it is important for individuals to register their security interests

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correctly in order to maximise the level of priority they obtain under the Act.

Who takes priority?

The priority of competing security interests under the Act can be summarised as follows:

- a perfected security interest ("perfected" meaning that either the security interest is registered on the PPSR, or the collateral is in the control of the secured party) will have priority over an unperfected security interest;
- if there are two perfected security interests, the security interest that was perfected first will take priority; and
- if there are two unperfected security interests, the security interest which 'attached' to the personal property first will take priority. Attachment occurs when the grantor of the security interest has rights in the personal property and either value is given for the security interest or the grantor does an act by which the security interest arises (such as entering into a security agreement).

The key takeaway of this of course being that it is vitally important for individuals to ensure that their security interest is registered on the PPSR in order to obtain priority over other interests.

However, while the summary above outlines the general rules relating to priority, there are exceptions.

Purchase money security interests

The most notable exception to the general rules of priority under the Act relates to purchase money security interests ("**PMSI**").

Prior to the Act, the most common form of security for goods sold on credit was a Romalpa or Retention of Title clause ("**ROT**") retaining title in the goods until payment was made. This was not considered to be a security as title simply remained with the vendor. Under the Act, however, a ROT clause is a security interest requiring registration on the PPSR.

A PMSI is a particular type of security interest in personal property. A PMSI will secure the unpaid purchase price for goods if a ROT clause exists, but there are other types of PMSI. A PMSI will secure the assistance provided by one party to another party to allow the other party to purchase or acquire rights in certain personal property. For example, where a bank provides a loan to a company to enable the company to purchase an asset, the bank will be eligible to register a PMSI over that asset.

A PMSI is given what is called "super priority" on the PPSR. That is, it will take priority over all other security interests in the same personal property (whether perfected or unperfected) regardless of when the PMSI is perfected.

When is a PMSI likely to arise?

A PMSI is likely to arise where:

- money is lent to the grantor in order to enable the grantor to purchase personal property (as outlined in the bank loan example above);
- the secured party has given the grantor personal property, but all or part of the purchase price remains outstanding and a ROT clause or other security exists;
- the secured interest is subject to a PPS lease transaction (i.e. a lease or bailment of goods for a term exceeding one year or for an indefinite period); or
- the secured interest is subject to a consignment transaction.

Key takeaways

It is important for individuals with security interests in personal property to not only ensure that their interest is registered on the PPSR, but also registered correctly in order to secure the highest level of priority possible. It is also necessary to ensure that an appropriate form of security exists as the Act does not create security interests, it only provides for their registration and priorities.

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INSIGHT | **By Mark Gowans & Jarrad Napier**

Set-off Defence Gains Ground in Unfair Preference Claims

Is *Morton v Rexel Electrical Supplies Pty Ltd* [2015] QDC 49 (**Rexel**) gaining ground across Australia? In 2015, Queensland District Court Judge Searles held that Section 553C of the *Corporations Act 2001* (Cth) (the **Act**) may apply in situations to reduce a liquidator's unfair preference claim, by allowing the amount still owing to a creditor to be set-off against the liquidator's claim. This may only occur in situations where the creditor being sued by a liquidator is owed money by the company in liquidation beyond the amount owed to them in the unfair preference claim.

Rexel applied and followed the matter of *Re ACN 007 537 000 Pty Ltd (in liq); Ex Parte Parker* (1997) 150 ALR 92 (**Re Parker**). In short, Re Parker concerned a holding company being sued in its capacity as de facto director for insolvent trading by the liquidator of its subsidiary company under Section 588V of the Act. It was found that Section 553C of the Act could apply to set-off debts owed by the subsidiary to the holding company. The effect of Rexel, picking up the language in Re Parker, is that creditors are in a position to defend unfair preference claims with a defence of set-off. Up until recently, reliance upon Rexel was approached with great caution and criticism.

However, in *Stone v Melrose Cranes & Rigging Pty Ltd, in the matter of Cardinal Project Services Pty Ltd (in Liq) (No 2)* [2018] FCA 530 (**Stone**), a creditor relied upon Section 553C of the Act in defending an unfair preference claim. Whilst the creditor did not succeed, the Court did find that the authorities supported a set-off in circumstances where voidable transactions are in dispute, including unfair preference claims.[1] Whilst Stone did not rely upon Rexel, it has followed similar reasoning in Rexel and applied Re Parker.

The reason why the creditor was unsuccessful in Stone was not for the sake of the principle being in dispute, but that the Court held a set-off is not available in circumstances where it can be established the creditor had notice of the company's insolvency. Notice under Section 553C(2) of the Act requires more than 'reasonable grounds for suspecting'; what is required is proof of facts known to the creditor, which would warrant the conclusion of insolvency.[2] Notice requires an analysis of the facts and consideration of the transaction at hand, and each case is contingent on its own circumstances.

As long as the facts establish that a creditor did not have notice of a company's insolvency and is still owed money by the company in liquidation, Section 553C of the Act is available to those creditors to reduce the alleged unfair preference claim.

1 See generally, *Re ACN 007 537 000 Pty Ltd (in liq); Ex Parte Parker (1997) 150 ALR 92; Duncan v Vinidex Tubemakers Pty Limited [1999] SASC 157; and, Hall v Poolman (2007) 215 FLR 243; Buzzle Operations Pty Ltd (in liq) v Apple Computers Australia (2011) 81 NSWLR 47.*

2 *Jetaway Logistics Pty Ltd v Deputy Commissioner of Taxation [2009] VSCA 319 at [22].*

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NEWS & VIEWS | **By Patrick Cook**

Contract Termination for Insolvency – Not Anymore!

So you think that you have the right to terminate a contract if the other side is insolvent? Maybe not as of 1 July 2018.

New laws have recently come into effect preventing parties from enforcing contract termination rights triggered by certain insolvency events for a period of time.

The new restrictions aim to assist businesses in financial distress to maximise their survival chances.

This article outlines what you need to know about the changes.

Ipso facto

Ipso facto clauses are commonplace in Australian contracts. An ***ipso facto*** clause is a contractual provision that allows a party to terminate or modify the operation of a contract upon the occurrence of an insolvency event. For example, a contract clause that entitles a party to terminate the contract if a voluntary administrator is appointed to the other party is an ***ipso facto*** clause.

Previously there was no general restriction on the enforcement of ***ipso facto*** clauses against companies undertaking a restructuring or rehabilitation in Australia. This meant, for example, that trade creditors may refuse to continue to provide goods and services following the occurrence of an insolvency event in reliance on an ***ipso facto*** provision, even if the company is otherwise continuing to perform under the contract.

The ability for another party to a contract (called a "counterparty") to terminate key contracts following the occurrence of an insolvency event is generally recognised as one of the most significant impediments to successfully implementing a formal corporate rescue or sale (as a going concern) in Australia, particularly for contract based businesses where value is primarily concentrated in the company's contracts and not in its physical assets.

How do the new laws work?

The new laws amend the ***Corporations Act 2001*** (Cth) and apply to prevent or 'stay' certain termination and other ***ipso facto*** rights from being enforced against a counterparty which, as part of a genuine restructure, appoints an administrator or receiver to all, or substantially all, of its property or proposes a scheme of arrangement.

New laws have recently come into effect preventing parties from enforcing contract termination rights triggered by certain insolvency events ...

The rights that will be subject to the stay are those rights that arise by reason of the counterparty's entry into the insolvency process or its financial position. The stay will also apply to self-executing type provisions (i.e. automatic termination type clauses).

The period of the stay depends on the type of insolvency process. For example, in the event of a voluntary administration, the stay will begin when the company enters administration and will end when the administration ends or, if the administration ends because the company is wound up, it will continue until the affairs of the company are fully wound up.

Even when the stay does come to an end, any right that is subject to the stay will remain unenforceable to the extent the reason for seeking to enforce that right relates to circumstances that arose prior to the commencement of the stay. For example, where a party has a contractual right of termination which relies on a counterparty's financial position and which arose prior to that counterparty's entry into administration, the party cannot exercise that termination right if the counterparty successfully trades out of the administration.

Are there any exceptions?

As you would expect, because of the wide-ranging impact of the new laws, the Government has excluded certain types of contracts and certain types

of rights from the operation of the stay by regulation and declaration. These include (among others):

- public services contracts, such as the supply of products to the Commonwealth;
- arrangements for the sale of a business;
- uplift clauses and indemnification;
- termination rights in standstill and forbearance arrangements;
- rights of novation and assignments;
- contracts, agreements or arrangements to which a special purpose vehicle is a party;
- appointment of receivers without acceleration of debt;
- circulating security interests;
- guarantees without acceleration;
- government licenses and permits; and
- novation, assignment and variation.

What should I do?

The new laws came into effect on 1 July 2018 and only apply to contracts made after that date.

Now is the time to start thinking about how these new laws might affect your business. Particularly, what you can do to seek to maintain flexibility and be protected in a range of scenarios and circumstances related to the financial distress of your company or that of your contract counterparties.

We have developed a number of strategies aimed at assisting companies to deal with the potential implications of the new laws.

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

New International Standard for Occupational Health and Safety

The International Organisation for Standardisation has recently published a new International Standard ISO 45001: "*Occupational health and safety management systems – Requirements with guidance for use*" ("**the Standard**").

The Standard does not replace any of the current Australian standards with respect to OH&S, and certification with the International Organisation for Standardisation is not compulsory. However, the Standard is a useful guide to implementing and maintaining a formal OH&S management system in any organisation.

Of particular note in the Standard is the defined term of "competence", the reference to the "hierarchy of control", and the requirements in respect of procurement (ie, procurement of products and services, or engagement of contractors).

Competence

Throughout the Standard the "*competence*" of workers (so far as the OH&S performance is affected) is referred to. The Standard defines competence as the "*ability to apply knowledge and skills to achieve intended results*" and, for instance, an organisation is required to ensure that their workers are 'competent' and that they have received the appropriate education or training, or have the necessary experience required. This 'competence' includes that required to fulfil the inherent requirements of the worker's role, as well as competence in respect of the requirements of the OH&S management system, and identification of hazards and OH&S risks.

The concept of determining "competence" particularly has implications when hiring contractors, as organisations are required to verify that any contractors they engage are "competent". This may result in organisations undergoing a more thorough and involved process when engaging contractors.

Hierarchy of control

The Standard adopts the "hierarchy of control" to eliminate hazards and reduce OH&S risks which is to be established and maintained. The "hierarchy" is defined in the standard as:

a. eliminate the hazard;

b. substitute with less hazardous processes, operations, materials or equipment;

c. use engineering controls and reorganisation of work;

d. use administrative controls, including training;

e. use adequate personal protective equipment.

The "controls" are listed in order of most to least effective, and it is this "hierarchy" which is to be followed in order to eliminate and reduce OH&S risks.

Importantly, "top management" (defined in the Standard as being the person or group of people who "direct and control" the organisation, so presumably directors and/or top level managers) are required to "establish, implement and maintain an OH&S policy that includes a commitment to eliminate hazards and reduce OH&S risks". This means that the "top management" of an organisation is required to consider and incorporate the "hierarchy of control" into the organisation's OH&S policies.

Procurement

The Standard requires organisations to "*establish, implement and maintain a process to control the procurement of products and services in order to ensure their conformity to its OH&S management system.*" This includes eliminating hazards and reducing

OH&S risks with respect to, for instance, hazardous or raw materials before they are introduced into the workplace, or having equipment intended for use by employees properly delivered, tested and installed, with necessary precautions or protective measures properly communicated.

Further to this, the Standard requires organisations to "*identify hazards and to assess and control the OH&S risks*" associated with contractors. This means that any contractors (and their employees) are required to comply with the OH&S management system of the organisation.

Organisations that wish to be accredited to the Standard should consider ensuring that persons responsible for the procurement of products and/or services have been provided with sufficient training with respect to the organisation's OH&S management system to ensure that the organisation can meet this requirement.

In any event, as businesses are increasingly dealing with globalised supply chains and doing business online (rather than in person) specific expertise in procurement is gaining increasing importance.

IF YOU WOULD LIKE MORE INFORMATION IN RELATION TO THE STANDARD AND HOW CERTIFICATION MIGHT IMPACT YOUR LEGAL OBLIGATIONS, PLEASE CONTACT:

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INSIGHT | **By Sandy Donaldson**

Do you own your Trade Mark?

A trade mark may be one of the most valuable assets of a business. It may be a name, a word or words, or a logo, or a combination of these.

Use by other entities

It is common in business groups for assets, including trade marks, to be held by a group entity that is not the trading entity using the trade mark(s) of the group for goods or services. If a trade mark is held or applied for by a person or entity that will not use the mark, considerable care must be taken to ensure that the mark is not susceptible to removal, or worse, that it is not validly registered in the first place.

The need for control

In a previous article (Wild Geese: The Bird has Flown) we commented on the decision of the Federal Court in the "Wild Geese Wines" case.[1] The main lesson from that case was that if a trade mark is licensed to another user, the owner must exercise real control over the licensee in the use of the mark. It is not sufficient if a licence agreement exists and provides rights of control, these rights must actually be exercised to comply with Section 8 of the *Trade Marks Act.*[2]

The Court in the Wild Geese case adopted the words of Aiken J[3] and said that "*A trade mark must indicate a connection in the course of trade with the registered owner".*[4]

1 *Lodestar Anstelt v Campari Inc [2016] FCAFC 92*

2 *Trade Marks Act 1995 (Cth)*
3 *Pioneer Kabushiki Kaisha v Registrar of Trade Marks (1977) 137 CLR 670 at 683*
4 *Lodestar Anstelt v Campari America LLC [2016] FCAFC 92 at para 95*

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The result in the Wild Geese case was that the mark was removed for non-use as no control was in fact exercised although rights to control existed in an agreement.

Control in a corporate group

Besanko J in the Wild Geese case indicated that control of a subsidiary by a parent company, where the parent company holds the registered trade mark, may be sufficient saying:

> **"***The connection may be slight such as selection or quality control or control of the user in the sense in which a parent company controls a subsidiary"*[5]

However, if the entity holding the registered trade mark in a group is not a holding company of the entity that is actually using the trade mark, this control may not be inferred, even if there is common ownership or management.[6]

If the relationship of a holding company and subsidiary does not exist (or, prudently, even if it does) to ensure that a registered trade mark is not vulnerable to removal for non-use, a licence agreement should ideally be in place with obligations for quality and rights of control, and the rights should regularly be exercised by the entity that holds the trade mark.

Invalid registration: who is the owner?

A recent case of ***Pham Global Pty Ltd v Insight Clinical Imaging Pty Ltd***[7] ("Insight case") has illustrated an even more fundamental problem that may arise. A trade mark that is registered or applied for may not be capable of registration if the registered holder or applicant is not the user of the mark.

There were many issues in the Insight case, but relevantly the Federal Court at first instance (Davies J)[8] and on appeal (Greenwood Jagot and Beach JJ) found that a trade mark (the words INSIGHT RADIOLOGY with a logo) which had been applied for by a Mr Pham could not be registered as Mr Pham was not the owner of the mark.

Davies J found (and the Full Court accepted) that the true owner of the mark was a company which had at times various names including Insight Radiology Pty Ltd ("Insight"). Mr Pham was the sole director of Insight and he and his wife were shareholders. The Judge found that the mark was designed for use by the company for its business purposes and that Mr Pham acted for and on behalf of the company, not in his own right, in having the logo of the mark designed.[9]

It was argued by Mr Pham that he intended to use the trade mark by licensing it to Insight, relying on Section 27(1)(b)(ii) of the ***Trade Marks Act.*** Section 27, relevantly, reads:

1. A person may apply for the registration of a trade mark in respect of goods and/or services if:

   a. the person claims to be the owner of the trade mark; and

   b. one of the following applies:

      i. the person is using or intends to use the trade mark in relation to the goods and/or services;

      ii. the person has authorised or intends to authorise another person to use the trade mark in relation to the goods and/or services;

The Judge did not accept the evidence of Mr Pham saying:

> *"The evidence considered as a whole strongly suggests to the contrary that it was never intended by Mr Pham that he would use the mark himself, whether by licensing the companies or otherwise but rather that his intention was always for Insight Radiology to use the mark in connection with its business, which, the evidence shows, has been the case.*
>
> *Accordingly, I do not accept Mr Pham's evidence that it was his intention to licence Insight Radiology and AMA Healthcare to use the IR composite mark, which I do not consider to be truthful of his actual intention at the time in the light of evidence as a whole. Consistent with the origin of the IR composite*

5 *Lodestar Anstelt v Campari America LLC [2016] FCAFC 92 at para 95*
6 *Healthworld Ltd v Shin-sun Australia Pty Ltd [2008] FCA 100 at para 60-64*
7 *Pham Global Pty Ltd v Insight Clinical Imaging Pty Ltd [2017] FCAFC 83*
8 *Insight Radiology Pty Ltd v Insight Clinical Imaging Pty Ltd [2016] FCA 1406*
9 *Insight Radiology Pty Ltd v Insight Clinical Imaging Pty Ltd [2016} FCA 1406 at para 61-62*

> *mark and its actual use I find that Mr Pham, as the controller of Insight Radiology, intended at the date of filing of the application that Insight Radiology would use the IR composite mark, not that he would use the IR composite mark either in the immediate future or at all."*[10]

Accordingly the primary judge and the Full Court found that Mr Pham was not the owner of the trade mark and could not apply for registration.

The Full Court, citing earlier authority, used the tag line that the *Trade Marks Act* provides for:

> *registration of ownership not ownership by registration.*[11]

Can assignment cure an ownership defect?

Mr Pham attempted to cure any problems with ownership of the trade mark by assigning the trade mark to Insight during the course of the application, and after opposition had been made to registration. The primary judge Davies J accepted that this did cure the defect, as Insight was then the owner of the mark and held that opposition to registration failed.[12]

The Full Court, however, did not agree. It held that Mr Pham did not own the mark so he could not assign it.[13] The Court held that even if Mr Pham could assign the mark, the assignment after the application was immaterial. The defect in ownership existed at the time of application and subsequent assignment could not cure that defect.[14]

Trade marks at risk

It can be seen from cases, particularly the Wild Geese and Insight cases, that a registered trade mark may be at risk under the *Trade Marks Act* of removal for non-use (Section 92), for cancellation (Section 88) or opposition to an application for registration (Section 58) on the basis of non-ownership if the trade mark is not used by the registered holder or applicant for the mark.

Licence agreements

To preclude the possibility of removal for non-use, a Licence Agreement in appropriate terms with conditions for control should be put in place between the trade mark owner or applicant and the user, and control should be exercised.

The existence of a licence may also assist an argument against an assertion that the registered holder or applicant is not the owner of the trade mark (as was found in the Insight case) but this will not be conclusive if the licence is introduced after the application or registration of the mark.

New applications

If a trade mark is registered in circumstances such as those of the Insight case, particularly in the name of an individual (although this could also be a company) and there are concerns that a licence agreement will not cure any defect in ownership, and a potential invalidity of registration, the only safe course appears to be a new application for registration of the trade mark. Before this action is taken, however, advice should be obtained and searches made to consider the possible consequences.

When an application is to made for a new trade mark, careful consideration should be given to the identity of the applicant if the applicant will not be the user of the trade mark. It may be prudent to put a Licence Agreement in place at the time of application to clearly establish the intention of the applicant to use the mark by licensing it.

If there is any doubt about existing marks, it would be prudent to obtain advice.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

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10 *Insight Radiology Pty Ltd v Insight Clinical Imaging Pty Ltd [2016] FCA 1406 at para 65-66*
11 *Pham Global Pty Ltd v Insight Clinical Imaging Pty Ltd [2017] FCAFC 83 at para 19*
12 *Insight Radiology Pty Ltd v Insight Clinical Imaging Pty Ltd [2016] FCA 1406 at para 70-71*
13 *Pham Global Pty Ltd v Insight Clinical Imaging Pty Ltd [2017] FCAFC 83 at para 45*
14 *Pham Global Pty Ltd v Insight Clinical Imaging Pty Ltd [2017] FCAFC 83 at para 44*

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No Place Like Home

Patrick Walsh Director

Patrick will tell you that while having experience counts, it's engaging and enjoying interaction with people on all levels that ensures the best possible results.

Perhaps it's Patrick's significant backpacking experience, meeting fellow travellers and talking to locals from so many different countries, that instilled this philosophy. Or maybe it was trading stories back and forth with fellow cyclists during various grueling races around Australia?

Whatever the reason, as you watch Patrick assist his clients you could be forgiven for thinking the law had always been his passion. But as it turns out, as the tale is often told, it wasn't his first choice. Patrick explained:

> *"When I came back to Adelaide after travelling for 12 months, I didn't think I wanted to be a lawyer. I'd enjoyed the adventure and spending my time passing through different countries. My love of the country and my fondness for a glass of wine gave me a strong desire to work in the wine industry. Unfortunately the industry was struggling at the time and it was difficult to find work. Ultimately I came to a crossroads and decided to reinvest my energies into pursuing a legal career. When I got an opportunity with one of the premier Employer Industrial Relations firms in South Australia, I felt at home and didn't look back."*

Patrick soon realised why workplace law suited him so well… his inherent people-skills are almost a prerequisite for successful results.

> *"The ability to effectively liaise and negotiate with other parties in any transaction or dispute is critical to being able to get the best outcome for your client. A lawyer with good relationships and good personal skills will get better results, whichever side of the table they're sitting on, and will ultimately be much less expensive."*

Patrick has found that workplace law is a lot more unpredictable than corporate law, with parties continually finding ways to surprise. He's also realised that disputes are not just about money… of course it is an important factor, but he explains that workers' motivations are more complicated than cash alone.

> *"If you can work out where the other side is coming from, you'll be able to negotiate with them much more effectively. An example of this was a dispute I resolved recently regarding a worker's knee injury. My client's main concern as the employer was the*

risk that the worker would be classified as a 'seriously injured worker'. During the settlement conference, it became clear that the worker enjoyed her job and wished to stay on. Her prime concern was ensuring she could have surgery on the knee when required, and ongoing medical support. I was able to negotiate a settlement based on avoiding a liability of the worker being classified as 'seriously injured', but ensuring that she would have an entitlement to be reimbursed for the relevant medical expenses on her knee."

With the 'Fair Work Act' in the news of late, Patrick comments that the current industrial relations framework generally works well, but that enterprise bargaining has become difficult for all parties involved, particularly small business employers. He advocates a less technical and more holistic approach would serve workers and employers better.

"In my experience, it's too easy for disaffected parties to have agreements struck down for technical breaches that either don't affect the outcome or might adversely affect only a very small minority of workers covered by the agreement."

Away from the negotiation table, Patrick is an avid reader, traveller and bike rider. Memorable moments in his story so far include watching Cadel Evans on the Alp D'Huez in the Tour De France 2012 (the year he won), and riding 220 km up Doi Inthanon in Northern Thailand.

"My mate and I badly misjudged how hard the ride up Doi Inthanon would be and how long it would take. In a moment of genuine cold hard fear, we ended up riding over an hour in the dark with no lights on a busy Thai highway back to Chiang Mai. We felt lucky to be alive!"

The experience of so much overseas travel in different countries and cultures has left Patrick quite philosophical about how good life is Down Under.

"I had a lot of fun and some profound adventures travelling the world, but the one lasting thought I was left with is how lucky we are to live in Australia."

Patrick is now firmly settled back in Adelaide, but he's not sitting still. With his recent rise to become a DW Fox Tucker Director, plus his upcoming marriage on the horizon, we look forward to the next few chapters in Patrick's story.

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