DW Fox Tucker Lawyers

Winter Report 2015

Quality Wool Charts Strong Growth Path

A buoyant agricultural industry is triggering healthy investment and expansion and one "home-grown" business charting a strong pathway forward is Quality Wool.

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CLIENT PROFILE

Quality Wool

Soon to celebrate its 25th anniversary, the business earlier this year became one of the largest, independent, locally-owned and operated wool brokering companies in the Australian industry.

From small beginnings in 1991, it set about developing a major footprint in SA and later into Victoria, and it has since launched into New South Wales and Queensland, as well as expanding its Victorian operations.

Quality Wool has company-owned wool handling centres at Port Adelaide, Naracoorte, Dublin and Jamestown in SA and at Geelong, Bendigo, Ballarat and Benalla in Victoria, and earlier this year it extended its reach with wool stores at Ararat and Edenhope in Victoria, as well as at Parkes, Wagga Wagga and Orange in NSW.

The company now supports farming families throughout SA, Victoria, NSW and across to Western Australia, whose wool clips find destinations largely in China, but also throughout Southeast Asia.

Quality Wool has long-term relationships with international woollen mills, particularly in China and Vietnam, where its trusted partnerships with textile leaders have aided vital marketing opportunities for its clients.

Managing Director Mark Dyson (pictured far right) said the latest expansion into new territories was a natural progression for the business and it was now targeting strong consolidation and further growth.

“It allows some economies of scale and we can get a stronghold on other areas,” Mark said.

“We are excited and we look forward to increasing our marketing services and support and further expanding our brand throughout eastern states.

“Rural commodities have been steady, but they largely appear to be on a firm footing going forward and this is encouraging for agribusinesses.

“We keep it pretty simple. Our core focus is to assist growers with their sheep and wool production and to devise selling strategies for them that deliver maximum profits.

“We have been very successful in building strong loyalty with our grower client base and we are looking to continue this under our expanded structure.”

“We have been very successful in building strong loyalty with our grower client base and we are looking to continue this under our expanded structure.”

Mark put Quality Wool’s success down to its people and the passion and support they have for the industry, farming families and rural communities.

The company is renowned for its personal understanding and relationships with clients; global wool market knowledge; stability of its team; and, as a result of its business structure, ability to be highly responsive.

Meanwhile, sitting alongside Quality Wool today is a flourishing livestock marketing business, Quality Livestock, which now allows an all-round, high quality service to be provided to clients.

In a short period since 2011, Quality Livestock has become a preferred marketer for sheep, lamb and cattle producers throughout SA.

It has grown rapidly and has become a major seller at saleyards and to abattoirs, where it has developed strong relationships.

Quality Livestock comprises a strong contingent of well respected livestock representatives and agents located throughout SA, however, it also has its own eyes on expansion into Victoria and New South Wales, so the team is set to build soon.

For further information:

Quality Wool
Visit http://www.qualitywool.com

Quality Livestock
Visit http://www.qualitylivestock.com.au

"We keep it pretty simple. Our core focus is to assist growers with their sheep and wool production and to devise selling stratagies for them that deliver maximum profits."

NEWS & VIEWS | **Tim Duval**

Agricultural Land Register

Transparency at what cost?

... public debate seems divided between the fear of "selling the family farm" to overseas interests, and the positive outcomes generated to the Australian economy through foreign investment.

On the back of several high-profile land (and water) sales to non-Australians, such as Australia's largest cotton farm, Cubbie Station, the issue of foreign investment in Australian agriculture is generating heated debate. One of the central themes in this debate has been that, historically, no one knows exactly how much agricultural land foreign companies and governments own.

Further, public debate seems divided between the fear of "selling the family farm" to overseas interests, and the positive outcomes generated to the Australian economy through foreign investment.

Register

The Australian Government has demonstrated a commitment to create increased transparency around foreign investment in 'agricultural land' by introducing a national *Foreign Ownership of Agricultural Land Register* ("***Register***"). The Register will be administered by the Australian Taxation Office ("***ATO***") and registrations can be processed at www.ato.gov.au/aglandregister.

The Register was implemented by Australia's Foreign Investment Review Board ("***FIRB***") updating Australia's Foreign Investment Policy ("***Policy***") to include additional obligations on foreign investors who currently hold, or will in the future hold, interests in agricultural land in Australia. This follows from a recent reduction of the threshold above which FIRB has to scrutinise purchases of "rural land" by foreign entities – from $252 million to $15 million.

From 1 July 2015, the Policy requires that:

- all foreign persons (and foreign government investors) that currently hold interests in agricultural land must register those interests with the ATO by 31 December 2015; and
- any new interests in agricultural land acquired after 1 July 2015 must be registered with the ATO within 30 days of the acquisition.

The obligation to register interests in Australian agricultural land applies irrespective of the value of the land and whether or not the acquisition was (or is) subject to FIRB approval.

Wide definition of agricultural land

Agricultural land is defined very broadly in the Policy as "*land in Australia that is used, or that could be reasonably used, for a primary production business*".

This definition extends wider than the definition of rural land under the F*oreign Acquisitions and Takeovers Act 1975* (Cth) ("***FATA***") which requires the relevant land to be used wholly and exclusively for carrying on a business of primary production.

It is expected that the Australian Government will introduce supporting legislation in respect of the Register by 1 December 2015. In the meantime, however, the requirement to register only applies as a matter of policy.

There is currently no penalty for failing to register an existing or new interest. However, it is expected penalties will be imposed when the policy changes are incorporated into legislation.

Is the Register necessary?

A survey conducted by the Australian Bureau of Statistics ("***ABS***") titled "*Agricultural Land and Water Ownership June 2013*" found that just under 99% of Australian farm businesses are fully Australian owned and just under 90% of farmland is fully Australian owned. Further, while there has been an increase in the area of farmland owned by businesses with some level of foreign investment, by far the majority remains Australian owned.

In addition, it is not currently possible to review or search the Register, and no set date has been announced for activation of such a feature.

Consequently, we question whether the Register, designed to 'improve transparency and better inform public debate and policy making' will achieve its aims, or whether the costs of establishing and maintaining the register could have been better spent in educating agribusinesses on investment opportunities and in promoting Australian agriculture as a source of food for Asia.

For example, commentators, including Primary Producers SA Chair, Rob Kerin, are calling for Australian farmers to have an open mind in relation to foreign investment. Mr Kerin was quoted in The Advertiser on 6 July 2015 as saying "*We grow and produce excellent food and wine, but the two things we lack are investment money to grow businesses to their full potential and markets to sustain them in the long term*."

While not advocating entirely selling out to overseas interests, Mr Kerin is encouraging those in agribusiness to consider the "*value of co-investment that will allow producers to continue doing what they do best while the investors themselves secure the markets for our quality products*."

While the Register may provide marginally better data on foreign ownership of Australian agricultural land, in our view agribusinesses would be better served focusing on opportunities to work with foreign investors, rather than concentrating on the perceived threat.

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INSIGHT | **Mark Minarelli & Lindsay Smith**

Getting Things in Order

Advance Care Directives

From 1 July 2014, South Australians have been able to record their instructions and wishes for future health care and living arrangements in a new document, known as an "Advance Care Directive". The Advance Care Directive has replaced three earlier documents, namely, the Enduring Power of Guardianship, the Medical Power of Attorney, and the Anticipatory Direction. However, any of these earlier documents executed before 1 July 2014 continue to have legal effect.

Matters dealt with under an Advance Care Directive

Under an Advance Care Directive, a person is able to:

- specify their instructions, preferences and wishes concerning their future health care, living arrangements and other personal matters; and
- appoint one or more "Substitute Decision-Makers" to make decisions about health care, residential and accommodation arrangements, and personal affairs in the event of becoming unable to make or communicate those decisions.

An Advance Care Directive does **not** give the Substitute Decision-Maker any power over property or financial matters. (These are instead dealt with under an Enduring Power of Attorney).

Validity

An Advance Care Directive becomes valid when it is witnessed in accordance with the *Advance Care Directives Act 2013*. One of the main requirements is that the person giving the directive must sign the form in the presence of a "suitable witness", such as a Justice of the Peace, lawyer, Minister of Religion, or bank officer with five years or more continuous service, together with a range of other persons listed in the *Advance Care Directives Regulations 2014*.

Effective from 28 May 2015, however, the Regulations impose a new (and slightly unusual) requirement – each Substitute Decision-Maker must now sign ahead of the person giving the directive. If a Substitute Decision-Maker signs last, the Advance Care Directive will not be taken to have been witnessed in accordance with the Regulations. The validity of the Advance Care Directive would therefore be in doubt.

Other requirements

An Advance Care Directive can only be made by an adult. He or she must be competent to give the directive, that is, he or she must understand what an Advance Care Directive is and the consequences of making an Advance Care Directive.
Before signing and accepting an appointment, the Substitute Decision-Maker is required under the Regulations to have read an information sheet, *Substitute Decision-Maker Guidelines*.

Under the Regulations, the person giving the directive is required to read an information sheet, *Advance Care Directive Information Statement*. Apart from ensuring that the relevant person has received and read the *Advance Care Directive Information Statement*, the "suitable witness" must certify that the person appeared to understand the Statement and that the person did not appear to be acting under any form of duress or coercion.

When an Advance Care Directive is used

A Substitute Decision-Maker or health practitioner can act under an Advance Care Directive if the person who gave the directive:

- is required to make a particular decision; and
- has impaired decision-making capacity, whether temporarily or permanently, in relation to that decision.

Observations

Although there are obvious advantages in making an Advance Care Directive, it seems a backward step that the State Government should now insist on the Substitute Decision-Maker signing first. This is likely to cause delays for many of the persons giving a directive who, having arranged for the Advance Care Directive to be prepared, must then await the return of the signed form from each of the Substitute Decision-Makers before finally making arrangements for it to be witnessed in the presence of a suitable witness.

There seems a danger that, in order to save time, many persons will make an inappropriate choice of Substitute Decision-Maker rather than choosing a more suitable family member or friend who happens to be living further afield. A further problem is that, being used to dealing with the conventional order in which documents are signed, the suitable witness may not be alert to the fact that the Substitute Decision-Makers are required to sign first.

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NEWS & VIEWS | **Ben Duggan**

The Enterprise Contract

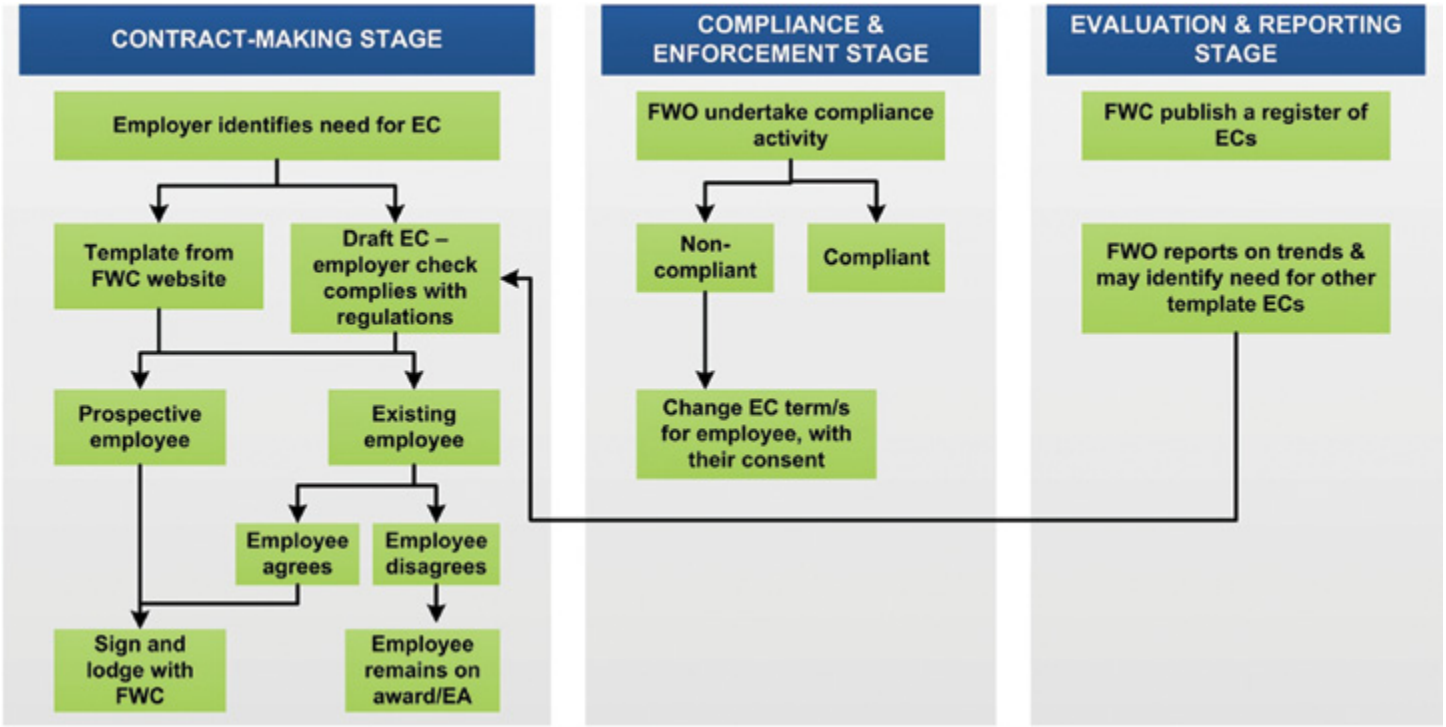
An AWA by another name

The Productivity Commission (PC) released its long awaited draft report in relation to the Australian workplace relations framework on 4 August 2015[1].

In brief, the PC has concluded that the workplace relations framework is "not dysfunctional" but there are reforms that can be made to improve the framework.

Interestingly, a reform that has been "floated" by the PC is the idea of a possible new type of individual statutory agreement to be known as the "enterprise contract" to meet the needs of small and medium sized businesses[2] (see chart as extracted from the PC's draft report).

Making an enterprise contract



An enterprise contract would, subject to a no disadvantage test, enable employers to vary a term(s) of a Modern Award for an entire class or group of employees without the need to either negotiate with each employee on an individual basis or form an enterprise agreement.

The PC, recognising the high costs associated with current statutory options (including enterprise agreements), proposes measures to minimise the costs associated with the adoption of the enterprise contract that are accompanied by a range of safeguards as follows:

- An existing employee would be able to choose whether to sign an enterprise contract or stay with their existing employment contract.
- The employer would be required to provide employees with a written form of the enterprise contract, so they were aware of its entitlements and obligations, which would then be lodged with the FWC.
- In contrast to an enterprise agreement no prior approval would be required of an enterprise contract before it is lodged with the FWC.
- The FWC would test compliance using the no disadvantage test following a complaint by an employee covered by the enterprise contract.
- A failure of the enterprise contract to pass the no disadvantage test would empower the Fair Work Ombudsman to vary the contract (which would include all other relevant employees covered by the same enterprise contract).
- The lodgement of the enterprise contract would also allow the FWC (or the Fair Work Ombudsman) to analyse the nature and trends in such contracts, and to provide a basis for industry templates that would enable any business to adopt a contract with certainty that it would pass a no disadvantage test.
- An employee could exit the enterprise contract after one year and return to the award (or any other agreed contract).

In brief, the PC has concluded that the workplace relations framework is "not dysfunctional" but there are reforms that can be made to improve the framework.

[1] Workplace Relations Framework, Productivity Commission Draft Report, August 2015.
[2] See chart as extracted from the Workplace Relations Framework Draft Report.

The PC's idea for an enterprise contract in its draft report recognises the practical difficulties, including high cost of negotiating individual arrangements and enterprise agreements under the current workplace relations framework.

The PC proposes that the enterprise contract would also have an expiry date, at which time the employer and employee would have to select among various options including:

1. The continuation of the current enterprise contract;
2. An adapted version of the current enterprise agreement;
3. A separate individual arrangements; or
4. An enterprise agreement.

In relation to the last option the PC's view was that enterprise contracts might provide a natural vehicle for progression to standard enterprise agreements as employees could, after one year, elect through a majority vote to commence enterprise bargaining.

In South Australia, the option of an enterprise contract could provide a cost effective and flexible work arrangement for its high proportion of small and medium businesses.

To test the PC's "floated" idea of an enterprise contract further, it seeks information on the costs (including compliance costs) and benefits of an enterprise contract from employers and other stake holders.

The PC has identified particular areas of interest as follows:

- Additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements;
- The extent to which the enterprise contract would be a suitable addition to the current suite of employment arrangements, how it could fill the gap identified, and specific examples of where and how it could be utilised;
- Clauses that could be included in the template arrangement;
- Possible periods of operation and termination; and
- The advantages and disadvantages of the proposed opt in and opt out arrangements.

The PC has invited submissions from employers and other stakeholders that are to be made by no later than Friday, 18 September 2015.

Comment

The PC's idea for an enterprise contract in its draft report recognises the practical difficulties, including high cost of negotiating individual arrangements and enterprise agreements under the current workplace relations framework.

Cleary the PC's enterprise contract idea is targeted to small and medium businesses who have not traditionally engaged in enterprise bargaining because "the procedural aspects of such bargaining can be daunting..."[3].

In South Australia, the option of an enterprise contract could provide a cost effective and flexible work arrangement for its high proportion of small and medium businesses.

The ability to utilise template enterprise contacts which could provide for industry tailored flexibilities not available under applicable Modern Awards, coupled with the avoidance of compliance costs associated with formal approval of such contracts, are likely to be attractive to this group of employers.

A largely negative response to the idea for an enterprise contract with comparisons to "AWAs" (which became associated with the former WorkChoices framework) can be expected from the trade union movement in its submissions to the PC.

Employers will await with interest as to whether the Coalition Government will adopt any of the PC's recommendations (including the possible idea for an enterprise contract) as contained in its final report in the lead up to the next Federal election.

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[3] Page 37 of the Workplace Relations Framework Draft Report.

CASE IN POINT | **Patrick Walsh**

Supreme Court Awards Injured Worker $1.3 Million

Lessons for businesses using contractors

A recent decision by the Full Court of the Supreme Court of South Australia highlights the cost of common law claims.

Facts

The worker, Mr Sayed Anwar, was working in a potato packing plant operated by Mondello Farms Pty Ltd ('**Mondello Farms**'), pursuant to a labour-hire agreement. At the time of the injury, Mr Anwar was 21 years of age.

Mr Anwar's duties required him to, amongst other things, remove 20 kilogram bags of washed potatoes from a conveyor belt and place them manually on a pallet. On 11 April 2005, at which point he had only been working at the plant for just over a week, his hand became caught in a gap between the belt and a roller. His hand was caught for approximately 10 minutes, before it could be extracted using tools.

As a consequence of the incident, Mr Anwar suffered burns to the back of his hand and underwent plastic surgery on 5 May 2005, in which a skin graft was performed.

In September 2005, Mr Anwar suffered a psychotic episode and was subsequently diagnosed as suffering from schizophrenia. He then later developed Type II Diabetes.

... his hand became caught in a gap between the belt and a roller. His hand was caught for approximately 10 minutes, before it could be extracted using tools.

District Court

The Trial Judge, His Honour Judge Cuthbertson, found that Mondello Farms was liable in negligence and breach of statutory duty.

His Honour then went on to find that Mr Anwar's schizophrenia had been caused by the stress he suffered as a result of the hand injury and that his schizophrenia was the primary cause of his inability to work.

Judge Cuthbertson assessed the damages suffered by Mr Anwar as:

Past loss - $574,825.42.

Future loss - $1,503,057.50.

Included in this assessment was an amount of $11,032 for future treatment of Mr Anwar's diabetes. This amount was fixed after His Honour had already reduced it by 50% to account for his finding that Mr Anwar would have developed diabetes by the age of 50 years in any event.

This was an extreme reaction by an extremely vulnerable and predisposed individual'.

Importantly, in applying the statutory test set out in section 33 of the *Civil Liability Act 1936* (SA) ('**the Act**'), Judge Cuthbertson found that Mondello Farms did not owe Mr Anwar a duty of care for the mental harm caused by the hand injury as a reasonable person in the Mondello Farms' position would not have foreseen that a person of normal fortitude in Mr Anwar's position would have suffered a psychiatric illness as a consequence of the hand injury. His Honour stated that '*This was an extreme reaction by an extremely vulnerable and predisposed individual*'.

Accordingly, His Honour did not award damages for the psychiatric component of Mr Anwar's claim, and instead only awarded damages in the amount of $18,042.

His Honour went on to state that if Mondello Farms was liable for the psychiatric component of the claim, he would have awarded damages in the amount of $1,679,415.77, which included a reduction of 30% to account for the likelihood that Mr Anwar would have developed schizophrenia in any event.

Supreme Court

The issues on appeal were:

1. Was Mondello Farms' breach of duty a cause of Mr Anwar's schizophrenia, having regard to section 34 of the Act?
2. Was the consequential mental harm (mental harm arising as a consequence of a physical injury) reasonably foreseeable?
3. Did the trial judge err in reducing his calculation of the damages he would have awarded to Mr Anwar, had he found Mondello Farms liable for his schizophrenia, by 30%?

In his judgement, Justice Stanley (Kourakis CJ and Gray J concurring) stated that the trial judge had placed too much importance on the nature of the mental harm suffered by Mr Anwar, namely the fact that he had developed schizophrenia.

His Honour then went on to find that Mr Anwar's schizophrenia had been caused by the stress he suffered as a result of the hand injury and that his schizophrenia was the primary cause of his inability to work.

Their Honours found that the Court was required to consider 4 factors in relation to determining liability pursuant to section 33 of the Act:

1. Whether the plaintiff has in fact suffered mental harm.
2. The Court must conduct its enquiry from the viewpoint of a '*reasonable person in the defendant's position*'. This, the Court stated is '*the reasonable person possessed of the knowledge, experience, and capacity for care and foresight of, or to be expected of, the defendant*'.
3. Whether it is reasonably foreseeable by that defendant that a person of normal fortitude in the plaintiff's position would suffer **a** psychiatric illness in the circumstances of the case.
4. The Court must have regard to the use of the indefinite article. It is only necessary for the plaintiff to establish that it was reasonably foreseeable that they would have suffered any diagnosable psychiatric injury, rather than the specific injury that had been suffered.

It is this last point that proved to be the key difference, as their Honours found that '*a reasonable person in the defendant's position, namely, the operator of a potato processing factory using unguarded machinery which it knows has the potential to do physical harm of varying levels of severity, engaging unskilled manual labourers from Afghanistan of normal fortitude who suffers injury to his hand, of sufficient severity to require surgery, when trapped in unguarded machinery,* ***might suffer a psychiatric illness, such as anxiety or depression***.'

Justice Stanley (Kourakis CJ concurring) then went on to consider the medical evidence and found that although an award of damages in relation to Mr Anwar's schizophrenia should be made, a reduction of 30% was manifestly inadequate as the medical evidence established that Mr Anwar would have likely gone on to develop schizophrenia regardless of the hand injury. Accordingly, their Honours reduced the award of damages by 50%.

On this basis, the appeal was allowed and the damages awarded to Mr Anwar were increased from $18,042 to **$1,331,869.87**.

Lessons for businesses/employers

Businesses that commonly use contractors of labour hire companies need to be particularly mindful of their work health and safety obligations as they are not afforded the protection of the restrictions placed on employees bringing a claim for common law damages by the *Return to Work Act 2014* (SA); which requires a worker to establish a level of whole person impairment in excess of 30% (for either physical or mental injury – not both) arising from the work injury before they can bring a claim against their employer.

Businesses operating in "high-risk" industries should consider arranging periodic work health and safety audits to ensure that they are placed in the best position to rebut any allegations of negligence if somebody does suffer a workplace injury.

Close attention should also be paid to:

1. the terms of the contract under which labour is provided to your business to ensure that you are not incurring undue risk and liability; and
2. ensuring that the right insurance policies are purchased by your business that offer the coverage in the event of a workplace injury to avoid unpleasant surprises when a claim is made and coverage refused.

Businesses should consult with their legal providers to ensure that their business arrangements minimise the risk of a substantial claim for damages being brought against them by an injured worker.

Businesses operating in "high-risk" industries should consider arranging periodic work health and safety audits to ensure that they are placed in the best position to rebut any allegations of negligence if somebody does suffer a workplace injury.

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INSIGHT | **Sandy Donaldson & Girish Rao**

Nominee Directors

Between a rock and a hard place

A breach of any of these duties can give rise to a civil action for damages, or a civil penalty, or can also be the subject of a criminal prosecution.

Nominee directors are those appointed to the board of a company to represent the interests of a stakeholder. The stakeholder may be a shareholder, creditor or even an employee.

The question that troubles many nominee directors is, "*when, if at all, can I act in the interests of my appointor?*".

Take the following example:

- George is a director of Good Pty Ltd ("**Good**").
- He was nominated to his position by OK Pty Ltd ("**OK**") which is a shareholder of Good.
- The Board of Good is meeting soon to discuss and vote on a proposed acquisition of another company.
- OK stands to make significant profit from the acquisition, as it is also a shareholder in the target company.
- George is unsure whether he can approach the matter with an open mind and wonders whether he should excuse himself from voting.
- Good Pty Ltd's constitution does not offer George any guidance about what he can do.

There can be many variations on this theme. George may be a director of his nominator OK. He may also be a shareholder of OK, and have a personal interest in the outcome of the proposed acquisition. There could be a shareholder's agreement for shareholders of Good which addresses the role of a nominee director, but in the example above it is assumed that there is no agreement.

Duties of a director

Directors of companies have numerous and substantial duties both under the *Corporations Act* and at common law (unless common law duties are excluded by the Constitution or other agreement). Some of the main duties of a director under the *Corporations Act* are:

- To exercise powers and discharge duties with the degree of care that a reasonable person would exercise subject to a *business judgment rule* (section 180).
- To *act in good faith in the best interests of the corporation*, and *for a proper purpose* (section 181).
- Not to improperly use the position as a director to *gain an advantage for themselves or someone else or cause detriment to the company* (section 182).
- Not to use information gained as a director to *gain an advantage for themselves or someone else, or cause detriment to the company* (section 183).

A breach of any of these duties can give rise to a civil action for damages, or a civil penalty, or can also be the subject of a criminal prosecution (section 184).

The culmination of these duties, particularly the primary duty of a director to act in good faith in the interests of the company, means that above all else, George must have the best interests of Good Pty Ltd in mind when making any decision. If George considers that the proposed acquisition is in the interests of Good, he should be able to participate in discussions, and vote, without a breach of duty. However, if George has information gained from OK that the price may be inflated, or that the acquisition would not otherwise be in the interests of Good, he will face a dilemma.

Conflicts of interest

Issues arise where a nominee director is required to reconcile their primary duty to the overall company and their duty as a representative of a particular class of stakeholder. At common law, the fiduciary duties of a director include a duty to avoid a conflict of interest. In the *Corporations Act*, this is dealt with in section 191 by requiring a director who has a *material personal interest* in a matter to give notice to the other directors. This may be given as a standing notice (section 192). In a proprietary company, if the interest is disclosed, a director may participate in meetings and vote in relation to a matter involving a conflict of interest (this is the effect of the replaceable rule in section 194) unless the constitution of the company provides otherwise.

In the case of a public company, there are prescriptive rules that govern the conduct of directors in positions of potential conflict (section 195). Directors must disclose any personal interests prior to voting on matters and must not vote or participate in discussions on a matter in which they have a conflict, unless the board has approved otherwise.

Wholly owned subsidiaries

The picture is a little clearer in the case of a nominee director of a wholly owned subsidiary who represents the interest of a holding company. The *Corporations Act* states that a nominee director is taken to have acted in good faith in the best interests of the subsidiary if, amongst other things, the constitution expressly allows the director to act in the best interest of the holding company.

If a subsidiary company's constitution does not deal with the issue of nominee directors, it should be amended to do so to clarify the position of nominee directors.

The *Corporations Act* does not provide the same protection for nominee directors of non-wholly owned subsidiaries. In fact, there is very little guidance available.

George's dilemma

George's primary duty is to act in good faith in the interests of Good Pty Ltd. There is clearly no way that he could approach the matter with an open mind, free of any competing interests. But that does

not mean that George cannot vote. The legal principle is that George may act in the interests of OK Pty Ltd if he honestly and reasonably believes that the proposed acquisition by Good is also in the best interests of the company.

If George has information, likely gained from OK, that the acquisition may not be in the interests of Good, his position is difficult. He could, in a manner similar to a director of a public company, declare a conflict of interest and refrain from participating in discussions or voting on the matter. However, if he has information, which may have been gained confidentially from OK, that would be material to the consideration of the matter by the directors of Good, should he disclose this information? His common law fiduciary duties may require this. However, if information has been obtained in confidence from OK, this would also be a breach of fiduciary duty. Because of the competing duties, it would probably satisfy his common law obligations if he does refrain from participating in meetings of directors of Good and voting in relation to the matter. However, there is some uncertainty.

Company constitutions and shareholders agreements

In the case of a nominee director of a wholly owned subsidiary of a company, two issues are likely to arise. It would, as noted above, be desirable for the constitution to incorporate the provisions of section 187 of the *Corporations Act* to allow the nominee director to act in the best interests of the holding company.

... appropriate provisions in a constitution or shareholder's agreement may go a long way to resolving the dilemma in which a nominee director may be placed.

In proprietary companies with a number of shareholders, there will always be the potential for conflicts of interest and potential breaches of duty by a nominee director as a director of the subsidiary in relation to disclosure of information etc. It is possible for these issues to be addressed, at least to some extent, by suitable provisions in the constitution of the company and in a shareholder's agreement. These may make provision for:

- the ability of a nominee director to disclose information to the stakeholder appointing the nominee director;
- a nominee director to act in the interests of the shareholder appointing the nominee; and/or
- limiting the duties of directors to those contained in the *Corporations Act*, and excluding common law duties.

Even with appropriate provisions in the constitution and/or a shareholder's agreement, there may still be areas of uncertainty for a nominee director. However, appropriate provisions in a constitution or shareholder's agreement may go a long way to resolving the dilemma in which a nominee director may be placed.

If a nominee director does breach a duty to a company, and is held to be liable in a civil action for consequences of the breach of duty, the company cannot exempt, or indemnify, the director for this liability (section 199A of the *Corporations Act*). This is another reason to ensure that the duties of a nominee director are clarified by appropriate provisions in a constitution or shareholder's agreement.

Taking one consideration with another, like the policemen in *The Pirates of Penzance*, a nominee director's lot is not a happy one.

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NEWS & VIEWS | **William Esau & Briony Hutchens**

State Tax Reform

Corporate reconstructions and transfers of property within a corporate group

The Budget 2015 reforms to State taxes make corporate reconstructions easier with effect from 18 June 2015.

A new Part 4AA (Corporate Group Exemptions) is to be inserted into the *Stamp Duties Act*. These provisions replace the old *ex gratia* system for stamp duty relief on corporate reconstructions.

The new Part defines a corporation to include companies and unit trusts and a corporate group as essentially two or more corporations where the parent corporation (A) holds a 90% or more direct or indirect interest in the other corporation(s) (defined to be a subsidiary). To qualify, it is necessary that corporation (A) is entitled (whether directly or indirectly) to cast or control the casting of 90% or more of the maximum number of votes at a general meeting of the subsidiary, corporation (B). Without this condition being satisfied, then (B) is not a subsidiary of (A) and the corporations do not form a corporate group.

The new Part applies to a transaction involving a conveyance of property or an agreement to convey property from a member of a corporate group to one or more other members of the corporate group. The new Part also applies to duty arising under the landholder provisions in Part 4 of the *Stamp Duties Act*, which impose duty on a transfer of a 50% or more interest in a company or unit trust that holds land or an interest in land in South Australia with a value of $1M or more. In this situation, what is transferred is shares or units in a corporation within the corporate group, rather than an interest in the land itself.

The Commissioner must grant the exemption if:

1. the corporate group's interest in the property the subject of the transaction is not diminished as a result of the transaction; and
2. the purpose, or one of the purposes, of the transaction:
    a) is to change the structure of the group; or
    b) is to change the holding of assets within the group; and
    c) the transaction does not result in property of the group being held by the recipient corporation as trustee of a discretionary trust; and
    d) the transaction is not otherwise part of a tax avoidance scheme within the meaning of Part 6A of the *Taxation Administration Act*.

Application for exemption can be made at any time before or within one year after the completion of the transaction. However, it is necessary to make full and complete disclosure of all relevant documents including, where the application is in respect of a proposed transaction, draft documents intended to effect, acknowledge, evidence or record the transaction, and other evidence requested by the Commissioner regarding the transaction. This evidence may be required to be verified by statutory declaration.

In granting an exemption in respect of a proposed transaction, it will be a condition of the exemption that the applicant will, within 2 months of the transaction occurring, advise the Commissioner if the actual transaction, or any circumstances relating to it, differs materially from the proposed transaction or any circumstances of the proposed transaction, or if information relevant to the transaction, or any circumstances relating to the transaction, differs materially from information specified in the application. If the applicant fails to notify the Commissioner of anything as required by this condition, the Commissioner may revoke the exemption.

The Commissioner may also revoke an exemption at any time if:

1. he ceases to be satisfied that the transaction qualifies for the exemption; or
2. in the case of an exemption granted in respect of a proposed transaction, he becomes aware (presumably other than by way of notification by the applicant in compliance with the condition - however this is not clear from the draft legislation) that the documents that effected the transaction differed in a material particular from the draft documents submitted with the application for exemption; or
3. he becomes aware that the applicant provided false or misleading information, or failed to provide relevant information, in support of the application.

If the exemption is revoked, then duty is payable on the transaction (and the liability assessed in relation to the circumstances applying at the date of the transaction) as if the transaction had not been exempt. The time of payment of duty is taken to be 2 months from the date of the revocation.

However, the Commissioner has an unfettered discretion to impose penalty tax and interest as if the time for payment of the duty was 2 months from the date of the transaction itself. If additional duty, interest and penalty tax becomes due, then the members of the corporate group which were parties to the transaction are jointly and severally liable for these amounts.

We note that the Bill inserting the provisions has not yet been passed by the Legislative Council. A number of technical issues have been raised in respect of the draft legislation which we expect will result in amendments to the Bill before it is passed. However, we do not expect this to impact on the substantive effect of the legislation. Until the Bill is passed, the Commissioner is assessing applications for exemption as if the draft legislation contained in the Bill had been enacted.

The Tax and Commercial Teams at DW Fox Tucker can assist in advising on whether the new corporate group exemption rules will be available to any transaction entered into, or proposed to be entered into, after 18 June 2015.

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NEWS & VIEWS | **Amy Bishop**

Proposed Stamp Duty Changes

How they affect transaction structuring (Part 1)

The State government's proposed abolition of stamp duty on the transfer of business assets and shares in private companies and the phasing out of stamp duty on the transfer of commercial real property, as well as the eventual abolition of stamp duty in relation to transactions of a unit trust scheme, make restructuring of a business less expensive and consequently more manageable.

We say 'proposed' abolition because the State Budget proposals, many of which came into effect from 18 June 2015, are presently contained in the ***Statutes Amendment and Repeal (Budget 2015) Bill 2015***[1] which is not expected to be passed for some time. In the meantime, Revenue SA will provide ***ex gratia*** relief as if the Bill has been passed.

As well as a number of other measures, such as amendments to the ***Land Tax Act 1936*** and other amendments to the ***Stamp Duties Act 1923***,[2] the Bill proposes to give effect to the following:

- a broad definition of land to apply throughout the Act;
- removal of the $1 million landholder threshold;
- phased abolition of stamp duty on non-residential and non-primary production land (essentially on commercial land);
- abolition of stamp duty on most non-real property transfers;
- abolition of stamp duty on share transfers;
- abolition of stamp duty on the issue, redemption and transfer of units (in unit trusts) from 1 July 2018; and
- corporate re-construction exemption (which is dealt with in another article in this report).

Land

The introduction of a broad concept of land, to be applied throughout the Act, is aimed at ensuring any asset having any sort of connection to any type of land is captured. This will be important when looking to apply both the phased abolition of duty on non-residential and non-primary production land and the abolition of stamp duty on most non-real property transfers.

The main things included in the concept of land introduced by the Bill are:

- an estate or interest in land (including land covered by water);
- an option or right to acquire land or an interest in land;
- anything fixed to land whether or not they constitute fixtures at law;
- a mining tenement, certain pipelines and an interest conferred by a forestry property (vegetation) agreement.

The extension to things connected to the land is a significant expansion from the inclusion of only fixtures to land. However, provisions of similar effect have existed in the Act prior to the Bill.

Landholder threshold

The abolition of the $1million threshold that previously needed to be reached before stamp duty under the landholder provisions[3] would apply comes into effect on 1 July 2018.

After this time a consideration of whether there is an acquisition or increase of a prescribed interest, for the purposes of the landholder provisions of the Act, will need to be made each time there is a transaction involving shares or units regardless of the value of any land held by the company or unit trust.

Whilst stamp duty on share transfers is to be abolished from 18 June 2015 and stamp duty on unit transfers[4] is to be abolished entirely from 1 July 2018, if a sufficient interest in an entity which holds land[5] of any value is acquired or increased, the landholder provisions will still apply. Although this will include an entity which merely has a leasehold interest, there should be no resulting duty payable if commercial rent is payable and the lease has no inherent value.

Continued overleaf...

[1] Referred to as the 'Bill';
[2] Referred to as the 'Act';
[3] In Part 4 of the Act;
[4] and other transactions involving a unit trust scheme;
[5] It has been indicated that this will be only residential and primary production land, but see later as to whether this is accurately reflected in the Bill;

Proposed Stamp Duty Changes

How they affect transaction structuring (Part 1)

...from previous page

Commercial land

There is to be a phased abolition of stamp duty on non-residential and non-primary production land. This means that from 1 July 2016 to 30 June 2017 the sale of a commercial property will attract 66$^{2}/_{3}$% of the stamp duty that otherwise would have been payable, from 1 July 2017 to 30 June 2018 such a sale will attract 33$^{1}/_{3}$% of the stamp duty that otherwise would have been payable and from 1 July 2018 there will be no stamp duty payable.

There is to be a phased abolition of stamp duty on non-residential and non-primary production land.

According to Information Circular 76[6], released by Revenue SA to further explain the 2015-16 State Budget stamp duty measures, the landholder threshold removal will only apply where control of an entity holding residential and primary production land changes. Presumably, this is premised on there being, from the time of removal of the threshold, a complete abolition of duty on commercial land.

We do, however, have some concerns about the present drafting of the Bill in this regard. The abolition only refers to a "conveyance or transfer" of residential and primary production land. What it fails to do is refer to transactions where an entity notionally acquires an interest in residential and primary production land and thus ensure stamp duty on such transactions is also abolished. As presently drafted we can't see why the landholder provisions won't still apply and attract duty after the time of the abolition.

Another issue of note here is the debate that may be needed to be had about the classification of land as residential or primary production land. The Circular provides that the land use codes issued by the Valuer-General's office will generally be relied on for this purpose. If there is any disagreement with these codes, presumably the issue will need to be taken up with the Valuer-General's office before Revenue SA will change its stamp duty assessment.

This could raise problems with vacant land which is zoned as, for example, primary production but which is subdivided, with an intent to undertake a development, before the land is conveyed. In this case land will potentially pass, while in the course of development, from being primary production land to commercial land to become residential land. Ordinarily, a dispute about duty payable stands to be resolved by objection to the Commissioner and, if necessary, the Treasurer and Supreme Court, but here the issue will lie with the Valuer-General and there is no mechanism under the Act for disputing the Valuer-General's classification. There is also the problem of how land which is not in a zone at all is treated.

Non-real property transfers

The abolition of stamp duty on non-real property transfers, as contained in the Bill, will mean many business assets will no longer be assessable for stamp duty. Mechanisms such as Division 122[7] asset rollovers into a company, whether to resolve issues arising from Division 7A[8], for estate planning purposes or otherwise, may therefore become more financially accessible.

One issue to note in undertaking a transaction involving business assets is that there may be some assets, for example plant and equipment (unless the business is a primary production business), that are not covered by the abolition. The Bill provides that the abolition will apply to all property other than land or prescribed goods. Prescribed goods is a defined term meaning goods the subject of an arrangement that includes a dutiable land transaction[9] and the term includes goods that have a significant connection with the land.[10]

It would appear from the Circular that the goods 'significant connection' to land is intended to be given more weight than the drafting of the Bill presently provides. It is possible that an amendment will be made to implement such an intent before the Bill is passed as, without it, the latter part of the definition adds little to the requirement that the goods be the subject of an arrangement including a dutiable land transaction.
It would appear that dealings with assets such as intellectual property and goodwill, not being classifiable as 'goods', will not attract stamp duty. Also safe are the specific assets excluded from being prescribed goods, namely:

- goods that are stockintrade;
- materials held for use in manufacture;
- goods under manufacture;
- goods held or used in connection with land used for primary production;
- livestock;
- a motor vehicle or trailer; and
- a ship or vessel.

In a transaction involving land in which any goods other then these are transferred, careful consideration should be given to whether the goods will be considered prescribed goods and their transfer stampable.

The abolition of stamp duty on non-real property transfers, as contained in the Bill, will mean many business assets will no longer be assessable for stamp duty.

[6] Referred to as the 'Circular';

[7] of the *Income Tax Assessment Act 1997*;

[8] *ibid*

[9] Which is also defined and means a transaction that results in duty being payable on a conveyance or transfer of land or as if there were a conveyance or transfer of land;

[10] There are also certain goods excluded from this term, as described below;

Interestingly, there is no provision for any phased reduction of duty on prescribed goods related to commercial land to match the phasing out of stamp duty on such land.

What concerns us is what if there is, for example, a lease at an arguably under market value rent assigned as part of a business sale or rollover. If market value rental is payable under a lease there is usually considered to be no inherent value in the lease and no stamp duty chargeable. The situation is different where the rental is less than the considered market rate. There is, therefore, scope as the Bill is presently drafted for assignment of such a lease to be a 'dutiable land transaction' (since the lease will be within the broad new definition of land and will be considered to have a value and be chargeable with duty). If this course is followed by Revenue SA, any goods of the business being sold that are not within the above exemptions will be assessable to duty.

Of course, if the lease with less than market value rental is over a commercial property, this concern should not be an issue after 1 July 2018 because the lease will, after that time, be covered by the abolition of duty relating to this type of land. Interestingly, there is no provision for any phased reduction of duty on prescribed goods related to commercial land to match the phasing out of stamp duty on such land.

Treatment of the sale of a partnership interest will be an interesting area to keep an eye on. Previously, the sale of a partnership interest was itself a stampable transaction.[11] Now, although stamp duty on the partnership interest itself (being property that is not land or prescribed goods) is abolished, duty is able to be levied by looking through to the equitable interests of a selling partner in any land[12] and prescribed goods owned by the partnership. Thus, where there is no land or prescribed goods owned by a partnership there will be no stamp duty on transactions involving changes in interests in the partnership. This will avoid needing to evidence the value of such a partnership interest or to demonstrate that it has no value, such as has been the case with interests conveying only an entitlement to income.

Treatment of the sale of a partnership interest will be an interesting area to keep an eye on. Previously, the sale of a partnership interest was itself a stampable transaction.

Shares

The long-awaited abolition of stamp duty on share transfers is covered by the Bill. This exemption does not, however, override the operation of the landholder provisions.

These continue to levy ad valorem duty on transactions as a result of which a prescribed interest[13] in a land holding entity is acquired or increased.

Units

There are issues surrounding the treatment of units in the Bill. We expect further clarification and possibly amendments to be made. Accordingly, we defer our comments on these provisions to the second part of this article.

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[11] On which stamp duty was payable based on the market value of the interest (or consideration paid, if higher), which Revenue SA took to be the relevant percentage interest in the net value of the assets of the partnership
[12] From 1 July 2018 this is only relevant to residential and primary production land;
[13] Essentially being a direct or indirect interest of 50% or more;

INSIGHT | **Linda Scalzi**

Caveatable Interests

When to lodge a caveat

A caveat is a warning which comes from the Latin word for 'beware'.

Where a person has an unregistered interest in real estate, a caveat may be lodged to give notice of their interest. Depending on the type of caveat lodged (absolute or permissive), a caveat can prevent any further dealings with a property until it is removed or withdrawn.

The important thing to note when lodging a caveat is that the interest that is claimed must attach to the land itself.

Interests that are commonly the subject of a caveat include unregistered mortgages, leases and other equitable interests in property. The bottom-line is that the caveator (person lodging the caveat) must have an actual interest in the land itself. If a person is seeking to enforce an interest unconnected with the land itself, a caveat is not the appropriate remedy.

Where a person has an unregistered interest in real estate, a caveat may be lodged to give notice of their interest.

Examples of caveatable interests are:

- an interest as purchaser under an agreement for sale;
- an interest as purchaser under a conditional agreement for sale where the Courts would grant an injunction to protect the interest;
- an option to purchase;
- an equitable mortgage;
- the interest of a registered mortgagor, where the mortgagee has entered into a voidable contract of sale;
- an equitable lease;
- an easement;
- an oral agreement for the extension of an easement supported by acts of part performance;
- the interest of a unit holder in a unit trust;
- a beneficial interest under a resulting trust;
- a profit á prendre;
- exclusive mining rights;
- an inchoate interest in the land; and
- a builder's contractual right to charge the land with all monies owing.

Trustees in bankruptcy can also lodge caveats over property owned by the bankrupt and the bankrupt's spouse to protect the estate and interest of trustees of the bankrupt's estate. Failure to lodge a caveat could have serious consequences. In *IIB Global NV v Pascoe* (No 2) [2011] NSWSC 1270 the lodgement of a caveat prevented the transfer of a mortgage from the mortgagee to the first respondent.

A profit (short for profit à prendre, meaning "right of taking") in the law of real property is a non possessory interest in land similar to the better-known 'easement' which gives the holder the right to take natural resources such as petroleum, minerals, timber, and wild game from the land of another.

Note that if a worker is owed money in relation to work they have done on the land, a Worker's Lien can be lodged on the title in lieu of a caveat.

Inchoate interests are generally property interests that are likely to vest, but have not yet actually done so. The inchoate interest usually is dependent on an event occurring that triggers the interest, such as a relative's death triggering an inheritance. The interest that the inheriting relative has in the inheritance is inchoate until the death occurs, at which point it becomes a real interest.

Note that if a worker is owed money in relation to work they have done on the land, a Worker's Lien can be lodged on the title in lieu of a caveat. However, pursuant to section 15 of the *Worker's Lien Act 1893*, a lien under that Act upon an estate or interest of any owner or occupier will cease unless an action is brought against the owner or occupier to enforce the lien within 14 days

from the registration of the lien. The same provisions under the *Real Property Act 1886* relating to caveats apply to the Worker's Lien, however, the provisions under the *Real Property Act* that authorise the removal of a caveat by application to the Registrar-General are not considered to apply to a notice of a Worker's Lien.

If you have contributed to the purchase of land or have improved the land physically somehow, you may also have a caveatable interest in the land. For example, a partner to a former domestic relationship may well have the proprietary rights to the land on the basis of a resulting trust or a constructive trust as was the case in *Baumgartner v Baumgartner* (1987) 164 CLR 137.

A registered proprietor may also lodge a caveat against dealings with his or her own land, but the burden of proof rests on the caveator to justify the caveat. In *Daniell v Paradiso* (1989) 154 LSJS 146, the courts ordered that the caveat be removed to allow for the registration of a mortgage. The authorities recognise a number of other circumstances in which it may be appropriate for a registered proprietor to lodge a caveat. Examples of this include where the registered proprietor believes their interest in the land may be threatened by fraudulent activity or to prevent the registration of a transfer until payment of the purchase money.

In South Australia, caveats do not lapse. They protect the interest until they have been withdrawn, removed or have otherwise been extinguished.

However, some authorities indicate that in order to lodge a caveat on its own title, a registered proprietor must have some interest, or point to some circumstance, going beyond its status as registered proprietor. In *Sinclair v Hope Investments Pty Ltd* [1982] 2 NSWLR 870, it was determined that the registered proprietor had a right to lodge a caveat against its own title to prevent their mortgagee from completing a voidable contract of sale for the land.

Examples of non-caveatable interests are:

- the interest of a purchaser under a conditional contract of sale where the courts would not protect the interest by granting an injunction;
- a prima facie equity to set aside a transaction for fraud;
- the interest of a person who has made improvements to another person's land, but has not obtained an order for relief;
- an agreement to share profits on resale of land;
- recovery of a debt unrelated to the land;
- mere possession of a building site by a builder; and
- a mere equity to set aside a mortgagee's sale allegedly made in breach of the mortgagee's duties.

Generally, caveats protect property rights that exist in equity rather than under the *Real Property Act* . In South Australia, caveats do not lapse. They protect the interest until they have been withdrawn, removed or have otherwise been extinguished. A caveat cannot be relodged without the leave of the Supreme Court.

An application can be made to the Registrar General for the removal of a caveat if the caveatee (the person against whom the caveat is directed) objects to the caveat (*Real Property Act 1886 s191(e)*). The Registrar General will then send a notice to the caveator giving 21 days notice of his intention to remove the caveat.

If the caveator wants the caveat to remain, he or she must make an application to the Supreme or District Court, which may extend the time before the Registrar General removes the caveat or until further order. A State Court has no jurisdiction to extend the caveat where the interest claimed is the subject of a matrimonial case under the *Family Law Act 1975 (Cth)*; in which case orders can be sought in the Family Court of Australia.

If the 21 days passes, the Registrar General must remove the caveat by entering a memorandum that the caveat is discharged (s 191 (f)).

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INSIGHT | **Sandy Donaldson & Morgan Muirhead**

Signing on the Dotted Line in a Digital Age

Electronic transactions and signatures

Now that the majority of all communications take place via email or some other form of electronic communication, contracts may come into existence without any paper or other tangible record. Courts have held that contracts can be contained in emails or other electronic forms of communication.

In the event that a dispute arises as to whether a contract has been concluded, or some other form of transaction effected, electronically, the provisions of the relevant *Evidence Act* of a State or the Commonwealth will govern the admissibility and requirements for proof of electronic communications.

Apart from questions of proof, issues of validity can arise if a *signature* of a party is required for a contract or other document. A signature may be required, for example, for:

- a contract to be accepted by a party if the contract document itself envisages acceptance by signature;
- contracts or documents which, by law, require a signature, such as a contract for the sale of land (under Section 26 of the *Law of Property Act 1936* (South Australia)) or a guarantee; and
- a deed which a natural person executes "by signing, or making a mark, on the deed" (*Law of Property Act*, s.41).

Historically, the concept of a *signature* was the signing of a person's name, or the making of a mark, on a paper or other copy of a document. With the advent of computers, it is necessary to consider electronic and digital signatures (which are not the same, as noted below).

Digital and Electronic Transactions Acts

The *Electronic Transactions Act 1999* (Cth) was enacted to implement the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996 which provided a set of internationally accepted rules to remove legal obstacles and provide a more secure environment for electronic commerce. As the *Electronic Transactions Act 1999* (Cth) is restricted to Commonwealth laws, each State and Territory has also enacted their own *Electronic Transactions Act* (the relevant South Australian Act being the *Electronic Transactions Act 2000* (SA)).

Each of these Australian statutes establishes the general rule that a transaction is not invalid because it took place wholly or partly by means of an electronic communication. However, this general rule does not apply in respect of a transaction to the extent that a more specific provision of the legislative framework applies, as it does in the case of electronic signatures.

Courts have held that contracts can be contained in emails or other electronic forms of communication.

When a law requires the signature of a person, the electronic signature must adopt a reliable method for identifying the signatory and that signatory's intention in relation to the relevant document.

Electronic signatures

Electronic signatures often take the form of a digitalized image of a person's handwritten signature. However, they are more generally a sound, symbol or process attached to a document as a means, and with the intent, of the person signing the document.

In order to rely on an electronic signature, parties need to be able to show that they can identify the signatory and be able to indicate that the signatory knew and agreed to the document they were signing, and be able to show that the method used to affix the signature was reliable.

Digital signatures

Digital signatures are a more advanced type of electronic signature that involve a link to certain verifiable information which determines their authenticity. They might also be described as an electronic fingerprint which contains a unique coded message to ensure the authenticity of the signer.

Most digital signatures rely on public key cryptography as their identity verification core. Essentially, a cryptographically-generated private and public key (a random generated set of digits) is used for identity verification purposes. The private key is only used by, and known to, the person associated with it. The related public key is shared publicly and visible by anyone receiving the document which contains the digital signature.

To create a digital signature, the private key is used to generate a unique code from a combination of the private key and the contents of the document itself, and that code is then embedded in the document. Usually an image attached to the digital signature is calibrated as the visual feature of the signature, such as an electronic copy of the person's handwritten signature.

If the document is amended in any way after a digital signature has been affixed, the signature will no longer be valid, ensuring a higher level of security and accountability. A digital signature will typically also have a greater level of evidential strength than an electronic signature in any dispute or litigation.

Digital signatures are a more advanced type of electronic signature that involve a link to certain verifiable information which determines their authenticity. They might also be described as an electronic fingerprint which contains a unique coded message to ensure the authenticity of the signer.

How does digital signature software work?

The most well-known digital signature software products are DocuSign and Adobe EchoSign, which both operate using a similar process. You simply upload your document to the program and then tag the places in the document where the signatures eventually need to go. The software program sends the marked up file to your specified recipients who then sign it with a few clicks, either with standard cursive fonts or with a scrawl they draw using their mouse (or a finger, using a tablet). The signed file is then sent back to you. You can also set reminders that follow up your recipients to e-sign, and set documents to expire if they aren't signed in a timely manner. A simple dashboard allows the user to keep track of all their outstanding and completed contracts.

Legal risks

It is important to note that while digital signatures are generally more secure than electronic signatures, there is still a risk that the identity of the person using the private key is not accurate. There is not currently any practical way to determine the identity of the person making the digital signature with one hundred percent certainty. Nor is there any way of ensuring that the private key of a signatory is kept secret. For these reasons, one might argue that a handwritten signing is still a superior method of execution as an ink signing can be contemporaneously witnessed and verified by another person.

Additional security techniques, such as biometric authentication, chain of custody features, timestamps and email and IP address tracking, have been developed to mitigate against these risks. Reputable digital signature software products encourage verification of the signatory's identity by a certification authority, being a secure online database that can only be accessed by subscribed users. Each subscribed user, after providing verification information, is issued with a digital signature certificate that is stored online. The recipient of a digital signature can then locate a person's digital signature certificate and compare the public key on that certificate with the one they have received on the document in order to verify the other parties' identity.

Businesses which rely on electronic signatures should consider investing in reputable digital signature software, at least for their more important documents, and should ultimately aim to be satisfied with both their verification practices and those of the other party.

Execution of contracts

Where a contract is required, either by its terms, or by law, to be signed, the way that this often occurs now, in practice, is that pdf copies of a document are printed by parties and signed by the parties. These *counterparts* are usually then sent electronically by email to other parties. If this does happen, the fact that copies are transmitted by email (or otherwise electronically) is not actually an electronic transaction, nor is there an electronic signature. Rather, a paper copy of the document is signed. Although this may seem old fashioned, in the era of electronic and digital signatures, it is a relatively safe (if conservative) way to ensure documents are validly signed.

Documents can be signed by an individual or on behalf of a company in this way. This can also allow for the signature of witnesses, if required.

If a contract, or other document, is to be signed by a company it may be possible for this to be done by two directors, or a director and secretary, or a sole director, using digital signatures or electronic signatures under section 127(2) of the *Corporations Act*, but it may be necessary to satisfy other parties that the signatures are effective.

So even in a digital age, producing a paper document to sign, even if this is then scanned and sent electronically, may be the simplest way.

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CASE IN POINT | **Liam McCusker**

Strategy is King

"If you must be in a hurry, then let it be according to the old adage, and hasten slowly" - Saint Vincent de Paul

A fundamental talent of a good litigation lawyer is the ability to respond quickly, whilst refraining from acting in haste. Put another way, it is the wisdom to know which available strikes will (and will not) result in your client exposing its flanks.

Determining the best course of conduct for a matter is never an easy task - as being able to successfully predict the future course of a dispute predisposes that you already have full knowledge of its history, all of its participants and their individual character traits. Without this knowledge, the balance in almost every decision made will rest on a knife's edge and the consequences of making a (retrospectively) poor decision can be extremely damaging.

By way of example, imagine that you are a producer and exporter of bulk wine. One of your customers places an order for 10 shipping containers of sweet red wine. As is your practice, you engage a wine processing facility to prepare the wine according to the required specifications.

Once the wine has been made, and an independent laboratory verifies that the wine meets the required specifications, you sign off on the test results and arrange for the wine to be collected from the facility and shipped to the customer in Europe.

Unfortunately, when the wine arrives in Europe you are told that the containers have expanded and are leaking. The shipping agent collects samples of the wine to be tested and informs you that it appears that the wine has started re-fermenting during transportation and is unsuitable for consumption as wine.

Consequently, the purchaser rejects the wine and refuses to pay for it. Neither your customer, nor the shipping agent, will take responsibility for the condition of the wine. You seek legal advice on the complex legal and scientific issues that have arisen.

Given the urgency of the matter, within just 2 days of being instructed your lawyer produces a professional and well-reasoned letter of advice that states that "on the information before us", the wine was sound and in good condition at the time of being delivered to the shipping agent. Therefore, as the sale of the wine was made on a 'free on board basis', all risk in the wine passed to the end customer when the wine was delivered over the rail of the ship and the end customer remains liable to pay for the wine supplied accordingly.

You now have a difficult commercial decision to make. Do you, in reliance on the letter of advice, pursue your rights against the customer to have them pay for the wine? The customer has already refused to pay - and they are a good customer of yours. If you push the issue, you may lose their business. If you don't, your business loses considerable profits.

How do you convince them they should pay without upsetting them?

In answer to this quagmire, your lawyer recommends that you forward a copy of the letter of advice to the shipping agent and the customer together with an email that notes that the legal advice you have received suggests that the customer remains liable to make payment for the wine and invites the customers to contact you to discuss the matter.

That sounds like a sensible idea to you. It is a quick, legally and factually well-reasoned, but not overly aggressive, approach. In fact, why wouldn't you do it? It could result in a speedy resolution of the matter in your favour (which is clearly in your commercial interest).

Accordingly, you provide the shipping agent and the customer with a copy of the letter of advice. In fact, in order to keep them in the loop, you also provide a copy of the written legal advice to the processing facility.

Unfortunately, the letter of advice did not convince the end customer that it was required to pay for the wine. You decide that, for commercial reasons, you will not pursue payment from the customer or the shipping agent. Rather, you turn your attention to exploring whether something went wrong in the wine making process.

The above scenario was not dissimilar to the situation that arose in the recent decision by the Supreme Court in the matter of *BMD Wines Pty Ltd v Thachi Wines Pty Ltd* [1].

In that case, BMD Wines had (prior to the commencement of court proceedings) provided a copy of a letter of advice it had received from its lawyers to Globus Wines A/S (the customer), JF Hillebrand Australia (the shipping agent) and to Thachi Wines (the wine processing facility).

Following the commencement of court proceedings by BMD Wines against Thachi Wines, Thachi Wines contended that BMD Wines had waived the legal professional privilege[2] that would have otherwise prevented the letter of advice from being read by, and/or relied upon by, Thachi Wines in the court proceedings.

In this regard, the importance of the letter of advice to Thachi Wines was noted to be that it evidenced that BMD Wines had received legal advice to the effect that the wine was sound and in good condition at the time of being delivered to the shipping agent, the sale of the wine was made on a 'free on board basis' and ,therefore, all risk in the wine passed to the end customer when the wine was delivered over the rail of the ship and the end customer was liable to pay for the wine.

[1] Supreme Court Action No. SCCIV-13-1624 (26 May 2015) (unreported).
[2] Legal professional privilege is the name given to the fundamental principal that provides that communications made between a client and a lawyer for the dominant purpose of the lawyer providing legal advice are confidential and not to be adduced as evidence in court. As was explained by Jackett C.J. in *Re Director of Investigation and Research and Shell Canada Ltd*. (1975) 55 DLR (3d) 713, "*…the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untramelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him*".

Having waived its legal professional privilege in the letter of advice, Thachi Wines contended that BMD Wines was bound to also disclose any other legal advices it obtained in relation to the same subject or same issue. In doing so, the scope of that waiver should not be confined to any other legal advice that addressed the same subject matters or issues as the advice voluntarily disclosed. Rather, it should extend to the documents and information which were taken into account in formulating, or which otherwise underpinned or influenced, the legal advice chosen to be disclosed (i.e. all of the other confidential materials and communications passing between BMD Wines and its lawyers).

In determining that BMD Wines had, in disseminating its written legal advice, waived legal professional privilege in respect of that document, the Court noted that, in respect of the documents and information taken into account in formulating, or which otherwise underpinned or influenced, the legal advice (at paragraphs [21] and [22]):

> "The privilege in respect of the documents is waived by implication. The effect of the advice was that the wine was sound and in good condition and within the required technical specifications. The legal advice was prepared by the solicitor "on the information before us".
>
> Clearly the plaintiff's opinion as to those matters changed, because it instituted proceedings alleging that the wine was not of merchantable quality and was not within the required specifications. The change of position will be a significant issue at trial. As a matter of fairness, it seems to me that the defendant is entitled to inspect documents relied upon by the solicitor when he prepared the advice, so it is able to understand why the plaintiff's position changed after receipt of the opinion."

Given that communications between a client and a lawyer will typically contain information about the party's strengths and weakness, as well as information regarding the lawyers' strategy for the conduct of any matter, being required to give up that information to an opponent can be devastating for the party who has waived privilege (and invaluable for your opponent in the arena of the courts).

This decision highlights the need for parties (and their lawyers) to ensure that due consideration is always (to the extent possible at an early stage) given as to how a matter may unfold over time and, with those variances in mind, how a strategic decision made today could be a client's undoing tomorrow. For example, had BMD Wines simply reproduced, and asserted in its own name, the conclusions of fact and law set out in the letter of advice (without making reference to the existence of the letter of advice, or that the conclusions were consistent with the legal advice it had obtained), the same legal and factual assertions would have been communicated to the customer and the shipping agent without it resulting in a waiver of the privileged communications that had passed between it and its solicitors.

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NEWS & VIEWS | **Sandy Donaldson**

Privacy

A small business can be a credit provider. This will be the case even if the business does not make loans or extend credit in a manner similar to a bank or financial institution.

A reminder for small business

The Office of the Australian Information Commissioner (**OAIC**) has recently issued its Privacy Business Resource 10: *Does my small business need to comply with the Privacy Act?*[1] This is a reminder that a business which is a *small business* with an annual turnover of $3 million or less may nevertheless be bound by the requirements of the *Privacy Act*[2].

If a *small business* is caught by the provisions of the *Privacy Act* then it must, among other things:

- comply with the *Australian Privacy Principles* (**APPs**);
- have a Privacy Policy;
- have internal policies, procedures and resources to ensure compliance with the *Privacy Act* and the APPs.

The requirements of the *Privacy Act* and the APPs relate to *personal information* which is:

> Information or an opinion about an identified individual, or an individual who is reasonably identifiable:
>
> (a) whether the information or opinion is true or not;
>
> (b) whether the information or opinion is recorded in material form or not.

What small businesses are *APP entities*?

A small business will be an *APP entity*, and subject to the requirements of the *Privacy Act* and the APPs if the business:

- provides a health service or holds any health information, except employee records (this is a very wide field – see below);
- discloses personal information about individuals for a *benefit, service or advantage* (an example given by OAIC is a small business that sells its customer list to a marketing company or gives its own list in return for another list);
- is a related body corporate to an entity that is an APP entity;
- is a service provider to a Commonwealth entity;
- operates a residential tenancy database;
- carries on a credit reporting business.

These are only a summary of some of the main activities that can lead to a small business becoming an *APP entity*. It would be wise for all small businesses that handle personal information to review the checklist on the OAIC Website to ascertain whether or not the business is an APP entity.

[1] See http://www.oaic.gov.au/privacy/privacy-resources/privacy-business-resources/privacy-business-resource-10

[2] Privacy Act 1988 (Commonwealth)

Health services

The definition of *health services* in the *Privacy Act* is very wide and reads:

health service means:

> (a) an activity performed in relation to an individual that is intended or claimed (expressly or otherwise) by the individual or the person performing it:
>
> (i) to assess, record, maintain or improve the individual's health; or
>
> (ii) to diagnosis the individual's illness or disability; or
>
> (iii) to treat the individual's illness or disability or suspected illness or disability; or
>
> (b) the dispensing on prescription of a drug or medicinal preparation by a pharmacist.

Obvious examples of businesses which provide health services include health care providers such as doctors, specialists, clinics, private hospitals and day surgeries. The definition also includes other forms of health providers such as physiotherapists, chiropractors and naturopaths. More widely, it can in circumstances include other businesses such as schools, child care centres, weight loss clinics, gyms and fitness services. These are only a few examples.

Information held by a business providing a *health service* will most likely include *health information*, which will be *personal information* if the individual concerned is identifiable, and this will be *sensitive information*. Sensitive information is subject to higher standards of care and control in accordance with the APPs.

Credit reporting

The provisions of the *Privacy Act* which apply to credit reporting are separate from the requirements relating to personal information. The requirements in relation to credit reporting are stricter than provisions relating to personal information.

It would be wise for all small businesses that handle personal information to review the checklist on the OAIC Website to ascertain whether or not the business is an APP entity.

Obvious examples of businesses which provide health services include health care providers such as doctors, specialists, clinics, private hospitals and day surgeries. The definition also includes other forms of health providers such as physiotherapists, chiropractors and naturopaths.

A small business can be a *credit provider*. This will be the case even if the business does not make loans or extend credit in a manner similar to a bank or financial institution.

A small business (or other business) will be a *credit provider* if:

- a substantial part of the business is the provision of credit;
- it carries on a retail business and issues credit cards;
- it allows credit for the sale of goods or supply of services or hiring, leasing or renting of goods, for at least 7 days (it will be a credit provider only in relation to the credit that is provided).

As well as other specific requirements for management of credit information, a credit provider must have a **policy** about the management and credit information and credit eligibility information.

Warning to small businesses

The issue by the OAIC of its Privacy Business Resource team may be a wake up call to small businesses and an indication that the Privacy Commissioner will look more closely at the operations of small businesses and the application of the *Privacy Act*.

Small businesses should consider their activities and if necessary get advice, to determine whether they are either an APP entity that is required to comply with the APPs in relation to personal information, or the provisions of the *Privacy Act* in relation to credit reporting, or both. If the business is required to comply, it should put in place the necessary policies and procedures.

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INSIGHT | **Linda Scalzi**

Buying a New House?

Tips & traps for homebuyers

Buying a new home can be an exciting, but also daunting, experience. There is often a mountain of paperwork to complete and many deadlines to meet. Finding your dream property to live in or your ideal investment property is only the tip of the iceberg. It is best to engage an experienced and qualified Registered Conveyancer once you have found the right property. They will ensure that you have a smooth settlement process and avoid any problems. Linda Scalzi at DW Fox Tucker Lawyers will be able to assist you and provide a positive experience for you at a competitive price.

Here are some important items to consider when buying a property.

Can you afford the property?

Make sure that you can afford the property by getting good advice from a financial planner and a finance broker.

What other fees and charges will I have to pay?

Not only is there the cost of the property to consider but also the various government charges involved. Stamp Duty on the Transfer is one of the more expensive items to consider and is calculated on the value of the property. For example, a property worth $500,000 would attract $21,330 in stamp duty. When buying a property, you need to allow for this expense in your calculations. To calculate the amount of stamp duty payable on a property, there is a stamp duty calculator located on the Revenue SA website – go to http://www.revenuesa.sa.gov.au/services-and-information/calculators/stamp-duty-on-conveyances2 for more information.

Along with stamp duty, there are also fees that you will need to pay to the Land Titles Office. The most expensive fee is the registration fee for the Transfer. On a property worth $500,000, this fee is $3,751.50. To calculate the registration fee on the Transfer, there is a calculator located on the Land Services Group website – go to http://www.landservices.sa.gov.au/1Online_Services/60Fee_Calculator/_Fee_Calculator/Default.aspx?sect=about for more information.

There are minimal first home buyer concessions and grants available at present. Refer to http://www.revenuesa.sa.gov.au/grants-and-concessions for more information.

What name shall I purchase the property in?

Another thing to consider is what name you want registered on the Title. If you plan to live in the home then you would normally buy it in your personal name. However, if it is for investment purposes you may wish to have a company or a Trust make the acquisition. It is best to seek tax advice from your lawyer or accountant in this regard.

If you are buying the property with another person, such as a spouse or defacto partner, you would normally ensure that you are noted on the title as Joint Tenants. If you register as Joint Tenants, then upon the death of one Joint Tenant, the survivor/s must register this death on the Title. Upon registration, the ownership vests in the surviving Joint Tenant. Each Joint Tenant owns an equal share in the whole of the land.

If buying with friends, siblings or investment partners, it is more common to purchase as Tenants in Common. On the death of a Tenant in Common, the Executor applies to the Court for Probate of the Will. When this is granted, the estate of the deceased proprietor in the land is transmitted to the Executor, who then transfers it to the beneficiary named in the Will. It is important to re-examine any existing Will if you intend to register in this manner. Tenants in Common can hold in equal or in unequal shares. This is often determined by the proportion of capital contributed. Thanks to a recent ruling by Revenue SA, it is now possible to change the purchasing entity after you have signed the Contract without attracting additional stamp duty charges.

Do you want title insurance?

Title insurance is becoming more popular and is something to consider when buying a property. It is a one off fee and covers you against risks such as fraud, illegal building works, survey and planning defects and outstanding rates and taxes. Your conveyancer will be able to provide you with more information.

Title insurance is becoming more popular and is something to consider when buying a property. It is a one off fee and covers you against risks such as fraud, illegal building works, survey and planning defects and outstanding rates and taxes.

Make sure you insure the property immediately upon cooling off expiry.

Strata and Community Title properties normally have insurance in place but for Torrens Title properties, you need to arrange your own policy. The reason for this is that upon signing the Contract, the property is at your risk which means that if the property were to be damaged prior to settlement, then you would be considered the owner and could suffer a significant financial loss. Mortgagees require you to provide them with a copy of this policy prior to settlement with their name noted as an interested party.

How much deposit do I need to pay?

Upon cooling off, you will need to pay the specified deposit by way of cash or bank guarantee to the agent. Usually, the deposit is 5–10% of the purchase price so you need to ensure that you have this amount available at short notice.

Do you wish to lodge a caveat?

In some circumstances, purchasers may choose to lodge a caveat to protect their interest as purchaser under the Contract. This is common where there is a long settlement period or if you are concerned that the Vendor may attempt to deal with the property with someone else.

Is your Contract subject to any Special Conditions?

If you need finance approval and/or a building inspection you should ensure that these are included in the Special Conditions to the Contract. This means that if either of those conditions are not met, you will be able to rescind the Contract without suffering any adverse legal or financial consequences. However, if you are purchasing the property at auction you will not have this option available and you also will waive your cooling off rights. Before bidding at an auction, ensure that you have your loan pre-approved and you have carried out any inspections that you require.

What is a Form 1?

The Form 1 is required to be served on you 10 clear business days prior to settlement. The Form 1 details your cooling off rights, full details of the property and responses from various government departments. It is a long and sometimes confusing document to those unfamiliar with it. However, however your conveyancer will be able to explain it to you. If your conveyancer does find a discrepancy in the Form 1, then you are entitled to ask for a new Form 1 to be served. In that instance, your cooling off rights recommence.

When should you settle?

Normally settlement is within four weeks of signing the Contract but you may request a longer time frame if you need it as long as the vendor agrees to it.

A property is one of the most expensive investments you will ever make. It is important to surround yourself with qualified and experienced professionals who can help you make the right decisions and assist you with a smooth and stress free settlement process. If you need more information on any conveyancing matters, feel free to contact Linda Scalzi at DW Fox Tucker Lawyers.

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SUITS OFF | **Staff Profile**

Fit For Purpose

Lisa Harrington Senior Associate

Jogging? Check. Boxing? Check. Touch footy? Check. Weights and cardio programs? Check. Teaching fitness classes? Check, check, check. By her own admission, DW Fox Tucker Property, Wine and Hospitality specialist Lisa Harrington does not have a go-slow button. But if you think that means she has less energy available for her legal work, think again. Anyone underestimating this former swimming instructor, ballet teacher, national wine export manager and now marathon runner, does so at their peril.

The writing was on the wall for Lisa from a very early age. While other kids were watching DVDs and playing Nintendo, she was mastering tumble turns and demi-pliés. And, we might add, loving it.

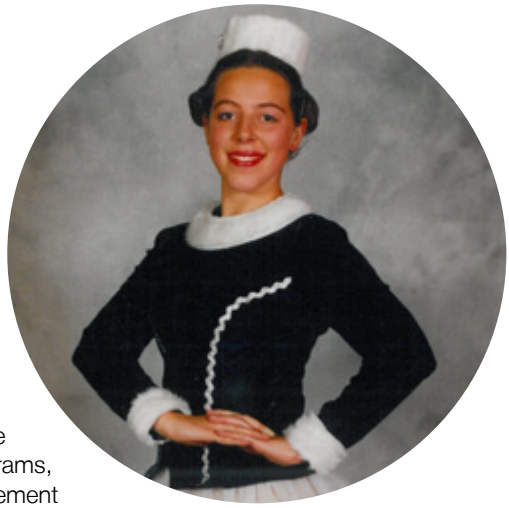
She started swimming and ballet lessons before she started school and excelled at both. By the time she was 16 she was teaching ballet part-time at Avant Studio in Tea Tree Gully. Within another 12 months she was also a qualified swimming instructor working at the Adelaide Aquatic Centre and Salisbury Pool. And despite that extra-curricular workload, she still managed to do well enough in her Year 12 studies to secure a place at The University of Adelaide graduating with a double degree in Commerce (majoring in Accounting and Finance) and Law (Honors).

"I've always been a person who loves a challenge," says Lisa. "I like to get involved in things."

Not surprisingly, balancing university study with work commitments presented no problems. Although the nature of her pursuits changed on occasionm, the workload was virtually constant.

She stopped teaching ballet after five years in 2004, the same year she completed her Commerce degree, but by early 2005 had filled this "spare time" with a job in the accounts department at Yaldara Winery - the beginning of her ongoing interest in the wine industry. Midway through that year, with her Bachelor of Laws now well iunderway, she was promoted to the position of Bulk Export Manager for Yaldara's parent company, McGuigan Simeon (now owned by Australian Vintage).

Again, Lisa thrived. "It was fantastic experience," she says. "I loved the added responsibility. Although, I have to admit, initially I did think they were crazy to trust a 21 year old kid with their multi-million-dollar export business!"



In 2006, while completing her Law degree, Lisa also undertook a Graduate Diploma in Legal Studies. And, because these two university programs, a high-level management position and teaching people to swim was not quite filling the diary, she accepted a friend's invitation to start playing social netball.

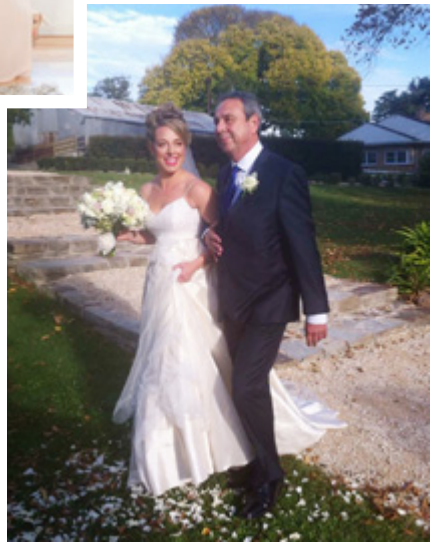
"It was all about learning something new," smiles Lisa. "And having an excuse to cath up with school friends."

In 2007 she graduated from Uni' and was admitted to practice law. "This was the beginning of what I think of as my 'real job'," she says. But far from being the end of what she conversely calls her 'play jobs', in that same year Lisa also became a qualified fitness instructor and started teaching after-hours Les Mills classes at ladies-only gym Fernwood in St Agnes. Seven years' on, she has taught at many gyms across Adelaide and her latest involvement is with the 'six weeks' program where she takes the cardio (particularly running) program.

"I guess it's just in my blood," she says. "It's also an excellent stress release. A lot of my work in law involves sitting and thinking, so its nice to unwind by doing something that's the exact opposite.

"And to be honest, it's only on the days I *don't* do anything extra that I ever feel tired."

Although we'd never liken her to the Energizer Bunny (because she'd kill us), that analogy, although slightly embarrassing, certainly wouldn't be conceptually inaccurate.



"I find that works really well for me," she enthuses. "When I get back to work I feel energised and focused and able to get on with the job.

"It also helps that I love my work, of course. Every day brings new challenges, and I just find it really rewarding to help my clients achieve their objectives."

As you'd imagine, that's music to our ears. Clients seem to appreciate it too. But if anyone from a rival law firm happens to be reading, forget about it.

She's ours!

We could go on. We could tell you how and when Lisa added touch football and distance running to her routine - how she is a regular on the fun run circuit, running Adelaide's City to Bay, Sydney's City to Surf and Melbourne's City to Sea, and more serious runs having completed the Gold Coast Marathon and the Great Ocean Road Marathon, which is a whole 45kms.

She is so dedicated to her running that when her now husband surprised her in Sydney last year and proposed on the eve of Sydney's City to Surf she celebrated hard ... and then she ran the next morning still on a high and achieving a personal best time despite the celebratory champagnes the night before!

In the lead-up to her wedding (which was in April this year) you would be forgiven for thinking Lisa would slow down a bit ... but nope, she added boxing and the first ever Adelaide Oval Stair Challenge to the mix instead.

"The next day my calves were sore, but my legs were fine."

Last year, on the back of marathon training, she agreed to do the Fred Hollows 50km Charity Trek in Sydney on short notice. "I thought it was a walk ... turns out, it wasn't!" says Lisa, who's team raised more than $5,000 for the charity.

Although we'd never liken her to the Energizer Bunny (because she'd kill us), that analogy, although slightly embarrassing, certainly wouldn't be conceptually inaccurate. When Lisa's *real* job gets particularly busy, she's even been known to go out for a game, class or run, and then come back to the office and get back to it.

What Lisa calls "an average week"

Monday
Boxing class or run

Tuesday
Teach 'Six Weeks' Cardio Program or participate in Cross Core.

Wednesday
Weights legs program
One hour Running Program run by James Ezard.

Thursday
Teach 'Six Weeks' Cardio Program or run
Evening touch football or Hip Hop class (her latest new activity)

Friday
Run or rest (if she has earned it!)

Saturday
Run and boxing class or weights program.

Sunday
Rest or run (if her husband lets her!)

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