

# Winter Report

## The Pioneer Of Urban Affordability



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CLIENT PROFILE

# Karidis Corporation



**A quintessential migrant success story of an unassuming property developer passionate about turning the city centre into a vibrant, affordable, and more liveable space.**

It is impossible to look at the Adelaide skyline and not see an indelible mark left by Gerry Karidis and his burgeoning property company: Karidis Corporation.

From quite humble beginnings in post-war Greece to one of Australia's most respected property developers and businessmen, Gerry Karidis' story is unlike any other.

Gerry's journey began when, in December 1955 as a young 18-year-old, he left his island home of Lefkada 400kms north-west of Athens to join his older brother Don on the other side of the globe in the relatively little-known city of Adelaide, South Australia.

Eager and bursting to get on with his new life, he soon found work on the assembly line at Chryslers barely a week after arriving. However, better wages and working conditions on the wharves of Port Adelaide beckoned.

Together with brother Don, and a little extra work labouring, concreting and cleaning houses, they soon had enough money to build their first house at Ottoway.

The brothers had no building experience and used mainly recycled materials. Gerry would hire local tradies and watch them intently to pick up skills and tips and then finish the work himself to save money. A testament to their amateur talents is the fact that the house still stands to this day.

This work ethic would stay with him throughout his life, and even now, the 80-year-old Chairman still puts in a full day.

As longtime friend and head of the Maras Group, Theo Maras recalled in a Today Tonight interview, "Gerry is 100% focused. He didn't understand what a fence was. He always crashed through everything."

Perhaps that's one of the reasons why his property fortunes went from strength to strength, and he was able to leave the wharves. Now, property opportunities seemed to present themselves at often unexpected moments.

One story goes that Gerry went to buy a new car for the couple's corner deli business West Croydon only to come home as the new owner of a bright yellow house in Old Port Road, Queenstown.

His first big commercial project presented itself in 1961. Gerry bought and demolished a property in Mile End and built six apartments for a tidy profit of some £6,000, or around \$80,000 in today's dollars.

Gerry Karidis was on his way, and people began to take notice. Investors, agents, builders, financiers and more all wanted to get to know the affable Greek businessman and he was happy to oblige: building solid relationships as well as houses and units.

Says Theo Maras, "Any investor who spent money with Gerry, never lost money."

As his business flourished, so too did his penchant for forging relationships, which now extended to politicians Don Dunstan and federal labour MP Clyde Cameron. It was through these connections that Gerry's world was turned upside down in a series of events that ultimately led to the undoing of the Government of the Day.

Supposedly, Minerals and Energy Minister Rex Connor, while seeking \$4bn for development and infrastructure projects, was looking for an alternative to raising funds through US financiers.

Meanwhile, through the nephew of his financier, Gerry Karidis had heard of someone with \$200 million to invest. An opportunity that he passed on to trusted friend Clyde Cameron who in turn brought it to the attention of Connor. As it happened, the opportunity fell through, but it did lead to the introduction of Tirath Khemlani, a Pakistani commodities dealer for respected London investment firm Dalamal and Sons.

Khemlani purportedly had access to billions in Arab oil money and flew to Australia to meet with Connor, Cameron and Gerry. History records that although many meetings took place, ultimately the loan fell through and the wounded Whitlam Government was well on its way to becoming a part of political infamy.

During all this, Gerry Karidis maintained an air of propriety. And, although the affair took a personal toll, Gerry's reputation remained untainted and his business continued to grow.

In the eighties, Gerry began a three-decade dream to repopulate the city centre by developing vibrant, affordable, and more liveable spaces: a legacy that continues today with a league of devoted friends and fans.

And we're proud to say we're chief among them. In fact, DW Fox Tucker's association with Gerry and the Karidis Corporation spans more than 30 years.

Throughout his entire career he has continued to pursue community interests. His involvement in a vast range of public bodies, community associations and committees, and particularly the Greek Orthodox Church, has led to many awards over the years, including recognition as a



*continued overleaf...*



Member of the Order of Australia in 1990.

In 2017, the Karidis Corporation continues to keep community interests at the heart of their business. Urban development, retirement homes and villages, apartments, shopping complexes and car parks are now part of the city landscapes in both Adelaide and Melbourne.

Echelon is the Karidis Corporation's latest development on the old Trims site in King William Street, Adelaide. Aptly described as luxury apartment living, this architectural masterpiece will deliver an unprecedented fusion of high-end apartment living,

state-of-the-art commercial spaces and a spectacular retail and hospitality opportunity.

It's just one of many ongoing projects the octogenarian seems to juggle on a daily basis. That said, Gerry's far from the retiring type. "I'll start to slow down a bit that's for sure, but I have to remain active."

Gerry Karidis has come a long way since setting out from the pretty little Ionian Island he once called home. And even though he has created some of the most iconic buildings in Adelaide along the way, surely his greatest success was building a reputation as a hard-working, honest, loyal, highly

successful, property developer and businessman, and a highly respected and valued South Australian.

**FOR MORE INFORMATION ABOUT KARIDIS CORPORATION AND THEIR CURRENT DEVELOPMENTS**

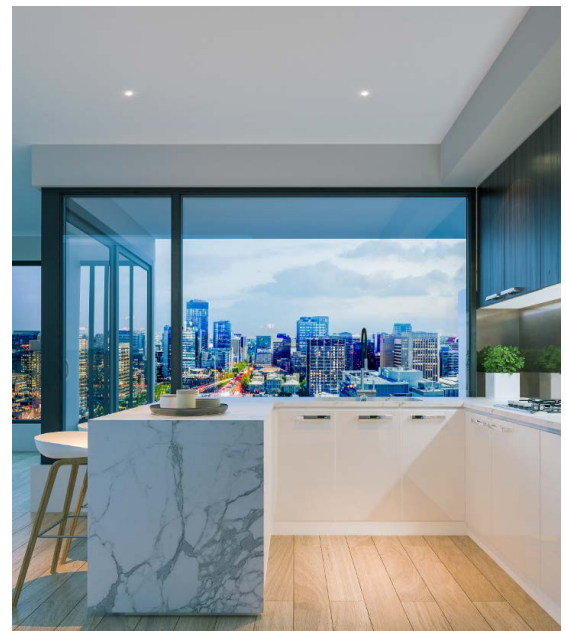
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Echelon Towers



Echelon Towers - Interior Kitchen

## FIRM NEWS

# DW Fox Tucker Welcomes Mouldens

## New Family Law Services & Stronger Dispute Resolution

If you've lived in South Australia for any length of time, you may have heard of Mouldens. Founded in 1851 Mouldens are highly respected and officially one of the oldest firms in the state... so it's with great pleasure we announce that as of 15 May 2017, DW Fox Tucker and Mouldens have joined together.

### Brand new Family Law Services & Stronger Dispute Resolution

This new partnership with our old friends at Mouldens means two big things for DW Fox Tucker clients. To start with, we'll be offering Family Law services for the first time, with a team headed up by Mouldens' former partner Joanne Cliff, one of South Australia's most recognised legal professionals in the field. Extending our suite of services into first class Family Law has been an ambition of DWFT for some time, so we're delighted to have found the right partners to achieve this.

The addition of the former Mouldens partners will also strengthen DW Fox Tuckers know-how and expertise in commercial & civil litigation, alternative dispute resolution, defamation, insurance claims and professional negligence. Former Mouldens' partner Debra Lane is a true legal mastermind across these kinds of matters and we're really looking forward to introducing her to our clients.

### Great Minds Think Alike When it Comes to Serving South Australia

There are many reasons why this is a perfect synergy, but by far the most important is the shared philosophy in serving South Australia. All of us



have a strong, non-negotiable focus on serving the local community, with highly specialised, truly cost effective services and without the distractions which come from being part of a big group.

Reaffirming this mutual belief, Debra Lane said "DWFT's focus on South Australia was a critical factor in the decision to join the two practices, as well as the fact that like Mouldens, our new partner is not part of a national or international law firm. We're really looking forward to offering a much wider range of services through the new firm."

DWFT managing director Joe DeRuvo is similarly excited about the joining of minds, telling us "This coming together reinforces our commitment to providing the South Australian community with highly targeted legal assistance, while remaining at a size that enables us to offer strong, affordable and genuinely responsive services."

"With Mouldens joining we have expanded our specialities to offer advice and representation on all aspects of family law, defamation and advice on insurance arrangements and policies, as well as professional negligence and

regulation... it's a significant step in the growth of this firm, and a proud moment indeed to bring on board a team with such a longstanding and highly regarded reputation."

Everyone at DW FoxTucker warmly welcomes our new colleagues and we're looking forward to a future of cracking success on behalf of our clients.

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INSIGHT | By Vasilios Marinos &amp; Jarrad Napier

# The ‘Stepping Stone’ Doctrine

## Are Directors Liable for Their Company’s Contraventions of the Corporations Act?

The ‘stepping stone’ doctrine is the term used to describe an action taken against a company for contravening the *Corporations Act 2001* (Cth) (**the Act**) that (if successful) triggers a finding that a director of the company has contravened one or more of their statutory duties in sections 180 to 182 of the Act. Exposing the company to the risk of criminal prosecution, civil liability and reputational damage. In these circumstances, the Courts have the power to, and do, impose civil penalties against the director.

One of the most notable matters where this has occurred is in *ASIC v Citrofresh International Ltd (No 2)*.<sup>1</sup> This litigation was brought by ASIC where it claimed Citrofresh International Ltd had contravened section 1041H by engaging in misleading or deceptive conduct. Upon the Full Court of the Federal Court finding that Citrofresh had in fact contravened section 1041H, it subsequently triggered the ‘stepping stone’ approach and the Court found the directors to be in breach of their duty of care and diligence in section 180(1) of the Act for failing to ensure that the contravention did not occur. Similar findings have been found by the Courts in *Fortescue Metals Group*<sup>2</sup> and *Sydney Investment House Equities*.<sup>3</sup>

However, a recent Federal Court decision, *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, has placed this doctrine in doubt. Justice Edelman (now Justice of the High Court of Australia) questioned whether the

assumption that directors are liable for their company’s contraventions under the Act was a correct presumption to make.<sup>4</sup>

As discussed above, ASIC is required to argue that the company had contravened the Act before establishing a director’s liability. In *Cassimatis*, ASIC successfully claimed that the company, Storm Financial Ltd, of whom Mr and Mrs Cassimatis were directors, had contravened section 945A(1) of the Act (as it then was) by providing financial advice, and without giving consideration to the subject matter of the financial advice, that was not appropriate to their investors.

ASIC then put forward an allegation that Mr and Mrs Cassimatis breached their duties of care and diligence for placing the company in a situation where it had actually breached the Act. Justice Edelman had ‘serious doubt’ about whether this assumption was a correct one and cited *ASIC v Mariner Corporation Ltd* (2015) 241 FCR 502, where Justice Beach found, “[i]t is wrong to assert that if a director causes a company to contravene a provision of the Act, then necessarily the director has contravened s 180”.<sup>5</sup>

*Cassimatis* and *Mariner* suggest that there may be a move by courts away from an automatic application of the ‘stepping stone’ approach towards one where a subjective consideration as to how the directors did, in fact, use their powers to permit contraventions of the Act by their company should be had.

However, there is still strong authority for the application of the ‘stepping stone’ doctrine, namely the High Court’s treatment of the James Hardie litigation of Peter Shafron.<sup>6</sup> Here, the High Court upheld the ‘stepping stone’ doctrine and found it even extended to officers who do not reside at board level.<sup>7</sup> Therefore, absent a higher authority from the Full Court of the Federal Court of Australia or the High Court of Australia, the ‘stepping stone’ doctrine will continue to be argued by ASIC in the future.

The matters set out in this article provide a reminder to all directors to ensure that they use their powers as directors for the sole benefit of their respective companies, which will in turn safeguard them from exposing the company to any avoidable criminal prosecution and/or civil liability. By a director complying with their fiduciary and statutory duties, they will in turn not only avoid prosecution against their respective companies, but also potential personal action against them.

<sup>6</sup> *Shafron v ASIC (2012) 247 CLR 465.*  
<sup>7</sup> *Ibid* 483 [41], 484 [46].

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<sup>1</sup> (2010) 77 ACSR 69.  
<sup>2</sup> (2011) 190 FCR 364.  
<sup>3</sup> (2008) 69 ACSR 1.

<sup>4</sup> (2016) 336 ALR 209, 371 [834].  
<sup>5</sup> (2015) 241 FCR 502, 583 [447].



NEWS & VIEWS | By Briony Hutchens

# Super Reform: Are You Ready For 1 July?

The much publicised superannuation reforms are set to commence from 1 July 2017. While these may not have a significant impact for some, they will require careful planning by others to ensure compliance.

Outlined below is a summary of some of the more significant changes that will commence on 1 July 2017.

- **Deductible personal contributions.** All individuals under 65, and persons between 65 and 75 who meet the work test, which requires them to be gainfully employed for at least 40 hours within a 30 day period during the financial year, can claim deductions for personal contributions that they make to superannuation, subject to their concessional contributions cap.
- **High income earners threshold.** The threshold at which high income earners will pay additional contributions tax (under Division 293) will be lowered from \$300,000 to \$250,000.
- **Reduction of concessional contribution cap.** The concessional contribution cap will be reduced to \$25,000 for everyone.
- **Reduction of non-concessional contribution cap.** The non-concessional contribution cap will be reduced from \$180,000 to \$100,000.

Individuals with a balance of \$1.6M (as at 30 June in the previous financial year) will not be able to make any non-concessional contributions and individuals with an account balance of less than \$1.6M can only make contributions to bring their account balance up to \$1.6M.

The 3 year bring forward rule remains for persons under 65, allowing individuals to contribute up to \$300,000 non-concessional contributions in one year, provided they do not make any further non-concessional contributions in the following 2 years.

If a person triggers the 3 year bring forward rule during the 2016/2017 financial year, they will still be able to contribute up to \$540,000 on or before 30 June 2017. Any balance of the bring forward amount not used as at 1 July 2017 will be adjusted to reflect the reduced non-concessional contribution cap.

In addition to amounts able to be contributed under the non-concessional cap, the Government has announced in the 2017-18 Budget that from 1 July 2018 individuals over 65 can contribute up to \$300,000 of the proceeds of sale of their principal residence as a non-



concessional contribution. To be eligible, the residence must have been owned for at least 10 years and the contribution is able to be made by both members of a couple in respect of the same home. Contributions can be made even if the individual's account balance exceeds \$1.6M.

- **Catch-up concessional contributions.** Individuals with a superannuation account balance of less than \$500,000 at the end of the previous financial year will be able to carry forward up to 5 years of unused concessional contributions. This only applies prospectively to unused balances from the 2017/2018 year onwards.
- **Transition to retirement pensions.** Income from assets supporting transition to retirement pensions will no longer qualify for tax exemptions. Instead, income from these assets will be taxed at normal concessional rates.
- **Spouse contributions.** The amount of income that a spouse can earn before the tax offset for spouse contributions reduces to \$0 will be increased to \$40,000 (from \$10,800).

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- **Transfer balance cap.** Commencing 1 July 2017 individuals will have a lifetime transfer balance cap of \$1.6M. This cap will be indexed, but only for individuals who have not previously fully used or exceeded their transfer balance cap. Indexation will apply proportionately where an individual has used part of their transfer balance cap.

Each individual will have a transfer balance account from the first time that they commence a retirement phase superannuation income stream. Transition to retirement income streams do not count towards the cap.

Amounts are credited to the account when they are transferred from accumulation phase into a retirement phase income stream and are debited when they are commuted and either paid out as a lump sum or transferred back into accumulation phase. Pension draw downs do not count as a debit to the account balance.

Increases and decreases in the account balance after the pension has commenced which are attributable to earnings, capital growth or capital losses referable to the capital supporting the pension do not count as credits or debits. As a result, the value of the pension can grow to exceed \$1.6M without breaching the transfer balance cap.

The Government has announced in the 2017-18 Budget, however, that the outstanding balance of a Limited Recourse Borrowing Arrangement (LRBA) will be included in a member's annual total superannuation balance and the transfer balance cap, with repayments of the principal and interest of an LRBA from a member's accumulation account being credited to the member's transfer balance account.



For individuals who have existing pensions as at 1 July 2017 the transfer balance account is the value of the superannuation interest on 30 June 2017. Where individuals have more than one superannuation income stream either in the one fund or across different funds, the balance is the sum of the value of all of these superannuation income streams.

Individuals who have current superannuation income streams the value of which exceeds the transfer balance cap will need to commute part of their income streams and either draw down the excess or transfer it back into accumulation phase by 30 June 2017.

Individuals who have a transfer balance cap on 1 July 2017 of more than \$1.6M, but less than \$1.7M, will have a 6 month transition period to bring their account balance down to \$1.6M without penalty.

Individuals who exceed their transfer balance cap at any time will have an excess transfer balance and will have to commute part of their income stream to remove the excess plus the notional earnings derived on the excess during the period of the breach.

If the excess continues for more than 1 day, then the individual is subject to excess transfer balance tax for the period of the excess. The tax is payable on the notional earnings (calculated daily) derived from the excess during the excess period and is payable at 15% for breaches occurring during the 2017-18 income year. In later years, the tax rate is 15% for the first breach and 30% for any subsequent breaches.

- **Tax exemptions for assets supporting pensions.** From 1 July 2017, where any member of an SMSF has a total superannuation balance (i.e. pension and accumulation) of more than \$1.6M, the fund can no longer use the segregated current pension asset method and must use the proportionate method. Actuarial certificates will not be required if the only superannuation interests paid by the fund are account based interests.

The current tax exemptions continue to apply up to 30 June 2017. Accordingly, any income (including capital gains) derived from segregated current pension assets up until this time are still tax exempt.



Transitional CGT relief is available so that assets with current capital growth do not need to be disposed of by funds to get the benefit of current tax exemptions on increases in value to date.

Where an asset that is currently a segregated current pension asset ceases to be a segregated current pension asset as a result of the commutation of benefits back to accumulation phase to comply with the new legislation, provided certain criteria are met, the fund can elect to trigger a capital gain as at the date that the asset ceased to be a segregated current pension asset via a notional disposal and re-acquisition of the asset. Any capital gain resulting from the election will be tax free and the cost base of the asset will be reset to its market value as at the date of the notional re-acquisition so that any future capital gain or capital loss made in respect of the asset is calculated based on any increase or decrease in value from that date only. In addition, the 12 month qualification period for the general CGT discount will be reset.

Where a fund is currently using the proportionate method it can also elect to trigger a capital gain based on the value of the assets as at that date. As above, this will reset the cost base of the asset and the 12 month qualification period. The capital gain made as a result of the election will be partly taxable and partly tax free and the fund can choose to defer the tax payable on the taxable portion of the capital gain until a subsequent realisation event occurs in respect of the asset, e.g. a subsequent disposal of the asset.

The anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* can apply to the election.

### What do you Need to do?

- If you currently have a pension with a capital value of more than \$1.6M:
  - you will need to make arrangements to ensure that the value of the pension as at 30 June 2017 is \$1.6M or less. This reduction may be effected via a number of alternative means, including via a draw down of the pension or a commutation of the pension or part of it back to accumulation phase.

The most appropriate method will depend on your individual circumstances.

- consideration should also be had as to whether the fund is eligible to trigger the transitional CGT relief and whether triggering this relief would be beneficial for the fund in respect of some or all of its assets.
- if you wish to make non-concessional contributions to superannuation, you should do so before 30 June 2017 as the new rules will not allow you to make any non-concessional contributions after 1 July 2017.
- If you currently have a pension with a capital value of less than \$1.6M:
  - you do not need to do anything pre 30 June 2017 to ensure that the lifetime transfer balance cap is not breached, unless one of the assets supporting the pension is subject to a LRBA which, when the outstanding balance of the LRBA is taken into account under the new provisions announced as part of the Budget, will result in your transfer balance cap being breached.
  - if you have funds to make non-concessional contributions, you should make this contribution before 30 June 2017, and trigger the 3 year bring forward where possible, to maximise the amount of contributions that can be made. This is particularly important if your current superannuation account balance is close to \$1.6M.

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INSIGHT | By Mark Gowans &amp; Krystie Miller

# A Safe Harbour From Insolvent Trading?

In late March 2017, draft reform legislation in relation to the *Corporations Act 2001* (Cth) ("**the Act**") was introduced as part of the National Innovation and Science Agenda. A key element of the reform has been dubbed as the "**safe harbour**" provisions. The purported rationale behind the reform is to:

"... promote a culture of entrepreneurship and help reduce the stigma associated with business failure, ... [and offer] businesses a better chance of restructuring outside of a formal insolvency, which often produces significantly better outcomes for the company, its employees and its creditors".<sup>1</sup>

The Act presently imposes a corporate veil whereby company directors are generally shielded from personal liability for company debts save for in certain and exceptional circumstances. For example, section 588G of the Act places personal liability on company directors who allow a company to incur a debt while insolvent, or which debt has the effect of making the company insolvent, when there were reasonable grounds for suspecting that the company was or would become insolvent at the time of incurring the debt. The Act also enables a Liquidator to seek to recover from the Company's director(s) an amount equal to the loss and damage incurred by a creditor of the Company to whom a debt is owed.

## Legislative Reform

In contrast, proposed section 588GA(1) of the Act provides a defence to an insolvent trading claim for company directors who can prove that when they suspected that the company may be

(or may become) insolvent:

- they took a course of action that was reasonably likely to lead to a better outcome for the company and the company's creditors than if the company was placed into external administration; and
- the debt was incurred in connection with that course of action.

The prescribed factors which a Court may consider in determining whether a course of action taken by a director was reasonably likely to lead to a better outcome for the company and the company's creditors (refer proposed section 588GA(2) of the Act) include:

- obtaining appropriate advice from an appropriately qualified entity who was given sufficient information to give appropriate advice; and
- steps taken to:
  - i. prevent misconduct by officers and employees of the company that could adversely affect the company's ability to pay all of its debts;
  - ii. ensure that the company was keeping appropriate financial records;
  - iii. appropriately inform themselves of the company's financial position; and
  - iv. develop or implement a plan for restructuring the company to improve its financial position.

## Limitations to Entering the "Safe Harbour"

Unsurprisingly, there have been limitations placed on the proposed "safe harbour" provisions, including where the company has failed to:

- provide for employee entitlements; and
- meet its reporting obligations under the *Income Tax Assessment Act 1997* (Cth).

Further, company books will not be admissible to support the defence if a director fails to permit inspection or delivery of any of the company books in accordance with certain provision of the Act.

## Be Sure to Seek Legal Advice

Whilst an "**appropriately qualified entity**" is not defined in the draft reform legislation, if you are a company director and suspect your company is facing insolvency, seeking legal advice could save you from personal liability from an insolvent trading claim.

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<sup>1</sup> The Treasury, Australian Government, *Government releases insolvency law reforms for consultation (28 March 2017)* <<http://kmo.ministers.treasury.gov.au/media-release/025-2017/>>.



NEWS &amp; VIEWS | By Russell Jones

# When Should “Without Prejudice” Be Used?



*It's a common, and often savvy, tool used in negotiations and disputes, however, can marking your correspondence as “without prejudice” actually have the opposite effect on your claim?*

One of the major barriers to settling a dispute can be the reluctance of the disputing parties to speak freely and openly. Negotiations generally require concessions and compromises – meaning that the parties can often feel a sense of paranoia that any statement made in the course of negotiations can come back to haunt them later in Court. This will, naturally, stifle any productive discussion and result in each party keeping their cards close to their chest.

This is where “without prejudice” comes into play, and may be important.

## What is “Without Prejudice” and What Does it Mean?

In general, “without prejudice” refers to the privilege attached to written or verbal statements made by a party to a dispute in a genuine attempt to settle that dispute.

A document, or a verbal statement, made without prejudice cannot be compelled to be produced in evidence or referred to in proceedings. Marking documents and

correspondence with “without prejudice” allows the parties to freely work towards a compromise without the risk that their statements may be used against them later should negotiations fail.

It has become common practice for some practitioners and laypersons alike to print “without prejudice” on any documents and correspondence in relation to a dispute. In order to qualify for without prejudice protection there is a little more required than simply printing the magic words on a document, but care should be taken to ensure that this is appropriate.

Wells J in *Davies v Nyland* (1975) 10 SASR 76 said:

“in some quarters of the community there is a belief, amounting almost to a superstitious obsession, that the expression “without prejudice” is possessed of virtually magical qualities, and that anything done or said under its supposed aegis is everlastingly hidden from the prying eyes of a Court”

## When Does it Apply?

As can be expected, there are restrictions as to where and when the without prejudice protection will apply. Importantly, without prejudice will not protect a document or statement made in the course of negotiations that are not related to dispute resolution (i.e. commercial negotiations). This is a principle of common law and, specifically expressed, in section 67C of the *Evidence Act 1929 (South Australia)*.

Without prejudice privilege will only apply to parties who are engaging in genuine settlement negotiations in an attempt to settle legal proceedings that have commenced or are at least contemplated, or where other dispute resolution avenues have commenced. Mere involvement in commercial negotiations will not attract without prejudice privilege.

In determining this, the Court will look at the circumstances surrounding each communication and assess whether the parties intended to negotiate to resolve their dispute and reach a settlement.

***A document, or a verbal statement, made without prejudice cannot be compelled to be produced in evidence or referred to in proceedings.***

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Many people misunderstand this basic principle, which has led to the growing misuse of the term. Commonly, people will mistakenly put “without prejudice” on the following:

- Correspondence which is unrelated to settling a dispute;
- Letters of Demand where they are not making any concessions or discounting the amount they are demanding; and/or
- Correspondence where they are merely trying to finalise the terms of an agreement.

Unfortunately, this can lead to a rude shock when such correspondence, which was thought to be protected, resurfaces at later Court proceedings in a detrimental way.

**Does “Without Prejudice” Need to be Included to Gain Protection?**

As outlined above, the test for whether a communication is protected by “without prejudice privilege” is based on the contents of the document or communication rather than the label. The Court will look at the nature of the communication and intent of the parties over any explicit statement that the communication is to be protected. As the converse of a document bearing the “without prejudice” mark which may not be protected, a communication may be found to be protected by “without prejudice privilege” without bearing any explicit reference to it.

**What if you Wish to Refer to a Without Prejudice Document?**

Although one party may mark a document or communication without prejudice, the privilege cannot

be waived, and the document or communication cannot be used in proceedings unless both parties agree. Careful consideration should be given to whether offers that are made in negotiations to settle a dispute should be “without prejudice” or “open”. It may be that the party making the offer will wish this to be known if the dispute proceeds to litigation.

**Conclusion**

Without prejudice privilege is an important tool in early dispute resolution – with many settlements being achieved due to the facilitation of open and frank negotiations between parties in an environment where admissions or other communications cannot be held against them. However, the “without prejudice” label can lead to complications, legal arguments and potential negative cost implications if used in the wrong context.

Therefore, while it may seem like an attractive “catch all” it is important to give proper consideration as to whether a particular document or communication is protected by the without prejudice privilege before sending it off bearing those magical words or claiming it in discussions.

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NEWS &amp; VIEWS | By Morgan Muirhead

# Update On Mining Acts Review

In September 2016 the Honourable Tom Koutsantonis, Minister for Mineral Resources and Energy, announced a comprehensive review of South Australia’s *Mining Act 1971* (*the Mining Act*), *Mines and Works Inspection Act 1920* and *Opal Mining Act 1995* with a view to introducing a bill into State Parliament in mid-2017.

The review intends to ensure that South Australia (SA) has leading practice legislation to both enhance competitive investment and maintain our reputation as a safe and business friendly place to invest. Although each of the three statutes under review has been amended at various times, previous changes have arisen out of a piecemeal approach rather than any coordinated, wholesale overview.

Key industry bodies and groups have welcomed the current review as a positive and timely process for the State to undertake. The Department of State Development (*‘DSD’*) news release states that the review of these mining laws will seek to accelerate delivery of economic and social benefits for all people of SA through increased investment and employment achievable through reduction in red tape. More specifically, DSD aims for the review to:

- improve SA’s ‘One Stop Shop’ model for resource developments;
- establish SA as a leading



e-business practitioner in the world's rapidly evolving digital economy;

- improve transparency and land access engagement, negotiation and court resolution processes;
- implement flexible financial assurance models that increase community confidence in mine closure and environmental rehabilitation performance and outcomes; and
- reinforce the existing strong environmental protections offered under the Mining Act.

In addition, DSD seeks measured amendments to the Mining Act to facilitate transparency through better access to relevant documents (such as licence and lease applications, the terms and conditions of grant of a licence or lease and approved Programs for Environmental Protection and Rehabilitation ('PEPR')) provided that those rights do not impose upon obligations of commercial confidentiality.

## *... mining laws will seek to accelerate delivery of economic and social benefits for all people of SA through increased investment and employment achievable through reduction in red tape.*

Some of the key questions being asked in relation to the Mining Act deal with how best to reduce red tape and at the same time achieve an appropriate balance of interests between landowners and proponents. In particular:

- Should landowners have a right to initiate negotiations in relation to exempt land (as explorers and operators currently do under section 9 AA(1))?
- Should the jurisdiction of the Warden's Court be reinstated to deal with exempt land proceedings?
- Should the Form 21 Notice of Entry include a section relating to issues with declared equipment?
- Should the Minister be able to place conditions on a PEPR so that mining operations cannot

commence until a particular point in time (for example, after payment of a bond or satisfaction of a compliance direction)?

- Should we move all tenements to the graticular block system and if so, by what method? SA currently uses a combination of Australian Geodetic Datum 1966 (for exploration licences) and Geocentric Datum of Australia 1994 (for production tenements). DSD is likely to convert all production tenements to Geocentric Datum of Australia 2020 at some time after its release in 2018.
- Should we move to a caveat system such as that used in WA, where a 'subject to claim' caveat can prevent dealings with a tenement that is the subject of a potential farm-in?
- How are we able to decrease tenement assessment times and improve security of tenure, and create more consistent processes for surrender and cancellation of tenements?
- Would there be benefits to overlapping of mineral specific exploration licences? Other jurisdictions have particular tenements for particular minerals or classes of minerals so that one company can search for and extract what they want while freeing up rights for other operators to search for and recover different minerals in the same area.



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- Would greater flexibility in relation to the size and shape of exploration licences benefit explorers? Allowing for the potential amalgamation or subdivision of exploration licences may also increase opportunities for exploration.
- Should we abolish the Mineral Claim to potentially improve the transition from exploration to mining?
- Should the forfeiture provisions which already apply to mineral claims, retention leases and mining leases also apply to exploration licences?
- Should the term of an exploration licence or mining lease be extended?

More generally, DSD is suggesting potential changes to mining tenement structure that aim to promote greater flexibility and efficiency. South Australian Chamber of Mines and Energy ('SACOME') CEO, Ms Rebecca Knol, has stated that SACOME are committed to initiatives that encourage multiple and sequential land use and to working with other sectors to achieve sustainable co-existence between mining and other land users. SACOME's submission to DSD includes the following key recommendations:

- modernisation of process to improve operational efficiencies



and make processes clear for all stakeholders;

- streamlining of the mining lease approvals process to make them more workable for industry and transparent for stakeholders; and
- improving access to land to ensure the process is efficient, effective and affordable for all parties.

SACOME is also in favour of reverting disputes under the Mining Act to the Warden's Court, which is seen to be more accessible and cost effective in dealing with mining related disputes.

Grain Producers SA believes DSD has a distinct conflict of interest in both promoting and regulating mining and exploration and has called for an independent review panel to take charge of the Mining Act review. The group has lodged an extensive submission which calls for more rights for landowners to be able to prevent mining occurring on their properties and raising its concerns about the independence of the review. Their submission focuses on the exploration process being a huge disturbance to farmer's businesses, not only in terms of physical and financial distress, but also emotional distress.

The consultation process came to an end in March 2017, with 131 groups making submissions to DSD. DSD is currently consolidating the submissions which will eventually be made public and it will then announce the next stage of community engagement and legislative schedule.

The Australian Bureau of Statistics records the value of SA's mineral exploration expenditure for the

twelve months post December 2016, at AU\$49.4 million<sup>1</sup>, while its mineral resource production was roughly AU\$3 billion<sup>2</sup>. While there has been a continual decline in the State's mining industry over the last decade, the agricultural sector has grown, with SA grain farmers harvesting a record 11.1 million tonnes of grain in 2016-2017 (an estimated value of about AU\$2.2 billion at the farm gate)<sup>3</sup>. Despite the recent downward trend in mining related investment, the economic importance of SA's mining industry cannot be understated. The SA State Government recognises the need for vigilance to update and enhance government mechanisms across the mining and agricultural industries to achieve better balance between sectors. The current Mining Acts review is a timely and important opportunity to improve mining legislation to encourage further investment and development in a measured and responsible manner for the benefit of all South Australians.

<sup>1</sup> Australian Bureau of Statistics, 8412.0, Mineral and Petroleum Exploration, December 2016.  
<sup>2</sup> Department of State Development, South Australian mineral resource production statistics for the six months ended 31 December 2016, Report Book 2017/00014.  
<sup>3</sup> Primary Industries and Regions SA, Crop and Pasture Report SA, 2016-17 Crop Performance Summary and Final Crop Estimates, March 2017.

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NEWS &amp; VIEWS | By Amy Bishop

# Long Live The Queen

(Adelaide Trade Mark)

**If you have trade marks you probably know about the “use it or lose it” provisions. In order to maintain your trade mark registration you need to continue to use your registered mark in the course of trade for the goods and services to which the registration relates.**

However, the recent decision of the Australian Trade Marks Office in relation to the trade mark WOODLEY’S QUEEN ADELAIDE RIESLING<sup>1</sup> (**Queen Adelaide Case**) has demonstrated that it is possible to retain the registration of a trade mark despite there being no relevant use of the mark in limited circumstances, as explained below.

## Non-Use Provisions

Section 92(4)(b) of the *Trade Marks Act 1995 (Act)* provides that if the registered owner of a trade mark does not use their trade mark in Australia in relation to the goods and services to which the registration relates for a continuous period of 3 years another party may, after one month, apply to have the unused trade mark removed from the register.<sup>2</sup> The burden of rebutting any allegation made under Section 92(4)(b) is on the owner of the registered trade mark, who must show that it has indeed used the trade mark.<sup>3</sup>

The requirement for use, and the non-use provisions, are a

<sup>1</sup> *Make Wine Pty Ltd v Modern Ancient Brands Pty Ltd* [2017] ATMO 17 (24 February 2017).

<sup>2</sup> There are slightly different grounds under section 92(4)(a) of the Act for removal where there is claimed to have been no intent to use the trade mark at the time it was applied for.

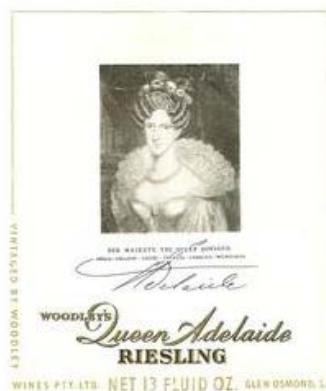
<sup>3</sup> Section 100 of the Act.

fundamental principle of Australia’s trade mark laws and have been often applied.<sup>4</sup> In some cases, even use of the mark has not been enough; such as the case of the WILD GEESSE WINES trade mark<sup>5</sup> discussed in the article in our 2016 Spring Report. Here a licensee was actively using the trade mark, but the trade mark owner’s mere right to control, without any actual control, was not sufficient use to prevent removal of the mark.

The possibility that a trade mark can be removed is common, even in countries like China where the trade mark system is on a first to register basis.

## Queen Adelaide Case

In the Queen Adelaide Case, Modern Ancient Brands Pty Ltd (**Modern Ancient Brands**) sought removal for non-use of the registered trade mark appearing below, containing the words WOODLEY’S QUEEN ADELAIDE RIESLING, in relation to wine (**Trade Mark**):



Modern Ancient Brands wished to register WOODLEY as a trade mark in relation to wine, but its application had been rejected under section

<sup>4</sup> See footnote 5 and also: *Dimitri v Chiotelis* and *Evangelos E. Chiotelis v TAP Worldwide LLC* [2014] ATMO 4 (14 January 2014); *Shine Beauty Pty Ltd v Shine Ltd* [2015] ATMO 21 (23 February 2015); *Chitty Chiu (Health 24 Pty Ltd) v Media24 Intelprop Holdings Ltd* (2015) 116 IPR 583

<sup>5</sup> *Lodestar Anstalt v Campari Inc* [2016] FCAFC92.

44 of the Act as being substantially identical or deceptively similar to the Trade Mark. The removal of the Trade Mark for non-use would, therefore, allow its trade mark application to proceed. Although, it is interesting to note that Modern Ancient Brands had rejected an offer for its trade mark to co-exist with the Trade Mark.

The Trade Mark owner, Make Wine Pty Ltd (**Make Wine**), no longer produced and sold wines with the Trade Mark. The only possible use of the Trade Mark during the relevant 3 year period was the sale of a small number of bottles of wine bearing the Trade Mark through wine auctions.

The argument advanced for use of the Trade Mark in the Queen Adelaide Case was that the auction of the Queen Adelaide wine constituted sales in a secondary market amounting to use of the Trade Mark. The enquiry turned on whether the use was *in the course of trade*, presumably by Make Wine. Modern Ancient Brands’ position was that the wine had been purchased for private use and had left the market place. Therefore, when then sold at auction, it was not use of the Trade Mark in the course of trade.

The Delegate of the Trade Mark Registrar, who was the decision maker in this case, found that the sales of the Queen Adelaide wines through wine auctions did not constitute use of the Trade Mark by Make Wine in the course of trade. This was essentially based on the finding that the wines were bought by individuals for their private consumption rather than for the purposes of investment or resale. Their sale many years later in small quantities for marginal prices (of \$2 to \$3 per bottle) indicated that the wines did not remain in the course of trade.

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### How did Make Wine Retain its Registration of the Trade Mark Despite This Finding of Non-Use?

The Delegate, upon Make Wine's request for the Registrar to do so, exercised the discretion of the Registrar in section 102(3) of the Act not to remove the Trade Mark from the Register even though the grounds on which the application for its removal were established. The Registrar was entitled to make such a decision if the Registrar was satisfied that it was reasonable to do so.

The Delegate considered there were sufficient reasons for exercising the discretion and maintaining the Trade Mark on the Register. While Make Wine's "significant and enduring" reputation in its QUEEN ADELAIDE branded wines was a leading consideration, even greater importance was placed on its current sales of wine under a new label that was considered to be deceptively similar to the Trade Mark. The new label did not contain WOODLEY which, you will recall, was Modern Ancient Brands' desired mark.

*... even where there are substantial enhancements or alterations, there may be scope for traders to retain previous versions of their updated trade marks.*

However this was considered not to be relevant as this case was about the use and reasons for retaining on the register the Trade Mark.

### Modernisation of Trade Marks

An important recognition was made in the Queen Adelaide Case that traders commonly update and alter their trade marks to keep up with the times.

It may be expected that such changes might come within section 100(3)(a) of the Act. This provides that an allegation of non-use can be rebutted where a trade mark, which has been altered or added to in a way that does not substantially affect its identity, has been used in good faith. This provision was not referred to in the reasoning in the Queen Adelaide Case, presumably because the new wine label was a substantial change to that represented by the Trade Mark.

This decision suggests that, even where there are substantial enhancements or alterations, there may be scope for traders to retain previous versions of their updated trade marks. This offers some comfort for traders that continued protection may be afforded for older marks when refreshing and modernising their trade marks, particularly if a substantial reputation can be associated with the trade marks.

### Conclusion

Although the decision in the Queen Adelaide Case is encouraging for those with trade marks with a long-standing reputation in the market place and, possibly, for traders seeking to modernise a trade mark, the decision did depend on the exercise of a discretion of the Registrar. It remains important to be vigilant in ensuring you are using your trade mark and that you seek advice on marketing any updated versions.



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NEWS & VIEWS | By Patrick Cook

# Joining The Crowd

## What you Need to Know About Australia's Crowd-Sourced Equity Funding Regime

After a protracted journey through Parliament that initially began in 2015, the *Corporations Amendment (Crowd Sourced Funding) Act 2017 (Act)* is here! The Act establishes the crowd-sourced equity funding (CSF) regime in Australia.

Under the CSF regime, eligible companies can raise a limited amount of equity capital from a large number of investors, including 'mum and dad' retail investors, through internet based intermediary platforms, without providing prospectus-level disclosure.

This is big news for the start-up community as the current fundraising laws in Australia generally make it prohibitively expensive, and the compliance requirements too onerous, for start-ups and small companies to raise funds from retail investors.

Australia now joins a host of other countries that have CSF, such as Canada, USA, the UK and New Zealand.

Although the Act only received royal assent in March this year and is set to come into effect on 29 September 2017, just two months later, as part of the 2017-18 budget, the Government has released the *Corporations Amendment (Crowd-Sourced Equity Funding for Proprietary Companies) Bill 2017 (Bill)* to extend the CSF regime to include proprietary companies.

This article outlines what you need to know about the CSF regime under the Act if you are a company wanting to access CSF, a



potential investor or an intermediary, as well as the changes to the CSF regime proposed under the Bill.

### Is my Company Eligible?

A company wanting to access CSF will need to be an 'eligible company' under the Act. An eligible company is a public (unlisted) company limited by shares with an annual turnover or gross assets of less than \$25 million that is not a subsidiary or related entity of a listed company. Companies that operate an investment business are excluded.

The Act presently excludes the ability for proprietary companies to access CSF. However, they may convert to a public company in order to do so.

The exclusion of proprietary companies from the CSF regime has been hotly debated and the subject of significant public consultation. If the Bill is passed, the CSF regime will be extended to include the ability for proprietary companies to raise funds from the crowd. Please see below for more details of the proposed changes to the CSF regime under the Bill.

### How Does my Company Raise Funds?

To raise funds from the crowd, eligible companies will need to prepare a specific CSF offer document containing the information prescribed by the regulations and publish that offer document on an intermediary platform. There are

certain restrictions on advertising and publishing CSF offer materials that fundraisers and intermediaries must comply with.

**... the CSF regime will be extended to include the ability for proprietary companies to raise funds from the crowd.**

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Fundraisers will be limited to making one CSF offer at a time and that offer must only be published on one intermediary platform and can only be open for a maximum of 3 months.

Eligible companies can raise up to \$5 million through CSF in a 12-month period. This \$5 million cap includes amounts raised from small scale personal offers and offers made via an Australian Financial Services License (AFSL) holder.

The CSF regime currently only allows eligible companies to issue new fully paid ordinary shares. It will not facilitate the sale of existing securities that have already been issued.

### Are There any Corporate Governance Concessions Available?

Fundraisers who complete a CSF offer within either 12 months of registration or conversion to a public company will be entitled to certain corporate governance concessions for a maximum period of 5 years, including:

- an exemption from the requirement to hold an Annual General Meeting;
- an exemption from the requirement to have audited financial reports. This concessions ceases once more than \$1 million has been raised from CSF offers; and
- the ability to provide financial reports to members by publishing on its website.

These concessions will only apply to companies that register or convert to a public company after the CSF regime commences.

### How do I invest?

A potential CSF investor will be able to access CSF offers by browsing online platforms operated by CSF intermediaries.

After reviewing the CSF offer document, if the investor decides to invest, they pay the application money to the intermediary via the platform. The intermediary holds the application money until the minimum subscription amount for the offer is reached and the other conditions prescribed by the CSF regime are met.

The intermediary then forwards the investor's application money to the fundraiser. The fundraiser will then issue the relevant shares to the investor.

'Mum and dad' (i.e. retail investors) will have a 5 business day cooling off period to withdraw their acceptance of a CSF offer if they change their mind for any reason.

Retail investors will be limited to investing up to \$10,000 per fundraiser via a particular intermediary platform within a 12 month period. However, there is no cap on the total amount that a retail investor can invest in all CSF offers each year.

Retail investors are investors who are not sophisticated investors or professional investors under the Act.

### What is the Role of the Intermediary?

The role of the intermediary is to operate and manage an internet based platform that publishes fundraisers' CSF offers, collect and deal with CSF investor application funds, and facilitate investor communication about CSF offers.

Intermediaries will need to hold an AFSL expressly authorising them to provide CSF services. Depending on the nature of their activities, intermediaries may also need to hold an Australian Market Licence.

Under the CSF regime, intermediaries have a number of obligations, including to:

- conduct a prescribed check on the fundraiser before publishing offer documents;
- publish a prescribed investor risk warning and information about a retail investor's cooling off rights;
- obtain a risk acknowledgement from retail investors;
- ensure that their platform has an application facility to allow investors to apply for shares under CSF offers;
- provide a communication facility to allow investors to communicate about CSF offers;
- disclose any fees paid to them by fundraisers, and any interest that the intermediary has or intends to take in the fundraiser.

*A potential CSF investor will be able to access CSF offers by browsing online platforms operated by CSF intermediaries.*



## Eligible companies can raise up to \$5 million through CSF in a 12-month period.

Intermediaries will, therefore, play a key role in regulating CSF raisings and will have significant responsibilities and potential liability in relation to them.

### What Changes are Proposed Under the Bill?

One of the major criticisms of the CSF regime under the Act is that proprietary companies are excluded from fundraising from the crowd unless they first convert to a public company.

Under the Bill it is proposed that the regime will be extended so that proprietary companies can make CSF offers without first converting to a public company. However, this extension is not quite that simple. There are a number of proposed additional obligations imposed on CSF proprietary companies; a number of which usually only apply to public companies.

The key changes to the CSF regime proposed under the Bill to extend access by proprietary companies are outlined below:

#### 50 shareholders' cap

CSF shareholders will not be counted as part of the 50 non-

employee shareholder cap imposed on proprietary companies under the *Corporations Act*.

#### Takeover concession

Proprietary companies with CSF shareholders will be exempt from the takeover rules in Chapter 6 of the *Corporations Act* where a CSF company includes a provision in its constitution that requires a person who acquires more than 40% of the voting shares in the company to offer to purchase all other voting shares in the company on the same terms within 30 days.

A company wanting to take advantage of the takeovers concession will be required to lodge its constitution with ASIC.

#### Additional obligations

Currently, the key additional obligations proposed under the Bill are:

- Maintenance of a more comprehensive company register and notification to ASIC.
- The related party transaction restrictions in Chapter 2E of the *Corporations Act* will apply to a company with CSF shareholders.

- Financial and directors' reports must be produced.
- Companies that raise greater than \$1 million in CSF will be required to have audited financial reports.

#### Corporate governance concessions

With the proposed extension of the CSF regime to include proprietary companies, the various corporate governance concessions available to public companies accessing CSF during their first 5 years will no longer be necessary. Therefore, under the Bill these concessions will not be available to public companies that are incorporated or converted from a proprietary company after the Bill becomes law.

#### What Should I do?

Whether you are a potential fundraiser, investor or intermediary, now is the time to start thinking about how you might take advantage of this exciting new fundraising and investment opportunity.

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INSIGHT | By Brett Zimmermann

# Application And Transition: The Proposed WET Rebate Revision Legislation

In last year's Federal Budget the Treasurer stated that the Government would introduce amendments to the Wine Equalisation Tax (**WET**) legislation that would have effect from 1 July 2019. These amendments would, amongst other things, 'tighten' (ie, restrict) the rules regarding the eligibility of wine producers to access the WET rebate. Between then and now Treasury called for responses and undertook consultation as to the extent and form of these amendments. Various industry bodies, wine producers and others (including ourselves at DW Fox Tucker Lawyers) provided comments.

There is now exposure legislation giving effect to Treasury's reforms. This exposure legislation has yet to be tabled before Parliament, but on the assumption that it will be in the next Government sitting and passed shortly thereafter, we summarise the key changes:

- The WET producer rebate cap for each producer (or group of associated producers) will be reduced from \$500,000 to \$350,000 per annum;
- The test for whether two producers are "associated producers" will be tightened by extending the timing of the test from the end of the financial year to at any time during the financial year;
- the WET producer rebate will be limited to wine for which:
  - producers maintain ownership of the wine's source product throughout the wine-making process;
  - 85% of the final product originated from source product that was owned by the producer;
  - producers have packaged the product in a container that does not exceed five litres (or 51 litres for cider and perry); and
  - producers have branded the final product with a registered trade mark owned by that producer (or a common law trade mark if the mark does not qualify for registration); and





- grape wine product containing between 700 millilitres and less than 850 millilitres of grape wine per litre will now be subject to excise and excise equivalent customs duty rather than the WET.

We do not provide detailed commentary on these changes. Instead, in response to a number of similar questions being asked by our clients, we thought to highlight the rules regarding the application and transition of the existing rules to the new rules.

If passed without revision to their application date, the WET amendments will apply to assessable dealings from 1 July 2018.

A number of questions arise for determination from the exposure legislation. For example:

1. What of unsold wine stock already on hand that has been produced prior to the publication of these provisions, or wine produced between now and the end of 30 June 2018?
2. If rebatable under the existing rules, will that wine continue to be rebatable?
3. Further, will that (what we shall refer to as “Old Rebatable Wine”) continue to be rebatable after 1 July 2018, even if under the new rules it would not be?

For example, in a practical context can vintage 2016 or 2017 wine be sold after 1 July 2018 and still get the benefit of the WET rebate if:

- It is sold as bulk wine, or does it require trade mark labelling and to be sold up to a maximum of 5 litre containers? or
- Subject to the earlier producer rebate provisions (that are also to be repealed), if less than 85% of the wine was produced from source product owned by the producer before the wine making process?

In order to answer these questions, it is necessary to consider any transitional provisions; noting that when any taxation law is amended, particularly one which is a tightening or a narrowing of existing rules that have application on a future date, separate provisions are introduced to deal with the change so as to potentially soften the immediacy of any detrimental impact.

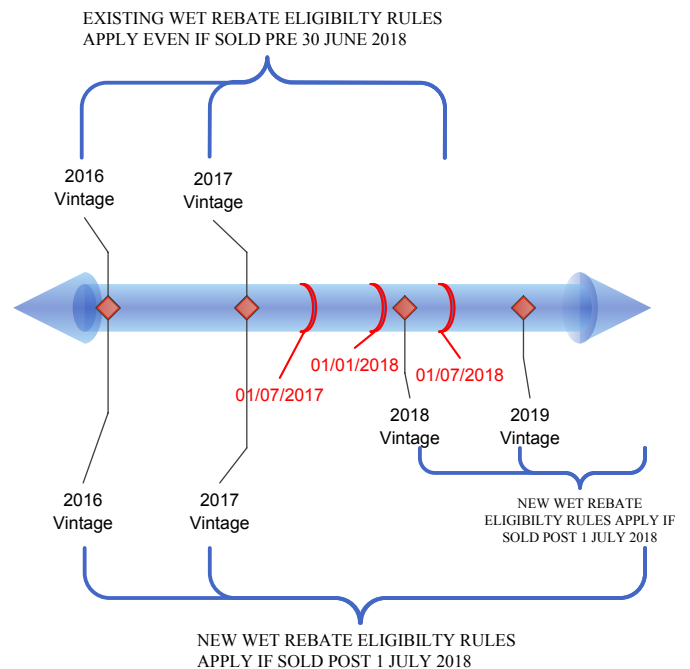
On our review of the exposure draft legislation and its accompanying explanatory memorandum, the position, on its face, appears confused.

The application and transitional provisions note that the amendments to WET rebate eligibility apply to assessable dealings in wine from the FY2019 financial year (ie from 1 July 2018). They go on to provide that the amendments *also* apply to assessable dealings in circumstances where the crushing of the source product for more than 50% of the wine occurred on or after 1 July 2018 (thereby presumably picking up wine produced from the 2018 vintage).

This then raises the question as to whether either:

- the new WET rebate eligibility rules:
  - o apply to all assessable dealings from 1 July 2018, irrespective of the year of vintage of that wine; noting that neither the exposure draft legislation or explanatory memorandum uses the word ‘all’; and
  - o also apply to assessable dealings in relation to 2018 vintage wine, even if those assessable dealings are before 1 July 2018.

Diagrammatically:



(Interpretation A)

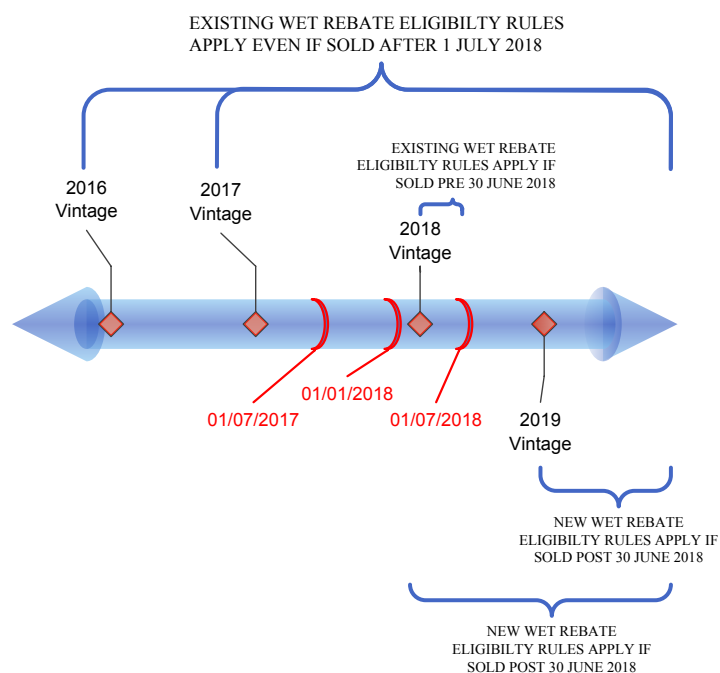
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## OR

- the:
  - new WET rebate eligibility rules apply to assessable dealings from 1 July 2018 bringing into those rules wine produced from the 2018 vintage; and
  - current existing WET rebate eligibility rules will continue to apply to assessable dealings for all existing wine stock on hand and wine produced this 2017 vintage (unless that wine is blended with more than 50% 2018 vintage wine) even if that dealing is after 1 July 2018.

Diagrammatically:



## (Interpretation B)

We do not believe it is clear as to which of these two interpretations Treasury intended in drafting the exposure draft provisions. On a literal reading of the draft application provisions<sup>1</sup>, we believe that, on balance, Interpretation A is the most accurate.

However, we believe it would be inequitable for there to be no grandfathering of existing product in tank and of wine from the current 2017 vintage to enable its eligibility. Otherwise, there would arguably be an unfair level of retrospective taxation.

<sup>1</sup> Specifically s 18(1) and 18(2) of Exposure Draft *Treasury Laws Amendment (Measures for a Later Sitting) Bill 2017: Wine Equalisation Tax*

From a practical perspective, absent grandfathering of the current rules, wine producers owning existing product that might not thereafter be eligible for the rebate, might seek to fast track the disposal of their product pre 30 June 2018 with their existing stock.

From our review of the explanatory memorandum as a whole and statements made by Treasury throughout the consultation period, it is not clear what the precise intent in regard to this issue is. We hope that before finalisation of the exposure draft and its tabling before Parliament, Treasury's position is made clear and there is to be no disadvantageous retrospectivity.

We note that the application and transitional provisions contained in the amending legislation to the WET Act that introduced the earlier producer rebate provisions in December 2012<sup>2</sup> made specific reference to wine which was subject to an assessable dealing after the relevant application date, but related to wine that was manufactured before the application date. A similar provision would be useful in the current provisions.

We anticipate providing an update once the final position is known.

<sup>2</sup> *Tax Laws Amendment (2012 Measures No. 5) Act 2012*.

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INSIGHT | By Patrick Walsh & Jonathan Ikonomopoulos

# Recognising The Health Benefits Of Good Work

## Returning Injured Employees to the Workplace After They Have Suffered a “Non-Compensable” Injury

In most cases where an employee is sick or injured, it is a simple matter of the affected employee taking personal leave until he/she is cleared to return to work by the doctor. In circumstances where an employee has suffered a more serious illness or injury outside the workplace, however, there is a lack of statutory framework aimed at assisting employers to graduate the employee back into the workplace.

Injuries/illness to employees give rise to issues “absenteeism” and “presenteeism” and creates a significant productivity cost for employers as well as a personal cost for those employees who are injured or ill. Unlike absenteeism, presenteeism is not always clear and it is often very challenging for employers to know when and understand how an injury or illness limits the performance of their employees.

Long-term work absence is harmful to the physical and mental health of employees. Research shows that if an employee is off work on account of injury or illness for:

- 20 days the likelihood of a successful return to work is 70%;
- 45 days the likelihood is 50%; and
- 70 days the likelihood is 35%.<sup>1</sup>

In our experience employers are generally acutely aware of the risk of returning an employee who is injured or ill back into a workplace environment which has potential to aggravate, accelerate or exacerbate an underlying and non-compensable injury or illness, opening the door for a claim for a work-related injury.

For employers seeking to effectively manage injured employees in the workplace and boost productivity, recent cases have illustrated tools that employers can use to manage injured employees back into the workplace.

### Communication

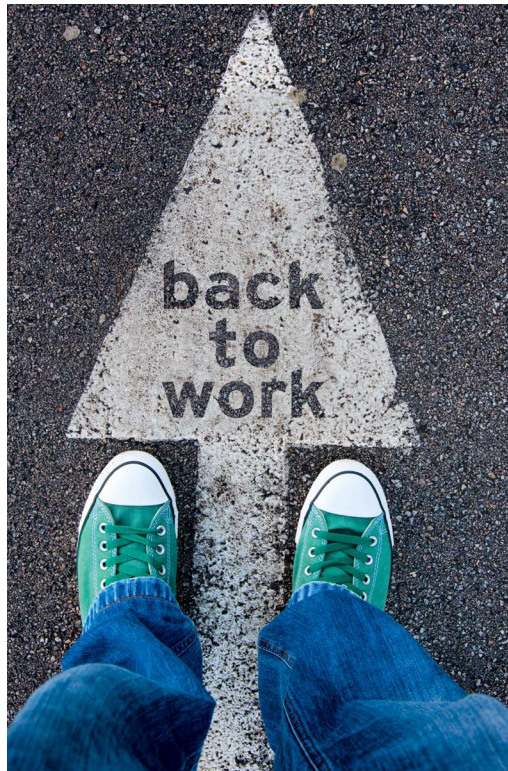
In [Laviano v Fair Work Ombudsman \[2017\] FCCA 197](#) Mr Laviano filed a general protections claim against his former employer, the Fair Work Ombudsman (“**the FWO**”) following the termination of his employment for failing to attend a medical assessment and refusing to communicate with his employer during a protracted period of sick leave.

Mr Laviano was absent from work between 24 March 2014 to 21 September 2014, and 7 October 2014 to 22 December 2014, returned to work on 23 December 2014 but was then absent from work on 24 December 2014. His absence, for the most part, was due to a psychological condition.

The FWO requested that Mr Laviano attend a medical examination on six separate occasions between 22 July 2014 and 27 November 2014 for the purposes of understanding the nature of his condition so as to assist him to return to work. Mr Laviano did not attend any of the scheduled assessments, save for

one where he attended late and the assessment could not proceed.

Mr Laviano asserted that between 7 October 2014 and 22 December 2014 he could not work, could not attend to any compensation-related matters and could not communicate with the Respondent due to what he described as his disability.



<sup>1</sup> The Australian Faculty of Occupational & Environmental Medicine & The Royal Australasian College of Physicians, *Australian and New Zealand Consensus Statement on the Health Benefits of Work, Sydney 2011 12.*

*continued overleaf...*

*...from previous page*

On or about 14 October 2014, Mr Laviano's treating psychologist advised him not to make contact with or open any mail from his employer. Mr Laviano took no steps, either directly or via a third party, to notify the FWO that he would not, in effect, be communicating with them or the reason as to why.

In his evidence, Mr Laviano said it was because of this advice that he did not know about the medical assessment scheduled on 27 November 2014 until his return to work for the day on 23 December 2014.

On 9 January 2015, the FWO terminated Mr Laviano's employment pursuant to section 29 of the *Public Service Act 1999* (Cth) for the non-performance of his duties as a consequence of him not attending a medical appointment scheduled on 27 November 2014.

His Honour Judge Altobelli found ***"it was unreasonable, in all the circumstances, for the Applicant to simply, and in effect, 'shut down' all communication between the Respondent and himself given the circumstances and the history of his relationship with the Respondent, and then use his self-imposed ignorance not even as a shield but as a sword, in the present proceedings."***

### Seeking Medical Information

In a previous [article](#), we discussed the implications of the decision in [Australian & International Pilots' Association v Qantas Airways Ltd \[2014\] FCA](#), which reinforced an employer's rights to seek medical information to satisfy work health and safety obligations.

In circumstances where an employer is seeking to return an injured, or ill, employee back into the workplace, it is appropriate to request the employee submit to an independent medical examination where there is a reasonable concern about the ability of the

employee to undertake work duties in a way that does not represent a risk to the health and safety of the employee, and the employee's colleagues.

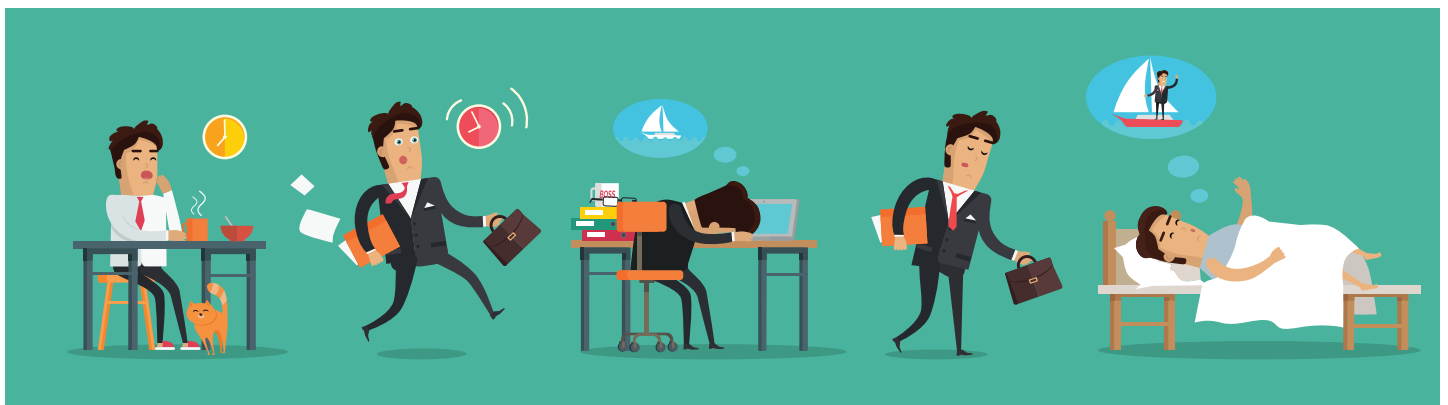
### Requiring Employees to Perform Work

An employee is contracted to perform the work stipulated in the employment contract. Provided an employer makes a reasonable direction that an injured worker perform duties that are within the scope of the contractual relationship between the employer and the employee, it will be a breach of the employment contract for the employee to refuse.

Whether a direction to perform work is reasonable will depend on the particular circumstances in which the direction is made. Some of the factors an employer will need to consider are:

- whether the duties are within the scope of the employment contract?
- can the duties be performed safely?
- do arrangements need to be made for the employee to get to/from the workplace?
- has the employee been provided with reasonable notice of the requirement to attend the workplace and perform duties?

Employers should also ensure that all parties are clear about the nature of the duties and the duration for which they will be provided. It is not always possible to accurately predict the rate at which an injured employee may recover and employers need to make sure that they manage expectations as to how long alternative duties may be offered from a legal risk perspective, but also to properly manage the injured employee.





## What Happens When an Injured Employee is Unable to Make a Sustained Return to Work?

We have previously discussed the issues that employers need to consider before making a decision to [dismiss an employee who has been unable to return to the workplace](#).

As stated above, employers should be clear about:

- the nature of any alternative duties that can be offered; and
- the duration for which those duties will be offered.

If an employee is not able to make a sustained return to the workplace, an employer is not under an obligation to create a new position and the employer will need to consider redeployment or dismissal.

### Conclusion

There are very good financial reasons to keep employees who are injured or ill engaged and productive in the workplace. In order to do so effectively, employers need to be mindful of the work health and safety obligations applicable in their jurisdiction to ensure they provide an injured or ill employee with a safe workplace environment.

Although employers may not be able to avail themselves of the statutory rights and obligations that a Workers' Compensation scheme provides when employees are injured in non-compensable circumstances, they should be aware that similar rights exist at common law that can be used to assist with returning injured employees back into work.

We suggest that employers:

- ensure that employees use their personal leave entitlements appropriately;
- communicate with their employees to maintain a connection with the workplace and to understand the nature of any injury or illness that may be affecting their ability to perform work;
- in circumstances where an employee takes a significant period of leave, or constant repeated periods of leave, request that they be provided with all the appropriate information concerning the injury or illness so as to ensure that the employee makes

a safe return to the workplace and is undertaking work for which he or she is fit and able to safely perform;

- if there is a reasonable apprehension of risk to the health and safety of the injured employee, direct that an employee submit to a medical examination for the purposes of ascertaining the nature of the injury/illness, the expected duration of the injury/illness, and what duties the employee is capable of performing in a safe manner; and
- consider implementing a rehabilitation and return to work plan in consultation with a return to work expert.

If you have any questions or concerns with respect to employers' rights in the workplace, consult your legal counsel.

**FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:**



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# An Accomplished All-Rounder...

In the Office, in the Kitchen & on the Slopes.

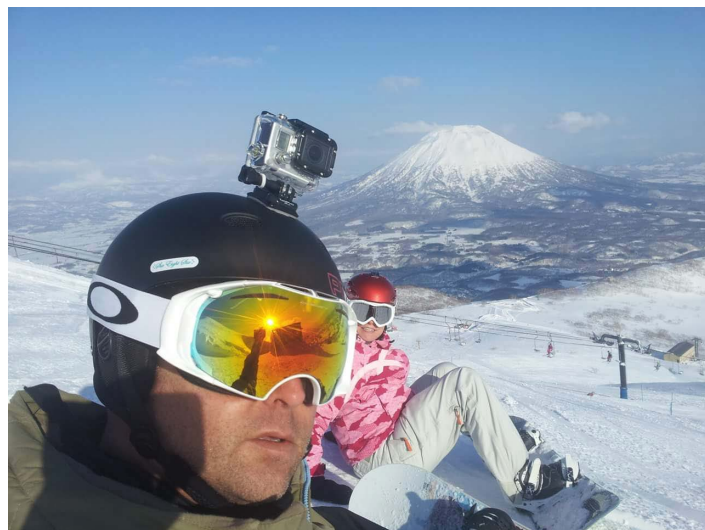
**Briony Hutchens** Director

*Having access to a great lawyer like Briony, who can provide legal expertise and innovative solutions in just about any area of tax law, is a tremendous asset to any client. (And she's a valuable source of advice on creating the perfect lasagna or assessing the quality of snow on the slopes.)*

Some clients prefer dealing with a lawyer that they can discuss a full range of matters with, and Briony comfortably fills that role. In fact, Briony works across such a diverse variety of industry categories with such broad legal scope - tax, superannuation, wills, estates, succession planning and general commercial - she's the quintessential "best friend" to business.

We prompted Briony to name her top three areas of tax law, but it appears that was a big ask:

*"It's impossible to get down to a list of three", she explains. "I love advising clients on business structuring issues, state taxes (including stamp duty, land tax and payroll tax); taxation disputes, trusts, self-managed superannuation funds, property and joint venture projects, and all aspects of commercial transactions."*



Tax is just one of a number of areas where Briony shines: combining her technical expertise, commercial experience and innovative solutions to help clients when they need it most. When asked what drives her in accepting such complicated briefs, her reply is a natural reflex:

*"I love helping my clients achieve their commercial objectives, while at the same time ensuring their legal obligations are flawlessly achieved."*

And, while Briony believes acting for clients is reward enough, she admits that regular wins fuel her passion for the law.

*"Every matter with a successful outcome is a good win, although I do find helping my clients through large transactions as well as successfully defending my clients in taxation disputes particularly satisfying."*

Superannuation, wills, estate and succession planning are among Briony's other professional passions, but what does such an accomplished all-rounder care about in her spare time?







*“Well, I love snowboarding so much that I took a year off between finishing study and starting work to do a season at Big White*

*mountain in Canada, and even managed to hit the slopes on our honeymoon, snowboarding in Japan.”*

Briony tells us music and cooking come next in her list of things she loves outside of the office. She met her husband Mark at a rock concert, long before the days their daughter Isabelle made going out such a mission impossible, and about Briony’s cooking he says that her lasagna is “the best food he’s ever eaten”.

Briony is a director of DW Fox Tucker, a Chartered Tax Adviser, and is currently completing a Master

of Taxation. She is also no stranger to picking up kudos; recently winning the ‘Best Lawyer Australia – Wealth Management/Succession Planning Practice 2017’ after taking out the same award in 2016.

If anyone has all the right ingredients to be one of the best, it’s Briony.



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