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Lawyers

Summer Report 2015

On the rise

The Port Adelaide Football Club will be seeking to top the table on and off-field in 2015, and DW Fox Tucker will be right there with them. *Continued on page 2*

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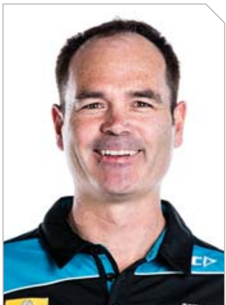
CLIENT PROFILE

Port Adelaide Football Club

As any Australian Rules Football fan knows, the **Port Adelaide Football Club** (PAFC) is one of the oldest and most successful sporting clubs in Australia. Established in 1870, it has won 36 SANFL premierships, including an incredible six in a row from 1954-1959 and has since added the 2004 AFL premiership to its tally. When PAFC entered the AFL in 1997 it was, and still is, the only pre-existing non-Victorian club to do so.

Along the way, the club has built an enviable reputation for never giving up, always giving their best and constantly striving to improve. The essence of PAFC is immortalised in the **Port Adelaide Creed.** This attitude is today embodied in not only their high-achieving playing and coaching group, but also in their much-lauded corporate team.



As PAFC's official supplier of legal services, DW Fox Tucker works closely with the club's corporate leaders in support of its business objectives. We recently caught up with **Richard Kelly, General Manager - Corporate** *(pictured)* to get his perspective on how this iconic South Australian sporting entity is shaping up for 2015.

How would you describe the overall level of satisfaction at Port Adelaide with your performance in 2014?

Finishing the season as AFL preliminary finalists and SANFL runners-up, on-field it was clearly another step up from the previous season [in which we finished 5th]. But in football, unless you can get the ultimate prize it's not a successful year.

Off-field, the performance of the team and the move to Adelaide Oval enabled the club to expand its corporate partnerships significantly. But we still have a way to go to be premiers in this category as well, and that's our aim.

To what extent do you think on and off-field fortunes are linked?

A lot of corporate success is reliant on the football result. The more successful you are the more people come to the game, so you get better broadcast timeslots, which brings better exposure for partners, so more partners want to come on board, and the wheel keeps turning.

No matter what our position on the ladder though, a partner's link with our club and its supporters can generate great results for their business. And although we stop short of belting out "Never tear us apart" here at corporate headquarters, we do try to replicate the attitude of the players and never give up in our pursuit to make sure a partner is getting the most out of its relationship with us.

What corporate initiatives and decisions this year do you think have had the greatest impact on your organisational success?

The move to Adelaide Oval has certainly played a big part; engaging with our passionate supporters through activities on game day in Rundle Mall, and on the Oval plaza as they enter the stadium.

We also do a lot of work at community level with various programs, and with the Magpies at SANFL level. Our work with the indigenous community and the Aboriginal Power Cup, which promotes indigenous education, is a good example of our community engagement.

Your Chairman David Koch has said he's confident of attracting considerably more high-level sponsorship this season. On what is this confidence based?

We have a highly skilled team that's engaging prospective clients every day.

Clients will partner with the club in various ways, of course, and the process may take up to 12 months to ensure we find the right fit for each other. But in the AFL space we play in a national game, so we're able to provide one of the most engaging platforms that a business can partner with.

Are there any plans to alter the club's offering to sponsors?

All partnerships are unique with the club – there's no set formula. We're in the business of understanding what the client is trying to achieve and then matching those objectives with the many benefits we have to offer.

The club launched a push into China during 2014, establishing a relationship with a football club in Hong Kong and hosting a business function there. Do you plan to build on that relationship this year?

Absolutely. We'll continue to work on plans to play a game in China and promote our game and club to the people of China. We hope to play a game there soon and, through our efforts, help connect people, business and sport.

As mentioned previously, we came a long way in 2014 and we now want to go to another level to support the continued success of the club.

We have a great desire to be best in league in everything we do.

DW Fox Tucker is proud to be a Key Partner of the Port Adelaide Football Club and wish them every success, on and off-field, this season.

Front cover
Middle l-r: DW Fox Tucker Senior Associate Patrick Walsh, PAFC Head Coach Ken Hinkley, DW Fox Tucker Director John Walsh. PAFC Captain Travis Boak. Front l-r: Kane Mitchell, Jake Neade, Jarman Impey.

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INSIGHT | **Sandy Donaldson**

Finders Keepers

Who "owns" abandoned goods?

Take a drive around the suburbs of any Australian city and you will usually come across things sitting on the footpath, commonly furniture or old household appliances. This seems increasingly to be the accepted way to dispose of unwanted articles in the home, and these usually disappear quite promptly; evidencing the old saying *"One man's trash is another man's treasure"*.

Who owns discarded property?

If you do see something that you would like to have on the side of the road, or somewhere else where it does not appear to be in the possession of anyone, can you take it? If you do, does it become yours?

The old children's rhyme *"Finders keepers, losers weepers"* might apply, but the answer to these questions may not always be simple, particularly as it may be necessary to get inside the mind of the owner, or former owner, of the article[1], and the mind of the finder, to determine their intentions in relation to the article.

Intention to abandon or appropriate

The law in Australia is not completely clear, but the main accepted view expressed is that the owner of an article can abandon or renounce ownership[2] of the article by parting with possession (if held by the owner) and by forming an intention to abandon the article and ownership of it.

Someone who finds, or comes into possession of, an abandoned article may become the owner of the article by *appropriating* it; that is by taking or keeping possession of the article and by forming the intention to own it.

How is intention ascertained?

Usually, the intention of a person who appropriates an article will be clear, but it may be difficult to ascertain or infer the intention of an owner of an article who may, or may not, have had the intention to abandon the article (the *"first owner"*). Usually, the first owner will not be known if an article that is apparently lost or abandoned is found, and the first owner may not express any intention in relation to the article.

It is possible for the first owner to make an express declaration of intention to abandon an article in an agreement, or otherwise, but this is unusual.

If an article is found, the circumstances in which it is found may indicate the likelihood of an intention to abandon the article, or the opposite. Articles which are merely lost are not abandoned.

Size may matter

If you find something like an old lounge suite or a table on the side of the road or in a public space there is a fair chance that it is not there by accident but has been abandoned and left with the intention that anyone who wants it may have it (*appropriate it*).

On the other hand, if you find something small and valuable, such as a gold nugget found by a school girl in a railway station[3] or a Pentax camera left on a fence[4] it would seem unlikely that these have been abandoned.

The place of finding an article may also give an indication as to the likely intention of the first owner to abandon the article, or not. Something found at a public rubbish dump would normally be taken to be obviously abandoned and available for appropriation by a finder[5]. But even at the dump, finding something of real value may lead to doubt.

Finding a damaged dinghy in mangroves may not be circumstances in which it is reasonable to assume that the boat had been deliberately abandoned rather than that it had broken away from moorings[6]. The finder of a damaged motorcycle, with parts scattered, in scrub may lead to the belief by the finder that the bike had been abandoned[7]. However, whatever may be the belief of the finder of an article as to whether or not it has been abandoned, this does not mean that the first owner did have an intention to abandon the article.

Remedies and larceny

If an article is found and appropriated, what may be the consequences if it is not abandoned by the first owner?

If the first owner becomes aware of the appropriation, he or she may require the article to be returned, or may be able to obtain damages for its loss *(either in conversion or detinue or for trespass to goods)*. This will certainly be the case where there is no reasonable cause for the person making the appropriation to believe that the article has been abandoned. If the first owner has acted in a way that induces the belief that the article has been abandoned, this may preclude recovery (but this has not been decided).

The appropriation of an article that is found can also constitute larceny by finding. This is the case even if the first owner of the article is not known, as in the examples of the gold nugget and the camera. However, intention is a necessary ingredient of the offense of larceny by finding, and unless the finder is proven not to have had a genuine belief that the article had been abandoned and may be appropriated, the offense of *larceny by finding* is not committed.

continued overleaf...

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Finders keepers

The old expressions *"finders keepers"* and *"possession is 9 points of the law"* (sometimes expressed as *"possession is 9/10ths of the law"*) suggest that a finder in possession of an article may keep it. However, a first owner, as noted above, may be able to recover the article, or obtain damages for its loss, but it will be necessary for the first owner to prove ownership, and that the article was not in fact abandoned.

Until such time as the first owner of a found article appears to assert a claim to the article, a finder who has possession of the article may use it, but may run the risk of potential liability for loss or damage, or of prosecution for larceny if there is no reasonable cause to believe the article has been abandoned.

Police control of found property

In South Australia the *Police Regulations 2014* made under the *Police Act 1998* make provision for *"found property"*; that is *"any personal property that has been lost and whose owner is unknown at the time at which it is found"*.

If *found property* is delivered to the SA Police, the finder may make a claim to the property within 42 days from the day on which it is delivered to SA Police. The police must retain custody of the found property for at least two months, but may then return the found property to the finder.

Regulation 75(2)(a) provides expressly that the finder:

> *"…does not obtain title to the property as against the owner or the person who lost the property until the end of 5 years from the day on which the property was returned to the finder by SA Police".*

The Regulation goes on to say that the finder is taken to have agreed to return the property, or to pay its value if it is no longer in possession, to a person who *"claims the property"* and who proves that claim to the satisfaction of the Commissioner within the 5 year period. The finder is also required to indemnify the police in respect of any claim made against them as a result of the return of the property to the finder.

The Regulations do not expressly provide that title to found property will pass to a finder at the end of the 5 year period, but this does seem to be the inference in Regulation 75(2)(a). The reason for the 5 year period is not apparent. Apart from the Regulations, a first owner may not be able to maintain an action for the *torts of detinue or conversion or trespass* after 6 years under the *Limitation of Actions Act 1936*.

So, there are potential risks if you retain an article that you find. In the case of larger items of furniture or appliances etc. any risk may be minimal, but it may depend on the circumstances in which these are found. Smaller valuable items, however, will usually not be *abandoned* by their owner and the safest course would seem to be to deliver these to the police, and to make a claim on the articles if these are not claimed by the first owner. If the first owner does not make a claim then, hopefully, *finders* may be *keepers*.

[1] The expression *"article"* is used to refer to tangible, moveable personal property or chattels; things that it is possible to have actual physical possession of.

[2] *"Ownership"* is used to mean *title* or *property* in an article. This may equate to a right to possession of the article.

[3] *Keene v Carter* BC9401870, Supreme Court of Western Australia.

[4] *R v MacDonald* (1983) 1 NSWLR 729.

[5] *AL Hamblin Equipment Pty Ltd v Commissioner of Taxation* (1974) 131 CLR 570, Jacobs J.

[6] *Feist v Bonython* [1944] SASR 176.

[7] *Donoghue v Coombe* (1987) 45 SASR 330.

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NEWS & VIEWS | **Christopher Knott**

Guarantors Beware

Settling with the bank may not be the end of the matter

You are a director of a company. You and the other director provide a guarantee to the bank for the company's debts.

The company fails and the bank demands payment of the debt, $1million.

You dispute your liability as guarantor and the bank settles with you for $100,000 with the bank covenanting not to sue you for any further amount. You feel relieved to have resolved the demand in this way.

However, the recent decision by the High Court in *Lavin v Toppi* [2015] HCA 4 has confirmed that this may not be the end of the matter. Your fellow director, who ended up paying the rest of the debt, may be able to recover a further $400,000 from you - being your share of the residual amount of the guaranteed debt.

Under a joint and several guarantee given to a creditor, the creditor can recover all the debt, or any part of it, from any one or more of the guarantors. The creditor is not bound to pursue all guarantors, nor is it bound to obtain an equal amount from each guarantor. Therefore, the bank can settle with you for $100,000 and chase your other director for the balance.

However, between themselves the guarantors are bound to contribute to the debt equally – known as the *right to contribution*. If they do not contribute to the debt equally then legal action may be taken by an "over payer" against an "under payer" to recover the amount of the overpayment.

The right to contribution in the matter of *Lavin v Toppi* was held by the High Court to not be affected by the deal done by the guarantor with the bank.

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INSIGHT | **William Esau**

Environment Protection Act

Site contamination: What to do when selling

The *Environment Protection Act* provides that the *"appropriate person"* may be issued with a *"site contamination assessment order"* or a *"site remediation order"* in relation to a site. An "appropriate person" is a person who caused the site contamination. Site contamination exists if there are chemical substances on land which are above permitted background concentrations.

A site contamination assessment order is made against the appropriate person requiring that an assessment of site contamination be carried out where the Environment Protection Authority (EPA) believes that site contamination exists on land. A site remediation order is an order to the appropriate person, giving details of site contamination and requiring the person to whom it is issued to remediate the site within a specified period. Depending upon the level of site contamination, this may be a very costly exercise.

The appropriate person who may be served with a site remediation order will be the person who caused the site contamination at the site or, if it is not practical to issue an order to that person, then the owner of the site, provided that:

1. before the person acquired the site, the person knew or should have known that chemical substances were on the land likely to require remediation; or
2. before the person acquired the site, the person knew or should have known that activity that caused site contamination had been carried out on the land and the activity is an activity prescribed by regulations as potentially contaminating activity.

Therefore, the appropriate person who may be required to remediate site contamination will either be the person who caused the contamination or the person who acquired contaminated land where that person either knew or should have known that contamination existed or that activity was carried out on the land which is potentially contaminating activity.

It is possible to transfer liability for site contamination under Section 103E of the *Environment Protection Act*. Liability may be transferred from the owner (seller) of land to a purchaser in relation to all or part of site contamination. However, in order to transfer liability, it must be clear that site contamination actually exists on the land. This is best achieved by having a site assessment carried out. Provided the requirements of Section 103E of the *Environment Protection Act* are met, then the purchaser will assume the owner's liability for site contamination. These requirements are as follows:

1. Site contamination must actually exist.
2. The land being sold is sold subject to an agreement in writing, under which the purchaser assumes liability for either all or part of site contamination. When this happens, the purchaser is taken to have assumed the seller's liability for site contamination and the requirement to remediate land applies to the purchaser and not the seller, as if the purchaser had caused the site contamination in the first place.
3. It is necessary that the seller gives a notice to the buyer in a form approved by the EPA setting out the legal effect of the agreement. A copy of the agreement must then be lodged with the EPA.

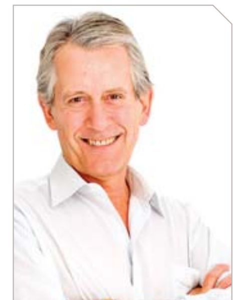
However, the protection afforded to a seller will not apply if the buyer did not acquire the land in a genuine arm's length transaction (i.e. the transaction was a sham). A genuine arm's length transaction is one where there is no special duty, obligation or relationship between the parties.

The EPA then records on the Public Register details of each agreement which excludes or limits the liability for site contamination. The entire agreement is then lodged with the EPA and is also on the Public Register.

Under these arrangements, the new owner is deemed to have caused site contamination and the EPA can then require the assessment and remediation unless there is some restriction on the buyer's liability under the agreement.

Where site contamination exists and a site contamination assessment or remediation order is made, it will be a criminal offense not to comply with the orders which may carry substantial penalties.

Sellers who wish to sell land subject to contamination and wish to transfer liability to the purchaser will need to be familiar with the *Environment Protection Act* and the strict guidelines which relate to a transfer of this liability. DW Fox Tucker will be pleased to advise sellers and buyers on these provisions.



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INSIGHT | **Julie Van der Velde**

Business Transactions

Myths and tax traps

When you buy a business venture or invest in one you are putting your money into something someone else has set up, organised and run. You can never eliminate all the risks but you can remove some of them by making sure that you don't go into an investment with blinkers on. This seems obvious, but frequently I find myself trying to help people who bought a business with minimal, if any, investigation. This is generally due to one of the myths of business transactions. Myths like, it's ok because:

Myth # 1: the vendor is a 'good bloke';

Myth # 2: legal investigations cost too much; or

Myth # 3: there are warranties.

This article looks at just some of the tax traps you may be caught in if you rely on myths. There are many other traps to avoid (both tax and commercial) which we will write about in later articles.

Greg was a good bloke, so when Greg offered him the opportunity to buy the business Michael jumped at it.

Myth # 1: **The good bloke**

Michael started working in Greg's chicken bar, Cluck P/L, part-time when he was in Year 10. He liked the work and when he finished school Greg offered him a full-time position as manager. Most of the time Greg was off looking after his other businesses so he gave Michael a free hand with Cluck P/L and it did well. Michael managed the four part-time employees and even managed to grow the business. After 10 years Michael believed he knew everything about Cluck P/L and he also knew Greg pretty well. Greg was a good bloke, so when Greg offered him the opportunity to buy the business Michael jumped at it.

Michael used all of his savings and borrowed the rest from NACBZ Bank. He didn't need to ask to see the financials because he had worked with the bookkeeper to prepare the quarterly BAS and helped compile the company financial reports and tax returns so he had all the details. Michael instructed his lawyer not to investigate the company he was buying but just to put through the sale.

The sale went through and things went well for a while. Then Michael got a letter from RevenueSA.

The letter stated that from 2003 when it was incorporated until 2014 when Michael bought it, Cluck P/L had been one of several businesses wholly owned by Greg and so grouped for payroll tax. None had registered to pay payroll tax so no payroll tax had ever been paid.

Michael explained the chicken bar's payroll was less than $600,000 and he hadn't owned it back when it was grouped. RevenueSA were not interested in Michael's explanations.

Payrolls for employees in all of Greg's companies since 2003 had averaged $2,000,000 per year so a lot of payroll tax was due. Any tax (including interest and/or penalty tax) payable under the *Payroll Tax Act 2009* (SA) and/or the *Tax Administration Act 1996* (SA) by a member, or members of a group, is a debt due jointly and severally by every person who was a member of the group during the period the tax became due. A company is a legal person so the company Michael had bought was liable for the payroll tax. Unfortunately, as Greg and many of Greg's businesses seemed to have disappeared, Michael's chicken bar was one of the most solvent left.

Michael now has no savings and no business, but some valuable experience. Also, he no longer thinks Greg is a good bloke.

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Myth # 2: **Legal investigations cost too much**

Nathan worked in management for years. He had experience in several engineering and manufacturing businesses and a good understanding of local industry and how local markets worked. In his 40's Nathan started to think about buying a business himself and putting some of his own theories to the test. Nathan looked about for a suitable investment and found AFM P/L. He looked into the business carefully and spoke to several of the customers whom he knew from his own previous roles at different firms. Nathan went over the financials with his accountant and looked at the tax returns.

Everything looked good and Nathan made an offer for the business. As stamp duty was so much lower he decided to buy the shares in the company rather than buy the business from the company. Also, his accountant advised him that running a business through a corporate structure would give him better asset protection and he knew himself that buyers and suppliers were more comfortable dealing with a company.

Nathan's lawyer explained that the company would remain liable for all its debts and for any warranties given and any torts that might have been committed even if all the shares changed hands. He advised Nathan to undertake a full due diligence investigation before any contracts were signed. Nathan didn't see the point. It was an expensive process and with all his years of business experience he knew what he was doing. Nathan decided to go ahead and save the extra expense.

The sale went through and things went well for a while. Then Nathan got a letter from the Australian Taxation Office (ATO).

The ATO said they had concerns about fringe benefits and would like to come out and take a look at some company records. Nathan knew quite well that it wasn't the sort of request you could say no to although he thought it a bit peculiar as the business didn't give any staff benefits and had never lodged an FBT return. They agreed on a date, a couple of ATO officers turned up and asked for some files and a couple of days later they met with Nathan.

First of all they asked about the IT ledger accounts; particularly the computer system that had been installed into the previous CEO's home and networked for use throughout the property in 2012. They pointed out that although it was all listed as being for work purposes and so not subject to fringe benefits tax the full surround sound system in both living areas and the five plasma screens did not seem to be fully adapted for 100% business use. While Nathan was thinking about this the ATO officers went on to ask about the ledger labelled business subscriptions; they weren't concerned about the subscriptions to 'What's New in Electronics' or to the 'Business Review Weekly' but queried subscriptions to the 'Royal Adelaide Golf Club', the 'Adelaide Club' and the 'Exclusive Wines Club'. Before Nathan could start to respond the ATO officers were on to the next ledger, business vehicles. Nathan knew his predecessor CEO had been driving around in an Audi R8 Spyder Quattro but he hadn't realised that it was on a novated lease from the company and treated as 100% business travel. Before the ATO officers even asked Nathan knew there wasn't going to be a log book in the records. In comparison, the fact that the marketing assistant, who happened to be the previous CEO's daughter, was driving a Lexus and the part-time office assistant, his teenage son, was driving a Mini Convertible, both treated as 100% business use, paled to insignificance.

After several more unanswerable questions Nathan got the good news. None of the ledger entries since he had taken over raised issues for the ATO.

Nathan went to see his solicitor to see what, if anything, he could do. After some negotiations with the ATO a figure was eventually agreed to payout their claim for unpaid fringe benefits taxes over the last six years together with interest and penalties. Nathan asked the NACBZ Bank to increase his overdraft and fortunately they agreed. Nathan is lucky, his business will survive and he has gained some valuable experience, albeit rather expensively.

Myth # 3: **There are warranties**

Eddy regularly bought companies cheap. Once he got in he sold off the assets for more than the shares had cost and paid out the fully franked profits to one of his holding companies. Eddy had a good friend, Gary, who practised as a commercial solicitor and regularly did the legal work on Eddy's acquisitions. Unfortunately, Gary did not know a great deal about tax so, although he looked into some matters for Eddy, there were some he missed.

Eddy bought Land Co P/L in 2012. Within 18 months he had wound up the business, sold all the assets and paid his holding company some significant dividends. Eddy was about to close the company when he got a letter from the ATO.

According to the ATO Land Co P/L had made something called an interposed entity election in 2008 when an associated trust had made some losses due to the GFC. This meant that every time the company paid a dividend to someone who wasn't in the same family group as the previous owner there was a withholding tax due at the top rate. Eddy hadn't paid this tax. Worse still there were no rebates for this tax and no franking credits allowed. Eddy had bought the shares in his holding company and was expecting the fully franked dividends to be paid there with no additional tax at all.

Eddy went back to Gary and asked if this was covered by the warranties. Gary thought not. Eddy has gained some valuable experience and is considering whether his friendship with Gary is worth more than the potential damages from suing him for negligent due diligence work on the transaction.

If you are planning to buy a business please talk to me, or another member of our specialist Tax team, before committing yourself to what might be a very expensive mistake.

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CASE IN POINT | **Mark Gowans, Kelly Fussell & Leesa Simons**

Calling All Failed "Blockheads"

Building works gone wrong

Many of you may have been inspired to build a new house or renovate your existing house/property by television shows such as "The Block" and "House Rules", but what happens when (true to the drama that is commercial TV) the services of your builder, architect or other tradesmen aren't up to scratch?

As a general rule, any claim for building defects (including negligent works and/or breach of a contract) must be commenced within 6 years. But 6 years from when? Is it from when building works first commenced? Or is it from when the defect was first discovered?

The Queensland Court of Appeal recently found that when there is physical damage from a latent building defect, the limitation period for bringing a claim will not necessarily commence on the appearance of the damage, but rather when the damage can be traced to its source by the application of reasonable diligence.[1]

The facts

In January 2000, Springfield Land Development Corporation (*"Springfield"*) and Melisavon Pty Ltd (*"MPL"*) entered into a contract for the design and development of a residential golf course and club house.

MPL (the Builder) obtained a geotechnical report which revealed that the soil beneath the proposed club house was susceptible to ground heave[2] because of varying moisture conditions. To overcome this issue, sufficient separation between the foundation slab of the club house and the ground itself was required.

Shortly after construction commenced, a crack in the foundation slab was identified. It was agreed by the parties that the crack was a result of ground heave that was greater than expected, but that the slab was otherwise stable. The parties agreed to apply a concrete seal to disguise the crack. However, at a site inspection some 7 months later extensive cracking was identified as a result of further ground heave.

Consequently, a defect liability period expiration inspection notice was issued to the Builder requiring rectification of (amongst other things) the cracks. In response, the Builder alleged that the majority of defects had been rectified and the remaining items were not caused by defective workmanship or materials.

In June 2005, the Builder ultimately denied liability for the ground heave and asserted the issue was the result of faulty design and maintenance.

The Supreme Court of Queensland proceedings

Springfield commenced proceedings against MPL in June 2011 seeking damages for negligence in the sum of $866,258. MPL defended the proceedings on the basis that the damage first occurred in late 2003 or, alternatively, in early 2004 and, consequently, Springfield's claim was *"out of time"*.

Springfield argued that it did not discover the defects until 2009 or 2010 when it became aware that the damage was caused by the defective design of the club house and the surrounding area.

MPL filed an application for summary judgment against Springfield to dismiss Springfield's claim on the basis that Springfield did not have a reasonable basis for its claim against MPL (*"the Application"*). In determining the Application, the Supreme Court of Queensland stated that the issue as to when the cause of action arose was not a simple matter of determining when the cracking first appeared in the foundation slab.[3]

As a general rule, any claim for building defects (including negligent works and/or breach of a contract) must be commenced within 6 years.

As the Application was summary in nature, the Supreme Court dismissed the Application on the basis that it was necessary for a factual investigation to occur (and determinations to be made) as to when Springfield first became aware (or ought to have become aware) that it had suffered loss because of the alleged defective design.

The appeal proceedings

MPL appealed the Supreme Court's summary decision to the Queensland Court of Appeal.

The Queensland Court of Appeal held that the cause of action arose when Springfield had actual knowledge of MPL's faulty engineering design or when the defective design itself became apparent or could be discovered by reasonable diligence as it is only then that Springfield suffered an actual reduction in the market value of the club house.[4]

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However, if reasonable enquiries would have revealed the cause of the defect, the defect would be said to be apparent even though it was not in fact known to Springfield at that time.[5]

How does this affect you?

The time in which proceedings may be commenced for material damage to building works may not start running until the link between the physical manifestation of the damage and the underlying defect responsible for the damage is known (or ought to be known).

If you (or someone you know) are aspiring "blockheads", are involved in a building dispute and are unsure whether you are "out of time" to take further action against your builder, tradesmen and so forth (or if you yourself are a builder, tradesperson etc. involved in such a dispute), please contact our Commercial Disputes & Insolvency Team for assistance.

[1]*Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd* [2014] QCA 233.

[2]An excess in water which causes the ground to expand and 'heave' the property upwards and outwards.

[3]*Springfield Land Development Corporation Pty Ltd v Melisavon Pty Ltd* [2013] QSC 228 at 62.

[4]*Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd* [2014] QCA 233 at 43 and 53. Similarly, in the case of Owners – *Units Plan No. 1917 v Koundouris* [2014] ACTSC 269 at 42, it was held that *"…a cause of action in negligence for latent defects… is complete when the defects become manifest or are otherwise discovered."*

[5]*Cyril Smith & Associates Pty Ltd v The Owners – Strata Plan No 64970* [2011] NSWCA 181 at 15.

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CASE IN POINT | **Patrick Walsh**

When is an Employee Absent and when is an Employee on Leave?

The Supreme Court clarifies

The Full Bench of the Supreme Court, in a majority judgment, in *Flinders Ports Pty Ltd v Woolford* [2015] SASCFC 6 has clarified what it means to be on "unpaid leave".

This decision involved an employee who was employed as a casual worker to perform mooring, deckhand and maintenance duties in Port Lincoln Harbour. He was employed on a series of contracts from 16 October 1990 until 10 October 2008, when he ceased work due to a work-related injury. During this time the employee worked varying hours, shifts and duties depending on the work that was available. For differing reasons, both Kourakis CJ and Stanley J found that the worker had been continuously employed by Flinders Ports Pty Ltd until his employment was formally terminated on 23 September 2011.

Section 3 of the *Long Service Leave Act 1987* (SA) (*'the LSL Act'*) states that where an employee is employed on a casual basis, the weekly rate of payment for the purposes of long service leave will be calculated by reference to the average number of hours an employee worked during the three years preceding when the entitlement to long service leave arises.

At issue was whether the period that the employee was away from work as a result of his work-related injury (and in receipt of weekly payments pursuant to the *Workers Rehabilitation and Compensation Act 1986* (SA)) should be disregarded for the purposes of calculating the employees long service leave entitlement pursuant to section 3(4)(b) of the *LSL Act*, as "unpaid leave".

Stanley J and Kelly J (Kourakis CJ dissenting) found that *"Leave is an entitlement relieving the employee from the performance of work duties, which is conferred by the terms of the employment contract, an industrial instrument or Act of Parliament that applies to that employment. Usually such leave is paid. Leave can also be granted to an employee by an employer as an indulgence. The employee is relieved from the performance of work outside of any contractual or statutory context."*

Although this decision concerned circumstances in which an employee was away from work as a consequence of a work-related injury, it potentially has much broader application to any employee who is employed as a part-time or casual employee, or paid on a performance basis.

Simply because an employee is not at work, they will not be taken to be on unpaid leave. In order to be on unpaid leave an employee will need to be able to establish that they are using an industrial entitlement or that the employer has in some way positively condoned the employee taking a period of unpaid leave.

If you have an employee(s) who has been absent from work for a period of time without authorisation from the employer (and not on paid leave), you should seek advice as to how this decision might affect you.

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INSIGHT | **Brett Thorneycroft & Isabel Miller**

Buying or Selling a Business?

How to ensure the best outcomes

Buying or selling a business can involve complex legal processes and documentation. What may seem like a simple transaction, can become problematic very quickly if the parties involved do not understand the process.

One of the key issues to consider before a business sale is whether the assets of the business, or all the shares in the company that owns the assets, will be sold. These two methods may have significant implications for both the vendor and the purchaser and should be considered by both parties when structuring the transaction. In determining which structure is more appropriate, consideration should be given to the legal, commercial and tax implications, as these consequences and risk exposures can differ significantly.

Asset sale

Under an asset sale, the purchaser acquires some or all of the assets owned by the vendor that are used in its business and the vendor retains the ownership of the corporate entity.

The vendor's business name may or may not be included in the sale and the licences, contracts and employees may or may not be transferred to the purchaser depending on the terms agreed. In fact, critical contracts may require the consent of the counterparty before a transfer can occur. If it is anticipated that the consent to transfer may be difficult to obtain, this may be a factor going towards doing a share sale.

If the purchaser wishes to take on the employees, the relevant employees' employment with the vendor will need to be terminated and those employees would need to accept new employment with the purchaser.

A purchaser is likely to prefer an asset sale because the purchaser can 'cherry pick' which assets to acquire.

Another reason the purchaser may prefer an asset sale is because the company's liabilities and encumbrances are not automatically transferred to the purchaser unless the parties agree otherwise (as is the case with a sale of shares). Further, the price paid for the CGT assets is reflected in the purchaser's cost base for these assets which could reduce capital gains tax that might arise on a future disposal of those assets.

Share sale

Under a share sale, the purchaser acquires all the shares in the company that owns the assets and runs the business. By acquiring shares, the purchaser indirectly obtains ownership of all assets and assumes all liabilities of the company.

The parties will need to ascertain all the shareholders of the company and the number and type of shares comprising all the issued capital. Additionally, the parties will need to identify and comply with any restrictions on transfers, including any pre-emptive rights provisions in the company's constitution or shareholders' agreement.

All contracts and licences of the company remain with the company, subject to their terms and conditions. As previously mentioned, some contracts may contain change of control provisions requiring third-party consent, without which, the third party may have the ability to terminate. The purchaser should cause, and ensure that the sale agreement requires, the vendor to obtain such consent prior to completion. Similarly, all employees remain with the company under their employment agreements, subject to any change of control provisions under which consent from the relevant employee may be required.

As the purchaser indirectly assumes all of the liabilities and encumbrances of the company (whether recorded or unrecorded and whether known or unknown), due diligence of the company is undertaken to identify these liabilities and encumbrances and is usually more rigorous than the investigations undertaken where the assets of the business are sold.

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Asset sale or share sale?

Generally, a purchaser will be more likely to prefer an asset sale to limit the extent of liabilities it takes on and to set its cost-base of the assets for Capital Gains Tax (CGT) purposes in any subsequent re-sale. However, a vendor may prefer a share sale for tax reasons and to significantly reduce the extent of any potential liabilities that may remain with it. In most circumstances, the tax implications drive the structure of the transaction.

Other key legal considerations under both structures are outlined in the table below.

Due diligence

The appropriate due diligence process will depend on a number of factors, including the size of the business and the complexity of the business structure.

To manage its risk exposure to breaches by the vendor in respect of undisclosed liabilities or encumbrances, the purchaser will obtain appropriate warranties and indemnities.

Under an asset sale, any liability not specifically assumed by the purchaser will reside with the vendor. This may limit the need for due diligence to only those assets or liabilities that are specifically contracted to transfer to the purchaser.

SHARES	ASSETS
Points in favour of share sale	
Tax losses in target company may be able to be carried forward and set against future profits of business.	Tax losses remain with vendor company, and cannot be used by the purchaser.
Contracts, licences and leases go with target company (subject to change of control provisions).	Contracts, licences and leases will, typically, require consent to assignment. Some may not be assignable.
Change of ownership less visible to market.	More visible. However, usually purchaser acquires target's corporate name.
Lower stamp duty (if company incorporated in Victoria, stamp duty may be nil).	Higher stamp duty.
Less disruptive for employees – continuity of employment	Termination and re-employment – more disruptive.
Documentation is more straightforward.	Documentation more cumbersome. Transfers of specific assets, e.g. business names, trademarks, property lease, real property etc. Need to apportion price state by state.
Quicker – all assets of target company go with the sale.	More time consuming – need to identify and list assets.
Points in favour of asset sale	
All liabilities (including tax) go with target company.	No pre-acquisition liabilities assumed.
Share acquisition impractical if target company business is one division of several divisions operated by vendor.	Can acquire parts of vendor's business.
Target's assets will not be able to be used as security for financing acquisition.	Target's assets available to be charged by the purchaser.
Impractical if numerous vendors or if not all are willing sellers.	Single or limited number of willing vendors.
Neutral points	
Regulatory approvals such as by the Foreign Investments Regulatory Board and the ACCC.	

On the other hand, in a share sale the purchaser has the potential to acquire the unknown, and consequently a more thorough due diligence of the company is likely to be required by the purchaser.

Further, a vendor should also conduct its own due diligence to identify any ongoing risk exposure for it, such as any guarantees or securities provided and to understand what critical warranties may be required of them.

How we can help

Whether you are considering selling or buying a business, our corporate and tax specialists can provide you with advice on the legal, commercial and tax implications of the transaction and assist in negotiating the terms of the sale and drafting or reviewing the legal documents.

We make sure the rights and obligations of both parties are clear, avoiding unnecessary disputes and ensuring that everything runs smoothly throughout the transaction.

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

Land Tax

The Commissioner's views on trust beneficiaries

Broadly, the object of the provisions is to deter artificial, blatant or contrived schemes to reduce or avoid liability for any state tax.

Land tax is imposed at progressive rates on the aggregate taxable value of the taxable real property owned by a taxpayer. Where land is held in trust, however, section 13(3)(b) of the *Land Tax Act 1936 (SA)* provides an exception to the aggregation principle unless the land and other land are held in trust for the same beneficiary.

Occasionally land and other land are each held by separate trustees on the terms of a separate discretionary trust but with commonly described beneficiaries. In this case the Commissioner of State Taxation takes the position that the words 'the same beneficiary' can apply to a collective group of objects of a discretionary trust and section 13(3)(b) does not apply.

In doing so, the Commissioner has rejected arguments that the words "the same beneficiary" require the identification of a particular common beneficiary entitled to the land held in each trust and cannot be applied where the beneficiary can only be identified as a commonly described class of objects among whom the trustee may, subject to the powers conferred on it, distribute the land held in trust.

The ordinary meaning of the words "the same beneficiary" would appear, however, to require the Commissioner to identify the exact same beneficiary in each of the trusts in which land is held so the Commissioner's position is questionable.

The objects of a discretionary trust have a right to due administration of the trust, but there is support for the proposition that no object has an interest in the trust fund or any proprietary interest in any asset of the trust.[1] This is consistent with the decision in *Lygon Nominees Pty Ltd v Commissioner of State Revenue [2007] VSCA 140* where the Victorian Commissioner of State Revenue successfully argued that, because the trusts which held land were wholly discretionary, and as such there was no person or class with a vested or even contingent interest in the income of the trust, there was no beneficial owner for whom any of the lands were held.

The Court of Appeal of the Supreme Court of Victoria held for the Commissioner that beneficiaries of a discretionary trust did not have any estate or interest in land held by the discretionary trustee and as such were not beneficial owners.

Similarly, in *Commissioner of State Revenue v Famajohn Nominees Pty Ltd [1999] VSC 383* it was held that 2 parcels of land were not held for "different beneficial owners" because, even though one parcel of land was accepted by all parties to have a beneficial owner, the other parcel of land was held by the owner in its capacity as trustee of a discretionary trust and, therefore, had no beneficial owner.

If the various potential objects comprising the class of objects of each discretionary trust do not have any estate or interest in property held by the trustee, there are no beneficiaries for whom any of the property is held. It then follows that the trust property cannot be held in trust for the same beneficiary because there is no identifiable beneficiary for whom the property is held. This is true for all objects of such a trust including takers in default.

In the alternative, the Commissioner has a second prospective argument for aggregation. If two trusts have similarly described objects the Commissioner may seek to argue that the holding of land separately under each trust is a scheme to which Section 40B of the *Taxation Administration Act 1996* (TAA) will apply.

From 1 July 2011, a new Part 6 general anti-avoidance provision applying to all state taxes was included in the TAA. Broadly, the object of the provisions is to deter artificial, blatant or contrived schemes to reduce or avoid liability for any state tax.

The provisions operate by making a person liable to pay an amount of tax avoided by the person as a result of a tax avoidance scheme.[2] A tax avoidance scheme is any scheme that a person enters into for the sole or dominant purpose of enabling liability for tax to be avoided or reduced.[3] In determining the sole or dominant purpose, any purpose relating to avoiding, reducing or postponing a liability for Foreign Tax is disregarded.[4] Foreign Tax in this context includes any tax of another state or territory or of the Commonwealth besides taxes imposed by overseas jurisdictions.[5]

Part 6A would recognise the ownership of the land as being under separate trusts and not for 'the same beneficiary', but alter the tax consequences of the holdings. To apply the Part the Commissioner is required to issue a notice of assessment, or reassessment on the basis that a transaction constitutes a scheme that is a tax avoidance scheme of an artificial, blatant or contrived nature.

In determining whether a scheme has a sole or dominant purpose of enabling liability for tax to be avoided or reduced and is of an artificial, blatant or contrived nature, eight matters are listed which should be taken into account. Part 6A requires consideration of the purpose of the relevant taxation law or any provision of the relevant law.[6] Prima facie, the purpose of any taxation law is to raise revenue, but a more specific analysis shows that the purpose of subsection 13(3)(b) is to except a trustee from the effects of aggregation.

Even if the purchase of property in two or more separate trusts were to constitute a scheme, it will not be sufficient to enliven the section unless that scheme is also found to be blatant, artificial or contrived.

The disjunctive should be noted; the scheme need only meet one of the three criteria to trigger the provision. Further, however, the scheme identified must be found to have a sole or dominant purpose of enabling liability for tax to be avoided or reduced.

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The establishment of discretionary trusts to hold land may well be attributable to significant family or commercial purposes. A dispute with the Commissioner under Part 6A will require evidence to be addressed of any such purposes relied upon by a trustee. If land is to be acquired and held by a trustee in such trusts, a careful record of these purposes ought best be made by the trustee at the time of the acquisition.

[1] For example: *Commissioner of Stamp Duties NSW v Buckle* [1998] HCA 4; (1998) 192 CLR 226; *Lygon Nominees Pty Ltd v Commissioner of State Revenue* [2007] VSCA 140; *Commissioner of State Revenue v Famajohn Nominees Pty Ltd* [1999] VSC 383.

[2] Section 40B *Taxation Administration Act* 1996.

[3] Section 40C(1) *Taxation Administration Act* 1996.

[4] Section 40C(3) *Taxation Administration Act* 1996.

[5] Section 40C(4) *Taxation Administration Act* 1996.

[6] Section 40D(d) *Taxation Administration Act* 1996.

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NEWS & VIEWS | **Mark Minarelli & Russell Jones**

National Electronic Conveyancing System Coming to SA

Will it provide a shock to clients?

After successfully conquering New South Wales and Victoria, the National Electronic Conveyancing System has its sights set firmly West as it aims to take hold in South Australia in 2015, but how, if at all, will the changes affect clients?

Following years of discussion and planning, electronic conveyancing is scheduled to finally hit South Australia in the third quarter of 2015, bringing with it a complete overhaul of the conveyancing process for legal practitioners and conveyancers.

The National Electronic Conveyancing System (NECS) is a scheme that facilitates the online completion of real property transactions and lodging of land title dealings. The intent of the system is to make the overall conveyancing process more efficient by eliminating the need for preparation and lodgment of physical documentation including the need to attend settlement at the Lands Titles Office.

The basis for the scheme is the creation of an online workspace which will enable conveyancers and legal practitioners to, among other things:

- lodge land title documents and related instruments needed to register changes in property ownership and interests;
- allow all accredited parties involved to access and complete the various documentation required to finalise the property exchange or transaction; and
- allow for the electronic settlement of all financial transactions at a nominated date.

While the intention is to eventually enable the entire process to be performed through the online workspace, initially only the following documentation will be able to be completed through electronic conveyancing:

- Mortgage;
- Discharge Mortgage;
- Caveat;
- Withdrawal of Caveat;
- Transfer Title;
- Nomination;
- Withdrawal of Nomination;
- Consent;
- Form 24, Form 25;
- Notice of Acquisition; and
- Notice of Sale.

The benefits for legal practitioners and conveyancers are that the online process allows for greater efficiency in file management and a streamlined settlement process.

What does this mean for clients?

The client will be obliged at the outset to attend a face to face meeting with the practitioner. At this meeting the client will need to authorise the practitioner to enter the digital workspace as an authorised representative of the client. This will include authorising the practitioner to apply a digital signature on behalf of the client to a digital transfer. Additionally the practitioner will be required to identify the client using a point score similar to that used by banks in opening an account. It is obligatory that the practitioner (only a lawyer or registered conveyancer) take all reasonable steps to identify the client.

The streamlining of the settlement process by creating the possibility of online settlement removes the need for practitioners and banks to attend at the Lands Titles Office.

This also allows multiple settlements that are dependent on each other (i.e. a purchase of land depending on a sale) to occur simultaneously and immediately, once again reducing time and creating greater transparency.

One aspect of the new system that may seem counter intuitive to this philosophy is the requirement of a Verification of Identity (VOI) for each party to the transaction. A VOI requires added obligations on each party involved in a transaction to have their identity verified by the practitioner or conveyancer representing them in conjunction with the requirements of the VOI Policy.

continued overleaf...

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The VOI Policy facilitates the security of each party to a transaction by limiting fraudulent conduct.

As well as VOI, other strategies such as the new Certification policy (which requires practitioners or conveyancers to certify each conveyancing transaction) as well as the introduction of the Priority Notice (a notification of intended dealings with land to protect the interest of parties from other dealings until the transaction has been completed) help to increase the security measures around property transactions and promote consumer confidence in the system.

The majority of the changes will be felt by practitioners. Thankfully, the overwhelming effect is that clients can expect a more efficient production of the same service while feeling more secure about entering into a property transaction as a whole. Will it be less costly? Whilst this system brings with it significant advantages, lower fees may not be one of them. Time will tell.

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NEWS & VIEWS | **Mark Gowans & Kelly Fussell**

Receivership - Post Appointment Employee Entitlements

To pay or not to pay? That is the question

What is receivership?

Receivership is a form of external administration which may apply to corporations, partnerships and individuals. It is the primary objective of a Receiver to realise the secured asset in order to provide for the repayment of the secured creditor who appointed the Receiver. Prima facie, the Receiver may pay the secured creditor in priority to any other claim holders and remit the balance to the company (or liquidator if applicable). However, this position is affected by statutory provisions which give priority to certain claims.

The priorities payable by a Receiver depend on the type of security interest held by the secured creditor; circulating or non-circulating. This article will focus on circulating security interests (formerly described as floating charges).

Pre Appointment Employee Entitlements

It is well acknowledged that sections 433 and 556(1)(e) and (g) of the *Corporations Act 2001* (Cth) (*"the Act"*) require payment of wages, superannuation contributions and superannuation guarantee charges (*"Employee Entitlements"*) due and payable to employees as at the date of appointment of a Receiver in priority to monies payable to a secured creditor pursuant to a circulating security interest.

But what about Post Appointment Employee Entitlements?

What has been traditionally much less clear is whether or not Post Appointment Employee Entitlements ought to be paid by a Receiver as a priority payment pursuant to the Act.

In the matter of *Challenge Australia Dairy Pty Ltd (Administrators Appointed)* (Receivers and Managers Appointed) [2011] FCA 10 (*"Challenge Australia Dairy"*), the Federal Court of Australia considered whether (like section 556 of the Act), section 558 was of application to receiverships.

The effect of section 558 of the Act is that priority is afforded to those employees who continue to work with the company after the commencement of liquidation and, as such, their entitlements incurred post appointment take priority to a circulating security interest.

His Honour Justice Barker held that section 558 of the Act does not apply to receiverships and, accordingly, unlike liquidations, Post Appointment Entitlements do not have priority over a circulating security interest. This decision was consistent with that of Finkelstein J in *McEvoy v Incat Tasmania Pty Ltd* (2003) 130 FCR 502 (*"McEvoy"*).

The decisions in Challenge Australia Dairy and McEvoy confirm that a Receiver is not required to pay Post Appointment Entitlements in priority to a secured creditor's circulating security interest (at least where a receivership was not followed by a winding up). However, in both decisions, the Court acknowledged that this decision is not without difficulty. For instance, the post appointment entitlements of employees' whose employment is terminated by a Receiver will rank behind the secured creditor's circulating security interest and this may expose the Receiver to personal liability.

Subrogation

The recent decision of *Divitkos, in the matter of ExDVD Pty Ltd (In Liquidation)* [2014] FCA 696 (*"ExDVD"*) considered whether a secured creditor was entitled to a right of recoupment or subrogation to the extent of priority payments to employees paid out of the secured asset in a later liquidation.

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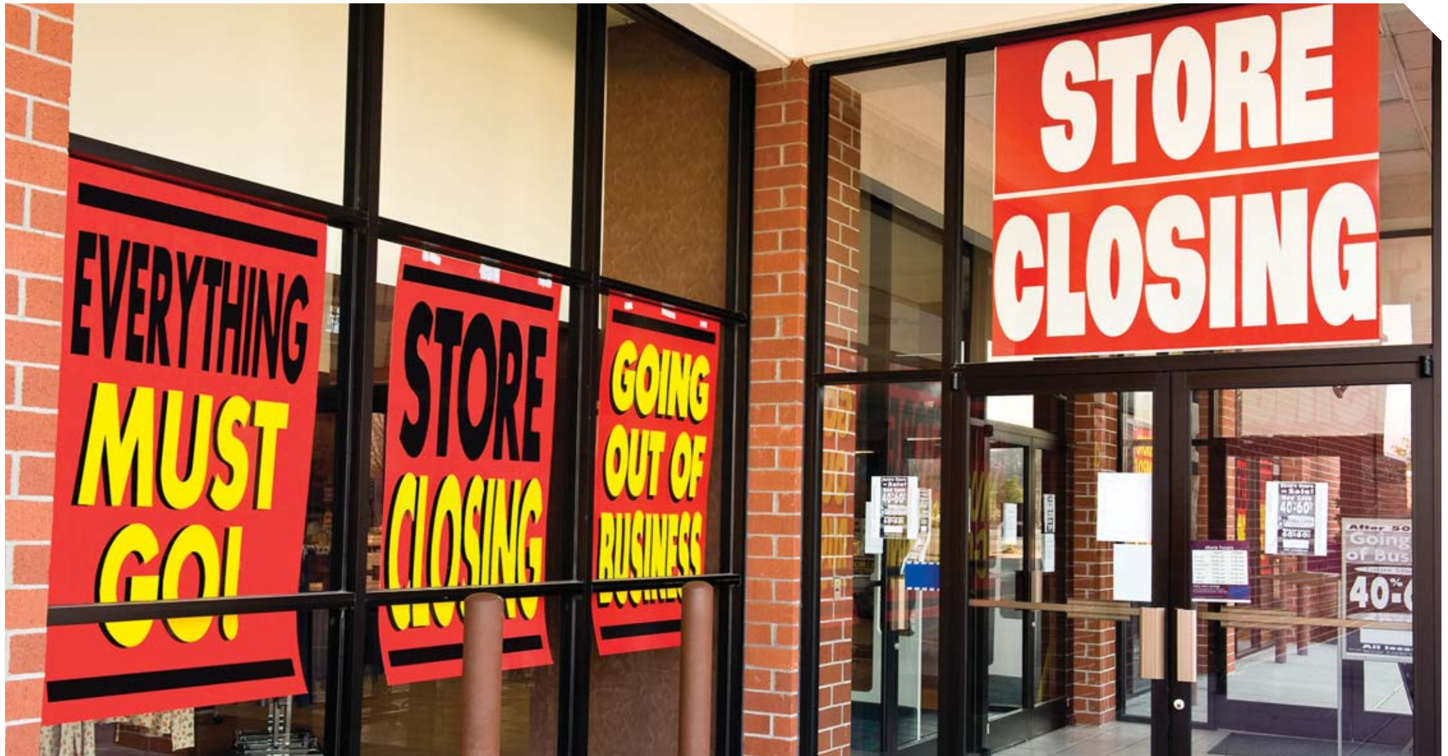

In ExDVD, Commonwealth Bank of Australia (CBA) had appointed Receivers and Managers. On the same day, but after the appointment of Receivers, Voluntary Administrators were appointed (who some four months later became liquidators of the Company). The Receivers paid employee entitlements in the sum of $945,557.44. These payments were made before and after the date of liquidation and related to pre and post appointment entitlements.

CBA asserted that they were entitled to $945,000 on the basis that their security was diminished by that amount as a result of the payments. It was contended by CBA that its entitlement to priority in the liquidation arose either from a right of recoupment or from its right to be subrogated to the rights of the employees whose claims were given the statutory priority.

His Honour Justice White found that CBA was entitled to be subrogated to the position of the employees for any shortfall of its secured debt up to the amount paid for employee entitlements and, therefore, had priority over unsecured creditors.

Justice White also considered the decisions in McEvoy and Challenge Australia Dairy, and determined that where a receivership is followed by a winding up, section 558 of the Act has application to vary the priorities in section 433. Accordingly, there appears to be no difference in the employee entitlements which are afforded priority under section 433 where there is a receivership and liquidation – irrespective of their order.

Conclusion

In summary, Receivers:

- are not required to make payment of Post Appointment Employee Entitlements as a priority in circumstances where only a Receiver is appointed;
- in instances of the appointment of a Liquidator and Receiver, the Receiver ought to consider making payment of priorities in the order prescribed in sections 433, 556 and 558 of the Act;
- should retain records of payments made pursuant to section 433; and
- advise their appointer to lodge a proof of debt for any shortfall using their subrogated position in a winding up.

For assistance or advice regarding receivership, contact our specialist Dispute Resolution and Insolvency team.

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NEWS & VIEWS | **Ben Duggan**

Workplace and Employment Law

Significant events in 2014 and predictions for 2015

Developments and significant events in 2014:

- *Commonwealth Bank of Australia v Barker* [2014] HCA 32 – The High Court unanimously found that employment contracts in Australia do not contain an implied term of mutual trust and confidence. Courts will only imply terms into contracts to ensure the business efficacy of the contract. An implied term of mutual trust and confidence in employment contracts is not necessary, particularly considering the statutory protections against unfair dismissal. This is an important decision for employers as such a term would significantly widen causes of action available to employees against their employers. It should be noted that despite this decision, such a term could still be implied in different factual circumstances so employers should be crystal clear as to whether or not benefits are discretionary or contractual.

- *Fair Work Amendment (Bargaining Processes) Bill 2014 (Cth)* – the Coalition's Bill aims to make two key changes to our Fair Work regime. First, the Bill seeks to tighten the circumstances in which protected industrial action can be taken by unions and workers. This would restore the legislation's intended purpose for strikes to be used as a last resort. Second, the Bill seeks to ensure the Fair Work Commission is satisfied that improvements to productivity in the workplace are discussed during the bargaining process. Employers will welcome both these proposed developments. The Bill has been referred to the Senate Education and Employment Legislation Committee, with a report due 25 March 2015.

- *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41: The High Court found an employee was lawfully dismissed for abusive conduct during a lawful protest. The employee engaged in protected industrial action by protesting onsite, holding a sign that included the word 'scabs'. The employer terminated the worker's contract for breaching the company's Code of Conduct, as 'scabs' was an offensive term which intimidated other workers. The majority of the High Court held the dismissal was not adverse action due to the employee taking industrial action. Instead, they accepted the employer's evidence that the reason for dismissal was because the employee's actions breached the Code of Conduct.

- Last year, the Fair Work Commission began dealing with matters under its new anti-bullying jurisdiction. The *Application by Ms SB* [2014] FWC 2104 shed some light on how the Commission will interpret the legislation. Overall, the interpretation was good news for employers who were concerned that allegations would be made against them when supervisors or managers are simply trying to supervise, manage, control, counsel or discipline staff. As long as management's actions are reasonable and carried out in a reasonable manner, no bullying complaint should be made out. Additionally, the Commission has adopted a pragmatic approach by considering a course of action in its entirety, rather than segregating each individual step of a course of action.

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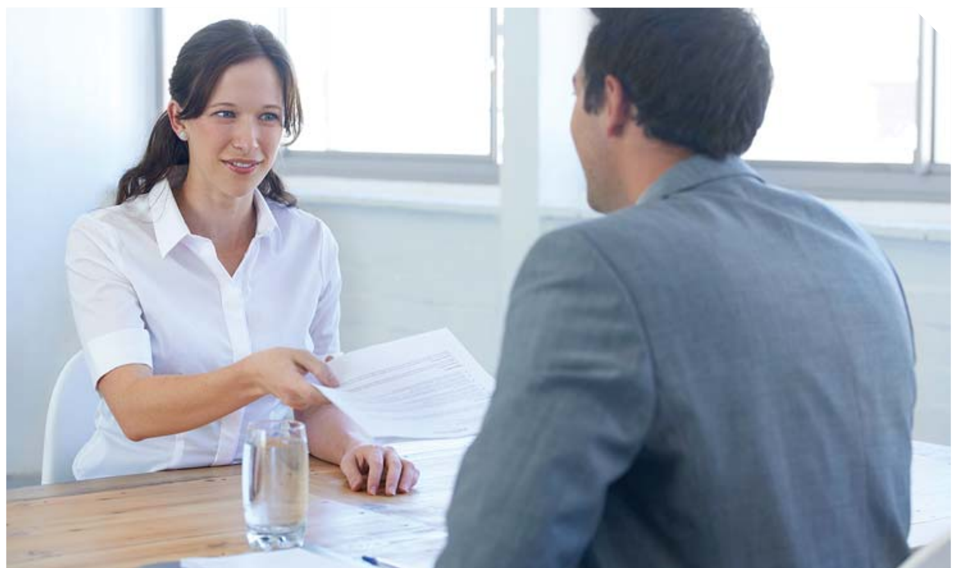

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- The Fair Work Commission also began arbitrating general protection dismissal disputes. We will keep you informed of significant decisions.
- The Superannuation Guarantee increased from 9.25% to 9.5% on 1 July 2014. This will increase to 10% in 2021.
- On 1 July 2014 the following thresholds relating to industrial relations were indexed:
  - The unfair dismissal income threshold has increased from $129,300 to $133,000.
  - The compensation cap for unfair dismissal claims has increased from $64,650 to $66,500.
  - The minimum wage has increased $0.50 per hour from $16.37 to $16.87.
  - Employees that fall under a modern award had their pay indexed 3%.
- The Commission of Audit suggested the Fair Work Ombudsman and Commonwealth Ombudsman merge roles. However, the Government did not act on this recommendation.
- The Coalition have introduced a $10,000 incentive for employers that employ people over 50 years of age who have been on social welfare for 6 months. The Restart Program has failed to meet its objectives with only 500 people benefiting from the scheme compared to its projected target of 32,000 per year.
- As of 1 October 2014, organisations with more than 500 employees have been required to implement one or more policies regarding gender equality, such as equal pay between men and women.

Predictions for 2015:

- The Royal Commission into Trade Union Governance and Corruption tabled its interim report on 19 December 2014 which found a number of serious flaws in the current system. The Minister for Employment has expressed his plans to create a Registered Organisations Commission to combat criminality in trade unions and ensure there is a clean trade union movement. Further hearings will be conducted this year before the release of the final report.
- The Government is transforming its controversial paid parental leave scheme into a 'holistic families package'. The final product is still unclear, however it is anticipated the planned full replacement salary of 6 months (limited to $50,000) will be decreased. The Bill has received significant opposition due to tight economic conditions. Nevertheless, parental leave requirements may become more onerous for employers if the Bill is successful.
- *Building and Construction Industry (Improving Productivity) Bill 2014* (Cth): The most significant change is the proposal to bring back the Australian Building and Construction Commission (ABCC). The Bill also aims to limit industrial action and unlawful picketing, while increasing penalties as a deterrent.
- The major changes to employment law in 2015 surround builders, as the Government has also proposed a new Building Code. The code will outline the standard of workplace relations conduct required of contractors to be eligible to work on Federal Government funded projects. The code has a retrospective application to enterprise agreements made on or after 24 April 2014.
- Employers with more than 100 employees will incur additional gender reporting requirements on 1 April 2015. The report must include a number of Gender Equality Indicators to help identify and abolish discrimination. Contact us for further information on your reporting requirements.
- The Productivity Commission's review of the *Fair Work Act 2009* (Cth) is expected to be completed by November 2015. Interested parties can make submissions as to what has and hasn't worked under the current legislation. The Commission will then make recommendations on how to improve the current system based on the findings. It is expected that very little will change in industrial relations over 2015. However, the government is setting itself up for more significant changes if elected for another term.

  A draft of the Commission's first issues paper has recently been leaked. The paper states that five extensive documents will be published, including:

  1. an overview of the system including its objectives and faults;
  2. issues relating to pay and conditions, with consideration to minimum wages, the award system and the NES;
  3. the bargaining framework and industrial disputes;
  4. employee protections; and
  5. other workplace relations matters (including an analysis of the institutions under the system, attached compliance costs and arrangements for public sector employees).

  The due date for submissions was 13 March 2015, by email to workplace.relations@pc.gov.au
- The recent four year review of modern awards by the Fair Work Commission found a number of inconsistencies between modern award provisions and the National Employment Standards. The Commission is currently drafting amended clauses to cure these inconsistencies. These clauses will be made available throughout the following months with an opportunity for comment before the Commission holds further hearings. Further information about the four year review and the amendment process can be found on the **Fair Work Commission's website.**

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NEWS & VIEWS | **William Esau & Morgan Muirhead**

Miscellaneous Purpose Licences Under the *Mining Act 1971* (SA)

Applications, conditions and compensation

Section 52 of the *Mining Act 1971* (SA) (**Mining Act**) allows the Minister to grant a miscellaneous purpose licence (**MPL**) to any person in respect of mineral land for:

- the carrying on of any business that may conduce to the effective conduct of mining operations or provide amenities for persons engaged in the conduct of mining operations;
- establishing and operating plant for the treatment of ore recovered in the course of mining operations;
- drainage from a mine;
- the disposal of overburden or any waste produced by mining operations; or
- any other purpose directly relating to the conduct of mining operations.

A Prescribed Form 17 is required to initiate the MPL application along with payment of the prescribed fee. The MPL must also identify the area to which the licence is to apply pursuant to regulation 52.

The Department of Primary Industries and Regions (PIRSA) have clarified the conditions under which a MPL may be granted, in their publication titled 'Minerals Regulatory Guidelines Version 1.9: Guidelines for miners – mining approval processes in South Australia'. Generally, MPLs are suitable where the following applies to the proposed MPL activities:

- The activity is required to achieve economic and practical mining activities on a mining lease owned by the proponent in SA (where the activity is for infrastructure that may be used for other private or public purposes, the primary purpose should be to support the mining operation).
- The proposed activity will achieve better environmental outcomes if located outside the mining lease, or it is not practical due to area limitations to undertake the activity on the mining lease.

While a mineral claim is not a prerequisite tenement to a MPL, the tenure of a MPL will be linked to the tenure of the primary mining lease or operation to avoid the existence of MPLs without clear linkage to an active mining operation. Where the proposed MPL does not share a common boundary with a mining lease, specific justification will be required from the applicant to demonstrate that no other tenure is practical and that the activity is integral to the economics of the mining activity.

Operations that may be suitable for the grant of a MPL include:

- Transport of ore (e.g. haul road, railway, slurry pipeline or conveyor).
- Water supply pipeline, where greater than 50% of the water transported is required for mining operations.
- Dam or other water storage facility.
- Airstrip for a mine site.
- Electricity supply for mining operations where greater than 50% of the electricity transported is required for mining operations.
- Processing, value-adding plant, camps, temporary mineral storage or other infrastructure and permanent overburden dumps, and tailings dams where the MPL shares a common boundary with the relevant mining lease and either:
  - the MPL is required to avoid sterilisation of resources (e.g. if the infrastructure were located on the mining lease, resources would not be able to be practically mined); or
  - an environmental benefit is gained by granting the MPL (e.g. there is a sensitive environment on the lease area, and relocation of the infrastructure off the lease area will result in overall less environmental impact).

Operations that may not be considered appropriate for the grant of a MPL include:

- Roads, railways, water pipelines, electricity lines or airstrips where these initially are planned to be primarily servicing a purpose other than mining.
- Processing plant or other infrastructure located remotely from the mine site.
- Infrastructure for value adding of mineral products (e.g. manufacturing retail products from minerals) where less than 50% of the raw material used does not derive from the mine.
- Gas pipelines.

While landowners (or pastoral leaseholders) do not have the right to object to or veto the grant of a MPL, they do have the right to make representations on the application to the Minister and also the right to compensation. In addition, the grant of a MPL or the activities authorised by a MPL are not considered 'mining' under the definition of the *Native Title Act 1993* (Cth) and hence native title parties do not have the benefit of a formal negotiated agreement under Part 9B of the Mining Act. Any native title claimants do have the same rights as other landowners; that is, the right to make comments to the Minister on the MPL application and the right to compensation.

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Section 54 of the Mining Act provides for compensation to landowners (or pastoral leaseholders) of land in respect of which a MPL is granted. The amount of compensation payable depends on individual circumstances, including factors such as:

- the potential impact to the land from the proposed activities (e.g. intensive use of existing property tracks, unplanned damage to land or infrastructure);
- any loss of productivity or profits resulting from the conduct of proposed activities (e.g. loss of existing livestock or crops);
- reasonable costs incurred by the landowner related to the miner accessing their land (e.g. use of water for drilling, operational supervision such as shepherding, unplanned disturbances such as assisting bogged vehicles); and/or
- reasonable costs incurred by the landowner in negotiating compensation (e.g. negotiating initial land access agreement and obtaining legal advice).

If parties are unable to negotiate the amount and type of compensation, either party may apply to the Warden's Court (for amounts up to $250,000) or the Environment, Resources and Development Court (for amounts exceeding $250,000) for an order in relation to compensation.

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NEWS & VIEWS | **Sandy Donaldson & Tim Duval**

The China-Australia Free Trade Agreement

What is it and what are the likely impacts on agribusiness?

A Free Trade Agreement ("FTA") is an agreement between two or more countries to provide trade free from export and import duties. The removal of trade duties results in a greater flow of goods between the countries, and increased profitability in the industries that are included in the scope of the FTA.

The Abbott Government has negotiated a number of FTAs with Australia's key trade partners, including Japan, Korea and, most recently, China. The new FTAs are in addition to those already in place with New Zealand, United States, Malaysia, Singapore, Thailand, Chile and the ASEAN countries. Several others are still being negotiated.

What is ChAFTA?

On 17 November 2014, the negotiations surrounding the China-Australia Free Trade Agreement ("ChAFTA") were concluded. ChAFTA is expected to be executed, ratified and implemented within the next 12 months. It will see the elimination of trade tariffs for a number of Australian exports, including for agricultural goods. Suppliers of crops and other goods that are exported to China are set to benefit from an increased demand in Australian produce as a direct result of ChAFTA.

What benefits will ChAFTA have for the Australian agricultural sector?

China will remove the tariffs (over a number of years on a staged basis) that were previously imposed on Australian beef, sheep meat, dairy, wool, wine, hides, skins, leather, nuts, fruits, vegetables, seafood, grains, processed foods, pork and live animal exports. Most of these tariffs will be removed between four and nine years after implementation, except for those on barley and some other grains, which will be removed on the day ChAFTA is implemented.

Australian produce has a global reputation for being of very high quality and is in demand throughout the world.

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CASE IN POINT | **Caroline Knight & Belinda Cullinan**

Omissions must cause or contribute to loss to allow rejection of insurance claims

Implications of *Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33*

Background

Highway Hauliers (the insured) is an interstate freight transport business that owned a fleet of vehicles, including prime movers and trailers. The insured entered into a contract with various Lloyd's Underwriters (the insurers) in which the insurers indemnified the insured against specified loss, damage or liability occurring to or in respect of the vehicles for the period of the insurance.

The insured's fleet vehicles were such that they could be linked to form a "B Double", a formation which the insurers' policy specifically stated would not be indemnified unless, among other things, the driver of the vehicle had a PAQS score of at least 36. PAQS in the policy refers to "People and Quality Solutions Pty Ltd", and a psychological test the company provides to measure a driver's attitude towards safety.

It was two such B Doubles, driven by persons who had not taken the PAQS test or any equivalent program, that were damaged in separate incidents on 16 June 2004 and 2 April 2005. This was the primary ground on which the insurers challenged the indemnity claims.

First instance proceedings

The case was heard at first instance in the Supreme Court of Western Australia, in which the insured sought indemnity under the policy for damage to the vehicles, third party liability and consequential loss. In those proceedings, Justice Corboy held that the insurers had an obligation to indemnify the insured by reason of the operation of section 54(1) of the *Insurance Contracts Act* (1984) (Cth) (**ICA**).

Justice Corby went on to state that the fact that neither of the drivers in question had taken the PAQS testing could not reasonably be regarded as being responsible for causing the loss. It was only in this case that section 54(2) of the ICA would have been enlivened enabling the insurers to deny indemnity. His Honour held that the insurers had breached the terms of the policy by refusing to pay the claim and were therefore liable for the insured's consequential loss.

Court of Appeal

The insurers appealed the decision in the Court of Appeal. However, Justice Corboy's decision was upheld by McLure P, Murphy and Pullin JJA. Special Leave was granted for the insurers to appeal the decision in the High Court with the condition that they undertake to pay the insured's reasonable costs on appeal.

High Court decision

The case turned on the interpretation of sections 54(1) and (2) of the ICA.

Section 54(1):

> *"Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act."*

Section 54(2):

> *"Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim."*

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The insurers conceded during trial that the loss incurred by the insured could not be reasonably connected to the fact that the drivers of the vehicle had not done the PAQS, leading the Court to find no application of section 54(2) to the issues. The question then became whether section 54(1) had been enlivened.

The High Court found that the fact the insured's drivers were untested at the time of the accidents was an omission which occurred *during* the period of insurance. Further, it rejected the insurer's submission that the 'claim' to which section 54(1) refers is a claim for an insured risk and held that as the insured was seeking indemnity under the policy in relation to the accident which occurred during the period of insurance, it was sufficient to enliven s 54(1). Ultimately, the Court agreed with the decision of the Court of Appeal and dismissed the insurer's appeal.

Implications for insurers

Section 54(2) of the ICA would have applied in this matter if the loss was caused by the insured's untested drivers.

The High Court's decision reaffirms that:

1. section 54(1) will apply only to acts or omissions occurring *after* the policy was entered into and will only allow an insurer to reduce liability for loss so far as its interests were prejudiced; and
2. the only acts or omissions upon which an insurer may refuse a claim under section 54(2) are those that can be reasonably regarded as *causing or contributing* to the loss in question.

For further information on this case, or to discuss its specific implications for you, please contact our Insurance & Risk Management team.

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The China-Australia Free Trade Agreement

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By removing the trade duties on these products, China will benefit from easier and cheaper access to our produce. In return, Australian producers will be able to capitalise on China's ever-increasing population and their growing demand for food.

According to initial guidance from the Department of Foreign Affairs and Trade, the terms of ChAFTA are currently the most favourable of any FTA that China has entered into. Australia should capitalise on the competitive advantage over producers from the United States, Europe and other key trade players.

For example, in the Chinese dairy market, Australia is currently competing with New Zealand, the United States and Europe. Following the implementation of ChAFTA, Australia will receive preferential access to the Chinese market as the only country in the world that can provide unlimited supplies of duty-free cheese, butter and milk products whereas New Zealand for instance, is subject to restrictive safeguard measures on a wide range of dairy products.

The implementation process

The negotiations of ChAFTA have been officially completed, but there is still a long way to go until it is in force and the agricultural sector can benefit from the removal of trade restrictions between the two countries.

For example, the agreement will need to be translated into Chinese and both versions will need to be signed by the Parties.

The agreement will then need to be ratified by both Parliaments so that it is binding on both countries. Once ratification has occurred, each country's trade practices will need to be changed in accordance with the terms of ChAFTA.

Both the legal and practical implications will take time, and it is expected that the whole process will be implemented by late 2015.

Australian produce has a global reputation for being of very high quality and is in demand throughout the world.

From the date that ChAFTA officially comes into force, it will still take between four and nine years for most of the trade tariffs to be removed, meaning that the full benefits of ChAFTA are unlikely to be realised before 2024. However, by this time, 95% of Australian exports to China will be tariff-free.

DW Fox Tucker has a strong interest and expertise in the agribusiness sector. So please don't hesitate to contact us if you have any questions in relation to ChAFTA or commercial issues in agribusiness more generally.

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SUITS OFF | **Staff Profile**

A Lasting Affair

John Tucker Director

John hosting guests at a gourmet lunch to benefit the Women's and Children's Hospital Foundation in 2014 (l-r): John Sutton, Manuel Ortigosa, Ron Brumby, Mark Swann, Harold Tomblin, John Tucker, Tony Lutfi, Nicholas Begakis AO, Peter Buttery and Ed Betro.

There are essentially three ways someone can discover a passion for their work. Some are undoubtedly born with it. Others stumble into it by chance. While the third group finds what begins as a general attraction grows, over time, into something they simply couldn't imagine themselves without.

John Tucker, leader of the DW Fox Tucker Tax team and one of Strathalbyn's favourite sons, counts himself among the latter. And after nearly five decades plying his trade, the *Best Lawyers Australia* 2014 Adelaide Tax Law Lawyer of the Year says that passion remains as strong as ever.

What was it that first drew you to the law?

If I'm honest, it was really my father's desire that I become a self-employed professional!

Law seemed to tick all the boxes of what I "should" do, which led me to study it at the University of Adelaide.

Where did you get your start?

I started as a part-time article law clerk at Cleland Teesdale Smith & Co early in 1966, became a full Partner on 1 July 1968 and remained there for about 14 years

Malcolm Teesdale Smith was a great mentor for me in my Articled Clerk years, he impressed upon me the value of attention to detail.

A start in the law has however been a continuing process as new knowledge and skills in the application of that new and of my existing knowledge have been derived through subsequent practice associations and learning experiences right up to the present.

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In the years that have followed, what would you consider to be your greatest achievements?

In terms of personal recognition, being elected National President of the Taxation Institute of Australia by my peers in 1992 certainly stands out. I had been heavily involved in the activities of the Institute and derived great enjoyment and benefit from it and its members, so election to that office meant a great deal to me.

I've also been fortunate enough to have my work and professional skills recognised in other community and industry circles, and that's always been very satisfying.

Another satisfying achievement, has been my ability to build and maintain a number of longstanding - some very longstanding - and deeply rewarding professional relationships with clients and other professional services providers, including accountants, business advisers and other lawyers.

That's a two-way street, of course. Rewarding work related relationships only come when both parties do good work. It is satisfying to look back over many matters where I and my team have provided high quality services and considerable value to our clients, especially those where creative solutions have been successfully provided for difficult issues.

What have been the major interests in your life outside the law, and how have you indulged them?

My family has always been very important to me, of course, but I regret they have suffered at times from the priorities I have afforded my work.

I also have enjoyed participation in sport, in particular cricket and tennis. Through cricket I became involved with Prince Alfred Old Collegians Association and eventually, the youngest to that time, became President of that body. I have spent significant parts of my "spare" time in pursuing a number of private business interests, particularly in the food industry.

I've found these ventures very satisfying and rewarding for a number of reasons, not least of which is the close association with people engaged in different walks of life. My involvements in food manufacturers Bellis Fruit Bars, Tuckers Natural and Greenwheat Freekeh Pty Ltd, have provided stimulating challenges outside my professional practice.

In the final analysis though I have been a workaholic and these other interests have been subjected to the demands of legal practice and post graduate study.

Having now worked for 49 years, are there any professional goals that you'd still like to achieve?

Of course! I'm looking forward to helping our new firm grow its current respected status to be second to none and to continuing to help our Tax team deliver the best results possible for our clients.

When that happens it's a very satisfactory outcome to be part of.

Another satisfying achievement, has been my ability to build and maintain a number of longstanding and deeply rewarding professional relationships

***right:** l-r: Ron Brumby, Manuel Ortigosa, Mark Swann, John Sutton, Ed Betro, Harold Tomblin, Peter Buttery & John Tucker*

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