McKEAN & PARK LAWYERS

MATTERS DECEMBER 2007

POST ELECTION UPDATE

KYOTO WHAT'S NEXT

By ROSS BLAIR

The writs have been returned, the electorate has spoken and we now have a new Government. Prime Minister Rudd has promised to ratify the Kyoto Treaty and is likely to recall Parliament before Christmas for that purpose. Ten years late, but better late than never. In doing so, it would seem he will have the active support of the Greens. All in all, it seems certain that Australia will rejoin the Kyoto fold before the Treaty comes into full force and effect on 1 January 2008 which is pretty much what the McKean & Park Future Law Team has been saying for a long time.

So, following years of remaining practically stationary in our approach to global warming, it is likely Australia will now move, and move very swiftly because we have been falling very far behind. To begin with, it will set, or participate in setting, targets. A mandatory 20% renewable energy target will be drafted into legislation and, when enacted, should give some real incentive to the development of sources of renewable energy other than wind and solar power. The possibilities of geothermal energy, for example, have been ignored for far too long. Here in Victoria, the McKean & Park Future Law Team suggested its possibilities years ago, particularly its possibilities in Western Victoria. We were eventually able to obtain legislation to enable the development of geothermal energy to occur. If that legislation were now made less bureaucratic than it is, development would occur all the sooner.

Before this happens, however, our new Prime Minister will be off to Indonesia where, having ratified Kyoto, Australia will again be permitted to participate in the bargaining processes. The decision to be taken is what carbon emission targets will be allocated for the second commitment period of 2013-2017. Australia's quota for the first commitment period (2008-2012) is 108% of its 1990 carbon emissions level. This time around, we cannot expect anything like that level of international generosity to be repeated and the target is therefore likely to be in the vicinity of 92-95% of the 1990 level.

But having rejoined the fold, Australia will also have the opportunity to press for a realistic period for which sequestered carbon must be retained in Kyoto forests (carbon sinks) in order to qualify as carbon offsets. The ultra radical approach has so far been to demand that the retention be in perpetuity or, for at least, 100 years. What is not understood is that offsets can be considered, at best, only as circuit breakers designed to get carbon emissions into decline and not as a permanent solution.

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Changes to the Workplace Relations Law by the Labor Party.

By SAMANTHA GIDLEY

The new Federal Labor Government intends that amendments will be made to the Workplace Relations Act ("the Act"). Its proposals are contained in the policy document "Forward with Fairness" published in April 2007. Some of these changes will be minimal, and others will have significant consequences for employers.

1. Employment Standards:

There are currently 5 national employment standards.

- **1.1 Annual Leave**
- **1.2 Parental Leave**
- **1.3 Personal/Carer's Leave**
- **1.4 38 hour working week**
- **1.5 Minimum Wages**

Labor proposes that there be 10 national employment Standards.

- **1.6 Annual Leave**
- **1.7 Parental Leave**
- **1.8 Personal/Carer's Leave**
- **1.9 38 hour working week**
- **1.10 Community Service Leave**
- **1.11 Public Holidays**
- **1.12 Information in the Workplace**

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Added to this there is increasing evidence that timber and timber products included in land fill do not break down into carbon gas for very long periods. The retention period could therefore be cut back considerably particularly if conditions were applied in support of an environmental approach to logging. This would have the effect of encouraging tree growing for its carbon absorption capabilities and to give some support to the retention of old growth (but carbon emitting) forests. The security of the system could be impeccable given Australia's land registration system particularly as applied in Victoria.

Some dairy farmers took the Future Law Team's advice in the early years of this millennium and planted trees to offset their livestock methane emissions. It is late, but not too late, for Government to assist other dairy and beef producers towards the same result. Of course, the climate being as it now is, the growing of trees is not as certain as it once was. But it is not necessary, that the trees be grown on the farmer's own land. The trees can and should be grown where they have the best chance to survive and prosper under the Forestry Rights Act which we initiated.

McKean & Park will make it clear to the Australian Government that its CarbonCost Calculator is available if Government wants to introduce realistic carbon calculations covering both embodied and operational energy usage in the built environment. That introduction would provide enormous benefits to business and those benefits would be capable of being profitably exported. The CarbonCost Calculator has the ability, when developed, to predict a building's total 'lifetime' consumption of energy and therefore to set the framework in which architects, designers and builders could commence the process of reducing that predicted figure and in the course of that process develop new designs that will revolutionise energy use in buildings and their fabric and construction.

But the big 'next' will undoubtedly be the capping of carbon emissions and the opening of a carbon trading market. This will affect all of us, particularly those involved in any kind of business. Prices for all goods, services and property will alter radically and continue to alter every five years during at least the first 60-70 years of this century, each time to a level equivalent to twice that of the introduction of the GST or more. But unlike the introduction of the GST, the changes will be anything but uniform.

We in the McKean & Park Future Law Team have been participating in all this since the 1990's. We believe we can help you in understanding what is about to happen and what you can best do to adapt to the changes that are going to occur, whether you represent a single business or an entire industry. Of course we can advise you regarding the legal requirements both those that exist now and those that are likely to be introduced in the very near future. But we can advise you on far wider issues than just the legal issues. The McKean & Park Future Law Team isn't comprised only of lawyers, we have worked over long periods with and have access to economists, academics, scientists, accountants and many other professionals all vitally interested in the issues that are now about to come to fruition. We have advised political parties, industries and Australia wide businesses. If you think we can help you - give us a call.

If you would like to read what we have been saying over the years please visit our website www.mckeanpark.com.au. If you would like to inspect our CarbonCost Calculator please visit its website www.carboncostcalc.com.

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Changes to the Workplace Relations Law by the Labor Party

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1.13 Notice of Termination and Redundancy

1.14 Long Service Leave

1.15 Flexible work for parents

2. Changes to the industrial landscape:

2.1 Australian Workplace Agreements will not be permitted. There will be a transition period for those employees whose terms and conditions are currently subject to Australian Workplace Agreements.

2.2 Labor proposes that industrial action continue to be unlawful whilst parties are subject to a Collective Agreement. It will only be authorised during a bargaining period for a collective agreement and the consent of the members is obtained by secret ballot. Strike pay will also continue to be unlawful.

2.3 Secondary boycott provisions will remain. The restrictions upon union right of entry will also remain.

3. Fair Work Australia:

Labor proposes that Fair Work Australia will replace the Australian Industrial Relations Commission, and all bodies incorporated to oversee the Workchoices legislation under the Howard government. It is known as the new "independent umpire." Labor proposes that its duties will include:

3.1 Assisting parties to resolve workplace grievances, including resolving unfair and unlawful dismissal claims;

3.2 Facilitating collective bargaining and enforcing good faith bargaining;

3.3 Reviewing and approving collective agreements;

3.4 Adjusting minimum wages and award conditions;

3.5 Monitoring compliance with and ensuring the application of workplace laws, awards and agreements and regulating registered industrial organisations;

3.6 Ending industrial action and determining a settlement between the parties for their workplace;

4. Award simplification:

4.1 The Australian Industrial Relations Commission will determine the modernisation and simplification of Awards. This will commence from 1 January 2008. The Awards will include a further 10 entitlements for those employees who are covered by the Awards.

4.2 Employees earning in excess of $100,000.00 would be exempt from Awards.

5. Unfair Dismissals:

Employees may claim unfair dismissal in the following circumstances:

5.1 For employees of businesses of less than 15 employees, he or she must complete at least 12 months of service;

5.2 For employees of business of 15 employees or more, he or she must complete at least 6 months of service.

5.3 A claim for unfair dismissal must be made within 7 days of being notified of the dismissal. Where the dismissal is found to be unfair, the remedy shall be reinstatement unless it is not in the interests of the employee or the employer's business. In such cases, compensation may be ordered.

6. Conclusion:

The main concerns for employers will be the extension of parental leave, the right of employees to request flexible work arrangements and the right of employees to request unpaid leave for emergency services duties. In the view of the writer, the most disquieting of the proposed amendments is not the return of the unfair dismissal laws. It is the fact that it seems to be the clear aim that employees will be re-instated after a dismissal in the event that it is deemed to be "unfair". This may have serious consequences for workplace morale and for the employer's authority to make decisions affecting its business.

For advice on the best practice to manage the new proposed laws, please contact Samantha Gidley on 9670 8822.

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OCCUPATIONAL HEALTH AND SAFETY: A minefield for Landlords?

By SAMANTHA GIDLEY

Whilst the Occupational Health and Safety Act 2004 (OH&S Act) is concerned primarily with the issue of Occupational Health and Safety for employers and employees, the Act can capture other parties, including Landlords. Section 26 of the OHS Act states that,

(1) "A person who (whether as owner or otherwise) has, to any extent, the management or control of a workplace must ensure so far as is reasonably practicable that the workplace and the means of entering the workplace and leaving it are safe and without risks to health."

(2) The duties of a person under sub-section (1) apply only in relation to matters over which the person has management and control.

(3) An offence against subsection (1) is an indictable offence."

The Act makes it clear that the duties are applicable to an owner of the premises. Arguably it may extend to the lessee of the premises. However, the owner of the premises should not rely upon the lessee for the reasons outlined below.

WHAT IS THE MEANING OF "MANAGEMENT OR CONTROL" UNDER THE OHS ACT.

The Act does not contain a definition of "management or control." The practice is therefore to defer to other Acts which contain statutory duties which may infer that a party has the "management and control" of a workplace. In each case this will be a question of fact.

An example of this is Section 52(2) of the Retail Leases Act 2003. It provides that the Landlord is responsible for maintaining in good repair (a) the structure of, or fixtures in, the retail premises; and (b) the plant or equipment at the retail premises; and (c) the appliances, fittings or fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services. This would be sufficient to infer that the Landlord has "management and control" of a workplace, and thus has responsibilities under Section 26 of the OH&S Act.

The Building Regulations 2006 also make it clear that the Owner of the building has certain responsibilities. The extent of these responsibilities are addressed below. Again, in most circumstances, these statutory duties infer that the owner has management or control of the workplace, rather than the lessee.

WHAT IS THE MEANING OF "REASONABLY PRACTICABLE"?

The matters which must be taken into account what is reasonably practicable are found in Section 20 (2) of the OHS Act. These are:

(A) The likelihood of the hazard or risk concerned eventuating;

(B) The degree of harm that would result if the hazard or risk eventuated;

(C) What the person knows or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;

(D) The availability and suitability of ways to eliminate or reduce the hazard or risk;

(E) The cost of eliminating or reducing the hazard or risk.

All elements will be taken into account when deciding upon the steps which need to be taken by the owner to ensure that the building/workplace complies with the Act. The owner should note that the cost of eliminating the hazard or risk is of minimal consequence in this decision.

Codes of Practice for the relevant industries are of assistance in determining what steps should be taken by the responsible parties, to satisfy the requirement to keep a workplace risk free "as far as is reasonably practicable."

Owners' responsibilities can be found within the Building Code of Australia. The Building Code has been incorporated into certain sections of the Building Regulations 2006. If the building is constructed prior to 1st July 1994, ("a pre-1st July 1994 building"), Subdivision 2 of Part 12 of the Building Regulations 2006 establishes the Owner's liabilities for building safety. The Owner must comply with the "Essential Safety Measures".

For the purposes of Subdivision 2, "Essential Safety Measures" are defined as "any measure (including an item of equipment, form of construction or safety strategy) required for the safety of persons using a building or place of public entertainment." The question of exactly what measures need to be taken by the owners is vague and left unanswered. Owners are potentially exposed as there are no proper guidelines to be followed to satisfy that they have complied with "Essential Safety Measures."

It is open to the Owner to defer to the definition of Essential Safety Features for buildings constructed after 1st July 1994. It regulates the requirement for owners of Buildings constructed after 1st July 1994 under Division 1 of Part 12 of the Building Regulations 2006. It also incorporates the definition contained within the Building Code of Australia. "Essential Safety Measures" are defined by reference to items contained within Tables I 1.1 to I 1.11 of Volume One of the Building Code of Australia. The list of safety measures is extensive and may not be entirely applicable to each building Owner. Nevertheless it provides significant guidelines which a "post 1st July 1994" owner can rely upon.

Under Section 149 of the OHS Act, compliance codes are to provide a practical guidance for those who have duties or obligations under this Act. Section 150 of the OHS Act states that a failure to comply with a compliance code does not give rise to civil or criminal liability. Therefore, the Owner of "pre-1 July 1994" premises is not, under the Building Regulations, required to comply with the Building Code and it may seem that this is the end of the matter.

Caution should be taken against this approach. Whilst the Owner is not in breach of the Building Regulations, he or she must comply with the OHS and do all that is "reasonably practicable" to ensure safety on site. With the lack of guidelines, it would be wise to defer to Division 1 of Part 12 of the Regulations for guidance and where it is possible, implement the safety precautions contained therein.

In addition to this, Owners of "pre 1 July 1994 buildings" must comply with the reporting requirements contained in Regulations 1214 and 1215. Regulation 1214 sets out the administrative requirements for the owner of the building for the reporting of compliance with "Essential Safety Measures". The Owner must ensure that an annual essential safety measures report is prepared in accordance with regulation 1215. The Owner must provide a report to the Building Commission prior to 13th June 2009 and each subsequent year thereafter. Regulation 1215 requires that the report:

(a) Be in a form approved by the Building Commission;

(b) Be signed by the owner or agent of the owner;

(c) Specify the address;

(d) Include details for any inspection report made under Section 227 of the Act (attached);

(e) Include a statement that the owner has taken all reasonable steps to ensure that safety equipment, safety fittings or safety measures are maintained and fulfilling their purpose;

(f) Confirm that since the last reports there have been no penetrations to required fire resisting construction, smoke curtains and the like.

Under the Regulations, Occupiers or Lessees are given one obligation. Pursuant to Regulation 1218, they must ensure that maintenance of exits are functional and clear of obstruction.

THE POSITION AT COMMON LAW: DUTY OF CARE:

At common law, Owners also owe tenants and occupiers a duty of care. The standard of care required has been debated at length by the various authorities. The case of Jones v Barlett held generally that the landlord owes a duty of care to take reasonable care to avoid foreseeable risk of injury to prospective tenants and members of their households.

What is reasonably foreseeable will depend upon the circumstances of the case. The landlord should have in place a reasonable system of inspection. The degree and timing of the inspection will depend upon the various circumstances of each premises.

This may include factors such as the age of the premises, terms of the lease and duration and the overall condition of the premises.

CONCLUSION:

Compliance with the various codes under the OHS Act will become mandatory in the future.

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The safest way for the owner to avoid a prosecution by Worksafe pursuant to the OHS Act, is to comply with the Essential Safety Measures of the Building Code where it is possible. The Owner should also recruit a suitably qualified person to review the essential safety measures within a building.

If an owner is found not to have complied with Section 26 of the OHS Act he or she may incur a fine of up to 1800 penalty units for a person or 9000 penalty units for a body corporate. As at the date of this advice, a penalty unit is $110.12.

The penalties are therefore significant. Under no circumstances should the Building Owner rely upon the Tenant to ensure the safety of the premises.

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The Owners Corporation Act comes into operation on 31 December 2007

In early October the Minister for Consumer Affairs released a Regulatory Impact Statement which includes draft regulations. These contain model rules which set out, inter-alia, the proposed mechanism for dispute resolution. This paper looks at the "Three Tier" dispute resolution process.

By TIM GRAHAM

HOW ARE DISPUTES CURRENTLY DEALT WITH?

Section 38(1) of the Subdivision Act 1988 states:

"If a dispute or other matter arises under this Act or the Regulations and affects a body corporate, an owner of land affected by a body corporate or a purchaser in possession under a terms contract of a lot affected by a body corporate, the body corporate, owner or purchaser may apply to the Magistrates Court for a Declaration or an Order determining the dispute or matter."

Disputes may also be heard and determined by the Victorian Civil and Administrative Tribunal where the empowering enactment confers jurisdiction on the tribunal; for example, the Fair Trading Act 1999, the Domestic Building Contracts Act 1995 and the Residential Tenancies Act 1997.

It has been said:

"The procedures available under Section 38 are very rarely used. This is not because of a lack of disputes but more an unwillingness to take them to court. There is, therefore, little guidance available on how the courts will exercise the powers given to them under this section. This uncertainty may increase the reluctance to litigate."

In addition, anyone who issues proceedings is faced with the usual delay and processes which must be followed to enable determination of the dispute. There is no mechanism for mediation at any early stage under the current regime. Mediation or a pre-hearing conference does not occur until after proceedings have been issued and potentially substantial costs have been incurred.

THE PROCEDURE UNDER THE OWNERS CORPORATION ACT 2006

Exclusive jurisdiction, with a few exceptions, is given to Victorian Civil & Administrative Tribunal ("VCAT"). Section 162 confers jurisdiction on VCAT to hear disputes or matters relating to the operation of an owners corporation, an alleged breach of the Act, the regulations or rules as well as the exercise of a function by a manager.

The new three tier dispute resolution process aims to regularise the procedure for dealing with disputes.

FIRST TIER

The first step in the procedure is for a lot owner or occupier to make a complaint to the owners corporation about an alleged breach by another owner, occupier or the manager of an obligation imposed by the Act, the Regulations or the Rules of the owners corporation.

The model rules provide as follows:-

- **The party making the complaint must prepare a written statement setting out the complaint and inviting the other parties to a meeting.**
- **If there is a grievance committee it must be notified of the dispute.**
- **If there is no grievance committee the owners corporation must be notified of the dispute.**
- **The parties must meet and discuss the matter within 10 working days.**
- **A party to the dispute may be represented at the meeting.**
- **If the dispute is not resolved the grievance committee or owners corporation must notify each party of its right to take further action.**

SECOND TIER

The owners corporation is required to serve a notice "specifying the alleged breach and requiring" the offender to rectify the breach with 28 days.

If the "accused" person does nothing and the owners corporation wishes to pursue the matter then the final notice must be served giving the person a further period of 28 days to remedy the breach.

If there is no compliance at this stage the owners corporation may apply to VCAT for an order.

MEDIATION/CONCILIATION

It is possible to apply to the director of Consumer Affairs to have the dispute referred to conciliation. Such a complaint must be in writing and identify the complainant. The matter will be referred to conciliation or mediation if the director forms the opinion that the dispute is reasonably likely to be settled.

THIRD TIER

An owners corporation may apply to VCAT provided that it is authorised by special resolution (75%) to do so (unless the breach relates to unpaid fees or a breach of the rules in which case a special resolution is not required). In determining the dispute VCAT may make any order it considers fair including one or more of the following:-

- **An order requiring a party to do or refrain from doing something.**
- **An order requiring a party to comply with the Act, Regulations or the Rules.**
- **An order for the payment of money (including exemplary damages and interest).**
- **An order varying any term of the contract or agreement.**
- **An order declaring that a term of the contract or agreement is, or is not, void.**
- **An order declaring the terms of a delegation or the meaning of a rule.**
- **An order appointing or revoking the appointment of a manager.**
- **An order in relation to damaged or destroyed buildings or improvements.**
- **An order as to the payment of insurance money under a policy.**

If VCAT determines that a person has failed to comply with a rule it may make an order imposing a simple penalty not exceeding $250.00.

CONCLUSION

Reports of any complaints must be tabled at each annual general meeting. Whilst the procedures are cumbersome they are designed to empower an owners corporation to handle its own affairs. It is hoped that the existing reluctance on the part of bodies corporate to pursue their legal options is overcome and that a greater degree of predictability is generated as cases are decided. Time will tell.

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