



PELHAM LAWYERS MERGES WITH MCKEAN PARK

The Partners are delighted to announce the merger of Pelham Lawyers with McKean Park. This merger took effect on 1 August 2011 and introduces new talent to the combined firm in the form of additional experience and expertise in the ever-expanding Owners Corporation area of law. In addition Pelham Lawyers practised Commercial and Family Law as well.

Pelham Lawyers had offices in both Port Melbourne and Preston with the Port Melbourne office closing and staff from that office now operating from our Bourke Street premises. The merged firm will continue to operate the Preston office to provide much needed accessibility to our legal services for our clients in the northern metropolitan area.

We welcome Anthony Wilkinson as Partner in charge of the Owners Corporation Team with Rob Savage and Rochelle Castro also now new Team members with Robyn Crozier.

You are invited to contact Anthony Wilkinson in the first instance for any advice on Owners Corporation issues including:

- Establishing Owners Corporations
- Registration of Plans of Subdivision

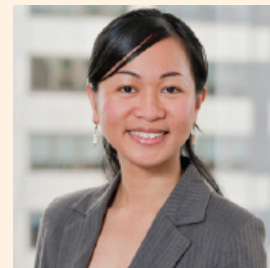
- Alterations to the model rules of Owners Corporations
- Advising on the operation and administration of Owners Corporations
- Dispute resolution for Owners Corporations, for lot owners, tenants and contractors
- Defence and prosecution of negligence and professional indemnity claims
- Conversion of company share and stratum title developments to subdivisional title
- Changing of unit lot liability and entitlements
- Efficient debt recovery for managers of Owners Corporations.



Anthony Wilkinson



Rob Savage



Rochelle Castro



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DEBT RECOVERY

WHEN A LETTER OF DEMAND HAS EXPIRED OR FAILS TO RECOVER AN OUTSTANDING DEBT

Your next option is to issue a proceeding in the Magistrates' Court of Victoria seeking recovery of the debt together with costs.

CIVIL AND MONEY MATTERS - MAGISTRATES COURT

The Civil Jurisdiction of the Magistrates' Court hears and determines disputes arising from claims for damages, debt or other monetary demands and for equitable relief.

The Magistrates' Court can determine most disputes over money or property from \$500.00 up to the value of \$100,000.00, however in certain circumstances the Court can hear cases with an unlimited value.

BEFORE COMMENCING A CIVIL PROCEEDING

There are certain things that you must do before you start any kind of civil court action. This applies to every party, whether you are a plaintiff, defendant, third party etc.

Legal Obligations

A person who is a party to a civil proceeding must first become familiar with overarching obligations. These obligations will apply to you at all times during a civil case.

These obligations are set out in the Civil Procedure Act 2010.

A brief overview of the Overarching Obligations are:

Overarching Obligations

- **Paramount Duty** – you have a paramount duty to the court to further the administration of justice.
- **Obligation to act honestly** – you must act honestly at all times in relation to your case.
- **Requirement of proper basis** – you must not make a claim or response to a claim that is vexatious, frivolous, an abuse of process or does not have a proper basis.
- **Obligation to take steps to resolve the dispute** – you must only take steps that will resolve your dispute or case. You must not cause undue delay.
- **Obligation to cooperate** – you must cooperate with the other parties.
- **Obligation not to mislead or deceive** – you must not engage in conduct which is misleading or deceptive, or is likely to be misleading or deceptive.

- **Obligation to use reasonable endeavours to resolve the dispute** – you must try to resolve your dispute with the other parties. You may use appropriate dispute resolution processes.
- **Obligation to narrow the issues in dispute** – if you are unable to resolve your dispute completely with the other party, you must try and resolve as many issues as you can, to narrow the issues that are in dispute.
- **Obligation to ensure costs are reasonable and proportionate** – you must ensure that any legal costs incurred during the case are reasonable and proportionate to the case, having regard to the complexity of the case and the amount in dispute.
- **Obligation to minimise delay** – you must ensure that you act promptly and minimise delay at all times during your case.
- **Obligation to disclose the existence of documents** – you must disclose the existence of any documents that you have which are critical to the resolution of the dispute. Once you are aware you have a critical document, you must disclose its existence to the other party at the earliest opportunity.

If you do not act in accordance with your obligations during your case, there may be penalties, such as extra costs or having your claim or defence struck out.

Proper Basis

One of your obligations when you are involved in a civil case, is to only raise points in your case which have a proper basis.

As your legal practitioner, we are required to certify that there is a proper basis for the claim or defence lodged on your behalf.

COMMENCING CIVIL PROCEEDINGS

Before you issue a Complaint

Going to court should be a last resort. Before issuing a complaint in the Magistrates' Court you should attempt to resolve the dispute directly with the other party. This may save you considerable cost and time.

Commencing Legal Action

If you are unable to settle your claim, you may wish to pursue your claim with the Magistrates' Court.

We would prepare and file a Form 5A Complaint document with the Magistrates' Court, which would attach a Statement of Claim. This is a factual description of why the money is owed to you.

Service of a Complaint

Service of a complaint is the act of providing a valid copy of the Complaint to the defendant (the person owing you the debt). If the Complaint is unable to be served within 12 months, you can apply to the court for the time for service to be extended.

McKean Park engages the services of a registered process server to serve the Complaint, as specific requirements apply for service depending on whether the defendant is an individual or a company.

If the defendant is a company, the Complaint must be served on the registered address of the company.

Once served, the defendant has 21 days to lodge a notice of defence with the court. They must also provide a copy to yourself or your solicitor, failing which, an application for judgment can be made against the defendant. This means that an Order is made by the Magistrate awarding the amount being claimed in the Complaint plus costs plus interest.

Once judgment has been entered against the defendant, the debt/default then becomes a matter of public record. The defendant may be subject to the following:

- **Problems obtaining finance**
- **Bad credit history up to seven (7) years**
- **Harassing phone calls and demands from creditors/sheriffs department or repossession agents**
- **Default notice on mortgages from the bank**
- **Creditors petition and commencement of bankruptcy proceedings**
- **An Order from the Court permitting creditors to directly deduct wages from the defendant's employer.**

Every business and individual requires a healthy credit rating. Bad credit may result in higher mortgage interest rates or outright rejection.

Enforcement of Civil Debt

In the event that a judgment has been entered and the debt remains unpaid, the Plaintiff has the right to enforce payment of the debt. A judgment will only be enforced at the request of the Plaintiff.

All methods of enforcement attract Court fees. All Court fees paid for enforcement can be added to the debt and are recoverable from the debtor.

The most common forms of enforcement include:

- Attachment of Debt
- Attachment of Earnings Order
- Instalment Order
- Summons for Oral Examination
- Warrant to Seize Property
- Winding up of a company
- Bankruptcy of an Individual

Before starting any legal action in relation to civil claims it is recommended that you obtain legal advice from a lawyer.

Please contact David Brett or Lisa Tucci of our office for a free quote on your debt recovery requirements.

david.brett@mckeanpark.com.au

PROPERTY DIVISION AND FAMILY LAW

BY MARIA KOURTIS
& MARK FINN



The *Family Law Act* governs property division in Australia for married couples and more recently, for de facto and same sex couples. Property in family law matters includes real estate, superannuation, motor vehicles and other chattels, businesses and shares.

A Court empowered with jurisdiction to administer the Act has the power to alter the interest of parties in property and to make "such Orders as it considers appropriate". However, any Orders must be "just and equitable" in all the circumstances of the case.

The principal Courts that deal with the Act are the Family Court of Australia and Federal Magistrates Court of Australia. Both Courts administer the Act in the same way. The difference between the Courts lies not with how they apply the Act in property cases, but how your matter will progress through the Court system. In some cases, a state Magistrates Court can deal with family law property matters, but these instances are limited.

FOUR STEP PROCESS OF DIVISION

The Act sets out a 4 step process to be followed in property cases. This process is followed regardless of whether the matter is before a Court or the parties are negotiating a settlement without Court involvement.

Step 1 is to identify and value the assets, financial resources and liabilities owned or in the name of the parties either jointly, separately, or in which they may have an interest. This is known as the "asset pool". The assets do not have to be located in Australia; overseas assets are also included. In this step the Court identifies what is there to be divided.

Step 2 involves an assessment of each party's contribution to the acquisition and maintenance of the assets and liabilities in the asset pool. Contributions take many

forms, including:

1. Financial contributions such as income earned during the relationship, redundancy packages, bonus payments, inheritances or gifts received during the relationship, or the ownership of assets at the commencement of the relationship.
2. Non-financial contributions such as performing renovations and repairs to property, or prudent management of property.
3. Direct contributions, such as the use of a bonus payment to purchase shares which increase in value over the passage of time.
4. Indirect contributions, such as paying household bills and day to day outgoings so that the income of the other party is paid into the mortgage.
5. Contributions made by a third party on behalf of one of the parties. This refers to instances like a monetary gift from a parent towards the purchase of real estate.
6. Contributions to the welfare of the family as a home maker or parent. These contributions do not have to be tied to a particular asset and should be recognised in a substantial and meaningful way. A common example is the contribution of the party who stays home to raise the children and run the household. In many cases, one party doing this has allowed the other party to earn a higher income than they could have otherwise by working longer hours.

Step 3 considers whether there should be an adjustment in favour of either of the parties on account of the financial resources of one of the parties or on account of "future

needs". The "future needs" factors are set out in s75(2) of the Act and include considerations such as:

1. The age and/or state of health of each of the parties;
2. each party's capacity for gainful employment;
3. the extent to which one party may have contributed to the income, earning capacity, property or financial resources of the other party;
4. whether there is an income earning disparity between the parties;
5. whether a party has any liability to pay child support;
6. whether one party has the primary responsibility for the care of a child;
7. the length of the marriage and its impact on the earning capacity of each party;
8. the standard of living for each party which is reasonable in the circumstances.

Step 4 requires a determination whether the proposed Orders are "just and equitable", or fair in the circumstances of the case.

Each party in a family law matter has an absolute obligation to make full and frank disclosure of their financial circumstances to enable the parties and the Court to properly apply the 4 step process.

If you require our assistance in family law property matters please contact either Mark Finn or Maria Kourtis for advice.

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SOCIAL MEDIA

RISKS FOR EMPLOYERS



BY AMY GRANGER

The increasing use of social media (such as Facebook, LinkedIn and Twitter) by employees in their everyday lives and also human resources and recruitment departments in screening potential job candidates and monitoring employees is well known. This has presented a need for employers to effectively manage the risks associated with the use of social media in connection with the workplace. Without a thorough and comprehensive social media policy, an employer will be exposed to risks which may result in costly and time-consuming consequences for the employer's business.

WHAT ARE THE RISKS FOR EMPLOYERS?

Damage to the Employer's brand or reputation

Either by association with unsatisfactory behaviour of employees made public via social media, or directly by employees publishing adverse or negative information about their employer on social media, the actions taken by employees on social media may have a damaging impact on the employer and its business.

A recent unfair dismissal case before Fair Work Australia ("FWA") demonstrates this type of behaviour, where FWA found that the publication by an employee of a blog on MySpace, which criticised her employer's investigation of sexual harassment allegations made by her, and the employee's subsequent refusal to remove or modify the blog, was a valid reason to terminate the employee's employment under the *Fair Work Act 2009* ("FW Act").

In the event that employees do behave, via social media, in a way that is damaging to their employer, it may be that the employer will be entitled to discipline and in more serious cases, terminate the employee. On this issue, FWA have stated that "it would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences".

Unfair Dismissal claims

In the event that an employee is dismissed as a result of their unacceptable behaviour in the use of social media, the employee may bring an unfair dismissal claim.

In a case decided by FWA last year, an employee brought an unfair dismissal claim after she was dismissed for posting a comment on Facebook which was derogatory toward the hairdressing industry and complained about her Christmas bonus and holiday pay. FWA found that the dismissal was unfair, because the comments did not damage the employment relationship.

Whilst comments on social media may affect the employment relationship of trust and confidence and, in some circumstances, justify

dismissal, it is clear that a range of factors must be considered in determining whether dismissal is justified, including whether the employer is named, who can access the comments, the duration of publication of the comments, whether the comments are likely to adversely affect the employer's business and whether the employer has a social media policy and the content of that policy.

A clear social media policy will assist employers in defending unfair dismissal claims.

General protections claims under the FW Act

A general protections claim may be made by an employee or potential employee, when adverse action has been taken against them by their employer. Adverse action will include a decision not to hire a potential employee, if that decision is made on the basis of the potential employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

It is becoming increasingly common for HR professionals to utilise social media when recruiting potential employees. Whilst social media such as LinkedIn and other social networking sites may provide recruiters with valuable information in respect of a potential employee, these sites may also reveal a characteristic of a potential employee which was not revealed to the potential employer. For example, the potential employee's Facebook page may reveal their sexual preference, which was not disclosed by the potential employee at the interview stage.

In these circumstances, if the potential employee is then unsuccessful, they may claim that the decision not to hire them was based on the employer ascertaining, via social media, their sexual preference. An employer will then be forced to defend an adverse action claim.

Claims for breaches of equal opportunity laws

Employers should be very careful in accessing an employee's social media sites. Information obtained from such sites, may be claimed by the employee to be the basis of discrimination or victimisation in the workplace.

For example, if an employer discovers that an employee is pregnant as a result of accessing the employee's social media site, and then takes some action which may be considered discriminatory against the employee, the employee may argue that the action was taken on the basis of the information which the employer accessed via social media. Obviously, employers should never try to circumvent privacy controls which an employee has placed on social media, and to be safe, should refrain from accessing employees' social media sites at all.

How can employers manage the risks?

Employers should take a proactive approach to managing the risks associated with the use of social media in the workplace by:

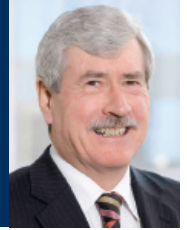
- refraining from accessing information via social media about job applicants and employees which is not publicly available, and specifically state in their social media policy that hiring decisions are based only on information provided by the applicant or sources provided by the applicant;
- assessing any current social media/IT policies that the employer has in place and how effective they will be in managing the risks listed above;
- running training sessions and providing information to employees about the use of social media and expected standards of behaviour in respect of social media;
- implement a relevant and thorough social media policy tailored to the employer's workplace; and
- considering the introduction of software which monitors excessive or inappropriate use by employees of social media in the workplace and on devices provided to employees for work use. Caution should be used when utilising such software, to ensure that no breach of privacy occurs. However, the Federal Court has recently upheld the termination of an employee, based on information obtained by the employer about his internet usage via desktop logging software.

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PERSONAL PROPERTIES SECURITIES LEGISLATION

WHAT YOU NEED TO KNOW

BY TONY ROGERS



COMMENCEMENT – OCTOBER 2011

Clients will have been aware from prior newsletter articles that the *Personal Property Securities Act 2009* passed by Parliament on 14 December 2009 has made wholesale changes to the registration of security interests in personal property.

The exact date of commencement of the legislation in October this year is not yet known but is expected to be the 31st of October 2011.

WHY HAS THIS NEW LEGISLATION BEEN INTRODUCED?

At the present time there are over 70 separate Acts of the Federal Government or States and Territories which regulate personal property securities. There are many duplications and competing priorities which arise as a result of the different Acts. There are in excess of 40 registers which will be combined into one single national register and obviously reduce the amount of red tape and the complexity within the existing laws. This will apply consistency with uniform rules for all security interests in personal property.

The legislation will have the effect of enabling registration of interests and perfection of security interests over all personal property when previously only some personal property was the subject of legislation such as motor vehicles, boats, crops and livestock.

The legislation itself sets out rules as to:

1. **How security interests are created and enforced.**
2. **How priority between competing interests is resolved.**
3. **How a security interest will be enforceable when a grantor of a security interest becomes insolvent.**
4. **Establishes circumstances in which personal property can be acquired free of any security interest.**
5. **Sets out rules for the enforcement of security interests.**

This type of legislation is not entirely new as it is already in existence in the United States, Canada and in New Zealand.

Since 2009 we have conducted various briefings for our clients on the changes which will affect many businesses through the radical change to the concept of legal title to assets. Business should be aware that the legislation will affect them and that their assets will be at risk.

EXAMPLE OF IMPACT ON CURRENT ARRANGEMENTS

Only recently we received a query from a firm whose business includes the sale of works of art delivered to the firm on consignment.

The artists who deliver the works of art to this firm on consignment will be at risk from October once the legislation commences. A good placed on consignment under the present law remains the property of the person placing the good on consignment. Under the new law unless the person placing the good on consignment has registered their interest in the goods are under the *Personal Property Securities* legislation in the event of the party to whom the goods were consigned being placed in liquidation the goods concerned will be considered goods "owned" by the party having control of the goods. In other words the artist in our example will lose out unless he or she has previously registered their interest on the Personal Property Securities Register. There will be a lot of dislocation caused by this legislation to use this as one example. We are aware that lobbying of the Federal Government by various interest groups such as artists is already underway to see if some exemptions can be provided under the legislation. It is doubtful that this could occur without affecting the broader scope of the legislation and so is unlikely.

Without going into the mechanics of the legislation if you are one of the following you should seek further advice from McKean Park:

1. **You provide credit facilities in any form.**
2. **You make loans or advances of funds to anyone including related parties.**
3. **You sell goods on credit.**
4. **You have goods or assets located at another person's premises.**
5. **You rent lease or hire goods or assets to others.**
6. **You supply goods on retention of title terms.**
7. **You supply goods on consignment where those goods are stored elsewhere.**
8. **You grant licences to other parties to use any of your products, trademarks or intellectual property.**
9. **You plan to take a form of security over personal assets.**

10. **You have any of your assets or funds, negotiable instruments or shares held on trust by other parties.**

If any of these examples are the case then you should obtain further advice as to your situation and the risks you may face unless you take account of the *Personal Property Securities* legislation.

BEWARE

1. **When you purchase any goods or a business the vendor of that business may not disclose a security interest in respect of the property being purchased. You, as purchaser, should check the security register of the vendor or you risk inheriting a good or chattel in which a third party may have a registered interest.**
2. **If you are approached by lenders seeking to amend or enter into new security arrangements you should ensure that the agreements are reviewed by your legal advisors to ensure that additional security is not being provided.**
3. **All businesses should review their arrangements and activities especially if your business relates to the sale of goods on consignment, lease or hire. Your documentation must be amended to enable you to register a security interest over any such property which is provided on consignment, lease or hire.**
4. **Businesses which have at present retention of title arrangements in their contracts for the sale of goods must review their agreements to make sure that you have the right and ability to create a proper registered interest (a purchase money security interest) to ensure you have coverage over those goods and priority over any other party in relation to those goods.**
5. **Finally if in doubt you should ensure that you register any security interest over personal property. Obviously the registration of your interest will be preferred in the event of a future dispute as to your rights in respect of such interest.**

You are invited to contact McKean Park to discuss your requirements and to ensure that your interests either as a lender or business proprietor are fully protected prior to the commencement of this important new legislation.

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NEW MEMBERS OF STAFF AT MCKEAN PARK

The Family Law Department has seen some changes in recent times.

Jim Mellas, Partner in charge of the Family Law Team left the firm to take up a career as a barrister practising in Family Law. We wish him well with his change of direction in the law.

As a consequence the firm employed two new Family lawyers – Maria Kourtis and Mark Finn to service our clients' needs and to expand our expertise in this area of law.



MARIA KOURTIS

Maria is an experienced Family lawyer having been in legal practice over nine years. She represents clients in all stages of Family Law matters and undertakes her own appearances in the Family Court, Federal Magistrates Court and County Court, both in preliminary and final hearings. One of Maria's favourite pastimes is opera and she is a long time subscriber to both the Victorian Opera and Opera Australia. Welcome Maria!



MARK FINN

Mark Finn is also a very knowledgeable lawyer in Family Law matters. He is an accredited member of the Independent Children's Lawyer Panel representing children in the Family Court and the Federal Magistrates Court. He also has a particular interest in acting for persons who require advice relating to same sex relationships.

In his spare time Mark enjoys travelling and the theatre. Welcome Mark!

MCKEAN PARK BREAKFAST SEMINARS

Our breakfast seminars during this year have been very successful and we have now included an additional topic in our program. Please see the list of the Seminars still to come this year:-

24th August – Pitfalls in Property transactions

NEW 8th September – Owners Corporations (Debt recovery and issues with serviced apartments)

20th September – Doing Business Overseas

18th October – Shareholders Rights

A light breakfast will be served at 7.30am and the Seminars commence promptly at 8am and finish at 9am.

If you are interested in attending any one of these Seminars, kindly contact Tammy Nikolic on 8621-2848 or email her on tammy.

nikolic@mckeanpark.com.au in respect of the Owners Corporation Seminar on 8th September and Melanie Shea on 03 8621-2860 or email her on melanie.shea@mckeanpark.com.au for the remaining Seminars.



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Clients should not act only on the basis of material in this newsletter because the contents are of a general nature only and may be liable to misrepresentation in particular circumstances. Changes to legislation occur quickly. Do not act on the contents of this newsletter without first obtaining advice from McKean Park Lawyers.

Liability limited by a scheme approved under Professional Standards Legislation.



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