

NEW FACES AT MCKEAN PARK

The firm continues its expansion with a wealth of new talent with the introduction of a new experienced commercial lawyer in the Commercial Team, a new family lawyer and a new workplace relations lawyer.



JOHN WHELAN – NEW COMMERCIAL TEAM LAWYER

We welcome John Whelan as a consultant in our Commercial Team.

John comes to us after 13 years running his own practice and prior to that 15 years in a legal firm at Williamstown.

Whilst John is primarily a part of our Commercial Team, with wide knowledge and experience in advising on business structures, trusts, CGT and GST, he also has developed extensive skills in leasing and property, business and personal succession planning. John also conducts litigation in the various jurisdictions including VCAT.

John is married to Paula and when permitted enjoys dinghy sailing on Albert Park Lake, golf and playing guitar.



AMY GRANGER – NEW WORKPLACE RELATIONS TEAM LAWYER

Amy graduated in 2007 with a Bachelor of Laws and Bachelor of Asian Studies (Japanese) and has joined McKean Park as a Lawyer in the Workplace Relations Team. Since being admitted to practise she has worked for a boutique firm in Employment and General Commercial Law and also as an Industrial Relations Officer with a Trade Union. In 2011 she enrolled to study her Master of Laws in Employment and Labour Relations Law at the University of Melbourne. Her particular interest is in handling matters involving discrimination in the workplace and she also enjoys involvement in litigious workplace relations matters. Outside the office Amy is very keen on fitness and is an accomplished aerobics devotee. She recently competed as part of the National Australian Team in the World Aerobics Championships in Amsterdam. Well done Amy!



LAUREN ARCHER – NEW FAMILY LAW TEAM LAWYER

We welcome Lauren Archer, a new lawyer to our Family Law Team. Lauren was born in Canada but has had the privilege of living and working on four different continents including South Africa, England and Australia for the past nine years. She graduated with a distinction in Bachelor of Laws from Deakin University whilst working full time as a paralegal/personal assistant predominantly in the Family Law area. Having worked in the area for over five years, she has gained significant experience and understands that the breakdown of a relationship is a very difficult and stressful time in people's lives. She works hard at being a solicitor that her clients can trust and confide in. Her most rewarding moments in Family Law come from empowering her clients with the law, ensuring they are aware of their rights and enabling them to take some power back during an emotional time in their lives. When she is not busy at work, Lauren enjoys travelling the world and making the most of Australia's outdoor lifestyle.



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SEXUAL HARASSMENT IN THE WORKPLACE

BY AMY GRANGER



Recently, a number of high profile cases involving allegations of sexual harassment in the workplace have been covered in the media. These cases highlight the need for organisations to be aware of their obligations to prevent sexual harassment in the workplace and provide a safe working environment for employees. A failure to act can expose an employer to a large claim for compensation.

WHAT CONSTITUTES SEXUAL HARASSMENT?

Sexual harassment in the workplace can take various forms, such as:

- **unwelcome touching, hugging or kissing;**
- **suggestive comments or jokes;**
- **unwanted invitations to go on dates;**
- **intrusive questions about a person's private life or body; and**
- **exposure to sexually explicit jokes or emails.**

In order to prove that sexual harassment has occurred in a legal sense, the following factors must generally be established:

1. **the behaviour was unwelcome;**
2. **the behaviour was of a sexual nature; and**
3. **a reasonable person would anticipate in the circumstances that the person who was harassed would be offended, humiliated and/or intimidated.**

Obviously, sexual interaction, flirtation or friendship which is invited, reciprocated or consensual will not constitute sexual harassment. It is important to note however, that unlike a claim for workplace bullying, a sexual harassment claim need not consist of repeated or continuous behaviour – a single incident can constitute sexual harassment.

WHEN IS SEXUAL HARASSMENT PROHIBITED?

Sexual harassment in the workplace does not necessarily have to occur whilst at work to be unlawful. Organisations should be aware that behaviour amounting to sexual harassment in the workplace can extend to situations such as conferences and training centres attended by employees, restaurants for work lunches and office functions or parties.

CAN AN EMPLOYER BE LIABLE?

Under discrimination legislation, employers may be liable for the actions of their employees in the workplace (even at social

functions connected with and outside the workplace), unless the employer can show that it took all reasonable steps to prevent the sexual harassment from occurring.



WHAT TO DO

The employer must show that it took all reasonable steps to prevent sexual harassment. What will be considered reasonable will vary according to the size, nature and culture of each individual workplace. Our workplace relations team at McKean Park can assist employers in tailoring an appropriate plan to prevent sexual harassment, which may include steps such as:

- **the writing and implementation of a sexual harassment policy;**
- **ensuring that the policy is regularly updated and provided to employees;**
- **ensuring that high level management supports and reinforces the policy within the workplace;**
- **providing regular training and information to employees in relation to sexual harassment;**
- **creating a positive workplace environment, e.g. prohibiting offensive material in the workplace;**

- **implementing an internal complaints procedure for dealing with sexual harassment complaints; and**
- **maintaining accurate records of complaints and reported incidents.**

THE DAVID JONES CASE

On 2 August 2010 Kristy Fraser-Kirk commenced proceedings in the Federal Court against David Jones Limited ("**David Jones**"), Mark McInnes and individual directors of the David Jones board. Her claims arose from alleged unwanted sexual advances by Mr McInnes to Ms Fraser-Kirk during the course of her employment with David Jones.

Part of Ms Fraser-Kirk's claim was for compensation on the basis of misleading and deceptive conduct, in contravention of trade practices legislation. It was alleged, among other things, that representations were made to Ms Fraser-Kirk at the time of commencement of her employment, to the effect that David Jones was a "fun, exciting place to work", and it was further alleged that such statements were misleading and deceptive, and were made recklessly.

Further, Ms Fraser-Kirk alleged that statements made by some of the directors of David Jones at a press conference to the effect that the incident involving Ms Fraser-Kirk had been a single event and that David Jones previously had no reason to question the conduct of Mr McInnes, were also misleading and deceptive. It is interesting to note that directors who were not present at the press conference were also implicated in the misleading conduct claim as it was alleged that they took no steps to correct the representations made in circumstances where they had a duty to do so.

The matter has now been settled by the parties but the issues that arose in this case are very compelling.

It is important that employers are aware of their obligations under trade practices legislation, in addition to their obligations under discrimination legislation.

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WILLS AND ENDURING POWERS OF ATTORNEY



— A FEW QUESTIONS ANSWERED

BY ELISABETH BENFELL
& GEOFF PARK

Q. WHAT HAPPENS IF I DON'T LEAVE A VALID WILL:

A. Several problems arise

1. There is no person nominated by you (your "executor") to immediately take control of things. Funeral arrangements are first priority, and if there is no immediate family surviving then the executor will be the person to take control of this situation. In some instances, usually where there is no immediate family, it is very important for a person to prevent entry to the house (such as by persons who might know where the outdoor key is or who have keys or are still prepared to break in) and change locks, remove valuables and make sure that insurance is up to date. An executor is the person to carry out these tasks.
2. There is no person nominated to carry out other tasks in the short term such as gathering information about assets and liabilities, arranging for payment of pressing accounts or arranging with creditors to wait until a grant of Probate can be obtained and the bank account accessed for payment, and with the information gathered instructing the solicitor to obtain the grant of Probate. During this period an executor named in a Will has certain limited powers, and necessary actions taken during this period will be ratified upon obtaining grant of Probate, whereas where there is no Will there is no person who has authority to carry out these tasks save State Trustees (in whom property of an intestate person vests until a grant of Letters of Administration is obtained. State Trustees is not interested in looking after this interim situation).
3. A person(s) must step forward and apply to the Supreme Court (through the Registrar of Probates) for a grant of Letters of Administration. The Registrar of Probates has a priority list of preferred persons who would apply for such grant, such as the person who is the closest next of kin and who could obtain the greatest benefit from the intestate estate. If you sit down and think about it that person may

not be the person you would have chosen to be your executor in your Will, for any number of reasons, including that person living outside Victoria or being too busy or being someone who you do not think would be prudent in looking after another person's moneys and investments.

4. Most importantly you have lost your right to direct your assets to various persons. The Administration and Probate Act, Victoria, sets out the way in which an estate will pass to other persons where the deceased leaves no valid Will. It is almost certain that the statutory formula just referred to would not accord with your own wishes. A glaring example would be a man dying leaving a surviving spouse and one child aged 5 years. The Act states that in those circumstances the spouse will receive all chattels along with the first \$100,000.00 value of the remaining assets and one third of what is then left. The 5 year old is entitled to the other two thirds, which would then have to be held in trust until that child reaches the age of 18 years.

Another example would be where the deceased did not leave a spouse or children surviving but left both parents surviving and 5 nephews and nieces, being the children of his/her brother and sister. In those circumstances the deceased's total estate would pass to the parents whereas if the deceased had thought about it he/she would probably have left most, if not all, to the nephews and nieces at an adult age.

By leaving a valid Will you overcome the problems above by nominating a person(s) to look after your estate assets and to carry out the terms of your Will, and you nominate the persons who will benefit. Furthermore during the process of talking to the solicitor about preparation of the Will you will also have an "estate health check" as other matters will be discussed such as jointly owned property and assets, family discretionary trust, superannuation and other ancillary matters such as an Enduring Power of Attorney (Financial).

Q. CAN I LEAVE A SUM IN MY WILL TO BE HELD ON TRUST FOR MY DAUGHTER WHO IS ON A CENTRELINK PENSION?

- A. Yes, but if the trust in the Will is not correctly worded then the pension may be reduced or completely terminated. A recent court decision has the effect that the pensioner should have no right to have any amounts of the capital of the trust given to them, but only the right to receive all or some of the income derived from the trust. Nevertheless there are ways in which capital can be paid and received by the pensioner.

Q. I WANT TO APPOINT AN ATTORNEY TO HELP ME DURING MY LIFETIME, BUT HOW DO I KNOW THAT PERSON WILL NOT ABUSE THE SITUATION?

- A. There are several types of "Powers of Attorney" that are available, and the most common form is the Enduring Power of Attorney (Financial). This document is extremely useful in many circumstances and covers most situations faced by elderly persons and other persons who become incapable of looking after their affairs after they have executed the document.

Some ways of assisting in prevention of misuse or abuse of an Enduring Power of Attorney (Financial) are:

- Including a provision in the document that it will not commence to operate until a particular date is reached or a particular event occurs (such as the donor losing capacity as certified by two medical general practitioners). Unless the donor is fearful that this might happen we



recommend that the document commence immediately it is signed, rather than at a later date.

- Limitations can be written into the document, as for example if the donor has been a passionate collector of BHP shares during his/her lifetime then the document could state that it does not operate in relation to any BHP shares owned by the donor.
- If a person suspects or knows that the attorney is misusing or abusing their position, that person can make an application to the Victorian Civil and Administrative Tribunal to have the Enduring Power of Attorney (Financial) revoked and if it is necessary an administrator appointed.
- The donor can simply not tell anyone else that he/she has executed an Enduring Power of Attorney (Financial). The donor would no doubt have business cards or

other papers of the solicitor with his/her own private papers at home and if the donor become incapacitated it is most likely the persons finding those papers would telephone the solicitor to ask what should be done, or if there is an Enduring Power of Attorney (Financial). At that stage the document can be produced and used, but this would save any potential for misuse or abuse up until that point.

Q. I SUSPECT MY FATHER WAS NOT OF SOUND MIND WHEN HE SIGNED HIS WILL. IN ANY EVENT HE LEFT VERY LITTLE TO ME IN THE WILL, AND LEFT MOST TO FRIENDS AND A VERY DISTANT RELATIVE IN THE USA. WHAT CAN I DO?

A. In recent times we have, through Elisabeth Benfell and Geoff Park, looked after a number of clients in a similar situation. All such

claims depend on the particular circumstances and facts of the case. However usually during a phone call to us we can indicate whether in general terms a cause of action may have arisen and whether it is possible a claim could be successful and whether further detailed consultation would be in order.

To discuss any of these matters or any other matters in relation to Wills, Powers of Attorney or deceased estates administration please telephone Elisabeth Benfell or Geoff Park of our Private Clients Team both of whom are amongst a small number of lawyers accredited by the Law Institute of Victoria as specialists in this area.

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DEBT RECOVERY

LETTER OF DEMAND

BY CHARMAINE GROVES



WHAT IS A LETTER OF DEMAND?

A letter of demand is a letter sent to a person or organisation who owes you money (a debtor) for your supply of goods or services. The letter advises the debtor of the amount outstanding and threatens court action to recover the debt, if it is not paid within a certain time.

WHY SEND A LETTER OF DEMAND?

A letter of demand can serve two purposes. First, it warns the debtor of your intentions to commence legal proceedings unless payment is made and gives the debtor one more opportunity to pay.

Secondly, the letter is a document which may be tendered in evidence during court proceedings as written proof of your claim of the debt owed and your attempt to settle the matter.

Copies of any relevant documents such as contracts, letters of agreement, invoices etc should be supplied to us, so as to assist the debtor to identify the transaction and their liability to pay.

Where a fax number or email is provided to us, we find it beneficial to send the letter of

demand by fax or email to confirm receipt, as well as ordinary post. Only one letter should be sent and you should be prepared to act on your threat to initiate legal action otherwise the debtor may simply call your bluff.

Your next option is to issue proceedings. The amount of the debt will determine in which Court we would seek recovery of the debt together with your costs and penalty interest in pursuing the debt. In most cases, we use the Magistrates Court of Victoria, which deals with debts up to \$100,000.00.

HOW TO RESPOND TO A LETTER OF DEMAND

- Do not ignore a letter of demand from a creditor, law firm or debt collection agency for monies owing.
- Carefully check the letter and if there are any matters that are unclear or if you require further details, write or ring the creditor (and keep a copy of the letter) if one is used.
- Seek legal advice if the claim is disputed.
- If you do not dispute the claim, contact the creditor and attempt to negotiate settlement of the matter on a "without prejudice"

basis. This means that you can try to reach a compromise without putting at risk your legal rights, that is, you are keeping open the option that you may take a different stance if the matter ends up in Court.

- If you are the creditor sending the letter of demand and the debtor contacts you in response, negotiating on a "without prejudice" basis this can be particularly useful, as you do not give up the right to sue for the full amount if a satisfactory compromise is not made.
- Keep in mind that most creditors are willing to accept less than the full amount, as it relieves them of the administrative and legal expense and delay in pursuing debt recovery action through the Courts.
- If you cannot afford to pay back the amount in full, offer to pay by instalments that are reasonable in the circumstances (this option is usually also available if the matter is taken through the Courts).
- If you are unable to pay at all then advise the creditor by letter.

We invite you to contact Charmaine Groves on (03) 8621 2888 for a free quote on your debt recovery requirements.

MCKEAN PARK BREAKFAST SEMINARS



We at McKean Park understand that dealing with the law and its intricacies can be a confusing and expensive experience for both businesses and personal clients alike. We have also realised over the years that many problems could have been avoided if clients had been aware of the possible pitfalls in certain situations, and taken steps to protect themselves accordingly.

Therefore, we have decided to introduce our free Breakfast Seminar Series, to run from March to October 2011, on the third Tuesday of every month. We have chosen topics that will be informative and beneficial to both business and personal clients, and have structured the topics to reflect that.

The seminar programme is as follows:-

15 March	Directors Duties.
19 April	Estate Disputes – How Binding is your Will?
17 May	Workplace Harassment and Bullying.
21 June	Pre- Nuptial Arrangements - how binding are they?
19 July	Personal Property Security Register.
16 August	Pitfalls in Property Transactions.
20 September	Doing Business Overseas.
18 October	Shareholders Rights.

A light breakfast shall be served at 7.30 a.m. and the seminars will commence promptly at 8.00 and finish equally promptly at 9.00 a.m.

The seminars are designed to provide an overview of each particular topic, some tips for avoiding problems and recognising potential problems.

If you are interested in attending any or all of the seminars, please contact Melanie Shea on (03) 8621 2860 or email her on melanie.shea@mckeanpark.com.au. We will then contact you closer to

the date of the seminars that you have expressed an interest in, to confirm whether you are still able to attend. We are more than happy if you wish members of your staff to attend particular seminars, and, if you are able to ensure that you have more than 10 people attending, we are happy to run a seminar at your premises.

If you have any other queries, please contact either David Brett (Head of the Litigation Department) on (03) 8621 2818 or david.brett@mckeanpark.com.au or his PA, Melanie Shea.



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