McKEAN PARK LAWYERS

MATTERS

JULY 2010

NATIONWIDE OCCUPATIONAL HEALTH & SAFETY LEGISLATION

BY CHRIS MOLNAR & JEFFREY WANG

WORK HEALTH AND SAFETY ACT (WHS ACT)

Whilst it is still 18 months before the commencement of the model *WHS Act*, (1 January 2012), organisations will need time to carefully assess their current OHS practices and implement necessary changes to ensure compliance with the *WHS Act*.

BACKGROUND

The Council of Australian Governments in July 2008 committed to making uniform national work health and safety laws.

In December 2009, the Workplace Relations Ministers Council endorsed the model *WHS Act*.

WHY DO WE NEED MODEL WORK HEALTH AND SAFETY LAWS?

The nationalisation of OHS legislation is aimed at providing a simpler system, especially for businesses that operate nationally and currently under varying OHS laws.

As it now stands, the responsibility for making and enforcing OHS laws sits with the respective States, Territories and the Commonwealth. This has resulted in significant differences and inconsistencies in OHS legislation throughout Australia. The main differences in OHS laws throughout Australia include:

- **Stricter obligations on employers in some states;**
- **Significant differences in range of penalties;**
- **Different tests for individual liability.**

These differences in the regulatory framework have prompted the making of the model *WHS Act*. Each State and Territory will implement the *WHS Act* with commencement from 1 January 2012.

MAJOR CHANGES

Some key areas of the legislation are:

- **Consultation obligation between duty holders (duty holder is any person who has a health and safety duty under the *WHS Act*);**

- **Duty holders may have more than one work health and safety duty;**
- **Increased penalties;**
- **Primary duties of care will be imposed on any "person conducting a business" as well as people who have "management or control" of a workplace;**
- **Unions will not be able to prosecute for breaches of the legislation;**
- **Officers have a duty of care to exercise due diligence.**

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INCREASED PENALTIES

Increased penalties include:

Category 1 – **reckless conduct** – without reasonable excuse which exposes an individual to a risk of death, serious injury or illness	Up to $3 million for a corporation
Category 2 – **failure to comply with health and safety duty** – which exposes a person to risk of death, serious injury or illness	Up to $1.5 million for a corporation
Category 3 – **other breaches** of health and safety duties	Up to $500,000 for a corporation

DUE DILIGENCE AND OFFICERS OF A COMPANY

The *WHS Act* provides that an officer of a company must exercise "due diligence" to ensure that the company complies with their duty or obligation. Due diligence for the purposes of the *WHS Act* includes the following officer requirements:

- **To acquire and keep up-to-date knowledge of work health and safety matters;**
- **To gain an understanding of the nature of the operations of the business or undertaking, and generally of the hazards and risks associated with those operations;**
- **To ensure that the person conducting the business has available for use, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business;**
- **To ensure that the person conducting the business has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and**
- **To ensure that the person conducting the business implements processes for complying with any duty or obligation of the person conducting the business or undertaking under the *WHS Act*.**

WHAT TO DO

Companies will need to ensure that up to date OHS policies are in place to meet the obligations of the *WHS Act* by 1 January 2012. Furthermore, new commercial contracts that are being entered into now may need to consider the model legislation. Contracts can be used to assist a business in meeting its OHS obligations.

In particular, new commercial contracts should be drafted to include duty holder consultation arrangements to assist parties in complying with their obligations to consult with other duty holders. This is critical with long term contracts which will remain in place after the commencement of the legislation.

Our Workplace Relations team at McKean Park can assist employers in a number of respects:

- **Drafting new contracts that will meet the requirements of the *WHS Act*;**
- **Developing new policies which will meet the requirements of the *WHS Act*;**
- **Reviewing and amending existing policies to ensure compliance with the new legislation;**
- **Providing training to workplaces on the changes.**

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TO MEDIATE OR TO LITIGATE

Mediation has been accurately defined as an informal, voluntary process intended to resolve conflicts, without resorting to arbitration or litigation, by using an impartial third party. *BY* NANCY HUA

At the end of a long-running litigation, there is rarely a happy plaintiff or defendant. The unsuccessful litigant is not happy for obvious reasons. The successful litigant has often spent too much money to get their desired outcome and therefore questions whether the time and risks were worth it after all. The most fortunate litigant is one who wins and manages to recover most, but never all of their costs from the other side. With this in mind, it is a good idea to negotiate with the assistance of an impartial third party prior to litigation, if possible. That is, it is only possible to mediate if the person(s) you are having a dispute with agrees to make an attempt to achieve a commercial agreement to settle the dispute without either of you taking the matter further to a court or tribunal. An experienced third party mediator can in many instances quickly recognise the core issues and nominate various options or assist with a resolution for the parties to work towards.

Mediation however, is not always a voluntary process. Once litigation begins, participation in mediation in most jurisdictions applies as a mandatory part of the court or tribunal rules and the parties are required to attend an informal session to settle the dispute without having to

continue using valuable court time and resources. This requirement is usually mandated once the parties have formalised their respective positions in writing in the form of a claim and response to the claim. At any point in time during the course of your litigation, you may choose to mediate. However, the more time and money you have spent and likewise, your opponent has spent on litigating, the less amenable you will each be to reaching a settlement by agreement.

The resolution of a conflict through mediation or negotiation is not intended to completely satisfy one party or the other. The goal is for the parties to agree to settle their dispute in a manner which they can live with, not one they consider satisfactory. A satisfactory outcome is in most people's minds, one which gets them what they want, without costing them too much to get it. To achieve this satisfactory outcome, you need to litigate and at the end of it all, your opponent must be willing to pay your costs and in a financial position to do so. The risk is there for everyone.

If you would like assistance or advice on any conflict situation which might require mediation or litigation, please contact our Litigation team.

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LEAVE IT ALL TO THE LOST DOGS HOME

BY DAVID BRETT

There is a long- standing legal saying that has far too much truth in it – "where there is a Will, there is a relative".

This saying is used to indicate the inclination of people to try and get more from the estate of a person who has died than they have been left in the Will, if in fact they have been left anything.

There have been many newspaper reports regarding this sort of claim, and it is usually referred to in the papers, incorrectly, as "challenging the Will". In fact, when a person dies and leaves a Will, the person who has been named to implement the provisions of the Will (the executor) must "prove" the Will in the Supreme Court. This means that the executor has to demonstrate to the Court that the Will has been validly made, complies with all legal requirements, and is enforceable. If that is done, a Grant of Probate is issued, which effectively is the Court saying that the Will is valid.

To "challenge" a Will means, from the legal viewpoint, to oppose the Grant of Probate on the basis that the Will is invalid, as a result of undue influence, lack of testamentary capacity, forgery etc. What most people understand by the term "challenging the Will" however means making a claim against the assets of the deceased estate, based on the allegation that the deceased has not provided sufficiently for the person in the Will.

Applications of this nature are brought pursuant to Part IV of the *Administration and Probate Act 1958* (the Act) and are referred to as "Part IV applications".

Until 1997, Part IV applications could only be brought by children and spouses of the deceased – and case law over the years had effectively made it very difficult for adult sons to bring claims, on the basis that the Courts took the view that "they ought to be able to look after themselves".

However, in 1997, the legislation was amended to allow claims to be brought by any person to whom "the deceased had responsibility to make provision" (s. 91 of the Act). This means that claims can theoretically be brought by a wide range of people, such as carers, more distant relatives, neighbours etc., and a number of such claims have in fact been brought.

Section 91 of the Act states that the Court must not order extra money to be paid to a person unless it is satisfied that the will has not made proper provision for the person, and then goes on to state the factors that Court will consider in hearing such claims. The court must first decide whether the deceased had an obligation to provide for the person and must then decide whether the provisions of the Will make adequate provision for the person.

In determining these questions, the court is required to consider a number of factors, including:-

- **The amount if any that has been left to the person in the Will,**
- **The family or other relationship of the person and the deceased, including the nature and length of the relationship,**
- **The obligations of the deceased to the person, and to any other beneficiaries of the estate,**
- **The size of the estate,**
- **The financial needs of the person,**
- **Any physical, mental or intellectual disability of the person or of any other beneficiary of the estate**
- **Any contribution of the person to the size of the estate,**
- **Whether the deceased had been maintaining the person to any and if so what extent,**
- **The character of the person,**
- **Any other matter the Court considers relevant.**

This is a very broad list and demonstrates that the Courts have a number of factors to consider when weighing up a claim against the estate.

Claims have, in the writer's view, been encouraged by the fact that, in the majority of cases, a person making a claim against the estate under Part IV will have their costs paid by the estate regardless of whether the claim is successful or otherwise. This was an understandable approach by the Courts prior to 1997, when only very close relatives could bring claims. In that situation, if a person had not been left anything, or only a small amount, it would appear to be reasonable to get the court to order further provision, as most people would think that a person does have some form of responsibility to look after his immediate family, rather than the Lost Dogs Home.

However, since the category of claimants has been expanded, that justification ceases to exist, and there has been a very substantial increase in the number of Part IV claims now being brought. The vast majority of claims are settled prior to trial, normally at mediation, because the costs of litigation and the fact that the costs will probably be coming out of the estate make it sensible for an executor to minimise the cost to the estate by compromising the claim, if at all possible.

This article is not intended to provide a guide as to how courts view these claims – each case is assessed on its own particular facts, and the results can vary considerably. In December, in the case of *Unger v Sanchez* [2009] VSC 541, the Court ordered further provision for the carer of the deceased. This was somewhat of a surprise as, although there was no doubt the carer had been of extreme comfort to the deceased and provided substantial and long standing care and assistance, the carer and her husband owned 3 properties worth in excess of $2.2 million, and had superannuation entitlements of over $333,000.00 and some $49,000.00 in the bank. It was felt that in view of these assets and resources, the carer did not have any need for financial provision from the estate, and therefore the Court ought not to order such provision.

Despite this, the Court did make an order in favour of the carer, and ordered that she receive $200,000.00. This case demonstrates that the Court considers all the factors, and that it is extremely difficult to predict what a Court will decide in such cases.

However, it is certainly the case that Courts approach such cases with a certain viewpoint:

1. **A person is free to leave his or her estate to whomever he or she wishes.**
2. **Nonetheless, a person does have certain moral and legal obligations to provide for certain people in their Will, and the Courts will enforce that obligation if required to do so.**

One point to remember in these cases is that clearly the deceased is unable to give evidence. Therefore, whilst no Will is immune from a Part IV claim, certain precautions can be taken, such as, if it is not intended to leave a bequest to a person who would normally expect it, it would be prudent to explain the decision in the will. This can be by reference to the behaviour of the person, or to financial contributions provided to the person during the lifetime of the deceased etc. This will assist the court in deciding whether there is an obligation to provide for a particular person, and if so, the extent of such provision.

It is the writer's view that there are a substantial number of unjustified and inappropriate Part IV claims being brought, with the purpose of effectively compelling the executor to pay money to the claimant at mediation, to avoid the prospect of the estate being further diminished by costs if the matter proceeds to trial regardless of the success of the claim or otherwise. If costs were awarded on the same basis as in virtually all other litigation, i.e. if you win, your costs are paid and if you lose you pay costs, the number of claims with very little if any merit, which all lawyers are currently seeing, would be greatly diminished, and the wishes of the deceased would be more properly respected.

Our Wills and Estates Team members, Geoff Park and Elisabeth Benfell are able to advise as to the best way to draw your Will to minimise the prospects of claims being brought against it, and they, as well as David Brett of our Litigation Team, are also able to assist you if a claim is being brought against an estate or if you wish to bring a claim against an estate.

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RESTRAINTS OF TRADE IN BUSINESS TRANSACTIONS

BY STEPHEN ROACHE

The inclusion of a restraint of trade upon a departing Vendor is generally considered to be a fundamental component of a sale of business to protect the goodwill acquired by a Purchaser. In a recent decision of the Victorian Supreme Court *Champion Charcoal Chicken Pty Ltd v Lemney Pty Ltd*, the Court was prepared to uphold the validity of a restraint of trade involving the sale of a chicken shop but on discretionary grounds refused to grant the injunction sought by the Purchaser due to the hardship which the Vendor would have incurred if the injunction had been granted.

The Vendor conducted a Chicken Bar and Take Away business in Hoppers Crossing and sold the business to the Purchaser. The Contract of Sale contained a restraint of trade precluding the Vendor conducting a business similar to the business being sold within a radius of 5 kilometres from the business premises for a period of five years.

The Purchaser subsequently instituted proceedings against the Vendor claiming that the Vendor proposed operating a Take Away chicken shop in Point Cook situated 4.9 kilometres from the Hoppers Crossing shop.

Whilst the Court was prepared to hold that the restraint provision was effective and would probably be breached by the Vendor, on discretionary grounds the injunction was refused. The Court noted that the Vendor

had entered into a long term lease of the new premises and had incurred considerable expense in fitting out the new premises. The business sold had also maintained its takings and there were 18 chicken shops within a 6 kilometre radius of the business sold.

A technical breach of the restraint did not give rise to injunctive relief in circumstances where the prejudice suffered by the Vendor by granting any injunction was substantially exceeded by the loss, if any, which the Purchaser suffered as a result of the technical breach.

The Courts have demonstrated some reluctance to enforce restrictive covenants. Even the most competently drawn restraints may be bypassed by the Courts, including those directed towards restraint of former employees.

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SECURITIES FROM INSOLVENT COMPANIES

BY TONY ROGERS

Financiers and for that matter companies in difficult trading conditions wishing to obtain finance must take heed of the case of *Bell Group Limited (In Liquidation) –v- Westpac Banking Corporation* (Bell's case) a case decided in 2008. It is important to consider the implications as it highlights the need for lenders to take particular note of the viability of a borrower when a financier takes any form of security for a loan.

This is particularly so where a company is insolvent or may be held to be insolvent and very often the case arises where a financier is striving to shore-up its position to maintain security over all assets of the borrower company.

The taking of additional security, particularly when there is financial uncertainty of the borrower, is a risky undertaking. A lender must ensure that the company is not insolvent when the security is taken. It is common knowledge that a company is insolvent if it is unable to pay its debts as and when they become due and payable. Directors of such companies will be aware of the likelihood of insolvency and the fact that they also may be held in breach of their fiduciary duties to the company if the company trades whilst insolvent.

The importance of Bell's case arises as it clearly established that a financier having known that the company involved was insolvent went ahead in any event and obtained additional securities. These securities were deemed unenforceable.

It is not uncommon for a Bank or other financial institution wishing to improve its security position at the time further advances are made or at the time security is reviewed. Both parties must ensure that the position is not exacerbated at that point. The company's solvency must be considered before either the directors or the financial institution enters into a new security.

For further assistance please contact Tony Rogers of the Banking & Finance Team.

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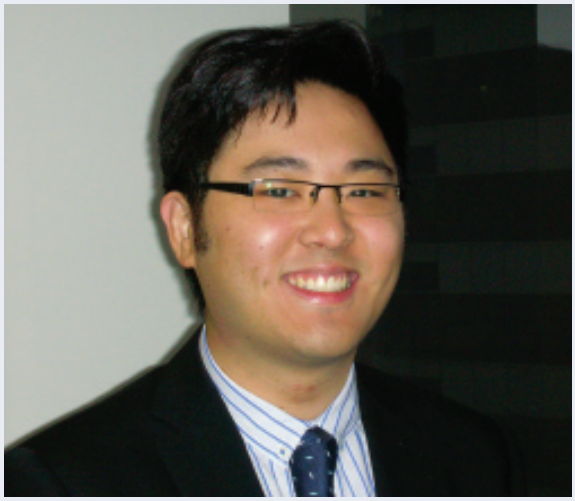
NEW LAWYER WORKPLACE RELATIONS TEAM

We welcome Jeffrey Wang, a new lawyer in our Workplace Relations Team. Jeffrey has gained significant experience in the Federal Department of Education, Employment and Workplace Relations and most recently, as an Associate to a Commissioner in Fair Work Australia. While working in Fair Work Australia, Jeffrey assisted in the drafting of a number of Modern Awards in the broadcasting and entertainment industry.

Jeffrey enjoys the area of Workplace Relations being a combination of a number of areas including workplace rights, safety and contract law. He is fluent in Mandarin and is currently undertaking a Master of Laws at the Australian National University. When he is not busy at work or his study Jeffrey enjoys participating as a Soccer Referee for junior competitions. Lately Jeffrey has been having some late nights and very early mornings following the World Cup.



LITIGATION BREAKFAST SEMINAR

The final seminar in the current Litigation Breakfast Series will be held on Wednesday 4 August 2010 at 7.30am. The topic is "What is a Contract? Do we have a Deal?"

This seminar is designed to give business people a brief insight into how contracts are formed, and altered, and what happens if they are breached.

The Litigation Department will be sending out invitations to the seminar in mid-July. If you are interested in attending the seminar, please contact Melanie Shea on (03) 8621 2860 and we will ensure that you receive an invitation.

We are more than happy to attend our client's premises to present the seminar as a training tool, if there are 10 or more people that would be attending. Once again, if you are interested in an in-house training seminar, at no cost, please contact Melanie Shea.

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