McKEAN PARK LAWYERS

MATTERS
NOVEMBER 2008

ROOM DEDICATION CEREMONY
MCKEAN LIBRARY AND PARK BOARDROOM

On 1 October 2008 the firm was host to a significant event in the history of McKean Park. Descendants of James McKean the original founder of the firm and of Arthur Leslie (Les) Park attended a ceremony which involved the actual naming and official opening of the McKean Library graced with a large portrait of James McKean and the Park Boardroom.

Tony Rogers, Senior Partner, talked on the history of James McKean and Les Park with some interesting insights into the characters of both gentlemen.

James McKean, who was a Minister for Crown Lands in the Legislative Council of the Colonial Government in the 1870's was quite famous for being interred by the Speaker of the House when he refused to "attend in his place" to be censured. He was taken into custody by the Sergeant at Arms and incarcerated in the brig underneath Parliament House for several days. When released he apologised to the chairman whom he had criticized during his speech but he refused to pay either a fine or for his sustenance whilst he was imprisoned.

Remarkably the chair which he had in the cell under Parliament is still available for inspection at the Parliamentary Museum and has scribbled underneath a bit of personal graffiti from our founder and reads "*State Prisoner James McKean*".

The successors to the firm founded by James McKean do not claim any such similar incidents in their history but are very proud to have such a learned lawyer and parliamentarian who led the way to establish McKean Park.

It was also mentioned that Les Park who became an employee of Harry McKean, son of James McKean, in the firm in October 1934 was a brilliant lawyer who practised well into his eighties. He had trained in the classics and his understanding of the English language was exemplary. Even in his latter years he had a very quick and incisive legal mind. Younger lawyers very often found his assistance invaluable. Les Park had two sons who both followed him into the law, Richard Park who retired from the practice in 2004 and Geoff Park who remains with the firm as a consultant. Geoff is an accredited specialist in wills and estates and a foremost expert in contested estates.

Following the conclusion of the opening of the rooms the guests then sat down to a luncheon held in the Park Boardroom.

As a result of the occasion many artefacts and memorabilia associated with the McKean and Park families were on display in the McKean Library for the day.

All guests are looking forward to the 150th anniversary of the firm in 2013.

Photos *(from left to right)*

Geoff Park and Richard Park jointly cutting the ribbon to the Park Boardroom

Robert Simpson - grandson of James McKean officially opening the McKean Library

Richard Simpson and Tony Rogers

Tony Rogers about to give his speech

Robert Simpson, Richard McKean and Margaret Ezzy

contents

HIGH FLYERS AND LOW FLYERS IN RECENT WILL CASES

BY GEOFF PARK

Extension of time to bring Testator's Family Maintenance Claim

Claims by persons for provision, or further provision, out of a deceased person's estate pursuant to Part IV of the *Administration and Probate Act Victoria* must be made to the court within 6 months after the date of grant of Probate of the Will or grant of Letters of Administration – section 99.

That time may be extended for a further period by the court provided that there is still some estate left undistributed. The application for the extension of time is made to the court by the person who would have made the claim for provision within the 6 month period.

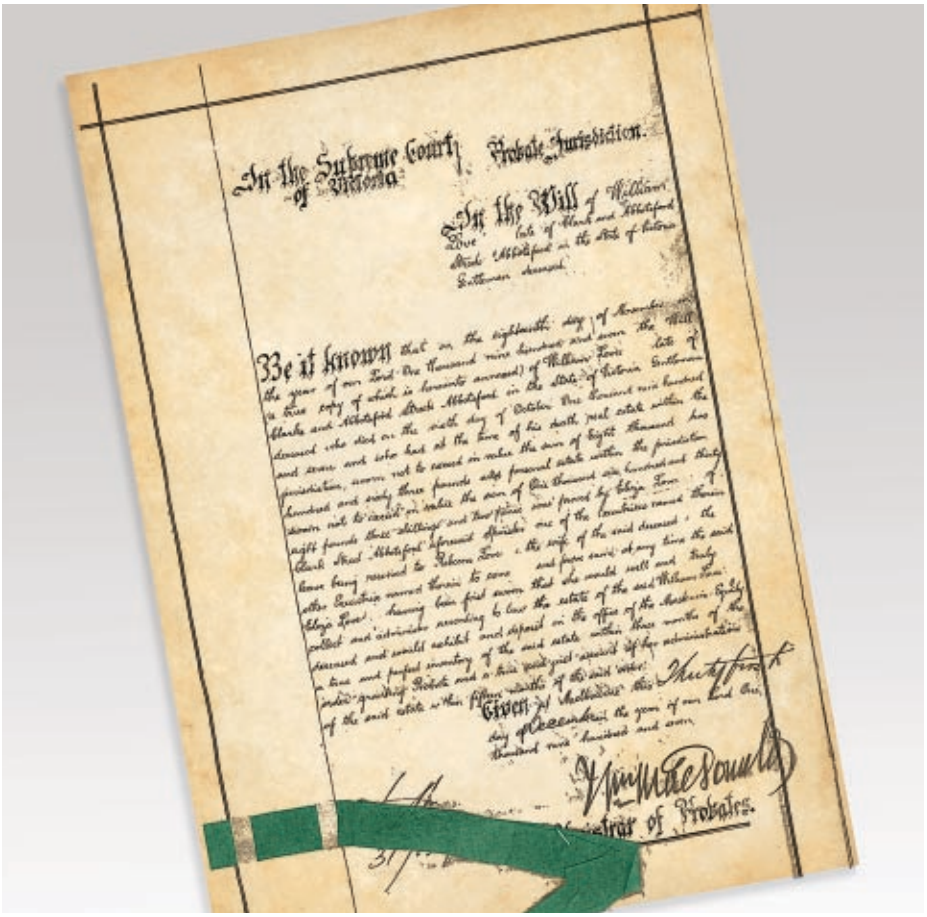
In general the applicant must show the reasons why there has been a failure to apply within time and why such failure should be excused. The applicant needs to show why it would be unjust for the applicant to be penalised for being out of time.

Recently, in Ansett -v- Moss [2007] VSCA 161 the Appeals Court reviewed a decision of the Supreme Court relating to the estate of the late Sir Reginald Ansett, who died in 1981, leaving an estate at that time of $8,200,000.00. Most of the estate was left to charities, a modest gift left to the Plaintiffs, larger gifts to his step children and a life interest in part of the estate to his second wife. When his second wife died in 2003 the step daughter made claims and this then aroused the Plaintiffs' interests in making claims.

The Court initially held that the deceased owed no responsibility to either Plaintiff, John Ansett or Robert Ansett, and that they had not discharged their onus of proving there was a reasonable excuse for delaying beyond the 6 month period. Leave to apply for provision was refused.

On appeal by John, that decision was overturned and his application sent back to the trial division of the Court to be re-heard by a different Judge. The Appeal Court said that there were no rigid rules to confine the discretion of the court to be exercised under section 99 of the Act. All relevant circumstances had to be taken into account.

Footnote: a recent newspaper report indicates that an adopted daughter of the deceased has just commenced an application to the Court for leave to make a claim against the estate out of time.



"INFORMAL" WILLS

For a long time the requirements for a validly executed Will in Victoria have been very stringent and have basically required that there must be a written document which was signed by the Will maker (or some other person at the Will maker's direction) in the presence of two witnesses.

However for persons dying after 19 July 1998, relief from the strict requirements has been provided by section 9 of the *Wills Act* 1997, whereby an application may be made to the Supreme Court of Victoria for dispensation from some of those strict requirements.

Under that section the court may have regard to any evidence relating to the manner in which the document was executed, and any evidence of the testamentary intentions of the Will maker including statements made by that person.

Furthermore the Registrar of Probates may exercise the power of the court under this section where all persons who would be effected by the decision consent.

In the recent decision of Estate of Peter Brock [2007] VSC 415 there were three documents put forward as the last Will.

The situation of Peter Brock's "blended family", and the effect of that on the three "Wills" is interesting and will be the subject of a future article.

Briefly the three Wills were prepared as follows:

1. **1984 Will. This was formally prepared by a solicitor, appointed executors, disposed of all of his property and was correctly signed and witnessed. There was no question about the legality of that Will.**
2. **2003 Will. This was an informal Will which was prepared on a "do it yourself" Will Kit form purchased by Mr Brock's de facto at his request, and was filled in to some extent by Mr Brock in the presence of his de facto and his personal assistant. The document revoked all prior Wills, appointed executors,**

gave funeral directions but failed to legally dispose of any of his property, and Mr Brock then signed the document in the presence of his de facto and personal assistant. The personal assistant also signed the document but the de facto did not.

3. **2006 Will. Mr Brock gave his personal assistant (a different person to the one above) a "do it yourself" form and asked her to complete it for him – he stood by her and looked over her shoulder as she filled in various parts after listening to what she had been told. Mr Brock's mobile telephone then rang and he went to another room to take the call and upon his return seemed agitated and he did not look at the document again or discuss it. The personal assistant signed her name as a witness even though Mr Brock had not signed it.**

The Court held that on the balance of probabilities the 2006 Will was not valid, even as an informal document, as the evidence did not support a view that he intended that document in that form to be his last Will. The Court acknowledged that it was a Will document being prepared for him and at his direction but was not convinced that he had concluded his input and therefore he did not have any intention that the document as it stood actually be his last Will.

The Court held that the 2003 Will was his last valid Will, and accordingly it had the effect of revoking the 1984 Will and appointing executors but as there was an intestacy as to his assets then the rules of intestacy, as set out in the *Administration and Probate Act Victoria*, applied as to who would benefit and in what proportions.

AND ANOTHER THING..... .....THE "FORFEITURE RULE"

There is a longstanding common law rule that a person who unlawfully kills another cannot benefit from that person's Will or estate. This is known as the "forfeiture rule". Accordingly a convicted murderer is not able to obtain a beneficial interest in the property of the victim. For example a man who murders his wife is not able to collect the proceeds of her life insurance policy and (by extension of the rule to another rule) is unable to take the deceased wife's interest in the matrimonial home which was jointly owned by the husband and wife.

The same rule applies to manslaughter, unless the manslaughter was of a quite accidental and unintended nature.

The above forfeiture rule will most likely effect the distribution of the property of the late Patrick Plumbe who died in April 2005. His body was found in his burnt out utility in the Warby Ranges, two days after he married and one day after he made a new Will. Newspaper reports of the 7 October 2008 say that after two days of the Supreme Court hearing for prosecution of the wife for murder, the wife changed her not guilty plea to plead guilty to manslaughter. Evidence indicated that the wife had an altercation with Mr Plumbe which resulted in him suffering a massive head injury, and that apparently the vehicle collision with the tree was staged and the deceased was still alive when the vehicle caught fire and killed him.

The newspaper reports state one effect of the new Will was to make the wife the sole beneficiary of his $1million superannuation fund. If that report is correct then the forfeiture rule will apply so that the benefit will not pass to the wife, as indeed the modified rule will also apply should there be any jointly owned real estate or personal estate.

CONTACT

Please contact either of our two Accredited Specialists in Wills and Estates law, Geoff Park or Elisabeth Benfell, for assistance in this area.

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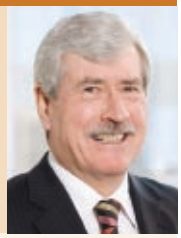
REFORM OF PERSONAL PROPERTY SECURITIES LAW

On 16 May 2008, the Commonwealth Attorney-General Robert McClelland introduced a consultation draft of the Personal Property Securities Bill 2008 (the Bill). This represented a significant landmark towards unifying the myriad of laws governing personal securities across the Commonwealth, States and Territories.

BY TONY ROGERS



Following the draft Bill, the Attorney-General published a Discussion Paper on 29 August 2008 of Regulations to be made under the proposed Act for public consultation. Submissions on the proposed Regulations closed on 17 October 2008.

Personal property is any form of property other than land and includes tangible and non-tangible property. The Bill, if passed, will provide a unilateral National Personal Property Securities Register that will combine registrations of existing personal securities on an electronic real-time database. That could see 'traditional' securities such as fixed and floating charges, taxi licences, liquor licences, company shares, hire equipment finance and motor vehicle leases abolished and consolidated into the one national electronic register.

The benefits for reform are clear, it will provide:

- **increased certainty for individuals, businesses and lenders,**
- **more forms of personal property to be offered as security,**
- **less complexity, and**
- **eventually, reduced costs.**

There are of course some concerns in respect of the implementation of the Bill that will need to be 'fleshed out'. They are, to name a few:

- **privacy issues of the information available on the register,**
- **the costs of implementation, in particular on small businesses,**
- **the priority rights of existing securities,**
- **existing but undisclosed property interests, and**
- **indefeasibility and competing security interests, especially as a result of fraud and the progressive nature of family/ de facto claims.**

It is anticipated that the Bill will commence in May 2010. Even though a lengthy lead time is predicted, businesses and lenders alike should take steps now to ensure that they fully consider the implications of these changes and not be left behind.

Our Commercial and Banking & Finance teams here at McKean Park will continue to observe these developments closely and keep you informed of the reforms. Please contact us if you require specific information or advice on how these reforms will affect your business.

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BREAKFAST SEMINARS BANKING & FINANCE

The firm has been host to two very well attended breakfast seminars put on by the Banking & Finance Section of the firm recently. These seminars are an opportunity for the firm to impart advice and knowledge to clients in the banking and finance world on issues that affect their daily work.

The recent seminars involved papers delivered by Tim Graham, Partner, on Owners Corporation law and the consequences the recent Owners Corporation Act has had upon the finance industry as well as consideration of building construction issues and tripartite agreements between builders, banks and developers. In addition Derrick Toh provided information on Cultural Heritage Management Plans and issues with developers and ultimately financiers and finally Tony Rogers provided insights into recent case law which impacts upon the finance industry including issues associated with powers of attorney, constructive trusts and the form of Mortgage which until now has been thought quite safe, the All Monies Mortgage.

The firm will be organising regular seminars and workshops on matters which affect you, our clients and shortly the Commercial Litigation Team will be conducting another breakfast seminar relating to insolvency issues which unfortunately may be more relevant in the foreseeable future.

If you are interested in being invited to our seminars please email April Wytkin at april.wytkin@mckeanpark.com.au and you will receive advance notice of workshops and seminars which may interest you.

SIGNIFICANT CHANGES TO DEFACTO COUPLE'S RIGHTS

New Victorian Relationships Act

BY JIM MELLAS

The Relationships Act 2008 was passed by the Victorian Parliament in April 2008 and will come into effect on 1 December 2008.

The Act deals with the adjustment of property interests between domestic partners and the rights of domestic partners to maintenance and relationship agreements. It also establishes a relationship register in Victoria for the registration of domestic relationships including same sex couples. It applies to domestic partners who have lived together in a domestic relationship for a period of at least 2 years unless there is a child of the domestic partners.

The changes introduced by the new Act are quite significant. In the past the State Courts have approached property divisions between domestic partners by reference to the past contributions that each party has made to the acquisition, conservation and improvement of the assets of the parties. The new Act will now also take into account the respective future needs of both parties which will bring it more in line with what is taken into account pursuant to the Family Law Act when adjusting property interests between married couples. In making an adjustment a Court will now have regard to the financial and non financial contributions made directly or indirectly on behalf of the domestic partner as well as contributions made in the capacity of homemaker or parent. In relation to a domestic partner's future needs a Court will have regard to factors such as the income, property and financial resources of each domestic partner, their financial needs and obligations, their responsibilities to support another person, the standard of living that is reasonable for each partner and the extent to which the payment of maintenance will increase that partner's earning capacity.

Another important change is that the Act provides that a Court can on the application of a domestic partner make an order for maintenance if it is satisfied that the applicant is unable to support himself or herself adequately because the partner's earning capacity has been adversely affected by the circumstances of the domestic relationship or for any of the other reasons arising in whole or part from the circumstances of the domestic relationship. The existing legislation dealing with domestic relationships does not make any provision for maintenance.

The new Act also provides for domestic partners to enter into relationship agreements which can be entered into either before entering into a domestic relationship, during the existence of a domestic relationship in contemplation of the termination of a domestic relationship or after the termination of the domestic relationship. Such agreements can make provision for dealing with financial matters at the termination of their relationship.

The Act will establish a register through which persons who are in a domestic relationship can formally register their relationship. The Act provides that persons who are in a registerable relationship may apply to the Registrar, in the form approved by the Registrar, for registration of that relationship if each person in the relationship is domiciled or ordinarily resident in the State of Victoria; and not married or in a registered relationship; and not in another relationship that could be registered under the Act. Under the Act a domestic relationship means a registered relationship or a relationship between two persons who are not married to each other but who are living together as a couple on a genuine domestic basis (irrespective of gender). The Act applies to same sex couples as well as other couples.

The Federal Government has also introduced the Family Law Amendment (Defacto Financial Matters and Other Measures) Bill 2008 which passed through the Senate on 16 October 2008 and was again approved by the House of Representatives in late October 2008. At this stage it is unknown when the amendments will be proclaimed or come into effect; however, the amendments will introduce national legislation in relation to defacto or domestic partners and will give jurisdiction in such matters to the Family Court and the Federal Magistrates' Court.

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OWNERS CORPORATIONS
PAYMENT AND COLLECTION OF LEVIES UNDER THE NEW REGIME

BY NANCY HUA

By now everyone who owns an apartment is involved with Owners Corporation and should be familiar with the approved "Fee Notice" form which is required to be sent to lot and unit owners for the collection of levies and charges. The Fee Notice must not only set out the fees being levied but also:

- **state the fees are payable within 28 days;**
- **note that interest will accrue after those 28 days (if unpaid);**
- **set out the procedure for disputing the fees and charges being levied.**

Once those 28 days are up, the Owners Corporation may issue a "Final Notice" in the approved form setting out:

- **the arrears payable;**
- **interest which has accrued on the arrears to the date of the Final Notice;**
- **the daily interest accruing on the arrears; and**
- **the Owners Corporation intention to take action to recover the arrears and interest if unpaid within a further 28 days from the date of the Final Notice.**

Approved Forms for Fee Notices and Final Notices are available to download at the Consumer Affairs website.

Owners Corporations cannot issue proceedings at the Victorian Civil & Administrative Tribunal (VCAT) for the recovery of unpaid levies until such time as the above steps are taken and the 28 days following the Final Notice has expired.

Lot owners may dispute the levies or fees being charged. An internal dispute resolution process is available which involves a meeting of the Owners Corporations taking place. Your Owners Corporation should provide you with a Complaint Form for you to complete. If this internal process does not resolve the issue, a lot owner disputing a levy or charge may take their complaint to Consumer Affairs or VCAT.

If you have any queries in relation to the recovery of levies by an Owners Corporation or a dispute as to levies or other matters, please contact us to discuss your situation further.

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NEW APPOINTMENT CHRIS MOLNAR,
PARTNER IN CHARGE WORKPLACE RELATIONS SECTION

Chris Molnar commences as a Partner with McKean Park in charge of the Workplace Relations Section of the firm from 10 November 2008. Chris will be responsible for advising on employment law, occupational health and safety, anti-discrimination law and industrial relations. Chris is an accredited workplace relations specialist with over 15 years experience advising significant private and public sector employers in Australia. He has specific expertise in change management, restructures, training in equal opportunity, bullying and harassment, strategic industrial relations advice and conflict management. He is one of the few lawyers with an MBA, combining legal expertise with an understanding of the practical requirements of business.

Prior to working with Harmers Workplace Lawyers as Melbourne Partner Chris worked for the Workplace Relations Section of Corrs Chambers Westgarth and prior to that, with the Australian Chamber of Manufacturers (now the Australian Industry Group) as a Senior Human Resources Consultant.

This appointment is a part of the development strategy being implemented by McKean Park to strengthen its expertise and capability in workplace relations practice.

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