

LAW INSTITUTE CELEBRATES 20 YEARS OF SPECIALISATION

BY DAVID BRETT



In 1989 the Law Institute of Victoria introduced the Specialisation Scheme. The Specialisation Scheme was designed by the Law Institute to increase the standards of the legal profession and to recognise and acknowledge practitioners with a high level of competency in a particular area of law.

The first exams in 1989 were for Family lawyers and of 62 Solicitors who sat the exam, 54 passed. Since that time the number of areas of specialisation has increased to 14 and the number of specialists has increased to over 780 solicitors.

We at McKean Park strongly support the Specialisation Scheme. Many of our Solicitors are specialists accredited by the Law Institute of Victoria and two of our specialists (Tony Rogers and David Brett) sit on the Specialisation Board, which oversees the conduct of the Specialisation Scheme.

A number of other specialists in our firm sit on the various Law Institute Specialist Advisory Committees, which are responsible for setting the rigorous examination processes which candidates must undergo to attain accreditation as specialists. The difficulty of the specialisation examination process is evident from the fact that only approximately 60-70% of candidates pass the examination. To obtain specialisation in a particular area, a Solicitor must:

(a) **Have been in practice for at least 5 years;**

continued on page 2...

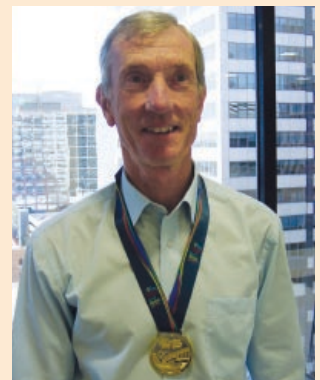
STOP PRESS GEOFF PARK GOLD MEDAL WINNER!

Geoff Park, as a member of the Melbourne University Boat Club Team won a gold medal in the men's coxless four rowing category of the World Masters Games held at Penrith Rowing Course, Sydney on 16 October.

Geoff's team beat another team from Queensland which had not been beaten for some 10 years in competition and third was a team from the United States of America. The average age of Geoff's crew was 60 years. Geoff has rowed consistently for the last 12 years having initially ceased rowing competitively once he had finished his university studies. He has been training 5 to 6 days per week with at least one and a quarter hours spent rowing on the river as well as the other strenuous training activities including the infamous ergometer. It is amazing

that Geoff is still able to spend some time in the office to continue to run his busy Wills & Estates practice. Geoff has advised that he has now retired from competition at its highest level but he will continue now to row for both pleasure and fitness.

As advice to all those who might be thinking of taking up rowing Geoff has said that it is one of the few sports which provides total body exercise as well as building a terrific camaraderie amongst crew members. Geoff is to be heartily congratulated for this magnificent achievement.



contents

LEASE RENEWAL NEGOTIATIONS - A CAUTIONARY TALE FOR LANDLORDS	2
TAKING CONTROL IN UNCERTAIN ECONOMIC TIMES	3
NEW COMMENCEMENT DATE FOR RESPONSIBLE LENDING REQUIREMENTS	3
SEMINAR ACTIVITY	4

- (b) Devote at least 25% of his or her time to practice in the area of specialisation;
- (c) Pass a rigorous examination process. This usually involves a 3 hour exam (or in the case of Property Law specialisation, two exams of 5 hours in total), a take home component and an oral component.

Having attained accreditation, the specialist must then undertake greater professional development requirements than those of non-specialist Solicitors and must maintain a strong presence in the area of work over their specialisation.

The specialisation system was designed by the Law Institute to ensure that the public can identify and utilise practitioners with expertise and a high level of skill in a particular area. It is only specialists accredited by the Law Institute of Victoria who are able to use the word "Specialist" in their documentation or advertising.

McKean Park is proud and pleased to support the Specialisation Scheme of the Law Institute of Victoria and is committed to its aims of improving the standards of the profession and acknowledging the high level of skill and competency enjoyed by those practitioners who obtain accreditation.

Happy 20th Birthday.



Photo (from left to right)
David Brett, Ian Dunn and Michael Brett-Young (CEO of the Law Institute)
at the 20th Birthday celebration held at the Supreme Court Library.

LEASE RENEWAL NEGOTIATIONS - A CAUTIONARY TALE FOR LANDLORDS

BY MARK FLYNN & STEPHEN ROACHE



The recent decision of the Federal Court in *ACCC v Dukemaster P/L [2009] FCA 682*, illustrates the dangers for landlords (and their representatives) in making uninformed or potentially misleading representations to tenants as to what is, or is not, a reasonable market rent in the context of lease renewal negotiations.

BACKGROUND

The case concerned leasing arrangements at the 'Paramount Centre': a retail shopping, office and apartment complex located on Bourke Street in Melbourne. The Australian Competition and Consumer Commission ('ACCC') alleged that the landlord had contravened the *Trade Practices Act* (and separately the *Retail Leases Act*) in relation to certain tenancies in the Food Court of the Centre. In brief terms, the ACCC contended that the landlord, through its general manager, had engaged in false, misleading, deceptive and unconscionable conduct in fixing or seeking to fix excessive and substantially above market increases in the rent payable by four tenants on the extension of the terms of their leases.

The Court found that the landlord had misrepresented to each of the tenants that the proposed rents for their respective premises were 'very reasonable' and 'below market value' when, in fact, the proposed rents were up to 120% higher than the actual market rent for each premises. As a result, the Court ordered, among other things, that the landlord and its general manager (who was found to be **personally** liable for the contravening conduct) pay

compensation to the tenants of an amount in excess of \$275,000.00 for their loss and damage, representing the difference between the rental charged and the actual market rent (together with interest).

IMPLICATIONS

The decision is significant for three main reasons –

1. It illustrates the dangers associated with making representations to a tenant about a proposed rental figure, for example, by asserting that the figure is 'very reasonable' or 'below market value' when in fact there is no basis for that belief.
2. The decision brings into sharp focus the obligation on landlords and their representatives to negotiate fairly with tenants, particularly where the landlord has a superior bargaining position (including, for example, by reason of cultural or language barriers).
3. It demonstrates the co-operative approach now being taken by enforcement agencies to prosecute breaches of consumer protection legislation, including the *Retail Leases Act* and *Trade Practices Act*. The action taken by the ACCC against the landlord was initiated following formal

representations made by the Office of the Victorian Small Business Commissioner ('VSBC'). In the result, what began as a dispute between a landlord and various tenants regarding the rental amounts proposed by the landlord, became a costly representative proceeding initiated by the ACCC against the landlord and heard in the Federal Court for alleged breaches of the *Trade Practices Act*.

FURTHER ADVICE

This decision will no doubt raise alarm bells in the minds of many landlords and their representatives who must now reassess their leasing management and negotiation practices to minimise any potential breach of relevant legislation, including the *Trade Practices Act*, and attracting liability for damages and costs associated with any such contravening conduct.

We believe this decision requires close examination with a view to identifying and implementing practical risk management procedures. We invite you to contact us to discuss the matter and the extent to which we may assist in updating any compliance strategies adopted in your leasing practice.

mark.flynn@mckeanpark.com.au
stephen.roache@mckeanpark.com.au

TAKING CONTROL IN UNCERTAIN ECONOMIC TIMES

BY MARK FLYNN & STEPHEN ROACHE



The recent Global Financial Crisis ('GFC') has inflicted a degree of pain on businesses and the economy generally. For many business proprietors, the biggest challenge over the past 12 months has been simply to stay afloat long enough to ride out the storm. Astute proprietors, with experience of previous downturns, will recognise the current climate as a golden opportunity to get their 'house in order' and emerge from the GFC ready to take advantage of the inevitable economic upturn.

Business proprietors would be wise to consider implementing one or more of the following strategies to deal with or otherwise capitalise on the current economic circumstances:

1. RESTRUCTURING

Many businesses have adopted, for historical reasons or through bad advice, an operating structure that has become inappropriate or obsolete from a taxation or legal perspective. There are obvious disincentives to changing structures 'mid-stream' including the possibility of triggering capital gains tax or stamp duty liability. As those liabilities are value dependant, there is an opportunity now in the midst of falling (or stagnant) commercial asset prices to minimise any exposure to them. Indeed, current (relatively) low asset prices may serve to reduce significantly the extent of any liability for capital gains tax or stamp duty triggered by a restructure. In 6 or 12 months time, however, and assuming the economy follows an upward trend, the situation may be different.

Moreover, by implementing any restructure now (and at least 12 months before any subsequent sale of the business), proprietors will be in a better position to enjoy any immediate taxation advantages, and otherwise

utilise the benefit of any capital gains tax concessions available upon any future sale potentially at the 'top of the market'.

2. BUSINESS SUCCESSION PLANNING

The pressure on business profitability and earnings has prompted a number of operators, particularly those close to retirement age, to revisit their exit strategies and succession arrangements. The GFC has prompted many either to bring forward or push back their retirement plans. An ill-conceived transition between owners can place additional and unnecessary pressure on a business at a time when profitability is already under attack.

By addressing the issue of business succession in a meaningful way, businesses can give proper consideration to the issue of commercial financing (both short and long term), retain talent and knowledge within the business, and provide greater certainty to principals, employees and clients alike to ensure that operations remain smooth during challenging economic times and any subsequent transition in ownership.

3. UPDATING DOCUMENTS

The rise in corporate insolvencies and personal bankruptcies during the GFC has tested the risk management strategies of

most businesses. No one has been immune from the fallout of the GFC, with debtor issues in particular placing a heavy burden on businesses. Many operators would have recently discovered, perhaps the hard way, that their existing terms and conditions of trade or other 'standard' commercial documents are insufficient to protect them against a customer who fails to pay and/or who becomes insolvent.

Prudent business operators will have been prompted by recent experiences to review and update their business contracts and rectify any shortcomings in them. Those operators will not only minimise their exposure to financial risk in the short term, but will now also stand a better chance of managing their legal and commercial risks into the future by ensuring that their documents are clear, precise, and achieve their intended purpose.

We have been assisting a number of our clients to implement these and other appropriate strategies in an effort to combat the economic downturn, implement effective risk management measures, and capitalise on opportunities to restructure their affairs. Contact us to discuss the extent to which we may assist you in the same way.

mark.flynn@mckeanpark.com.au
stephen.roache@mckeanpark.com.au

NEW COMMENCEMENT DATE FOR RESPONSIBLE LENDING REQUIREMENTS

BY DERRICK TOH



In our last Newsletter (July 2009) we reported on a new regime of responsible lending requirements being introduced under the new National Consumer Credit laws that would come into force on 1 January 2011. On 14 August the Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen, announced changes to the implementation of the reform packages. The implementation of the responsible lending requirements for brokers and lenders who are not Authorised Deposit-taking Institutions ("ADI") and Registered Finance Corporations ("RFC") has now been brought forward to 1 January 2010. These requirements will apply to ADIs and RFCs on 1 January 2011.

This was a reaction to the fact that State governments had already put in place a referral of powers under the existing Consumer Credit Code to the Federal jurisdiction, some as early as 31 October 2009. It was recommended by a Senate Committee that State parliaments ensure their "turn off dates" were legislated so that consumers dealing with non-banking institutions were not left without cover before the National scheme is in place.

This is a significant change which will affect non-ADI and non-RFC brokers and lenders. The responsible lending requirements require that lenders/ brokers:

1. not suggest or provide a loan to a consumer where such a loan would be unsuitable for the consumer or the consumer cannot reasonably repay the loan.

continued on back page...

2. inform the consumer that the lender/financial broker has discussed whether or not the loan is unsuitable for the consumer's needs and the consumer's capacity to repay the loan.
3. inform the consumer that a copy of the assessment will be available upon request.
4. inform the consumer who they are, their licence number and details of their external dispute resolution scheme.
5. inform the consumer of what fees and charges are required to be paid upfront before the loan is entered into.
6. inform the consumer what commissions the lender or adviser will be receiving.

Non-ADI and non-RFC lenders and brokers will need to be aware of their requirements under the new responsible lending obligations before 1 January 2010, which is less than 3 months away.

We also remind all lenders and brokers already engaging in credit activities that they will be required to register with ASIC for the Australian Credit Licence from 1 November to 31 December 2009. We understand that registration will be available online at the ASIC website.

The opposition has not been slow to criticise the Government in pushing their agenda at a pace which will leave some businesses struggling to adapt to the changes and the switching of commencement dates. To add to the confusion the commencement of other consumer credit requirements has been deferred until 1 July 2010. These other requirements include:

1. Application of the Consumer Credit Code to loans made to individuals for investment in real estate.
2. Introduction of a Default Notice for direct debit defaults and amendments to the current Default Notice requirements.
3. New business purpose declarations.
4. Introduction of new notices in response to hardship variations and postponements.

The Minister also released proposed licensing fees, which are set out in the table right:

ITEM	ELECTRONIC LODGEMENT	NON ELECTRONIC LODGEMENT
Application fee for a licence (10% discount for ADIs) and Annual compliance certificate:		
1 representative	\$450	\$565
2-5 representatives	\$1,050	\$1,315
6-10 representatives	\$2,700	\$2,375
11-20 representatives	\$4,600	\$5,750
21-30 representatives	\$7,500	\$9,375
31-50 representatives	\$10,250	\$12,815
51-100 representatives	\$15,900	\$19,875
More than 100 representatives	\$21,000	\$26,250
Change of authorization of a credit representative	Nil	\$25
Search of register	\$10	
Inspection of document	\$25	
Late lodgement		
1 month	\$65	\$65
More than one month	\$270	\$270

The Senate Committee heard from key stakeholders who have expressed concern as to how these fees would impact on their members especially with respect to smaller to medium sized organisations. For instance Abacus, the organisation that represents credit unions and mutual funds, highlighted that many of its members will now be required to pay \$21,000 (for institutions with more than 100 employees) per year to apply for the Licence and then pay a further \$21,000 on an annual basis to continue engaging in their usual credit related businesses. They will therefore be required to pay exactly the same amount as the largest Banks in Australia and feel that this is unfair.

The Committee acknowledged the concerns that were raised. It is yet to be determined whether the "scalability" of fees will be amended to allow for further variation in the table of fees.

derrick.toh@mckeanpark.com.au

SEMINAR ACTIVITY



McKean Park has recently hosted a large group of representatives of clients from Banks and Financial Institutions for a Seminar on the latest developments in the world of finance including the new Personal Property Securities Law, National Consumer Credit Law Reform and the relationship between Family Law proceedings and financiers. The latest Seminar was over subscribed and a further Seminar will be held shortly. If you are interested in attending the Seminar please contact amanda.mcmanus@mckeanpark.com.au for a brochure.

In addition the firm hosts various members of Owners Corporation management companies for bi-monthly workshops conducted by the Owners Corporation Team of Tim Graham, Robyn Crozier and Kim Whitty. These are always very well attended and they are an excellent opportunity for clients in this area to obtain expert advice on troublesome issues and to receive the latest news on any developments in the ever-changing landscape of Owners Corporation Law.



This newsletter has been printed on chlorine free recycled paper.

If you would prefer to have this newsletter emailed, require more information, require permission to reprint, or do not wish to receive any marketing material from McKean Park, please email James Dore: james.dore@mckeanpark.com.au.

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.

McKEAN PARK
LAWYERS

Level 11, 575 Bourke Street,
Melbourne Vic 3000 Australia
Phone 03 8621 2888 Fax 03 9614 0880
Email client.services@mckeanpark.com.au

www.mckeanpark.com.au