McKEAN PARK LAWYERS

MATTERS
FEBRUARY 2009

UNFAIR DISMISSAL LAWS SET TO CHANGE FROM 1 JULY 2009

BY CHRIS MOLNAR

As part of the Federal Government's changes to workplace relations, unfair dismissal laws are set to be amended significantly from 1 July 2009. Employers should now review their dismissal practices and policies, and implement any changes ahead of 1 July 2009.

The amending legislation, the Fair Work Bill 2008, is expected to become law in the Autumn session of Parliament after it has been considered by the Senate.

In short, the amendments will affect all employers in Victoria and employers in other States who are constitutional corporations.

Importantly, under the Bill, eligibility to bring an unfair dismissal claim will be significantly broadened – in particular, the size of the employer will no longer be a disqualifying factor. All employers in the national workplace relations system may be subject to an unfair dismissal claim.

The key expected changes are outlined below.

KEY CHANGES

1. The 100 employee exemption will be removed. However, small businesses will not be subject to an unfair dismissal claim if:
   - the employee has not served a qualifying period of 12 months; or
   - the employer has complied with the Small Business Fair Dismissal Code.

   The Code will apply to a small business employer with fewer than 15 employees, which include full-time, part-time and long term casual employees. A casual employee will be a long-time casual employee if they have been employed on a regular and systematic basis and have a reasonable expectation of continuing employment on a regular and systematic basis.
2. The operational reasons exemption will be removed. However, if the dismissal was for a 'genuine redundancy", then an unfair dismissal claim may not be brought. However, there are a number of conditions:
   - the employer must no longer require the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise;
   - the employer must have complied with any consultation obligations relating to redundancy in an applicable award or enterprise agreement; and
   - it will not be a "genuine redundancy' if it were reasonable to redeploy the employee within the employer's enterprise or an associated entity.
3. An employee will only have 7 days, instead of 21 days, to lodge an application, although it will be possible for an employee to obtain an extension in very limited circumstances.
4. The exemption relating to probationary periods is removed - the concept of the qualifying period remains. For employers who are not small businesses the period is 6 months.
5. In assessing whether a dismissal was unfair, the current criteria will apply save for one addition – "any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussion relating to dismissal".
6. Fair Work Australia, the body replacing the Australian Industrial Relations Commission, will have a broad discretion to deal with the matter informally and flexibly. Hearings may or may not be held and appeal rights will be limited.

Overall, employers will be at greater risk of an unfair dismissal claim and will need to ensure that their practices comply with the legislation to avoid large compensation pay-outs and potentially, reinstatement of the employee.

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SELF MANAGED SUPER FUNDS
TO BORROW OR NOT TO BORROW?

BY DERRICK TOH

Although early activity has been dampened by the economic crisis, self managed super funds ("SMSF") have begun obtaining finance to fund purchases of income producing property. This is following the introduction of amendments to the *Superannuation Industry (Supervision) Act* 1993 ("SIS Act") which came into effect on 24 September 2007. Pursuant to these amendments, superannuation funds formerly prohibited from investing in instalment warrants and borrowing money to acquire assets, are now allowed to do so under certain conditions. Those conditions were discussed in a previous article.

The Australian Taxation Office ("ATO") has raised certain concerns relating to SMSF borrowing activity which is contained in two publications:

- **Instalment warrants and super funds - question and answers**
- **Taxpayer Alert 2008/5**

QUESTIONS, BUT NO ANSWERS ...YET

In the 'questions and answers' paper, the ATO identified the following issues which give rise to concern, but is yet to formalise a view:

1. **Does an arrangement where a borrowing is guaranteed by a third party satisfy the new laws, particularly where the personal guarantee is provided by a member of the SMSF or a related party?**
2. **Does an arrangement that permits re-financing satisfy the new laws?**
3. **Does an arrangement that permits capitalisation of interest satisfy the new laws?**
4. **Can multiple draw downs from a single loan facility satisfy the new laws?**
5. **What constitutes an 'original asset' and a 'replacement asset' for the purposes of the new laws?**
6. **What constitutes 'maintaining a borrowing of money' as defined in Section 67(4A) of the SIS Act?**

It is advisable to seek further clarification on arrangements that contain these features and we suggest that it would be prudent to obtain a private ruling from the ATO until such time as the ATO provides further clarification.

TAXPAYER ALERT

In its introduction, Taxpayer Alert 2008/5 states that it is *"intended to be an "early warning" of significant new and emerging tax planning issues or arrangements that the ATO has under risk assessment… Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in this Taxpayer Alert might obtain their own advice or contact the ATO to seek guidance in relation to the superannuation regulatory issues covered in the Alert."*

The issues covered in TA 2008/5 relate briefly to:

- **monies advanced by a member or related party not at commercial rates of interest.**

  If the interest rate is below a commercial rate of interest, the ATO will consider such arrangements to be a form of contribution and as a result, the trustee/ member will be required to pay any excess non-concessional contributions tax.

  If the interest rate is higher than a commercial rate of interest, this would be a breach the sole-purpose test and a breach of the trustee's obligation under section 65 of the SIS Act by giving financial assistance to a member or a relative of a member of the SMSF using resources of the SMSF.

- **loan facilities that contain a capitalised interest component.**

  Under a strict interpretation of Subsection 67(4A)(a) of the SIS Act, it was argued that loan facilities that contain a capitalised interest component could be in breach of the Subsection which requires loan funds to be applied towards the acquisition of an asset. In this instance, some of the loan funds would be applied towards servicing the loan, and not towards the acquisition of an asset.

  The 'question and answers' document now states that this concern does not impact upon commercially issued instalment warrant products under which interest obligations may be met by further draw-downs of loan amounts.

  Furthermore, the ATO has advised that the instalment warrant product will continue to comply with the SIS Act requirements if:

  (a) **the amounts capitalised are costs of the original borrowing;**

  (b) **the original borrowing is applied to acquire the asset; or**

  (c) **the lender's rights against the fund in the event of a default in repaying the capitalised amounts remain limited to rights relating to that asset (or a replacement asset).**

- **the asset acquired is a 'non-complying' asset.**

  It is important to remember that any asset acquired by the SMSF, regardless of whether it is under an instalment warrant arrangement, must still comply with the other rules of the SIS Act.

  These include:

  - **the sole purpose test**
  - **investment strategy requirement**
  - **the related party rule**
  - **the in-house asset rule; and**
  - **the arms length requirement.**

- **loans that allow for multiple draw downs.**

  There was some debate as to whether a further draw down on the single loan facility would constitute a breach of the SIS Act requirements where the loan funds were being used to pay ongoing interest and charges.

  The ATO has clarified that a further amount drawn down under the arrangement to pay interest on the outstanding loan amount, or to pay other fees and charges associated with the borrowing is considered to be money applied for the purpose of acquiring the asset. However, this does not extend to amounts drawn down for the purpose of paying the costs of improving or maintaining the asset that has been acquired.

POINTS TO PONDER

Lenders should be mindful when entering into instalment warrant arrangements that the SMSF trustee has received proper legal and financial advice, especially in determining whether or not:

1. **the loan complies with the fund's investment strategy and has taken into consideration other aspects such as stamp duty, capital gains tax, GST, fees and charges;**
2. **the SMSF has the capability to maintain and service the loan;**

3. the security has enough 'fat' in it to recover the loan in the event of a default, bearing in mind the limited recourse nature of the loan; and
4. the arrangement complies in all respects with the SIS Act. Although this is a matter for the SMSF trustee, the reality is that if the SMSF is declared to be a non-complying superannuation fund, the consequent tax implications and penalties will affect the capability of the SMSF to repay the loan.

Where a SMSF trustee is considering a related party "loan" arrangement, the trustee must be careful to ensure that the loan arrangement complies with the SIS Act.

The asset must firstly come under one of the exceptions to the related party rule, i.e. listed securities at market value, business real property or an in-house asset which will not exceed 5% of the value of the total SMSF portfolio. The SMSF trustee in those circumstances should obtain legal advice as to whether:

1. the asset complies with the business real property asset exemption. Although this may seem relatively straightforward in some circumstances, there may be other factors involved which will require further consideration. For instance:
   - can short-term letting holiday apartments owned by a member of the SMSF be 'transferred' into the SMSF under the business real property exemption?
   - can a house which is currently owned by a member of the SMSF, and is being used as a doctor's surgery, be transferred into the SMSF under the business real property exemption?
   - can a farm which is owned by a member of the SMSF who also resides there be 'transferred' into the SMSF?
2. a member stands to obtain any sort of benefit with such an investment/ asset. If so, is this benefit incidental or more than incidental with regards to applying the sole-purpose test? For instance:
   - can short-term letting holiday apartments acquired by the SMSF be used by its members as a holiday getaway?
   - can paintings and other artwork owned by a member be 'transferred' into the SMSF?
   - can discounts and privileges received by the SMSF from its ownership of departmental store shares be transferred or assigned to its members?

CONCLUSION

Although this is still a relatively new and emerging area of law, there are many providers currently offering services and advice to set up what appears to be a 'standard' and 'straightforward' instalment warrant arrangement for your SMSF.

This is usually not the case and there are still many issues that need to be carefully considered. It is important that you always obtain legal advice. McKean Park is dedicated to ensure that you are kept up to date with all the latest news and views on this topic and you are invited to contact us for detailed advice.

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RETAIL LEASING: LANDLORDS OBLIGATION TO NOTIFY

BY STEPHEN ROACHE

The recent Victorian Supreme Court decision of *Xiao v Perpetual Trustees Company Limited and Anor [2008] VSC 412* has determined that a Landlord's obligation to notify a Tenant of the expiry of an option to renew under a lease regulated by the *Retail Leases Act 2003* is more onerous than Landlords and their managing agents may expect.

The decision dealt with the Landlord's obligation to warn a Tenant by notice under Section 28 of the *Retail Leases Act 2003 (Vic)* ("the Act") of the approach of an option deadline.

Section 28(1) of the Act provides that where a Retail Premises Lease contains an option to renew the Lease for a further term, the Landlord must notify the Tenant in writing of the date after which the option is no longer exercisable and such notification must occur at least six months and no more than twelve months before that date. Failure by the Landlord to comply with this Section allows the Tenant to exercise the option prior to the expiration of six months after the Landlord gives the requisite notice. In other words, the Tenant can exercise the option at any time up until six months after the Landlord has given the notice.

The case related to a Tenant who ran a Café from leased premises. The Lease ended on the 30th September 2008 and was governed by the Act. The Tenant was entitled to a further term provided it gave notice to the Landlord by 31st March 2008, being six months prior to expiry of the Lease term. The Landlord failed to notify the Tenant at least six months prior to that date. As no notice was given within the required time frame, time did not run against the Tenant until a notice was given. On 4th December 2007 the Landlord's Agent forwarded a letter by registered post to the Tenant which stated that the Tenant could not exercise the option to renew after 3rd June 2008 being six months after the date of the letter. Vickery J ruled that as the Tenant did not physically collect the registered mail until 31st December 2007 the Landlord had not notified the Tenant of the option deadline until the date of collection from the Post Office. Vickery J determined that the word "notify" does not equate to mere formal service or delivery but instead requires an actual communication of the relevant subject matter to the recipient in the sense of making the information known to him or her. Vickery J determined that "notify" involves the physical supply of the written document rather than despatch of the Notice by post. As a consequence, only upon receipt of the registered mail on 31st December 2007 did the six months begin to run against the Tenant within which to exercise the option. Accordingly, the Tenant had until 30th June 2008 to exercise the option and was able to lawfully exercise the option prior to that extended deadline.

As a consequence of the decision by Vickery J, Landlords and their Managing Agents must ensure that to satisfy the obligation to "notify" under the Act, notices must be personally delivered to the Tenant where possible.

Landlords and their Managing Agents must modify their practices and procedures to ensure that service of notices is effected personally where possible but where service of notices by post is unavoidable, ordinary prepaid post should be utilised and documentary evidence of posting should be retained. Ideally, Landlords should seek a written acknowledgement of receipt of notification from Tenants where possible unless service is effected personally upon the Tenant.

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WILL PREPARATION
(PART 1)

BY ELISABETH BENFELL & GEOFF PARK

For many, thinking about a Will and succession planning is unpleasant. It focuses attention on our mortality and can cause substantial dilemmas about how to be fair to all of those who may have competing claims on our estate. The process, however, is usually not too daunting and for most people the hardest part is picking up the phone to make an appointment. This article describes what you can expect at a meeting with your lawyer and things to think about in preparation for your meeting.

PRIVACY OF INSTRUCTIONS

1. When you meet with the lawyer for the first time the lawyer will generally wish to see you on your own. If you have been bought into the office by someone, that person will usually be asked to wait in reception. In most circumstances a husband and wife and domestic partners are seen together.

   The lawyer's role is to elicit your own thoughts and wishes in a free manner and without fear or appearance of influence. This helps to dissuade any person trying to attack the validity of the Will after your death thereby causing delays, costs and possibly changes to your wishes made by the Court.

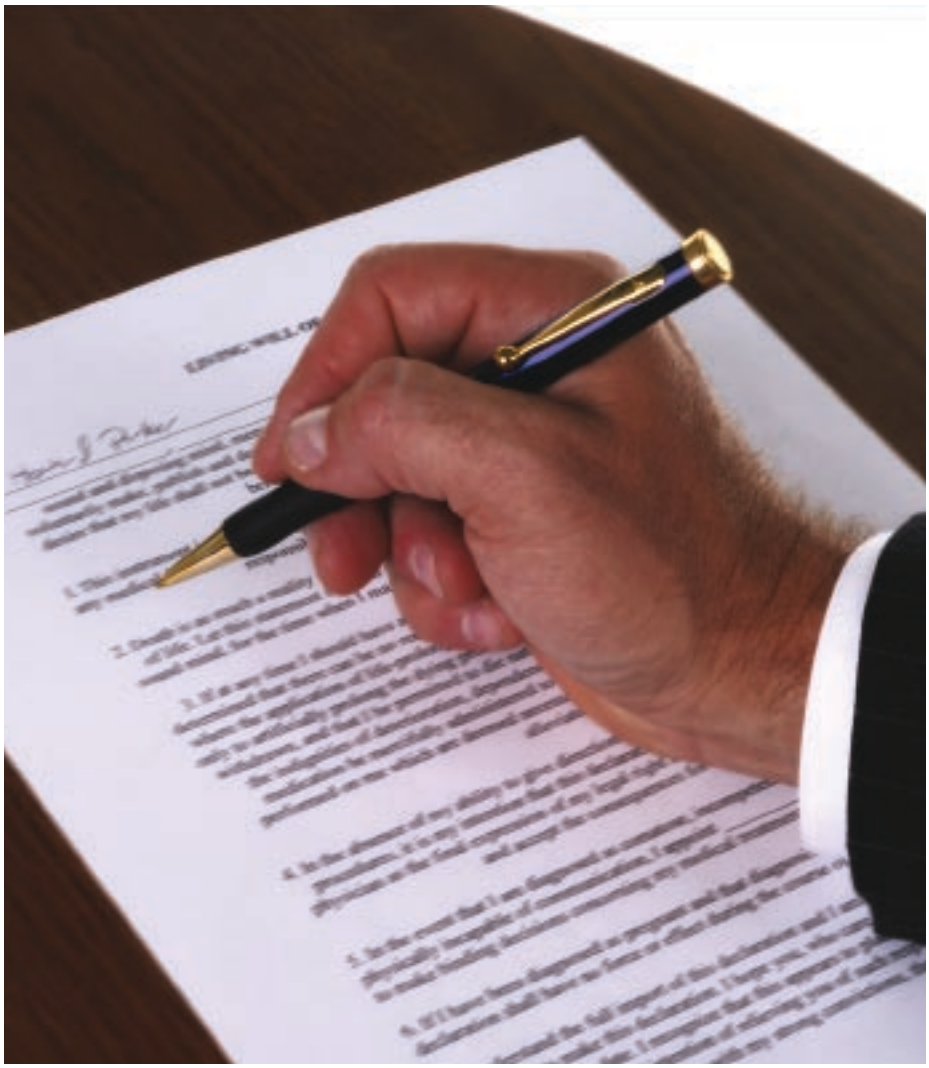
   There are exceptions to this as, for example, when a frail widow is accompanied by her daughter and the child has for some time been assisting mother with everyday matters and financial matters. In those circumstances mother would no doubt look to the daughter for assistance. It may be that part way through the interview the lawyer asks the daughter to leave the room to ensure the mother is freely able to express her wishes.

PERSONAL DETAILS

2. The lawyer will at some stage obtain your full name, current address, telephone number and email address (if available). If you have in the past or currently use a different name then all of these need to be advised to the lawyer so that those names can be included in your Will. This will assist in dealing with your assets on your death.

FAMILY & FRIENDS

3. You should be prepared to discuss openly details of your family such as your marriage or partnership, prior relationships, children, close friendships and the like. Your lawyer needs to find out all the people to whom you might owe an obligation to make provision for in your Will, and whether it is likely any person would make a claim against your estate on your death. While you are entitled to exclude someone who would normally expect to receive something under your Will, (such as a child, spouse or partner), you need to be aware of the possible consequences of doing so, and whether or not your wishes are likely to be effective.



ASSETS

4. At the meeting you will also be asked about your assets and their values and any liabilities. It may be helpful to bring a handmade list with you to the interview. The lawyer will wish to know who owns the assets, for example whether you own the asset alone or with other people. If you have any family trust you should bring a copy of the Trust Deed and a copy of the last financial statements of the trust to the meeting. Remember that your superannuation may form part of your asset pool and you should bring any papers you think may be necessary to the meeting such as the Trust Deed, Determinations In Writing or Binding Nominations, Member's Statements and the like.

   The location of your assets will be important. If you own assets overseas it is possible a Will made in Australia does not govern what will happen to those assets. Your lawyer will discuss with you whether you require a separate will made by a competent lawyer in the country where those assets are located.

continued on the back page…

TITLE CONVERSION

COMPANY SHARE AND STRATUM TITLES

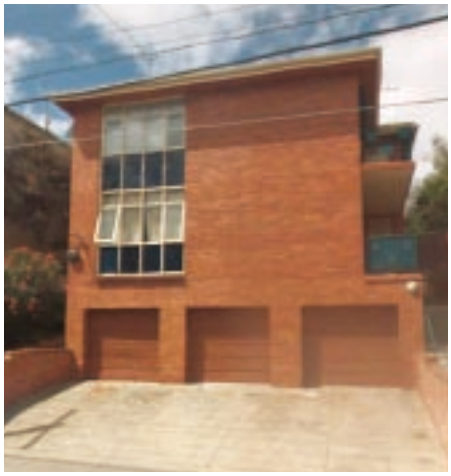
BY ROBYN CROZIER & TIM GRAHAM

WHAT IS A COMPANY SHARE TITLE?

This is a form of title where a company owns the land and the ownership of a block of shares gives the shareholder the right to occupy specific areas (e.g. flats and garages) of the land. The owner owns only the block of shares. Many financial institutions will not agree to provide loans against the security of the shares. The operation of the company including meetings of shareholders and lodging of annual returns is governed by the corporations law. The sale of shares is documented by way of a share sale agreement but regard must be had to the current ASIC policy guidelines regarding other disclosure requirements. A vendor's statement is also required to be prepared in respect of the sale.

WHAT IS A STRATUM TITLE?

A building is subdivided into lots which are defined by datum levels. It is sometimes difficult to determine where the boundary of a lot is located without referring to a surveyor. A separate certificate of title exists for each lot and the residual land (e.g. passageways, stairs, driveways, gardens and land surrounding the building). The residual land is owned by either a service company or all lot owners as tenants in common. Where a service company exists, each lot owner owns shares in the service company. A service agreement is entered into between the service company and each lot owner which regulates their rights and obligations. The service agreement is often registered on the certificate of title of the lot owner and the certificate of title of the service company in respect of the residual land. A charge may be registered by the service company on the certificate of title of the lot owner to secure payment of money and maintenance obligations under the service agreement. Often car spaces and garden areas are leased to a lot owner by the service company. The service company is governed by the corporations law and is required to lodge annual returns and hold meetings of shareholders in accordance with that law. A sale is documented by a contract of sale and a vendors statement which will include copies of memorandum and articles of association of the service company, the service agreement, the charge, the share certificate, the certificates of title to the lot and the residual land, the plan of subdivision and any leases between lot owners and the service company.



CURRENT LEGISLATION APPLICABLE TO LOTS AND OWNERS CORPORATIONS

In 1967 developers stopped using company share titles and stratum titles and elected to use the more streamlined procedure offered by the *Strata Titles Act 1967*. This Act allowed for the more streamlined subdivision of buildings and land. Under the Strata Titles Act, on registration of a plan of subdivision, a separate certificate of title issued for each lot and the common property was registered in the name of a body corporate of which all registered proprietors of lots on the plan of subdivision were members. Therefore it was possible for a lot to incorporate a building and a courtyard or carspace area. The Act excluded the operation of the corporations law and prescribed requirements such as insurance, easements, recovery of money from lot owners, maintenance etc.

The *Subdivision Act 1988* and the *Owners Corporations Act 2006* are the current forms of legislation which govern subdivisions with owners corporations (formerly known as bodies corporate) and title ownership is similar to that under the Strata Titles Act except airspace may now be subdivided.

A sale of a lot affected by an owners corporation requires a contract of sale and a vendors statement which will include copies of the certificate of title for the lot, the plan of subdivision and an owners corporation certificate.

WHY SHOULD A COMPANY SHARE OR STRATUM TITLE BE CONVERTED?

According to Land Victoria, there are approximately 1,000 to 1,200 stratum titles remaining in Victoria and possibly less company share titles.

Company share titles and stratum titles are cumbersome and expensive to manage and deal with due to their complexity and rarity. The sale, purchase and general dealing with company share titles and stratum titles is more expensive as there are a greater number of documents to be located and which require consideration.

Current legislation governing the management and operation of owners corporations is widely understood, cheaper and easier to enforce as the Victorian Civil & Administrative Tribunal (VCAT) has jurisdiction over dealing with disputes between owners corporations and their members.

It is easier and quicker to obtain finance against the security of a title governed by current legislation. Often financial transactions involving company share and strata titles have to be referred to a legal department of a financial institution or its lawyers. This can delay loan approval and require preparation of special loan documentation, which may incur additional fees payable by a borrower.

Many estate agents and the general public are not familiar with the legal complexities of company share and stratum titles and how to manage them and are frightened by the sheer volume of title documents. As time goes by, there are fewer lawyers who are familiar with dealing with company share titles and stratum titles as these were forms of titles first used prior to 1967.

Where lot owners decide to undertake a conversion, careful consideration as to the location of new boundaries of lots is required. If a conversion results in the changing of existing boundaries of lots, then capital gains tax issues will need to be considered.

In a strong property market, buyers are eager to purchase and do not always scrutinise the type of title they are purchasing. However in market conditions where buyers do not feel pressured to purchase, a more complex title such as a company share or stratum title is less attractive to buyers.

For any questions concerning conversion of company share titles and stratum titles please contact Robyn Crozier or Tim Graham.

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INTENTIONS

5. It would be helpful if prior to the meeting you give thought to the following matters:

   (a) whether you wish to make any **specific gifts**, such as jewellery, household contents, or other property

   (b) if you have any pets whether you wish to make **special provision** for them

   (c) who you wish to receive the **residue** of your estate. It is preferable to think of your residuary estate as a pool and to specify the beneficiaries to enjoy the pool and in what percentage proportions. The benefits of percentages is that first it is flexible to cater for any assets you own at the date of your death (addition to assets or disposal of assets during your lifetime are less likely to require a change to your Will) and second being parts of 100 is easier to comprehend and calculate rather than going into fractions and fractions of fractions

   (d) who the **executors/trustees** of your Will should be. Choice of executors is most important and a very broad ranging topic. One aspect is that trustees must act unanimously. If you believe that the trustees may find it difficult to get along and make unanimous decisions, but nevertheless wish those particular persons to be the trustees, then the lawyer will discuss with you options for dispute resolution between the trustees.

   (e) if you have **children** consider whether the share of a child should pass to that child's children (your grandchildren) in the event of the child not surviving you. Also consider the age at which you would prefer your children, grandchildren and others to take the gift. The age of 18 years is the minimum age, although where the gift is of significant value you may wish to pick an age over 18 years and give your trustees power to use the income and capital of the share of the potential beneficiary for maintenance, education, advancement and benefit.

   (f) If you have a **family trust** and own shares in a trustee company it may be necessary to make a gift in your Will of the shares to the appropriate person or persons (this may even be the executors). If you are the Appointor named in the deed or have the right to appoint an Appointor then it is even more important that your right be exercised in your Will. You will need to consider who should control the family trust on your death.

   Be prepared to provide the full name (including middle name) address and approximate age of the people who will be mentioned in your Will.

COST

6. It is likely the lawyer will give you an estimate of the costs to prepare your Will. This estimate will be more accurate at the end of the interview after it is clear what the issues are and the type of document(s) you require.

For a continuation of the article see our next Newsletter.

If you wish to discuss any issue in this article, or your specific requirements for a Will and succession plan please do not hesitate to contact Elisabeth Benfell or Geoff Park of this office, both accredited specialists in Wills and Estates.

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DAVID BRETT RECEIVES AWARD

McKean Park is proud to announce that David Brett, who joined the firm in January 2008, was awarded a Presidents Award by the Law Institute of Victoria (LIV) for his services to the LIV Accredited Specialist Scheme.

David is an Accredited Specialist in Commercial Litigation and, over the past 12 years has been the founder and sole organiser of the Commercial Litigation Specialist Study Group, which is designed to promote specialisation to the profession and ensure that specialists and aspiring specialists receive up to date education in the latest developments in their particular area of law.

David, in this role and in his role as the Chairman of the Specialisation Board, contributes a significant amount of his own time and resources to the Specialisation Scheme, and gives other practitioners the benefit of his extensive experience in a wide range of commercial litigation matters.

LIV LEGAL AWARDS 2008
Award Winner

We at McKean Park would like to congratulate David on his award, which demonstrates his contribution to the profession, and to the promotion of the LIV Accredited Specialisation Scheme.

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