McKEAN PARK LAWYERS
(incorporating Pelham Lawyers)

MATTERS
FEBRUARY 2012

DO THE CARBON TAX NUMBERS STACK UP?

BY MARK FLYNN

The Federal Governments Carbon Tax Scheme is due to commence on 1 July 2012. The Department of Climate Change and Energy Efficiency says only about 500 businesses will pay the Carbon Price directly but many others will pay whatever costs are passed on.

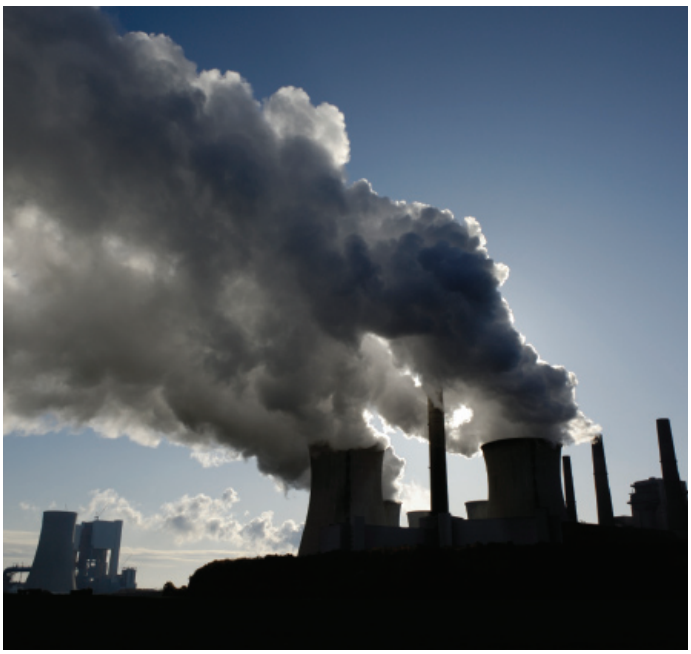
The Future Law Team has long argued that an effective "Carbon Tax" will have a greater impact than the introduction of the goods and services tax (GST).

The most significant impact of the Carbon Price Legislation will be on energy prices. However for many businesses most of the energy used in operation of their business will be imbedded in the goods and services that they buy and/or sell. As those goods and services are traded through the economy the increased cost of fossil based energy will pass through to all businesses and consumers.

There is a concern that businesses will simply pass on the increased energy costs without changing the way in which they carry on business. Ultimately such a "business as usual" approach will make Australian goods and services more expensive and less competitive in the international market. There is also a risk that unscrupulous businesses will use it as an opportunity to increase prices without any justification to do so.

Prudent businesses and consumers will look to reduce their carbon footprint and their exposure to higher energy prices in a number of ways:

1. Source energy from renewable sources (eg wind, solar, geothermal, biomass etc).
2. Implement energy efficiency measures to reduce energy consumption.
3. Seek goods and services from suppliers who utilise 1 and 2 (above).
4. Utilise alternate goods services and processes which are less energy intensive.



If you require advice or assistance from our Future Law Team on how to assess and minimise the impact of a "Carbon Tax" on your business please contact Mark Flynn Partner – Future Law Team.

mark.flynn@mckeanpark.com.au

contents

PERSONAL PROPERTY SECURITIES REGISTER

"TEETHING PROBLEMS FOR COMPANY CHARGES"

BY TONY ROGERS

The long awaited Personal Property Securities Register (PPSR) commenced operation on 30 January 2012.

There were quite a number of issues to be negotiated prior to this date, however, information to hand to date indicates that the migration of existing registrations from numerous other registers has been reasonably successful.

The Personal Properties Securities Act which came into force in 2009 had as one of its principal objectives the establishment of a single national register of all forms of personal security, such as company charges, commercial goods leases, hire purchase agreements, and retention of title arrangements.

SEARCHES

The Personal Property Securities reform resulted in many securities registers being closed, and in some cases, registration of security interests on existing registers have actually been removed and installed on the new PPSR. One of the more significant changes that has now occurred is that registration of company charges, formerly on the Australian Securities and Investments Commission (ASIC) register, no longer exist. If one now searches records of a company with ASIC, there will not be any details revealed of any existing company charges. What the searcher will find is that the records of ASIC will contain details of charges that have been satisfied previously, but not any current charges. It will be necessary to search the PPSR to discover the status of any charges affecting a particular company.

There have also been some further issues associated with searching the records on the PPSR when dealing with companies, and at present, there are difficulties associated with searching the Register by Australian Business Numbers or Australian Company Numbers (ABNs or ACNs). In some cases in the past, a search for instance on the ASIC register with either an ABN or an ACN resulted in a full and complete search. Unfortunately, at this stage, until a longer term solution is found, in some cases an ABN search on the PPSR will not reveal any information, whereas an ACN search may, and vice versa.

CHARGES

Registering of charges is now performed online by completing what is known as a Financing Statement. How the Charge details are removed from the Register is not as simple as it once was, namely by filing a Notice (Form 312) with ASIC. Now the secured party (eg. a Bank, for instance) has a statutory obligation to register a Financing Change Statement to discharge any associated registered finance statement within five business days of the interest being discharged, for example by payment of a debt due.

Non-compliance exposes the secured party to liability for statutory damages. It is easy to imagine some contentious matters in the future should a party dispute the date a debt has been repaid and no Financing Change Statement has been registered. Prudent lenders will now require at least a Release and Undertaking to register a Financing Change Statement.

Clients who require advice in relation to searches of company records and registering charges or other security interests, and the impact of the changes, are recommended to seek our advice. Please contact Tony Rogers, Partner, Banking and Finance Team.

tony.rogers@mckeanpark.com.au

THE NEW AUSTRALIAN WORK HEALTH AND SAFETY FRAMEWORK

BY AMY GRANGER

Inconsistencies in the Commonwealth State and Territory occupational health and safety laws were the catalyst for calls for uniform national legislation. On 1 January 2012, model work health and safety legislation commenced in some Australian jurisdictions.

Once fully implemented, the Commonwealth, States and Territories will replace existing regulation of workplace safety with the model legislation, regulations and codes of practice. The administration of the law will remain the responsibility of the Commonwealth, and each State and Territory, but Safe Work Australia (which was given the task of developing the model occupational health and safety laws) will be responsible for developing a national compliance and enforcement policy to complement the harmonised work health and safety laws.

The legislation introduces major changes to the regulation of work health and safety, which include:

Change of duty holder: in lieu of focusing on legal status for the purposes of imposing duties, the Model Work Health and Safety (WHS) Act focuses on the activity of the person for the purposes of imposing a duty – in particular, the primary duty will be on the person conducting a business or undertaking ("PCBU");

Duty of due diligence imposed on officers: an officer of the business will have a stand alone

duty of due diligence to ensure that the PCBU complies with its duty under the WHS Act;

Consultation: duty holders will be obliged, as far as is reasonably practicable, to consult, cooperate and coordinate their activities with other duty holders;

Penalties: in general, the WHS Act substantially increases penalties for breaches of the law, particularly those that involve gross negligence or recklessness and a serious failure to address hazards and risks;

Abrogation of the privilege against self-incrimination: the privilege against self-incrimination in responding to workplace investigations will be abrogated. The privilege exists in some, but not all, jurisdictions under the pre-harmonised law.

The model laws commenced on 1 January 2012 in New South Wales, Queensland, the ACT, the Northern Territory and the Commonwealth.

Victoria, WA, Tasmania and South Australia have expressed their intention to enact the model laws, however have not done so as yet. Although the Victorian Government has confirmed its support for the principle of harmonisation, it has pressed for the implementation to be delayed while it conducts investigations. The Bill has not been introduced into the Victorian Parliament.

Despite this, Victorian based companies operating nationally should be aware that they may have to comply with new harmonised laws in other states and territories. If you require further advice about your obligations in relation to workplace health and safety laws, please contact Chris Molnar or Amy Granger.

chris.molnar@mckeanpark.com.au
amy.granger@mckeanpark.com.au

WHAT HAPPENS TO YOUR DIGITAL ASSETS WHEN YOU DIE

BY MARK FLYNN

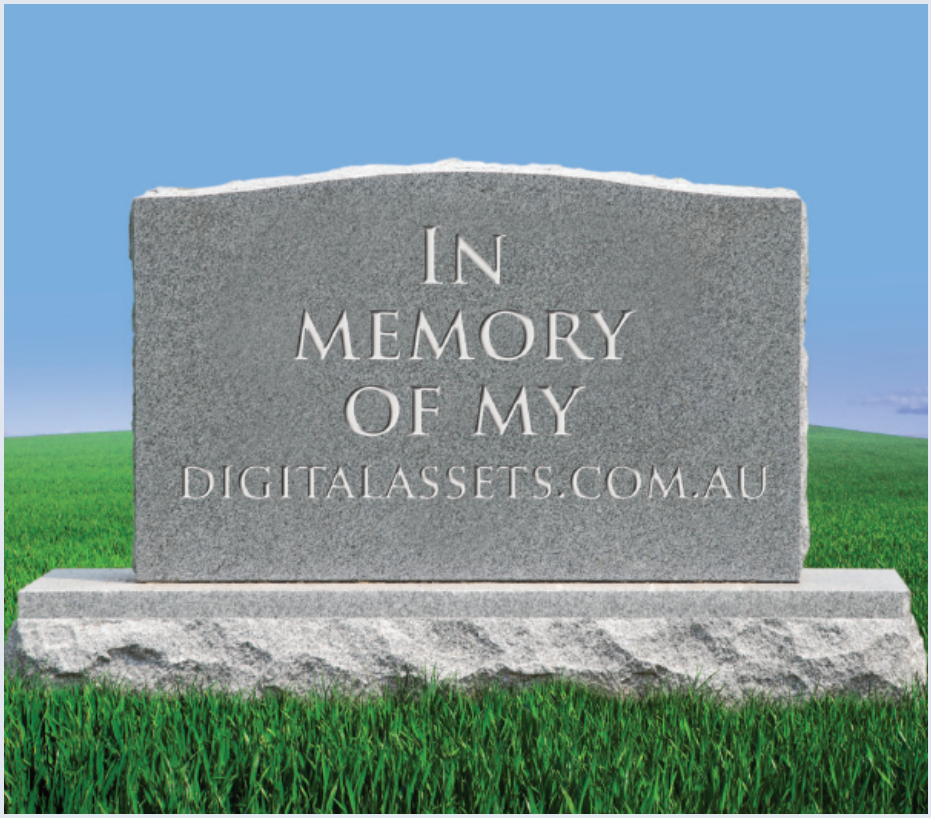
Most people think that a Will only deals with physical assets. However many of us have email addresses, blogs and websites. We use Facebook, Twitter, EBay, PayPal, LinkedIn, Flicker and other online accounts.

When it comes to preparing a Will or living trust these "digital assets" often get overlooked. In the event of death it may be difficult to close online accounts and/or change content and/or restrict access to many different online accounts.

A well drawn Will should clearly contemplate who is to receive the balance of any PayPal account or who is entitled to use a business domain name. Only by designating someone to handle your "online life" can common problems be avoided. Such as when a deceased person's name continues popping up on LinkedIn or Facebook messages. Unless those Companies are officially notified of a death the deceased person can continue to "live online".

A "digital executor" can be appointed to delete your Facebook page so no one can see it or to have access to it.

Most online accounts have stated policies on how to close a deceased person's account. However they all differ. Commercial websites allow you to create a free secure online list of accounts beneficiaries and a designated "digital executor." Fees are payable for "farewell notes" delivered electronically to loved ones after death. However, to avoid any delay in dealing with your "digital assets" it is simpler to nominate a "digital executor". It is also critical to have a written record of all accounts user names and passwords. They should be kept in a sealed envelope with your Will so that they may be acted upon the digital executor in the event of your death. Most important of all make sure that your nominated digital executor is made aware of his/her appointment and your wishes for your "digital assets."



If you require further information on how best to deal with your "digital assets" contact Mark Flynn Partner – Future Law Team.

mark.flynn@mckeanpark.com.au

FAMILY ASSETS POOL
DOES IT INCLUDE TRUST ASSETS?

BY MARIA KOURTIS

In the recent case of *Harris and Harris* The Full Court of the Family Court of Australia set aside Orders made by a Trial Judge about the treatment of Trust assets in a case involving property division between separated spouses.

The Trial Judge had included in the asset pool the assets of a Family Trust. The net worth of the asset pool was approximately $4,150,000. The value of the trust was approximately $1,500,000. The balance of the net asset pool was comprised of the equity in the former matrimonial home (of about $350,000) and superannuation ($2,300,000). Therefore the inclusion of the trust assets added substantial value to the asset pool. The husband appealed to the Full Court on the basis that the trust assets should not have been included in the asset pool.

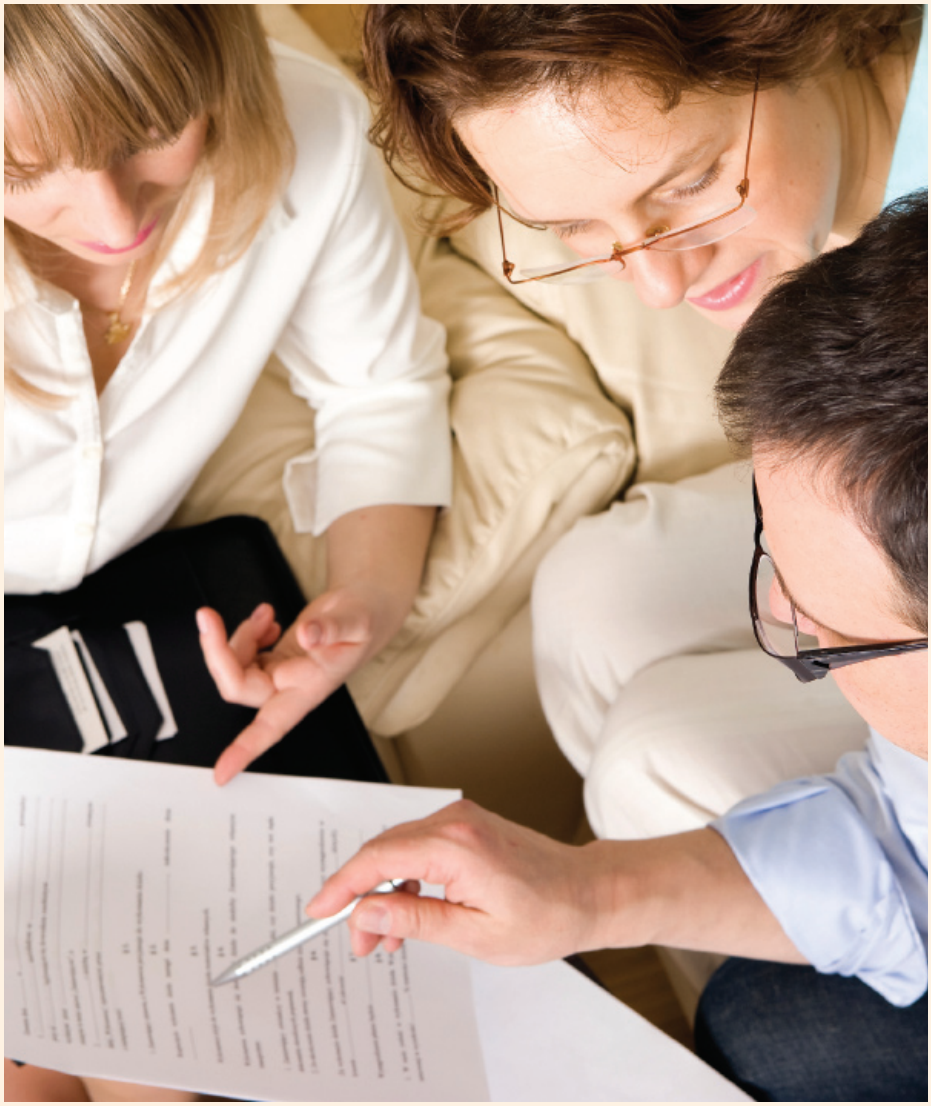
The Family Trust was created by the husband's father in 1978. The Trust ran a business which employed both the husband and the wife during the marriage.

The trust was structured so that the husband's father was the appointor of the Trust. When he died the husband's mother became the appointor which position she held at the time of trial.

The trustee was a trustee company of which both the husband's father and mother were the directors. Over time, the husband and the wife became the directors of the company. There were 100 shares in the trustee company which were divided between the husband's mother (98 shares), the husband (1 share) and the husband's sister (1 share). After the husband and wife separated the corporate trustee was changed to a new company of which the husband was not a director or shareholder.

At trial the wife argued that the trust assets should be included in the asset pool because the husband controls the trust. Previous cases provide that if a party has the power to realise for themselves the assets of the trust property, then the trust assets form part of the asset pool. This usually involves being a beneficiary of the trust and having the capacity to direct the distributions from the trust.

The parties agreed that the husband is a beneficiary of the trust. The relevant question for the Court was whether he controlled the trust. He did not *directly* control the trust. That means that he was not a shareholder or officer of the trustee company and his mother remained the appointor of the trust. Therefore, if the trust assets were to be included on the asset pool, the Court had to be satisfied that the husband controlled the trust *indirectly*, that is with his mother acting as his puppet.



Unfortunately, the majority of the evidence during the trial was about events that occurred before there was a change of trustee. Therefore the Court decided to remit the matter back for a retrial which would presumably seek further evidence about the decision making process by the trustee in determining what if any distributions have been made since the change of Trustee.

If you have any queries concerning your own trust assets in relation to issues such as this, please contact Maria Kourtis or Mark Finn for further advice.

maria.kourtis@mckeanpark.com.au
mark.finn@mckeanpark.com.au

LITIGATION HOW DOES IT WORK? PART 2

BY DAVID BRETT

WHAT HAPPENS NEXT?

Once a proceeding has been commenced, the Court rules prescribe a time for certain steps to be taken by the defendant. These steps are called interlocutory steps. In most courts, failure by the one party to comply with the timetable set by the court will enable the other party to seek orders to comply, and, in serious cases, to strike out the other party's claim or defence which would effectively finalise the matter. In any case, the costs of any application to enforce the timetable will normally be borne by the party in default.

Most cases in the higher courts are managed by the courts to ensure that there are no unnecessary delays in bringing the matter to completion. This is done by the courts holding directions hearings, where timetables are set for the conduct of the action, and any disputes that arise between the parties as to how the case is to be conducted, and what documents have to be produced etc., are resolved.

Some of the common steps ordered by the court to be undertaken include the following:-

Particulars

If a person wishes to obtain some more specific information about what appears in a statement of claim or a defence or other pleading document and these cannot be obtained from the other party's lawyer by consent, it is possible to apply to the Court for an order that these be supplied.

Discovery

Discovery refers to a process whereby each party can examine documents held by another party which are relevant to a matter in issue. In some jurisdictions a party can issue a notice to another party requiring inspection of certain documents or application can be made to the Court for access to a class of documents. Some documents are protected from examination by another party such as documents which are protected by legal profession privilege, that is, documents which have been brought into existence for use in getting legal advice or for use in litigation.

It is very important to note that when providing an affidavit of documents, which is the list of relevant documents disclosed during discovery, all documents, not simply those that are favourable to your case, must be disclosed.

It is also important to note that discovery is an ongoing obligation. As and when other relevant documents come to light, they must also be disclosed to the other party.

It is not necessary for the disclosing party to indicate the importance or significance of a document, merely its existence.

Interrogatories

Interrogatories involve serving on another party a list of questions to obtain sworn answers. Such evidence may then be used at the hearing. There are strict rules which apply to the kinds of questions which may be asked in interrogatories. It is possible to object to interrogatories on the grounds that they lack relevance, are vexatious or oppressive or are privileged. A Court can order that further answers be supplied. Failure to comply could result in a party's case being struck off. Increasingly interrogatories are becoming rarely used in litigation, however.

Expert evidence

The subject of the dispute may require both parties to tender evidence from an expert in the relevant area/industry. The expert will provide a report which will need to be filed and served on the other side if that party intends to use it at the trial/hearing.

Orders for the filing and service of expert's reports are often made at directions hearings, and experts' reports must then comply with the formalities imposed by the court rules. Your lawyer will be able to liaise with the expert to ensure that the appropriate expert is engaged, and the report prepared in the proper format.

Mediation

The courts are anxious to encourage parties to resolve their differences without having to go to a final hearing. Mediation is ordered in virtually every case, and forces the parties to negotiate with each other. Statistics show that the majority of cases settle at mediation. This can be because the parties understand the position of each other in more detail, they are concerned about increasing legal costs, and they may be concerned in the delay in obtaining a final hearing of the matter.

For whatever reason, mediations have a good history of resolving disputes, but a successful mediation obviously requires parties to attend in good faith with a real intention of seeking to finalise the matter.

WATCH FOR PART 3 ON TRIAL AND ENFORCEMENT IN OUR NEXT NEWSLETTER

david.brett@mckeanpark.com.au

MCKEAN PARK BREAKFAST SEMINARS

McKean Park understands that dealing with the law and its intricacies can be a confusing and expensive experience for both businesses and personal clients alike. Many problems can be avoided if clients are aware of the possible pitfalls in certain situations, and take steps to protect themselves accordingly.

Our free Breakfast Seminar Series this year will run from March to October 2012, on the third Tuesday of every month. We have chosen topics that will be informative and beneficial to both business and personal clients, and have structured the topics to reflect that.

The seminar programme is as follows:-

20 March 2012	What happens to Children in a Marriage Breakup?
17 April 2012	Unfair Dismissal - What is it and what are the consequences?
15 May 2012	Liquidation and Bankruptcy - An Overview of Insolvency.
19 June 2012	Personal Property Securities Register - How is it Working in Practice?
17 July 2012	Debt Collecting - Keep your Debtors Under Control.
21 August 2012	Pitfalls and Problems with Property Development.
18 September 2012	Caring for the Elderly - Legal Documents you should consider.
16 October 2012	Purchasing an Apartment or Unit? What does the Owners Corporation Mean to You?

A light breakfast will be served from 7.30am. The seminars will commence promptly at 8.00 and finish equally promptly at 9.00 a.m.

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

If you are interested in attending any or all of the seminars, please contact Charmaine Groves on (03) 8621 2860 or email her on charmaine.groves@mckeapark.com.au. We will then contact you closer to the date of the seminars that you have expressed an interest in, to confirm whether you are still able to attend. We are more than happy if you wish members of your staff to attend particular seminars, and, if you are able to ensure that you have more than 10 people attending, we are happy to run a seminar at your premises.

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

McKEAN PARK LAWYERS
(incorporating Pelham 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