McKEAN PARK LAWYERS

MATTERS

OCTOBER 2012

IN 2013 MCKEAN PARK CELEBRATES 150 YEARS IN THE LAW

Next year it will be 150 years since on 8th July 1863 the founder of our firm James McKean was admitted to practice as a Barrister and Solicitor of the Colony of Victoria. The firm is proud of its heritage and the fact that we can trace the firm's history back to 1863 with the name McKean being retained in the firm name throughout this period.

We are looking forward to celebrating this significant milestone during 2013. More on this remarkable event will be revealed in our next newsletter.

Celebrating 1863 - 2013
150 Years of service

James McKean

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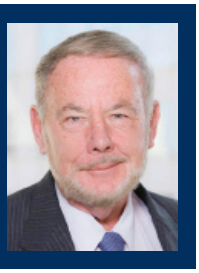
TOURING IN VICTORIA



BY ROSS BLAIR

In 2009 the Victorian Parliament enacted the *Crown Land Acts (Lease and Licence Terms) Act 2009* compelling everyone who conducts an organised tour or recreational activity for profit on un-leased Crown land to hold a tour operator licence (TOL). The Act drew little comment at the time. The parliamentary debates did not discuss what the proposed licence fees were likely to be and centred instead upon the benefits to Victoria of "nature oriented tourism". In any event, the licensing of tour operators had in fact been imposed by individual Crown land managers for many years and the licensing process enabled those managers to ensure that tour operators met reasonable safety and compliance standards so that the few people who were interested in the legislation probably regarded it as a good idea.

What was not generally recognised in 2009 were the financial ramifications of a TOL system and also its scope. The TOL provisions of the Act did not come into force until 1 July 2012 and it was not until then that the financial ramifications surfaced. These require a tour operator to obtain a separate TOL from each Crown land manager over whose Crown land he proposes to conduct a tour or recreational activity. This in turn, requires separate fees to be paid for each such TOL. The TOL fees comprise a relatively modest annual fee but to this is added a per capita charge for each tour participant ("visitor"). To avoid or at least lessen the very considerable paperwork required to be produced for each tour, the TOL system enables a tour operator to elect to pay an annual capped licence fee instead of the combined licence fee and per capita charges. In the current year (1 July 2012 – 30 June 2013) the capped fee amounts to $5.500 but this will rise to $12,500 in the following year and continue to rise thereafter. If the operator conducts a tour spread over the lands of two Crown land managers those capped fees are doubled and trebled if there are three managers involved. Tours that extend over the lands of even more managers increase on the same basis.

The scope of the TOL system is far wider than most people initially realised. The Crown lands of Victoria (often called "public land") take up approximately one third of the entire State and, in addition, include rivers, lakes and coastal waters. Our roads are constructed on Crown land as are our railway tracks. Many of our airfields are constructed on Crown land and almost all our major sporting venues. Just how many Crown land managers will be involved in issuing licences to cover a single tour by ship, bus, train or aeroplane is therefore a matter that will need considerable attention in the future.

Equally, attention will need to be given by those arranging charter buses, trains, boats or aeroplanes for school, sporting club, seniors, business and social trips in Victoria. If the trip falls into the category of a tour and the provider of the charter is not the organiser then whoever is the organiser will need a TOL and will need to pay the appropriate licence fee including per capita charges and to obtain separate TOL's from each Crown land manager through whose land it passes.

The Act and the Regulations made under the Act do provide some relief from the TOL provisions although the relief is very largely of a short term nature. The anticipation is that large tour operators may not be inconvenienced by TOL requirements and the requirements become less significant the larger the tour operator becomes. Small tour operators and those organising fund raisers and similar ventures, are however likely to be hard hit. Legal advice should be obtained by those who are potentially affected by the legislation because the penalties are considerable.

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"BUT I DIDN'T HIT THE CHILDREN .... THE NEW FAMILY VIOLENCE LEGISLATION UNDER THE FAMILY LAW ACT"

BY MARK FINN

THE NEW DEFINITIONS OF "VIOLENCE" AND "ABUSE"

In the past it was doubtful whether threats of violence could constitute family violence and that a parent could only commit an act of family violence if the perpetrator of the violent act actually hit the victim.

Amendments made to the *Family Law Act* that became operational from 7 June 2012 now makes it clear as to what constitutes an act of family violence and an act of abuse.

Historically, the *Family Law Act* has not dealt well with the concepts of family violence and abuse and these amendments recognise the true nature of violence in the broader sense against women and children.

Questions of family violence and abuse are significant factors that a Judicial Officer must consider when determining where a child is to live or with whom that child should have contact. The legislation prioritises protection from harm over the questions of whom the child should live with and who should spend time with the child.

WHAT DOES THE LEGISLATION SET OUT TO ACHIEVE?

1. **The Definitions of Family Violence and Child Abuse have been expanded:**

   Generally speaking, the definition of family violence has been widened to include threatening behaviours including stalking, repeated derision and intentionally causing death or injury to an animal. It also includes an additional definition for situations when children are not the direct victims of violence, which includes

overhearing threats of death or hearing threats to assault or threats to personal safety.

Finally, the definition takes into consideration serious psychological harm and serious neglect.

2. In determining the best interests of the child, the Court must attach some weight to the need to protect a child from harm or to ensure that a child is not exposed to an unacceptable risk.
3. The Court must also now take into account the willingness and ability of each of the parents to facilitate and encourage a close and continuous relationship which may be compromised if a parent has a fear of a child being exposed to a potentially unsafe environment.
4. The Court must have regard to any State Violence Order applying to a child or a member of the child's family.

It comes with some disappointment that the amendments do not properly address two of the most significant issues, namely:

1. Even where violence is involved, Courts and parties will still seek to obtain Orders that both parties have equal shared parental responsibility; and
2. Victims of domestic violence will still be forced to attend Family Dispute Resolution Centres, which may expose the parent and the children to further ongoing abuse or violence.

The creation of new laws in respect of the broadened definitions of Family Violence and Abuse will no doubt develop over time when Courts and Judicial Officers are forced to come to terms with the broader concepts, which will make for interesting times ahead.

If you, your partner or any members of your family believe you are victims of domestic violence abuse, please feel free to contact Mr Mark Finn or Ms Maria Kourtis.

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THE INDEPENDENT REPRESENTATION OF CHILDREN

BY MARIA KOURTIS

Sometimes in a family law case about the care of children, the Court will appoint an Independent Children's Lawyer. The Independent Children's Lawyer is a lawyer whose role it is to represent the interests of the children. In the Children's Court, a child's lawyer will speak to the child and act in accordance with the wishes of the child. That is not how an Independent Children's Lawyer represents the children's interests in a family law matter. In a family law matter, the Independent Children's Lawyer will:

- Ensure the Court has all the evidence the Court will require to decide the case;
- Facilitate negotiations between the parties;
- Arrange for experts such as psychologists to speak with the child to ascertain the child's view;
- Analyse the evidence and make submissions about what will promote the child's best interests.

Unless there is a very good reason, it is expected that the Independent Children's Lawyer will meet with the children they represent. The Independent Children's Lawyer will try to explain the Court process to the child, and answer any questions the child may have. They may also ask them questions about school, their family, friends and their everyday life. It is up to the Independent Children's Lawyer to decide what they discuss with the child, and the Independent Children's Lawyer cannot be forced to divulge their discussion with the children to the Court.

Often people ask about how their child's voice will be brought to the Court's attention. The Independent Children's Lawyer is responsible for ensuring that the child's perspective is communicated to the Court. A common way for this to be done is by the child speaking with an appropriately qualified professional such as a psychologist or social worker about their wishes and their perspective of the family. That professional will then report to the Court the child's point of view. The Independent Children's Lawyer does not have to adopt the child's position; sometimes what the child wants is not necessarily the best for them, but the Court is assisted by knowing what the child says and thinks.

Independent Children's Lawyers are generally funded by Victoria Legal Aid. If an Independent Children's Lawyer is appointed in your case, you may be asked to make a contribution to their professional fees. There are about 20 Independent Children's Lawyers in Victoria. Applications are considered by a panel comprising of representatives of the family law Courts, Victoria Legal Aid, and the professional organisations of barristers and solicitors, and reviewed, generally every 2 years.

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WATER DAMAGE TO AN APARTMENT AND OWNERS CORPORATIONS

BY ROBYN CROZIER

What should an Owners Corporation representative do on being notified by an apartment owner that water damage has been sustained to their apartment?

1. **Obtain as many details as possible from the owner of the apartment who has suffered water damage to ascertain:**
   (a) the location of the water entry into the apartment;
   (b) the amount of water flow into the apartment;
   (c) the damage caused to the apartment. Request photos of the damaged area.
   (d) their understanding as to where water has entered into the building and then into their apartment.
   (e) the contact details of the lot owner so that the Owners Corporation's insurer, a representative of the Owners Corporation and a building consultant engaged by the Owners Corporation can contact the lot owner to arrange to obtain access to their apartment to see the water damage and try to ascertain the cause of the water leak.
2. **Notify the Owners Corporation insurer.**
3. **Review the Plan of Subdivision to ascertain boundaries between lots and common property.**
4. **If possible, the representative of the Owners Corporation should undertake an immediate visual inspection of the apartment which has suffered water damage and try to ascertain:**
   (a) the point of entry of water into the apartment which has suffered water damage
   (b) the path of the water through the building; and
   (c) the source of the water ingress into the building,

   The representative of the Owners Corporation should also take photos of damaged areas and the area which is considered to be the source of water entry into the building.
5. **Contact any lot owners whose apartment may be affected by or be the source of water entry into the building and**

obtain appropriate contact details to arrange access into their apartment by a representative of the Owners Corporation, the Owners Corporation's insurer and a building consultant who will be engaged by the Owners Corporation to determine the source and cause of the water entry.

6. **As soon as possible, engage an expert building consultant with appropriate qualifications to provide a report to the Owners Corporation which provides evidence of:**
   (a) the point of entry of water into the damaged apartment.
   (b) the source of the water leak.
   (c) the reason for the water leak into the building.
   (d) the travel path of the water through the building from the initial source to the point of entry into the apartment.
   (e) repair works which need to be undertaken to:
      (i) stop the water leak from the initial source;
      (ii) repair damage to any part of the building through which the water has travelled; and
      (iii) repair damage to the apartment.
7. **The building consultant should be:**
   (a) provided with a copy of the Plan of Subdivision and advised of boundaries between the common property and the apartment.
   (b) advised of the necessity to ascertain the source of the water into the building, the reason for the water ingress into the building, the travel path of the water through the building and the point of entry of water into the apartment as this will assist in identifying:
      (i) whether the Owners Corporation or a lot owner will be responsible for any costs associated with damage and repair works; and
      (ii) whether a claim may be made against the builder of the building or its insurer for defective building works.
   (c) advised that if a dispute regarding liability for damage and repair works arises between the Owners Corporation and a lot owner or the builder, then proceedings may be issued in the Victorian Civil and Administrative Tribunal (VCAT) and he may be required to give expert evidence at a hearing.
   (d) requested to provide a costs estimate of repair works which should be split between the three water areas outlined above, that is, source, travel path and damaged apartment.
   (e) given the VCAT "Practice Note for Expert Evidence" and "Expert Evidence – Guidelines".
8. **Ascertain if any builder's warranty insurance applies to the common property or any lot affected by the Owners Corporation and whether a claim in respect of water damage against this insurance may be made.**

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DO BENEFICIARIES HAVE THE RIGHT TO INSPECT TRUST DOCUMENTS?

BY GEOFF PARK

It is almost a common occurrence that beneficiaries seek from trustees the disclosure of trust documents. Understandably, a beneficiary is eager to obtain particulars regarding a fund from which they may potentially benefit or from a fund that they believe may have allocated to them a benefit which has not been disclosed to them. But does a trustee have an unequivocal obligation to divulge such information? Over recent years, much attention has been paid to this question of the beneficiary's 'right to know'.

GENERALLY

The UK cases of *re Londonderry and Schmidt* established the two conflicting approaches taken when classifying the nature of a beneficiary's right. *Re Londonderry* expands the scope of beneficiaries entitlements; effectively endowing them with a right that is proprietary in nature. In practice, this approach dictates that trustees must produce documents when requested by beneficiaries.

In contrast, the ruling in *Schmidt* says that beneficiaries do not have a proprietary interest in trust documents. Rather, the beneficiary must seek an order of disclosure through the court; it is for the court to exercise its inherent jurisdiction to supervise and, if necessary, intervene in the administration of the trust.

THE AUSTRALIAN APPROACH

Neither *re Londonderry* nor *Schmidt* has been specifically endorsed in Australia at a federal level, and the law remains somewhat unsettled. However, recent judicial commentary in relevant Australian cases has been strongly indicative that the *Schmidt* approach is preferred, that is – beneficiaries have no automatic right to inspect trust documents.

WHAT IS A 'TRUST DOCUMENT'?

Australian case law has attempted to clarify a set of core documents, with judges recurrently indicating that documents that 'evidence or record the nature, condition and value of the trust assets' may constitute trust documents.

WHAT ABOUT BENEFICIARIES UNDER A DISCRETIONARY TRUST?

Beneficiaries under a discretionary trust are those that do not have a fixed interest, but are in a class of individuals that must at least be considered by a trustee when deciding who receives, income and also who receives capital of the fund. The trustee has an obligation to perform the trust but may choose amongst individual potential beneficiaries. The right to approach the court for disclosure of documents applies to every class of beneficiary, including the objects of discretionary trusts.

LIMITS TO DISCLOSURE

Generally, a court will order disclosure unless it finds a reason not to. The court may prohibit disclosure in circumstances where the best interests of the trust or the beneficiaries as a whole may be compromised. A further barrier may occur in cases where limits of 'reasonableness' are exceeded due to the continued and excessive demands of a beneficiary.

Confidentiality is frequently argued by trustees as a reason for non-disclosure.

PRATT, RINEHART AND LEW

These 3 high profile cases decided in 2012 raised some excitement in trustees and beneficiaries around the country. However, they were not cases that tested the beneficiaries rights and trustees rights/obligations in the context of this article. Pratt (former escort Madison Ashton took proceedings against the Pratt estate alleging Pratt had promised to settle $2.5 million dollars upon trust for each of her two children, and other benefits, if she retired as an escort and became his non-exclusive mistress), was mainly decided in contract law. Ashton lost and is appealing.

Rinehart (NSW) and Lew (Victoria) were about orders being sought to stop publication by the media of the proceedings.

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HOW DOES A COURT DEFINE DEATH?

A recent case in Western Australia provided an in depth analysis of the elements of the crime of murder. A father was applying to the Court for a declaration that his son was dead, so that he could obtain probate and process the estate. A man had in fact already been convicted of the son's murder. In an insightful summary of the law of homicide, the presiding judge commented as follows:-

"It flows from that decision there has been a finding by a Court that Craig Puddy is no longer alive. It goes without saying when a person is convicted of murder, the alleged victim is dead. The death of the victim is one of the essential elements of the offence. Moreover, the standard of proof is beyond reasonable doubt. In other words, it is safe to say beyond reasonable doubt that Craig Puddy is deceased."

How true!

STOP PRESS NEW ACCREDITED SPECIALIST AT MCKEAN PARK

Andrews Woods has successfully completed his specialisation accreditation examination and is now an Accredited Specialist in Wills and Estates. The Law Institute of Victoria conducts a rigorous assessment and examination procedure on applicants for specialisation accreditation and awards accreditation only to those who achieve a very high standard in their practice and knowledge of a particular specialisation.

Congratulations Andrew on your success and recognition by your peers as a lawyer who has special competence in such an important area of law.

STOP PRESS CHRIS MOLNAR, PARTNER OF MCKEAN PARK, HAS RECEIVED NATIONAL ACCREDITATION AS A MEDIATOR.

Mediation has become wisely accepted as an alternative to the formal adjudication of disputes at a hearing by courts and tribunals. Indeed, most courts and tribunals strongly encourage mediation prior to the formal hearing.

Chris has satisfied the standards set by the National Mediator Standards Board, including successfully completing a 6 day training course, and has now been registered as a National Accredited Mediator.

Chris is able to conduct mediations which have been ordered by a court or tribunal, or disputes where formal proceedings have not yet commenced. Chris is able to bring his expertise as an accredited specialist in workplace relations to the facilitation of workplace disputes, but is also able to facilitate commercial, property and personal disputes.

Mediation offers to parties an opportunity to settle their disputes earlier, confidentially and with less cost. In a mediation the parties are able to come up with innovative solutions which may give each party at least a partial win. Mediation is expected to grow in use and Chris Molnar looks forward to assisting parties resolve their differences in this expanding area.

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