McKEAN PARK
LAWYERS

MATTERS
NOVEMBER 2013

McKEAN PARK – 150 YEARS STRONG

Over 160 years ago, one of the early migrants, James McKean left Belfast in Ireland and made his way to Australia, and found his way to the then Colony of Victoria. James worked as a shearer and a journalist but decided that such a life was not for him.

In 1863, James McKean was admitted to practice as a Barrister and Solicitor in the Colony of Victoria. 150 years later, his name lives on in the name of our firm, McKean Park. Very few law firms in Australia can boast 150 Years of continuous operation, and even fewer have part of their original name still in use. One such firm is our associate firm in Sydney Pigott Stinson who also celebrate 150 years of continuous service this year.

Over the years the Firm became known as McKean & Wilson, McKean Wilson & Leonard and later McKean & Leonard.

Harry Tolhurst McKean followed in his father's footsteps from the late 1890's to maintain and grow the Practice. In October 1934 Harry McKean invited Arthur Leslie Park to join the Firm as an employee because his sister was linked to the McKean family through marriage. By 1939 Les Park became a Partner and at about that time the Firm became McKean & Park. Harry McKean remained a member of the Firm until 1956.

Les Park had two sons who followed him into Partnership, Richard, who remained a Partner until his retirement in 2001, and Geoff who remained a Partner until 2007. Geoff remains with the Firm as a Consultant and Accredited Specialist in Wills and Probate Law. He was also a gold medal winner in rowing at the Masters Games at the age of 67 years (that is nothing to do with his legal practice, but we are very proud of it anyway!).

We at McKean Park are very proud of the firm's past, but also embrace the future and the challenges that it provides to us as individuals, as an organisation and to our clients.

Demonstrating our commitment to the future, our Future Law team has been developed to allow us and our clients to face the future with confidence, confront and understand the issues that arise out of our constantly changing social, political and geographical climate. It cannot be doubted that matters move much faster now than when James McKean first hung up his shingle.

Celebrating 1863 - 2013
150 Years of service

Emails have replaced "snail mail", computers can do in one minute what may well have taken some days to do previously, and the expectations of our clients, staff and the public at large have all altered. As "Banjo" Patterson doubted that Clancy of the Overflow would suit the office and the "round eternal of the cashbook and the journal", you have to wonder how James McKean would view the current legal office.

We at McKean Park are aware of the Firm's proud past, and pay homage to it by embracing a culture of professionalism and service to our clients and the community. We are also aware that for the Firm to be here in another 150 years, which would be a remarkable feat, we must embrace change, look to the future and respond quickly to the constantly varying times in which we live, and the resulting changes that it brings to the needs and demands of our clients.

Sadly in this year of celebration Tony Rogers Senior Partner of the Firm passed away after a short illness but his important and valuable contribution to the Firm is acknowledged as we celebrate this significant milestone.

The past Partners of the Firm have left an indelible mark on the Firm by promoting its traditional values while focusing on personal client service and a clear vision for the future. Today the Firm is led by Mark Flynn, Anne Marie Gasbarro and Stephen Roache. As custodians of the Firm we look forward to taking McKean Park to its next milestone and thank all of our clients, staff and other stakeholders for their continued support.

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Vale Tony Rogers

Tony Rogers, senior partner at McKean Park, passed away after a short illness on 13 March 2013.

Tony was a larger than life figure, and a great communicator with clients, staff members and opposing lawyers. He is and will be sadly missed.

Tony had been at McKean Park for 37 years, during which time he moved up the ranks to senior partner, in his particular field of banking and finance. He was a firm believer in the importance of maintaining the highest standards in his work, and was always anxious to ensure that his skills and those of others in the firm were constantly updated and improved.

Tony's abilities were noted early – he completed his matriculation (VCE as it then was) when only 16, and then in 6 years at Melbourne University, completed degrees in law and commerce, obtaining honours in every subject! He completed his Articles at Arthur Phillips & Just, and then spent a brief period with Kearney Kearney & Co. before joining McKean & Park.

Tony's input into the legal profession was substantial – a firm believer in the Specialist Accreditation programme at the Law Institute of Victoria, he sat and passed his examination to become an accredited property law specialist. He then joined the Advisory Committee in that subject, and then became an important and well-respected member of the Specialisation Board of the Law Institute. The regard in which he was held can be seen from the naming of a scholarship for people wishing to undertake the specialisation examinations in his honour.

However, the main things that we shall remember about Tony were his warmth, his willingness to listen and consider all sides of an argument, and his ability to mix with people from all walks of life – a skill which is so important and yet so difficult to achieve.

Finally, one of Tony's tasks was the preparation of the quarterly newsletter – without his guiding hand, the frequency of the newsletter lapsed, but to ensure that Tony's efforts with it over the past years are rewarded, the newsletter is now back on track! He would have appreciated that.

As his best man, Paddy Kendler, said at Tony's funeral:-

"The earth needs people like you!! You have decency, honesty, generosity and geniality in spades!"

It does, and he did.

SELLING ONLINE? – SOMEONE'S WATCHING YOU!

BY DIVYA SHARMA

Do you sell products or offer services online? Do you make representations about your product or services on the internet? If the answer is yes, you are bound by the same competition, fair trading and consumer protection laws as if you were engaged in physical trading. Your customers have the same rights as if the product or service was purchased through a traditional store.

Consumers have the right to ask for repair, replacement or refund if your product is broadly faulty or unsafe, does not match any description, does not do what it is claimed to do. In case of a service, it must be delivered with due care and skill and within a reasonable time. Failure to comply with the law may mean you face fines up to $1.1 million if you are a business and $220,000 if you are an individual.

As part of the International Consumer Protection Enforcement Network (ICPEN), the Australian consumer watchdog Australian Consumer & Competition Commission (ACCC), along with 40 other consumer protection agencies around the world, conduct annual coordinated actions aimed at consumer protection worldwide. This year, the ACCC is conducting an information gathering sweep of the internet, to identify and review online shopping fine print, and is targeting traders who use confusing and misleading fine print on their websites to avoid their obligations to consumers.

The theme of this year's campaign is "*I bought what?*" which focuses on how rights are being represented by traders to consumers online, and identifies tricks used by dishonest merchants to fool consumers into believing such rights do not apply to online trading. ACCC responds to complaints and monitors online sales regularly. In the past such sweeps conducted by the consumer watchdog have been successful in taking down websites, organising refunds and writing to hundreds of online traders who had made incorrect claims on the internet.

Proceedings were instituted by the Watchdog in the Federal Court on 12 June 2013 against Coles Supermarkets Australia Pty Ltd (Coles). The ACCC alleged false, misleading and deceptive conduct in the supply of bread that was partially baked and frozen off site, transported to Coles stores and 'finished' in-store. The products were then promoted as '*Baked Today, Sold Today*' and/or '*Freshly Baked In-Store*' at Coles stores with in-house bakeries. While this was not an online representation, it does illustrate the sort of conduct that the ACCC is cracking down on in order to protect the consumer.

If you are not sure about what sort of representations made online can put you at risk or if you have simply not looked at your fine print terms and conditions for a long time we can provide comprehensive advice on the legal implications of the content on your website.

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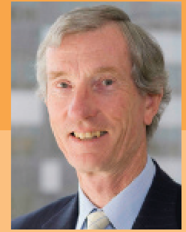
EMERGENCY WILLS



IT’S TOO LATE TO MAKE YOUR WILL, IF YOU ARE DEAD!

BY GEOFF PARK

Executing a new Will can sometimes be very daunting. Getting together information about assets (including those that are not in your name and would not strictly be part of your estate to be administered in accordance with your Will: e.g. jointly owned home, Superannuation and a Family Discretionary Trust set up during lifetime), sorting out who you would like to be your executors to administer the provisions in your Will and sorting out who will be the beneficiaries of your estate is time consuming and something that can be “done later”. The Will document that is prepared to meet all of your wishes needs to contain carefully constructed clauses to make sure that your exact requirements can be carried out and the document needs to be signed in a particular manner to be a “valid Will” in accordance with the provisions set out in the *Wills Act Victoria*.

However in emergency situations an abbreviated document can be prepared (as long as it clearly sets out your requirements) and can be signed by you in a manner which does not strictly comply with the Wills Act, e.g. only having one witness or even no witnesses at all. Such a Will is called an “informal Will” and such a document can be declared by the Supreme Court of Victoria to be a legal Will document upon satisfactory evidence being produced to the Court, including the Will makers intention that the document would be a Will.

Such informal Wills can be useful in emergency situations, such as execution of a document in a hospital where it is most common nowadays that staff will not witness legal documents, and can also be useful if you were in the solicitors office and wanted to make sure that the instructions you had just given would be carried out even though it may take a little while for the solicitor to produce a formal document and for you to execute that document.

Of course by having to apply to the Supreme Court to have such abbreviated document declared to be a Will means time and expense and it is far more preferable to have a formal document carefully prepared and executed. Accordingly soon after an abbreviated Will is signed, a formal Will should be prepared and executed.

The cost of preparing and executing a formal Will, which may be anywhere between $500.00 and several thousand dollars in more complex circumstances, should not deter you from going through the process resulting in the execution of a formal Will. Just think that this document will appoint persons of your choice to look after your estate and make provisions for distribution of your assets to persons of your choice and that your estate may be anywhere in value from $500,000.00 to several million dollars. Compare that one off cost with an annual cost of insuring your home, which may be $1,500.00 annually for one asset only, or with the cost of insuring and registering one of your motor cars which could amount to $1,500.00 annually. The expected cost of making a Will is good value!!

If you don’t make a Will then you don’t know who will administer your estate and you don’t know who will eventually inherit your assets.

When making a formal Will also think about an Enduring Power of Attorney (Financial) and an Enduring Power of Attorney (Medical Treatment).

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"FOR RICHER FOR POORER..." – "BEWARE OF PRE-NUPS"

BY KATRINA BRISTOW

When the introduction of Pre-nuptial Agreements in Australia was proposed in the 1990's, there was a lot of community opposition to the idea. Many people expressed the view that it was unromantic for two people who were about to marry to have to consider financial outcomes should the marriage fail. The public perception of "Pre-nups", as they are usually called, conjures up the notorious Pre-nups between American actors and sports people with enormous wealth whose lawyers draw up tight agreements to be enforced in the event of marriage breakdown. Most Australians would not identify with these high profile, very wealthy people and therefore many were opposed to the introduction of the legislation as not being relevant to themselves. However in 2003 the *Family Law Amendment Act* was passed and Section 90G provides guidelines as to when a Financial Agreement is binding on the parties and within the jurisdiction of the Family Court. This is then called a Binding Financial Agreement ("BFA") and is the Australian equivalent of the legendary "Pre-nup".

Section 90G (1) sets out a number of factors that are required if a BFA is to be binding. These include:-

- **The BFA must be signed by all parties.**
- **Specific independent legal advice on the BFA must be given to each party prior to signing the BFA.**
- **A Certificate or Statement stating that the specific legal advice has been provided to each party prior to signing the BFA must be signed by an Australian Legal Practitioner and provided to each party to the BFA.**

If one of the parties wants to set aside or dispute the BFA, he or she will rely on the provisions of Section 90K. These provide that a BFA can be set aside if::

- **It is obtained by fraud.**
- **There has been material non- disclosure.**
- **It has been enacted to defraud or defeat the valid claims of creditors or another third party.**
- **The Agreement is void, voidable or unenforceable.**
- **There has been a material change in the circumstances of a party or parties relating to the care, welfare or development of a child of the relationship or if a party to the BFA would suffer hardship.**
- **A party to the BFA had engaged in unconscionable conduct.**
- **There are issues in relation to superannuation flagging or there is a superannuation interest that cannot be divided.**

You should be aware that it is risky to have a BFA signed within one month prior to the marriage. It would be easy for one party to argue that he or she was pressured into signing the Agreement as the marriage was only weeks away.

Early this year Elizabeth Petrakis, the wife of New York Real Estate Tycoon Peter Petrakis, won a landmark bid to have her Pre-nuptial Agreement torn up after a Judge ruled she was forced into signing it.

Six weeks before her wedding in 1998 Petrakis was presented with what her lawyer called a "heavy handed" Pre-nup that would give her $25,000 for every year she was married but nothing more. "*I put my foot down and said I wasn't signing it*" Petrakis said. But four days before tying the knot she agreed to sign the Pre-nup after her fiancé Peter Petrakis, a Real Estate multimillionaire, promised he would get rid of the Pre-nup once the two began to have children. He also said if she did not sign it he would not marry her, even though her father had paid $40,000 deposit towards their lavish wedding.

After the first child was born, Petrakis refused to tear up the Pre-nup, so Elizabeth left him and then applied to have the Pre-nup set aside.

In an unprecedented ruling in February 2013, an Appellate Court in New York decided Peter Petrakis had fraudulently induced his wife to sign a Pre-nuptial Agreement and that his credibility was suspect. It handed down a decision which resulted in Elizabeth Petrakis being permitted to set aside the Pre-nuptial Agreement.

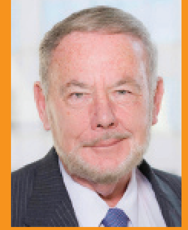
Whilst there is uncertainty as to the binding nature of the BFAs if requirements have not been complied with, when one party has significantly greater assets than the other party entering the marriage, particularly those people contemplating a second marriage in middle age where the parties have children from the first marriage, BFAs are recommended as providing parties with peace of mind regarding a financial outcome should the marriage fail. However you must ensure that all the legal requirements are met in regard to the drafting of the BFA and Independent Legal Advice is obtained by each party.

If you require any information about Binding Financial Agreements please contact Katrina Bristow.

katrina.bristow@mckeanpark.com.au

ROTARY CLUBS AND THE SUBSECTION 48(3) TRAP

BY ROSS BLAIR



Subsection 48(3) of the Associations Incorporation Reform Act 2012 (Victoria) (**Act**) provides as follows:

"(3) – If the rules of an incorporated association do not make provision for a matter as required by Section 47(2), the model rules, to the extent that they make provision for that matter, are taken to be included in the rules of the association."

This is not a part of the Act that most Rotarians ever have need to access, let alone consider. On the other hand, for many Rotarians it has considerable consequences which need to be recognized particularly by Rotarians who are members of incorporated Rotary Clubs that still retain the Recommended Rotary Club Bylaws (**RRCB**) which Rotary International (**RI**) prescribes, without any changes or alterations having been made to those Bylaws.

The RRCB contains many provisions such as for the elections of officers of the Club and other members of the Board, the provisions dealing with the operations of the Board, membership dues, bank accounts, the duties of the officers of the Club and many others. The Model Rules which are contained in the *Associations Incorporation Reform Act Regulations 2012* contain Rules covering exactly the same Matters as those referred to in the above examples.

Subsection 47(2) requires that the Rules of an incorporated association must make provision for each of the 23 matters that are specified in Schedule 1 of the Act, to the extent the matter is applicable to the association, and also to other prescribed matters. All the above examples are matters which are specified in Schedule 1 of the Act.

What follows from the above is that in the case of each of the examples given, because the matters involved are contained in the Club's Bylaws and not in the Club's Rules, SS48(3) will apply and as a result, the equivalent provisions in the Model Rules will be taken to be included in the incorporated Rotary Club's Rules. In none of the examples given do the provisions of the Model Rules agree with the equivalent provisions contained in the incorporated Rotary Club's Bylaws. It therefore follows that as a result of this an incorporated Rotary Club in such a situation may well be frequently breaching its own Rules by the simple expedient of following its Bylaws.

Other States and Territories have similar (but not necessarily identical) provisions to SS48(3). The Queensland version, for example is even wider in its scope than SS48(3). Indeed, in the version of SS48(3) contained in the previous *Associations Incorporation Act 1981 (Victoria)* in SS21(3) the wording is as wide as that in the current Queensland legislation.

All the above needs to be understood thoroughly and preferably to be dealt with in the Rules of incorporated Rotary Clubs such as those McKean Park provides. That recognition should extend to a reassessment of what is handed to a new Rotarian when he or she is inducted into the Club. New Rotarians after all are entitled to know exactly what are the Rules and the Bylaws of the Club in which they have sought membership.

SS48(3) is not included simply as a trap for inexperienced club secretaries and others. It does provide a safeguard in the case of incorporated associations which leave their Rules unchanged for lengthy periods. The requirements placed upon incorporated associations are constantly changing and if changes are required in an area to which SS48(3) applies it is considered appropriate that it occur automatically even though the members of the Club do not realise the change has happened.

On the other side of the coin in the current climate of increased litigation the process of automatic change by virtue of SS48(3) can, if it is not recognised by the members, provide a powerful weapon to be used against the Club by anyone suing it or involved in a discipline or a grievance process against the Club or another member.

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SURROGACY WHAT'S IT ALL ABOUT?

BY MARK FINN

Surrogacy is a form of assisted reproductive treatment where a woman conceives and carries a child in her uterus for another person or couple and then surrenders the child to that person or couple.

All surrogacy arrangements, whether between heterosexual couples or gay couples involve complex issues concerning emotional, financial and legal issues.

A surrogate mother is someone who conceives, carries and gives birth to a child for another person or couple. The surrogate mother agrees to hand over the child to that person or couple after the birth. In Australia, and more particularly in Victoria, surrogacy is regulated by the *Assisted Reproductive Treatment Act 2008 (Victoria)* which stipulates:

1. **The surrogate must be at least 25 years of age;**
2. **The surrogate must have previously been pregnant and given birth to a live child;**
3. **The surrogate must not use her eggs in the surrogacy arrangement.**

All parties, including the person who is donating their genetic material to the surrogate, including the surrogate's partner must:

1. **Undergo a criminal record check and a child protection order check; and**
2. **Undertake counselling and obtain independent legal advice.**

It is important to remember that surrogacy legislation in Australia may vary from State to State.

In a later newsletter, we will examine the question of international surrogacy.

If you have any questions concerning domestic surrogacy or international surrogacy, please do not hesitate to call our Mr Finn or email him at:

mark.finn@mckeanpark.com.au

NEW STAFF Welcome to Roland Burt, Katrina Bristow and Jessica Main

ROLAND BURT

Roland Burt joined the team at McKean Park on 5 August 2013, as a partner.

Roland has been working with clients in commercial litigation and dispute resolution for over 20 years.

Roland will discuss fixed fees for commercial litigation with clients. To find out more about fixed fees please go to our website at www.mckeanpark.com.au.

Roland's journey has taken him into a range of industries and businesses. He regularly acts in disputes and litigation in:

- construction & engineering
- information & communications technology
- property (including adverse possession, compulsory acquisition, off-the-plan sales contracts, leases)
- insolvency
- debt recovery, security enforcement
- fraud (often involving freezing orders)
- disputes within companies (especially shareholder remedies and the duties of directors)
- protection or ownership of confidential information and trade secrets.

Roland also prepares, modifies or reviews Australian Standards™ contracts for construction or engineering projects.

Outside the office he enjoys family and friends, sport (still turning out on the cricket pitch), and food and wine. He is a committee member of the Primary Club of Australia, the cricketer's charity raising money for disabled sports.

KATRINA BRISTOW

I am a Senior Lawyer at McKean Park. I have been practising exclusively in the Family Law jurisdiction for 36 years. I have practised extensively in property matters and children's matters with a specific focus on property matters.

I became an Accredited Family Law Specialist in 1989 with the first group of Family Lawyers to gain Accreditation. I believe that in addition to my experience as a Family Law Specialist I have very good communication skills and empathy with clients who are often distressed owing to the breakdown of their marriage or relationship. Whilst recognizing the importance of obtaining precise instructions from my clients and representing them efficiently, I am at all times conscious of the needs of my clients from an emotional perspective.

I endeavour to assist clients to resolve their matrimonial disputes by negotiation, if that is possible, rather than incurring the expense and delay which is necessarily involved in the Court process.

In my spare time, I enjoy going to the theatre, travelling to Europe and playing tennis.

JESSICA MAIN

Jessica joined McKean Park in September 2013 because of McKean Park's culture and dedication to providing high quality advice to its clients and the opportunity to further her interests and career in the firm's workplace relations team. She was admitted to legal practice in March 2011 and gained excellent experience at a medium sized firm in employment law, commercial litigation, civil litigation and insolvency.

Jessica works closely in the workplace relations team to advise and assist clients in all aspects of:

- Unfair Dismissal
- Unlawful Adverse Action
- Sexual Harassment and Discrimination
- Bullying Complaints
- Employment Contracts
- Workplace Issues
- Redundancies
- Awards and Enterprise Agreements
- Workplace Policies
- Health & Safety

Jessica prides herself on her ability to understand the needs of her clients and provide prompt, tailored and pragmatic advice.

Jessica was elected by her peers to the Young Lawyers Section Executive for the Law Institute of Victoria in 2013 and Co-Chairs the Young Lawyers Section Professional Development Committee.

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 April Wytkin: april.wytkin@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.

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