MATTERS
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WILLS, ESTATES, SUCCESSION PLANNING & ESTATE LITIGATION

Changes to Enduring Powers of Attorney

On 1 September 2015, the new Powers of Attorney Act 2014 ("the Act") comes into effect. The Act allows the appointment of an Attorney for financial, legal and personal matters, as well as the appointment of a Supportive Attorney.

A new form of Enduring Power of Attorney
The Act creates a new form of Enduring Power of Attorney which combines the former Enduring Power of Attorney (Financial) and Appointment of Enduring Guardian. Under the new Enduring Power of Attorney one or several Attorneys may be appointed to take care of the financial, legal and personal matters of the Principal (formerly "Donor").

The Act provides examples of financial, legal and personal matters and sets out in detail what an Attorney may and may not do on behalf of the Principal.

Which Attorney has precedence?
The Act allows different Attorneys to be appointed for personal and financial matters. If there is a dispute between the "Personal Attorney" and the "Financial Attorney", the decision of the Attorney for personal matters prevails. The Attorney for financial matters has an obligation to apply to the Victorian Civil and Administrative Tribunal (VCAT), if implementation of that decision would result in a serious depletion of the Principal's financial resources.

Appointment of Supportive Attorney
The Act introduces an additional form of Attorney, the appointment of Supportive Attorneys. A Principal may appoint one or more Supportive Attorneys. These Attorneys support the Principal in making and giving effect to decisions, other than "significant financial transactions."

The appointment is suspended for any period during which the Principal lacks decision making capacity.

The importance of capacity
Before the Principal can sign an Enduring Power of Attorney, he or she must have the capacity to make decisions. The Act spells out a comprehensive test and explanation of what "decision making capacity" means.

Signing of Enduring Powers of Attorney
The new Enduring Powers of Attorney must be signed by the Principal before two independent adult witnesses, one of whom must be a medical practitioner or a person authorised

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VCAT limits landlords' ability to recover outgoings

Landlords of commercial and retail premises in Victoria were all impacted by an Advisory Opinion, issued on May 1 2015, by the Victorian Civil and Administrative Tribunal, (VCAT).

The background
The Opinion relates to the scope of Section 251 of the Building Act 1993 and the ability of landlords to recover costs they have incurred in complying with their repair and maintenance obligations under the Retail Leases Act 2003. The Opinion is extensive and was issued following submissions to VCAT by the Law Institute of Victoria, the Real Estate Institute of Victoria and the Shopping Centres Federation of Victoria.

Opinion summary
In short, the Opinion concludes that:

- A landlord of commercial or retail premises can only require a tenant to undertake essential safety measures (ESM) obligations, in very limited circumstances, and at the cost of the landlord.
- A landlord of commercial or retail premises cannot pass onto a tenant the cost of works it is required to carry out to comply with its ESM obligations under the Building Act and Building Regulations.
- A landlord of retail premises cannot pass onto a tenant the cost of works it is required to carry out under Section 52 of the Retail Leases Act.

What are the obligations?
Landlords are obliged to ensure a particular ESM result or standard is achieved. This includes arranging an ESM report and complying with ESM obligations, such as installing smoke alarms and detectors.

Who bears the cost?
These obligations can be met by either the landlord or the tenant, if the lease provides for such obligations, but at the landlords cost. If a landlord fails to undertake these responsibilities the tenant may carry out the work. Tenants can then recover the cost from the landlord, or offset the cost against rent.

Implications for landlords
The implications for noncompliance by landlords are significant. Any lease requiring tenants to pay or contribute to any ESM costs, as listed above, is inconsistent with the Building Act and is therefore null and void.

What should landlords and agents do?
It is important that:

- Landlords review standard lease provisions to ensure that tenants are not responsible for the cost of ESM or repair items carried out by them.
- For leases covered by the Retail Leases Act, landlords should ensure that they do not pass on the cost of repairs as a maintenance outgoing.
- Agents are advised to suggest to landlord clients that leases be negotiated as a gross rent, inclusive of all outgoings.
- Market rent reviews should include consideration of the payment of ESM and repair obligations. This makes it clear to valuers which outgoings can and cannot be recovered.

Our message to landlords is "be careful". Whilst the VCAT Advisory Opinion is not legally binding, it is likely to be highly persuasive in any future court proceedings.

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to witness affidavits. The Statement of Acceptance signed by the Attorney must now also be witnessed.

Communication of loss of capacity
The new form of Enduring Power of Attorney enables the Principal to direct the Attorney to notify a third person that:

- the Principal has lost capacity and,
- the Attorney will now act under the Power.

What stays the same?
It is important to note that all Enduring Powers of Attorney (Financial) and Appointment of Enduring Guardians in place prior to the commencement of the Act will not be affected. There are no changes to Enduring Powers of Attorney (Medical Treatment).

What should I do?
At the time of writing this bulletin, the new forms were not yet available. It is anticipated, that the new Enduring Power of Attorney form will be longer and more complex than the current form.

As the preparation and witnessing of the new forms will be more onerous, we strongly recommend that if you have not yet made an Enduring Power of Attorney, you should do so before the new regime comes into effect on 1 September 2015.

Ines Kallweit, *(pictured page 1)*
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Splitting superannuation upon relationship breakdown

When a relationship breaks down, the accumulated superannuation is often one of the couple's most significant assets. Australian Family Law views superannuation like any other matrimonial asset to be divided between the separating parties. The only difference with superannuation is that, unlike most property, it is held in a trust.

Superannuation splitting laws
The superannuation splitting laws allow couples to divide superannuation benefits as part of their property settlement, even if held in the name of one party.

Under the splitting laws, the superannuation pool can be ordered to be divided upon the vesting of the asset at retirement. A predetermined amount will be paid to the non member spouse at this time, with the remainder accessible by the member. Alternatively, a share of the superannuation can be rolled over into a new account or fund for the benefit of the non member spouse.

The benefits of reaching a settlement by agreement
Separating parties who achieve a settlement, with the assistance of their solicitors, have more control over the outcome. They can weigh up the benefits, for example, of obtaining a larger share of the property and a smaller share of the superannuation asset. Often, this can assist one party to retain the family home. If parties resort to costly litigation, they have no control over the outcome.

Can I convert my super into cash?
The short answer is "no." Splitting does not convert your share of superannuation into cash. Your superannuation is still subject to superannuation laws.

Can you give me an example?
John and Betty married in 2005, straight after graduating from university and entering the workforce. John worked as a medical practitioner and Betty was a teacher. They had two children, James and Ophelia, born in 2007 and 2009.

Betty resigned from teaching 3 months prior to the birth of James. The couple decided that she would not work outside the home, in order to be the primary homemaker and parent. They both felt this was in the best interests of their children.

John and Betty separated in 2015. They each engaged their own solicitors and, as a result of negotiations, they agreed on a settlement.

The parties agreed that the matrimonial home should be sold. As Betty had given up her professional career to care for the children while John continued working as a GP to support the family, at settlement of the sale of the home, it was agreed that 70% of the net proceeds of the sale should be paid to Betty. The remaining 30% should then be paid to John.

As John and Betty had married and commenced living together straight after graduating from university, neither had any superannuation pre-marriage. Upon separation John had $300,000 of superannuation, whilst Betty only had $20,000.

It was agreed that each party's superannuation entitlement should be equal. Accordingly, the trustee of John's superannuation fund was ordered to effect a rollover of $140,000 from his fund into Betty's fund. John and Betty then each had $160,000 in their respective superannuation funds.

What should I do?
It is important to seek our advice at an early stage. We will assist with valuations of any superannuation and guide you in the most appropriate method of splitting your superannuation entitlement and any other assets.

Katrina Bristow *(pictured above)*
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Purchasers' claims for domestic building defects

A recent NSW case is a good illustration of the legal remedies available to purchasers of existing homes which turn out to be defective. The case illustrates the interplay between construction, consumer and property laws.

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The scenario
In the case of Williams v Pisano [2015] NSWCA 177, a couple purchased a newly completed double-storey five-bedroom house for $3.35m. With rooftop terraces, views of Sydney Harbour and a swimming pool, the marketing campaign had been enthusiastic (see above).

The sale settled in January 2012 and construction defects appeared almost immediately. In April 2012 rainy weather caused inundation of stair-wells, cupboards, bathrooms, laundry and garage. A flooding event in June drenched carpets, electrical circuits and muddied the pool. Heating and cooling became inoperative and 19 out of 23 windows leaked. The cost of rectification was assessed at over $1 million.

"Buyer beware"
"Buyer beware" is still a fundamental rule in real estate law. A purchaser takes the property "as is, where is". The purchaser must inspect and make inquiries about the property before signing the contract. The contract of sale usually contains no warranties about the condition of the property or the buildings on it.

Is the vendor liable?
No claims were made against the vendor under the contract of sale in Williams. However, the purchaser claimed that verbal statements and written information provided prior to contract stating the house was built to the highest standard were misleading and deceptive – and as such were in breach of the Australian Consumer Law (section 18).

The judge found that "far from being built to the highest standard, the house is profoundly defective". He held that the vendor had engaged in misleading conduct. However, to attract liability under the Australian Consumer Law, the misleading conduct must be in "trade or commerce".

The Court of Appeal restated law applied many times before – "in ordinary circumstances, a person who sells his home, whether by private treaty or by auction and whether he conducts the negotiations personally or through a real estate agent, would not be said to be undertaking those activities in the course of a trade or business or in a business context." The result was that the vendor was not liable under Australian Consumer Law. That law does not apply to the ordinary sale of a home.

Is the builder liable?
The Home Building Act 1989 (NSW), the Domestic Building Contracts Act 1995 (Vic) and similar legislation in other States, set out extensive warranties which a builder is taken to give in relation to home construction. This includes a warranty that the building will be fit for occupation as a home. The warranties "run with the land." If the warranties are breached, the current owner of the property has rights against the builder (subject to limitation periods) - whether or not they had a contract with the builder.

What about owner-builders?
In Williams, the vendor was a couple. The wife, Ms Dandris, built the house as owner-builder. The husband, Mr Williams, was not involved in construction. As owner-builder, Ms Dandris warranted, amongst other things, that the house was fit for occupation as a home. The judge found that the house was not suitable for occupation. Accordingly, under the Home Building Act, Ms Dandris was found liable for the cost of rectification. Mr Williams avoided liability altogether.

The moral of the story
It is a good idea to get a report from a building professional before signing a contract. This is especially the case when the home has been built by an owner-builder. After settlement, the purchaser's rights in relation to construction defects are likely to be restricted to the owner-builder.

Roland Burt *(pictured above)*
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Managing ill and injured employees

Managing workers who are ill or injured often involves complex legal and human resource issues. Employers, including managers who make decisions about the employment of injured or ill employees, can be exposed to expensive claims.

Management of an injured or ill employee often requires advice from an experienced workplace relations lawyer.

Best practice involves the steps and questions listed below.

Is the injury or illness work related?
If so, and the employee has incapacity for work, it is likely that workers compensation legislation will require the employer to find suitable employment for the employee for a period of 52 weeks. A dismissal during this period may expose the employer to a breach of the workers compensation legislation, and also unfair dismissal and anti-discrimination legislation.

Can the injured or ill employee perform the inherent requirements of their job?
One exception to discrimination is the inability of the disabled person to perform the inherent requirements of their job with no reasonable adjustments being available. An employer may require medical advice or guidance as to the capacity of the employee and as to what adjustments (if any) may be made to the employee's position.

The burden is on the employer to determine the inherent requirements of the particular position and consider their application to the specific employee. A position description is a good starting point to review the essential duties and responsibilities of an employee's position.

Can I request the employee be medically examined for the purposes of obtaining a report?
Employers can generally request an employee to undergo a medical examination in circumstances where there is a genuine need to do so, and the terms of the medical examination are reasonable. The medical expert used must be appropriate for the circumstances.

A medical report may be requested by obtaining consent from the injured employee.

What should the medical report cover?
The questions to be asked of the medical practitioner examining the employee and preparing a medical report may include:

- whether the employee can undertake the inherent requirements of the position;
- whether there are any reasonable modifications that can be made to the position;
- the prognosis; and
- generally the employee's fitness for work.

Employers should engage our workplace relations lawyers to prepare the letter to the medical practitioner to ensure the critical questions are included in the request and the inherent requirements of the role are identified.

Dismissal considerations
The opinion of a medical practitioner as to the ability of an injured or ill employee to perform the inherent requirements of their position, and the extent of any reasonable adjustments, is important in considering if the employment may lawfully be brought to an end. If an employee is eligible to make an unfair dismissal application under the Fair Work Act 2009 (Cth), the dismissal will also need to be fair.

Where to from here?
Often these issues are dealt with by employers alongside other workplace issues such as performance management, organisational restructuring, employee behaviour, or workplace health and safety. McKean Park can help solve employer problems in these areas.

Jessica Main *(pictured above)*
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Jessica Main wins legal award

We are proud to announce that our Workplace Relations Lawyer, Jessica Main, was selected as a winner in the 2015, "30 under 30" awards.

Run by Lawyers Weekly magazine, this recognises Jessica as one of the top thirty lawyers in Australia under the age of thirty in the category of workplace relations. Congratulations to Jessica on this outstanding achievement.

McKEANPARK LAWYERS



Special Event – Will Clinic Saturday September 26, 2015

Sometimes it is difficult to fit everything into a busy working week. To assist you, our Wills & Estates Team is running a Will Clinic on Saturday September 26 from 9am-1.30pm (so that you have enough time to go to the footy afterwards!). Ines Kallweit and Geoff Park (pictured above) will be available at our offices to take your instructions, or if we receive your instructions beforehand, have your estate planning documents ready for you to sign. **Places are limited. Please contact Jaclyn or Lidija on 8621 2888 to book your appointment.**

New-look newsletter and logo

This edition of our newsletter showcases our revitalised design format. Written in a reader-friendly style, we hope that our aim of presenting information in plain English and in an interesting way is achieved! We are also proud to present our refreshed corporate logo. Over the coming months you will see our new logo rolled out across our stationery and within our new website. Stay tuned!

Return of Robyn Crozier

We are delighted that Robyn Crozier has returned to McKean Park. Well known to many of our clients, Robyn has over thirty years of legal experience.

Expert in all aspects of property law, Robyn has a particular interest in Owners Corporations. Robyn advises Owners Corporations on their powers, obligations, operation, effective management and dispute resolution. Robyn is available to assist clients each Tuesday. We warmly welcome Robyn back to the Property Law Team.

Our expertise

Expertise is the backbone of our firm. Our teams are structured with a depth of experience. If we can't do it well – we won't do it at all. We proudly offer a full-service legal practice. Call us today for advice in the following areas:

- Aged Care & Retirement Living
- Building & Construction
- Commercial & Taxation
- Commercial Litigation
- Family Law
- Insolvency
- Leasing
- Property & Owners Corporations
- Rotary
- Wills, Estates, Succession Planning & Estate Litigation
- Workplace Relations

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