



WORKPLACE RELATIONS

Misconduct at end of year parties

As December approaches, employers all over Australia are finalising their end of year functions. In this article we discuss employee misconduct at these events and provide some practical risk-reducing tips to implement in your business.

Planning your party

Picture this, you have organised to provide food and drinks, (including the responsible serving of alcohol) for a fantastic end of year function.

You know that you may be liable for the actions of misbehaving employees. To reduce your risk of liability you have employee behaviour policies in place and conducted staff training. Before the party, you reminded staff about appropriate standards of behaviour and even gone as far as to say, "Don't be the idiot that I have to deal with on Monday morning!"

Things don't go to plan

Despite all your good planning an incident occurs. An over-excited, alcohol-infused employee swears at a National Director, propositions an employee and to top it all off kisses another employee.

The aftermath

Monday arrives and the complaints hit you like a tonne of bricks. You commence an internal investigation and due to the seriousness of the conduct, dismiss the misbehaving employee.

But it doesn't end there. Some affected staff resign and issue a sexual harassment claim against you. You then find out you are facing a decision of the Fair Work Commission for a case of unfair dismissal to reinstate the misbehaving employee.

The consequences

Don't be fooled. In 2014, Leighton Boral Amey experienced this scenario. Almost a year later they are still

subject to ongoing litigation in New South Wales. The law has changed and damages awarded in sexual harassment claims have increased significantly. Many recent decisions are well in excess of \$100,000.

What should employers do?

Consider implementing the following in your business:

1 Have workplace policies

At a minimum these should cover your expectations in relation to behaviour, sexual harassment, discrimination and bullying. A behaviour policy should also extend to expectations of employee conduct both at work, and in connection with events outside work with other staff (e.g. conduct after an end of year function).

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2 Train your staff

Have regular workplace behaviour policy training detailing your expectations. This will reduce your liability in the event of a misbehaving employee. We can provide this training onsite.

3 Alcohol and gifts

Prior to the function, remind staff about your expectations relating to alcohol and appropriate gifts (e.g. Kris Kringle). The law does not recognise the attitude of "it was just a joke".

4 Get your managers on board

Make sure all your senior employees are aware of, understand and comply with all policies in this area.

What if something goes wrong?

If an incident occurs, it is imperative that you access our advice promptly. We can assist you to investigate the incident, conduct any disciplinary process and reduce the risk of claims.

Contact us for a free workplace behaviour email

We have prepared an email to send to your employees prior to your end of year function, confirming employee behaviour expectations.

Please contact Jessica Main to access your copy of this important communication, which is free of charge.



Jessica Main
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Debt Recovery – What happens after a letter of demand?

In difficult economic times, debt recovery can be a business challenge. If you have a bad debt, business protocol includes issuing a letter of demand against your debtor. In the event that this fails, the next step is to consider instituting proceedings in the Magistrates' Court.

Before you issue a complaint

Going to court should always be a last resort. We advise first trying to resolve the dispute directly with the other party. A settlement will save you time and money.

The Magistrates' Court, plaintiffs & defendants

The Magistrates' Court of Victoria deals with debt recovery claims of up to \$100,000. A plaintiff is the person issuing the legal action. A defendant is the person who has the action filed against them.

Commencing legal action

The plaintiff files a Form 5A complaint document and a Statement of Claim with the Magistrates' Court. A Statement of Claim is a factual, written description of the case and how much is owed.

Service of a complaint

The Form 5A complaint and Statement of Claim must be served on the defendant within 12 months of filing the documentation with the court. If the defendant is an individual, they must be personally served with the documents. We engage Process Servers for this task.

Obtaining judgement

If the defendant has not lodged a notice of defence with the court and you and your solicitor within 21 days of being served, the Plaintiff may obtain a default judgment.

The judgment is entered for the amount claimed, plus interest at the rate prescribed by the Penalty Interest Rates Act plus costs.

Costs of issuing a complaint

Claim amounts determine the filing fee and legal costs and vary on a scale. These are listed on the Magistrates' Court website.

What is the effect on a defendant?

A judgment (also known as an Order) is public information. This will appear on the defendant's credit rating for 5 years, even if the defendant pays the debt. It is enforceable for up to 15 years.

Business and individuals need healthy credit ratings to function in our credit-driven society. Bad credit may result in higher interest rates or outright rejection and is a significant financial penalty.

How we can help you

Our lawyers are experienced in debt recovery and we operate a successful practice in this field. We are happy to provide a free quote on your debt recovery issue and advice on the best course of action for your situation.

Want to know more about debt recovery?

We have prepared answers to the most frequently asked questions in relation to debt recovery. Entitled "Debt Recovery – FAQ's", this simple question and answer format will answer your queries. To obtain a free copy, please contact Glenn Bushett or David Brett.



Glenn Bushett
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Preferential payments – don't get caught out!

Your invoice has been paid and the money is safely banked – or so you think. You have now received a letter from the company's liquidator claiming you have received preferential treatment and that the money needs to be returned. What should you do and how could you have avoided this situation in the first place?



What is preferential treatment?

In an insolvency scenario, one of the liquidator's first tasks is to determine whether any creditors have received 'preferential treatment.' Preferential treatment occurs when creditors have been paid some or all of their debt in the 6 months prior to the company's liquidation - and presumably, at the expense of other creditors. If the company was insolvent at the time the payments were made, then the payments may be recoverable by the liquidator.

Identifying signs of insolvency

In the current economic climate, be vigilant for signs of insolvency amongst debtors. These can include:

- Payments made outside of normal trading terms.
- Cheques being dishonoured.
- Lump sum payments, rather than payment of the whole invoice.
- The need to issue proceedings to recover debt.

Minimising risk

Prevention is better than cure. We suggest you undertake the following measures to minimise the risk of trading with insolvent debtors.

- Keep a regular eye on your debtors.
- To minimise losses, close accounts at the first sign of trouble. If you continue trading and get paid, there is a good chance that you will have to give the money back down the track.
- Keep good file notes and records of any discussions. There may be a good reason why payment has been delayed. This information can be used to defend your claim to keep monies paid to you.

Claiming a defence against preferential treatment

With the assistance of our lawyers, a defence against preferential treatment can be made. This involves proving that you did not know or suspect, nor would a reasonable person have known or suspected, that the company was insolvent at the time of payment.

Lessons we have learnt

From experience, we have learnt the following:

- Liquidators prefer to settle the smaller claims rather than litigate, (i.e. for sums less than \$100,000). This is due to the cost of litigation,

but it normally requires the creditor to make a sensible offer.

- If you are concerned about the financial situation of a debtor, try and get the money from a third party (e.g. a guarantor, a spouse etc.) rather than the debtor itself.
- If payment is received from someone other than the company, it is probably not recoverable from you. In this instance be prepared to take a reduced sum.
- If you have to pay back money, you are entitled to be listed in the liquidation for the amount you are owed. Realistically, this is unlikely to result in a payment to you.

Communication from a liquidator is usually cause for concern. If you receive a letter of demand for preferential payment, it is important to seek our advice promptly.



David Brett
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Preparing your business for sale

The sale of your business is the financial realisation of many years of hard work. Like the sale of your home, it is important to take the time to prepare your business for sale. This will ensure that your business is presented to potential purchasers in the best light - attracting the best possible price.

Prior preparation is imperative. We have developed a simple checklist to assist you with this process. Remember, if you fail to plan - you plan to fail!

Good businesses are always ready to take advantage of opportunities. Even if you are not planning to sell your business, you should have these checklist items up to date. This is good business practice, making your business immediately saleable. To assist you, we offer a one hour Business Health Check. Please contact Mark Flynn to access this service.



Mark Flynn
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Business sale checklist

Documentation

- ✓ Update and document all agreements with suppliers.
- ✓ Document customer agreements, with up-to-date terms and conditions.
- ✓ Document all company policies and procedures.

Employees

- ✓ Update and document all employment agreements.
- ✓ Ensure all key employees are supportive and secured with "golden handcuffs."

Financials

- ✓ Have all financials "strength tested," to ensure optimum sale price is achieved.
- ✓ Prepare for due diligence by assembling all required financial information.

Leases

- ✓ Ensure leases for premises are in place and are readily transferable.
- ✓ Identify leased equipment and pay out or ensure transferability.

Legal

- ✓ Ensure all assets to be sold are owned by the one business entity.
- ✓ Identify intellectual property rights, ensuring they are transferable.
- ✓ Involve legal advice at an early stage.

Sale actions

- ✓ Document any initial discussions with potential purchasers.

PROPERTY ALERT – Identification is a MUST

Lawyers must now take reasonable steps to verify your identity (whether you are an individual or a corporate entity) before any documents such as a transfer of land can be lodged at Land Victoria for registration. A standard procedure must be followed and will involve a face to face interview at our offices or through a third party agent, where you must produce original identification documents.



Real estate purchases by foreign buyers

A recent trend in our property market has been an increase in the sale of Australian residential property to foreign persons. But what is the legal scenario governing such transactions?

Who is a foreign person?

A “foreign person” can be a foreign natural person, foreign corporation or a trustee of a foreign trust. In general terms:

- A foreign person is an individual who is not an Australian citizen or permanent resident.
- A foreign corporation is a corporation incorporated outside Australia or with its controlling interest held by a foreign person, corporation or trust.
- A foreign trust is a trust whose beneficiaries are substantially foreign persons, corporations or another trust.

What type of residential property can foreign persons buy?

Foreign persons must seek approval from the Foreign Investment Review Board (FIRB) before purchasing residential property in Australia.

Foreign persons are usually given approval to buy:

- Vacant land for residential development.
- New dwellings, including house and land packages and “off the plan” apartments (whether to live in or not).

In addition, foreign persons who hold a temporary resident visa are normally given approval to buy one established dwelling to be used as their residence in Australia. This must be sold when they vacate it or when their visa expires. Under no circumstances can a foreign person buy an established home.

Generally, developers obtain pre-approval from the FIRB to sell apartments in a development to foreign persons. In these circumstances there is no need for the foreign person to seek individual approval.

Taxes, fees & penalties

From December 1, 2015 FIRB application fees will apply for residential property as follows:

- \$5,000 on purchases under \$1 million.
- \$10,000 on purchases over \$1 million, increasing in increments of \$10,000 for every extra million in the purchase price.

As of 1 July 2015 additional stamp duty of 3% applies to foreign purchasers, thus increasing the top duty rate from 5.5% to 8.5%. From 31 December 2015 a land tax

surcharge of 0.5% will also be applied to foreign persons.

An enhanced compliance/penalty scheme will also commence from 1 December 2015, administered by the Australian Taxation Office. There will be greater compliance activities with resultant prosecutions and civil and criminal penalties for offenders.

Suggestions for vendors

Your contract must include a warranty from any foreign buyer that consent of the FIRB is not required to purchase your property. It is also important that your real estate agent checks and records buyer identification details, such as a passport or drivers licence, at the time of sale.

How we can help foreign buyers

Our lawyers are well versed in the intricacies of property purchases by foreign persons. The rules surrounding the purchase of Australian real estate by foreign persons are complex. The applicable fees and taxes are substantial and the new compliance/penalty regime is robust and significant. Given this situation, legal advice should be sought by foreign buyers before any decision is made to buy Australian real estate.

Anne Marie Gasbarro (pictured)
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Christmas holiday office closure

McKean Park will close for the Christmas and New Year period on Wednesday December 23, 2015 at 5.00pm and will reopen for business on Monday January 4, 2016 at 8.30am.

On behalf of us all at McKean Park, we wish you a happy Christmas and a safe holiday season.

Introducing our receptionist

Bernadette Coyle is the face and voice of McKean Park. As our receptionist, Bernadette is the first point of contact when you visit our offices or make a telephone call to our firm. Bernadette joined McKean Park in 2011. A self-confessed "people person," Bernadette enjoys building a professional and friendly rapport with our clients.

When not at work, Bernadette "lives and breathes" football. She is a proud Gold member of the Richmond Football Club. Married earlier this year, she enjoys life with her new husband.

Check out our new website & enter our competition!

We are proud to announce the launch of our new website! Developed to enhance your online experience, our website is mobile compatible and user friendly. It features information on our firm, our services and our personnel.

To celebrate we are running a website competition. By correctly answering the simple question below, you can go into the draw to receive one of five \$100 Gold Class gift cards.

All entries must be received by Thursday December 17. Email your answer via the online email link on the *Contact* page of the website. Good luck!

QUESTION: What is the name of our allied law firm in Sydney?

HINT: To find the answer go to the *About* section of our website. Click on the *Our Alliances* page to find the name of our allied firm in Sydney. Pigott S _____ (7 letters)

www.mckeanpark.com.au

Our expertise

- 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

Disclaimer

You should not act on the basis of material in this newsletter as the contents are of a general nature only and may be liable to misinterpretation in particular circumstances. Changes to the law occur quickly. Do not act on the contents of this newsletter without first obtaining advice from McKean Park Lawyers.

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