



WILLS, ESTATES, SUCCESSION PLANNING & ESTATE LITIGATION

Should you pay a lawyer to apply for a grant of probate?

For many people their first experience of being an executor occurs after the death of a family member or friend. Aside from the grief and confusion, you now find yourself in uncharted territory. So, where do you start and what should you do?

Increasingly, many first-time executors are turning to the Internet for advice. With a preponderance of cheap online DIY Estate Administration kits available, some executors feel that they no longer need to pay for a lawyer to obtain a grant of probate and decide to “do it themselves”.

After seeing a growing number of executors get into legal difficulties, we explain the reasons for obtaining expert legal advice from the outset.

What is a grant of probate?

A grant of probate is the process by which the Will is validated by the Supreme Court of Victoria. Once

probate has been granted, the executor can then deal with the assets and liabilities of the estate.

What does the executor need to do?

An executor is responsible for the following:

- Determining what debts and liabilities have to be paid by the estate.
- Locating and securing physical assets owned by the deceased both individually, jointly and through a company or trust.
- Locating assets held by banks, share registries, insurance and superannuation companies.
- Working out the value of all assets and the requirements for dealing with them.
- Ensuring that there are no other issues, such as ongoing legal proceedings, which could impact the estate.

Sometimes this process can be quite simple. But if the estate is complex, or if the deceased was a poor record-keeper, obtaining this information can be quite onerous and time consuming.

Once the information is assembled, the executor needs to assess whether a Grant of Probate is needed to deal with the assets, and if so, start the application process.

Why use a lawyer?

Our Probate Team can assist you by:

- Obtaining the relevant information about the deceased’s assets and liabilities.

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- Liaising with financial institutions, share registries, brokers, accountants and other third parties on your behalf.
- Preparing the Probate application. This includes affidavits and exhibits, financial institution forms to close accounts and deal with shares, authorities and statutory declarations, as required.
- Providing advice about the interpretation of the Will, unusual procedural issues which may need to be addressed (such as different spelling of names, cause of death, formality of Will etc.), debts of the deceased unknown to the executor and potential claims against the estate.
- Finally, the distribution of assets to beneficiaries in accordance with the Will.

We strive to make the process of applying for Probate and administering the estate as efficient and stress-free as possible.

This ensures that executors fulfil their legal obligations whilst minimising the risk of personal liability, which may arise if mistakes are made.



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Airbnb – issues for owners & tenants

The Airbnb phenomenon has hit Melbourne. A quick search of the Airbnb website will show how many people are converting rooms in their homes and outfitting investment properties in your local area. However, before you jump on the bandwagon and list your property, there are a range of legal issues that you should consider.

Airbnb legal considerations

1 Planning laws

Do local planning laws allow your premises to be used for Airbnb accommodation? A quick call to your council will answer this for you.

2 Building law

Does your building comply with building law enabling the use of the premises for Airbnb accommodation? Different construction requirements apply to buildings depending on their classification (i.e. residential homes and motel/hotels are classified differently). Occupancy permits are issued on the basis of a building's classification and a person is prohibited from occupying a building in breach of the occupancy permit.

3 Mortgagee consent

Most mortgages prohibit borrowers from parting with possession or occupation of the property without first obtaining the written consent of the lender. Therefore, the lender's written consent may be required before you list on Airbnb.

4 Insurance – occupation issues

Under most insurance policies you should be able to identify who is in occupation of your premises at all times. What steps will you take to verify the identity of the person who is occupying your Airbnb premises?

5 Insurance – property damage, personal injury and contents cover

Will your insurance on the property including property damage, public liability and contents be affected? Contact your insurer to check your property is protected to cover the potential liabilities arising from Airbnb occupancy.

6 Tax Implications

Any money-making enterprise will have tax implications. Money paid by an occupant/guest will be assessable rental income. Expenses can only be claimed in the area of the premises subject to the Airbnb arrangement. If the property is your principal place of residence it would be exempt from capital gains tax. However, under an Airbnb arrangement there may be a loss of the whole or part of the capital gains tax exemption. Also, if you conduct an Airbnb business and income derived from it is above \$75,000 per annum, you may need to register for GST.

7 Residential Tenancy Agreements

If you are a tenant under a Residential Tenancy Agreement, you should obtain your landlord's written consent before entering into Airbnb. If you are a landlord and wish to prevent your tenant from using the property as Airbnb, you should include an appropriate clause in your Residential Tenancy Agreement.

8 Body Corporates/Owners Corporations issues

Owners Corporations sometimes pass rules restricting lot owner's rights as to the use of their apartment or unit. A recent Supreme Court ruling has indicated that an owners corporation rule prohibiting the use of an apartment or unit from letting as short stay accommodation will probably be invalid.



Clubs – protect your members by incorporating!

For many Australians, leisure time involves membership of a club. Sporting groups such as cricket, tennis and football clubs and community service organisations such as Rotary, form the fabric of our society. Other clubs are based around a hobby or interest or a shared ethnicity or cultural background.

The importance of incorporation

Ensuring that your club has a sound legal structure is vital. As a well-established means of legal protection many clubs incorporate. In the eyes of the law, once incorporated the club becomes a ‘person,’ separate from the human persons who are its members. Therefore, as an ‘artificial person’ the club becomes solely responsible for club debts.

Don’t make your members liable!

Without incorporation, members are individually liable for club debts. Even worse, the person to whom the debt is owed can sue selected members of the club, and they in turn, must sue other members to recover their shares of the debt and costs.

What types of debts are involved?

Debts can be everyday costs resulting from purchases, services or trading. They can include damages for injuries, loss or wrongs suffered by a club member. Damages incurred by a third party as a result of something done by the club will also constitute a club debt.

How do you incorporate?

Firstly, your club must comply with the incorporation laws of its State or Territory. Secondly, your club Rules must conform to these laws and be registered as a public document. Thirdly, the name of your club must contain something which indicates that it is incorporated such as the word “Incorporated” or its

Owners Corporations Amendment (Short Stay Accommodation) Bill 2016

Approximately 45,000 people live in central Melbourne, Southbank and Docklands - most in apartment buildings. The peaceful enjoyment of these occupiers has been affected by other apartments being used for weekend parties such as bucks’ parties, footy trips and schoolies week.

At the time of writing, the *Owners Corporations Amendment (Short Stay Accommodation) Bill 2016* is going through the process of being approved by Parliament. It is anticipated it will be passed early this year and come into force on 1 July 2017. The Bill is aimed at regulating accommodation arrangements and curbing inappropriate short-stays. An important feature of this Bill is

that both the Airbnb provider and the short-stay occupant may be liable to pay loss of amenity compensation.

Airbnb – what to do?

Airbnb has legal pitfalls for the unwary. Before signing up, we suggest you access our services. We can assist with an individual analysis of your property legal risk scenario.



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abbreviation "Inc." With our assistance, your club can be quickly registered for incorporation anywhere in Australia.

Rotary Clubs – specific issues

Incorporation protection for Australian Rotary Clubs is more complicated. As part of an international organisation, Rotary clubs must use the Standard Rotary Club Constitution (SRCC) and, subject to variations, the Recommended Rotary Club Bylaws (RRCB).

These documents are not drafted to comply with the incorporation laws of any particular country or state or the fact that many countries do not have incorporation laws. They are designed for use by unincorporated clubs and must be rejected when used to apply for incorporation in Australia.

Rotary Clubs – the problem of using Model Rules

To overcome this problem, many Rotary clubs mistakenly turn to the State's Model Rules. Although

appearing to be an easy way to incorporate they potentially create many problems and, in fact, solve none.

Once incorporated, Rotary clubs have no option but to sideline the Model Rules or 'dummy rules' and conduct their business under the provisions of the SRCC and RRCB. Potential dangers, especially in relation to insurance and management can result.

Should a dispute arise, a Court would regard the Model Rules as the legal rules of the club. If this results in the club being wound up, its funds must be distributed in accordance with its Model Rules and not in accordance with its Rotary documentation. This includes the funds of both the Club's service projects and club operations accounts.

It is so simple for anyone suing your club, to discover it is operating on Rules other than those it is supposed to. Armed with that knowledge learned counsel will have a field day

cross examining your club officers and witnesses, perhaps even you!

What should Rotary clubs do?

None of these problems need occur. The answer lies in the creation of Rules that comply with the requirements of the State or Territory under which the club is incorporated, as well as those of Rotary International. McKean Park has drafted, and regularly updates such rules. These can be provided electronically to your club upon request.



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Unfair terms in small business contracts

From 12 November 2016, amendments made to Australian Consumer Law have extended the application of consumer-focused unfair contract term protections to small business.

What is the aim of the legislation?

The aim of the legislation is to protect small businesses from “unfair” contract terms in standard form contracts. This will apply to any contract where either party is a small business.

What is a small business?

A small business is defined as being a business with less than twenty (20) employees. This is assessed on a headcount basis at the time the contract is either entered into, varied or renewed. The headcount also includes casual employees who are employed on either a regular or systematic basis.

What is a standard form contract?

A standard form contract is not defined by the legislation. However, it ought to be interpreted as a contract that is provided by one party to another on a “take it or leave it” basis.

Does the amount of the contract matter?

The value of the contract is relevant.

As such, the “upfront price” required by the contract must:

- not exceed \$300,000.00, if the contract is for twelve (12) months or less; or
- not exceed \$1,000,000.00, if the contract is for a duration of more than twelve (12) months

What would deem a contract term to be unfair?

A term in a small business contract will be unfair if it:

- causes a significant imbalance in the parties’ rights and obligations under the contract,

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- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term,
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Where does the burden of proof lie?

The burden of proof will be imposed on the party seeking to rely on the term or condition. As such, they must prove that the term is reasonably necessary to protect their legitimate interests.

In determining whether a term is unfair, a Court must take into account the following:

- the extent to which the term is transparent, and
- the context of the term in the contract as a whole.

A term will be transparent, if it is expressed in reasonably plain language, is legible, clearly presented and readily available to a party affected by the term.

What if the term is proven to be unfair?

If a term is held to be "unfair" it will be void and unenforceable. However, the contract itself will continue to bind the parties if the contract can operate without the unfair term.

What types of contracts are involved?

The unfair terms legislation applies to many different types of contracts. This includes leases, supply contracts, website terms and conditions, contractor agreements and many other commercial agreements.

What action should be taken?

As a result of these changes, all terms and conditions used in standard form contracts should be reviewed. This is important, as they may be subject to the amendment introduced into the Australian Consumer Law.

If your business relies on standard form contracts and regularly contracts with individuals or small businesses, you should seek our advice. We will assist you to ensure compliance with the new unfair contract terms regime.



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Welcome to Phoebe Blank

It was with pleasure that we welcomed Workplace Relations lawyer, Phoebe Blank, to McKean Park in July 2016. Phoebe was admitted as a lawyer in 2013, having attained a Bachelor of Laws and Bachelor of Commerce at Deakin University.

Since graduating, Phoebe has practiced principally in the field of workplace relations. She enjoys assisting clients with practical solutions to bring about a resolution to their workplace relations issues.

To further her studies, Phoebe is also completing a Masters of Employment Law at The University of Melbourne. Outside of work, Phoebe enjoys long distance running. She is currently training to compete in the Great Wall of China Marathon in May this year. Welcome to the team Phoebe!

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.

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