DonaldsonWalsh Lawyers

DWREPORT | WINTER 2011

SERVICE PROFILE

Unique insight now available in personal injury law

Introducing Donaldson Walsh Adelaide Personal Injury Lawyers

As DW's long-term clients would be aware, the firm acted on behalf of the Motor Accident Commission in South Australia's Compulsory Third Party (CTP) insurance scheme for the past seven years.

Not surprisingly, that experience taught the practitioners involved, many of whom had previously represented plaintiffs, just about everything there is to know about the workings of the personal injury legal system. It was clear that the depth of that accumulated expertise - that unique insight - would be of enormous benefit to personal injury plaintiffs. So the decision was taken to establish a specialist DW practice area in that field.

Midway through this year, **Adelaide Personal Injury Lawyers** was born.

Senior practitioners balancing professionalism and compassion

According to DW Managing Partner John Walsh, the Adelaide Personal Injury Lawyers team offers clients not only unique insight, but also vital sensitivity and a great deal of confidence that the right steps will be taken at the right time.

"It's a very experienced team," said John. "They've supported clients through devastating, life shattering events. So they understand - as well as anyone can - what their clients are going through. They're very aware that any delays in proceedings whatsoever will be likely to exacerbate the distress that their clients are in.

"You can be sure they'll do everything in their power to keep things on the right track and progressing."

The team is led by Special Counsel Joan Miller, who has more than 20 years experience in private practice, along with several in senior roles within state and federal government departments. Working with Joan are Deb Carroll, who has over 30 years in the field, and Kate Keough, with 12 years under her belt.

"We're all highly accomplished senior practitioners," said Joan. "We're skilled negotiators and litigators. We have strong, established relationships with all major insurers, and the kind of full-spectrum expertise that only comes from having seen things from both sides of the fence."

Joan was keen to reinforce John's feelings regarding the need to keep claims moving.

"As John said in the media, we all appreciate that when someone is seriously injured or killed as a result of another party's negligence or wrongful action, a successful claim can provide at least some compensation for loved ones," she said.

"But a poorly conducted case can only make things worse. It must be handled effectively, efficiently and sensitively by an experienced team that intimately understands the system.

"I'm proud to say that DW Adelaide Personal Injury Lawyers can provide that team."

Comprehensive service, flexibly delivered

DW Adelaide Personal Injury Lawyers offers advice and representation for clients in all forms of personal injury claims, including:

- **Motor vehicle accidents**
- **Medical negligence**
- **Public liability and property damage**

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"The first 30 minutes of the initial consultation is always free of charge"

STRAIGHT TALK

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- **Wrongful death and dependency**
- **Infant claims**
- **Nervous shock**
- **Total and permanent disability.**

The team also endeavours to be as accessible as possible in the delivery of their services, Joan said.

"Our offices are centrally located near the Courts in the CBD, with wheelchair access. But we're also happy to make hospital visits and out-of-hours appointments when required.

"And the first 30 minutes of the initial consultation is always free of charge."

If you're in need of legal advice on a personal injury matter, or have a loved one or friend who is, DW Adelaide Personal Injury Lawyers can provide immediate assistance.

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CASE IN POINT | Christopher Bruce

Shaping Your Brand

Bodum v. DKSH Australia Pty Limited [2011] FCAFC 98

A recent Full Federal Court decision has added support to the position that reputation can reside in elements of a trader's products (or services) over and above the brand name.

In the recent decision of ***Bodum v DKSH Australia Pty Limited*** [2011] FCAFC 98 the Full Federal Court held that the three-dimensional shape of a product can acquire a unique reputation that is separate to, and distinct from, the brand name associated with the product.

The decision is significant as there have been few Australian cases that recognise that independent reputation can reside in the shape of a product (or indeed any other element which does not involve the brand name – for example the colour or the "get-up"). Previous cases which have been successful in that regard have included the contoured Coca-Cola bottle and JIF lemon-shaped container, which were determined by the Court to have reputations inherent in their shape and/or features.

Australian law provides that unique three-dimensional shapes are entitled to protection under common law. In addition, registration of a shape as a trade mark (commonly referred to as a "shape mark") may be granted if the product shape is capable of distinguishing the product of the applicant trader from products of competing traders.

The number of registered shape marks within Australia is small when compared to the number of registered trade marks for words and logos. This can be attributed largely to the historical difficulty for a trader in proving that the product shape is capable of distinguishing the trader's product from other products in the same field. The difficulty in registering a shape mark was apparent in the 2009 Federal Court decision in which chocolate manufacturer Guylian failed in its attempt to register the seahorse-like shape as a shape mark for its praline chocolates.

The Federal Court's recent decision in the *Bodum case* has indicated that Courts will recognise and protect unique aspects of branding, not just traditional rights associated with the brand name.

"...registration of a shape as a trade mark (commonly referred to as a "shape mark") may be granted if the product shape is capable of distinguishing the product of the applicant trader from products of competing traders."

"The proliferation of "knock off" products, usually manufactured overseas and imported into Australia has meant that businesses need to consider the full range of legal protections and accompanying remedies available to them."

Background

In 1986 Bodum Group [**Bodum**], a Danish homewares company, began marketing and selling its Chambord Coffee Plunger in Australia. Bodum had engaged in extensive marketing and sales of its product since its introduction. Its marketing and sales strategy included emphasising the appearance of the product, including by in-store displays, which involved displaying the product outside of the packaging.

In 2004 DKSH Australia Pty Limited [**DKSH**] commenced importing and selling the Euroline Coffee Plunger within the Australian market. This product was manufactured overseas and had a similar appearance to the Bodum Coffee Plunger. Bodum considered that the Euroline Coffee Plunger could mislead, deceive or otherwise cause confusion amongst consumers in thinking the Euroline Coffee Plunger was manufactured by or was otherwise connected to Bodum.

As Bodum did not own a registered shape mark for its Bodum Coffee Plunger, or a registered design within Australia, Bodum could not take action for trade mark infringement or for design or copyright infringement. Instead, Bodum took action alleging DKSH had engaged in "passing off" and breaches of the then Trade Practices Act (now the Competition and Consumer Act).

The initial decision of the Federal Court held that DKSH had not engaged in action that amounted to passing off or misleading and deceptive conduct through its manufacture and sale of the Euroline Coffee Plunger in competition with the Chambord Coffee Plunger.

"As Bodum did not own a registered shape mark for its Bodum Coffee Plunger, or a registered design within Australia, Bodum could not take action for trade mark infringement or for design or copyright infringement."

Bodum appealed the decision, with the appeal being heard by the Full Federal Court. In its deliberations the Court considered:

- the minor differences between the Bodum Chambord Coffee Plunger and the Euroline Coffee Plunger, when compared side-by-side;
- the emphasis placed by each company on the appearance of the coffee plunger, including the in-store displays in which both of the coffee plungers were displayed outside of their packaging;
- the substantial reputation the Chambord Coffee Plunger shape had acquired within Australia, including its "iconic status" that was achieved, in part, by a humorous reference to *Bodum* in the popular television series *Kath & Kim*;
- DKSH's obligation to identify its Euroline Coffee Plunger in a way that made it clear to consumers that they were not viewing a coffee plunger associated with Bodum.

"Bodum was successful in arguing that DKSH had committed a passing off and had engaged in misleading and deceptive conduct."

Ultimately the Court determined that the Chambord Coffee Plunger had a substantial secondary reputation in the shape of its product and was therefore entitled to protection of its reputation, independent from the brand/product name. Bodum was successful in arguing that DKSH had committed a passing off and had engaged in misleading and deceptive conduct.

Comment

Businesses can take some comfort from this decision that the Courts recognise that protection of a brand extends further than just the name or logo.

The proliferation of "knock off" products, usually manufactured overseas and imported into Australia has meant that businesses need to consider the full range of legal protections and accompanying remedies available to them.

Businesses should consider whether shape marks and/or registered designs are worthwhile means of protecting three-dimensional aspects of their products. These are cost-effective options that provide protection additional to common law grounds.

Donaldson Walsh can assist in advising in relation to protection strategies for brands and all forms of intellectual property.

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"Businesses should consider whether shape marks and/or registered designs are worthwhile means of protecting three-dimensional aspects of their products."

INSIGHT | Alastair Donaldson

Use Restraint in Restraints of Trade

Australian Case Studies - Lessons to be Learned

"Although the basic principles relating to restraint of trade have been well settled for a long time, the competing issues and differences in each situation mean that there is a continuing stream of cases which deal with this topic."

What is a restraint of trade?

Restraints of trade contracts, or conditions in contracts, occur in many situations. For example, these may occur in a licence of a trade mark or other intellectual property where the licensee is only able to use the trademark or other IP for particular products or in leases where only certain activities are permitted. However, the most common examples of restraint of trade provisions which are considered by Courts are conditions restraining competition by:

- an employee after termination of employment; and
- the vendor of a business after the sale of the business.

Are restraints of trade enforceable?

A restraint of trade condition may be enforceable, but there are a number of impediments. Whether or not a restraint of condition is enforceable often requires a fine balance of competing issues. Although the basic principles relating to restraint of trade have been well settled for a long time, the competing issues and differences in each situation mean that there is a continuing stream of cases which deal with this topic. Some of the Australian cases from recent years illustrate the issues that can arise.

The basic premise: Restraints of trade are void

The starting point in consideration of any restraint of trade is that it will be void, as being contrary to public policy, unless it can be shown to be reasonable to protect legitimate interests of the party seeking to enforce the restraint, and having regard to public policy. This was established definitively in ***Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd*** (1894) AC 534. Although the basic principles have been established for a long time, the application of these principles continues to give rise to difficulty in many situations.

How are restraints of trade justified?

The onus is on a party seeking to enforce a restraint of trade to demonstrate that it is reasonable and valid. It is, generally, reasonably easy to show that there is a valid interest which requires the protection of a restraint of trade in a contract for a sale of a business, if the vendor is paid for goodwill of the business. Goodwill is a concept which is very difficult to define, and goodwill of a business may attach to various components of the business, including the name of the business, its location and licences which may be held by the business.

However, there will often also be an element of personal goodwill of the vendor. If the vendor were able to compete against the purchaser following the sale, then clearly, this may substantially diminish the goodwill of the business that has been sold, and for which the vendor has received consideration.

"The starting point in consideration of any restraint of trade is that it will be void, as being contrary to public policy, unless it can be shown to be reasonable to protect legitimate interests of the party seeking to enforce the restraint, and having regard to public policy."

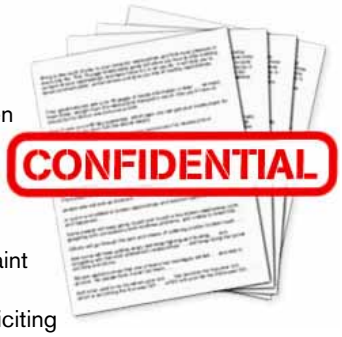
An example of a case in which a restraint of trade protecting a vendor has been held to be valid (although not without complications that are mentioned later) is ***Positive Endeavour Pty Ltd v Madigan & Ors*** [2009] SASC 2081. The Full Court of the Supreme Court of South Australia held a restraint against vendors of shares in a finance broker company to be enforceable. The Court found that if the vendors of the shares were able, directly or indirectly, to compete and to arrange finance for customers of the business, *trail* commissions may not be received by the purchaser, and what the purchaser bought was a right to trail commissions previously earned by the vendors.

"It is, generally, reasonably easy to show that there is a valid interest which requires the protection of a restraint of trade in a contract for a sale of a business, if the vendor is paid for goodwill of the business."

Another recent case that has affirmed that interests can legitimately be protected by a restraint of trade is ***BDO Group Investments (NSW-VIC) Pty Ltd v Ngo*** [2010] VSC 2006. In this case, restraints of trade were contained in a sale agreement for a business, a unit holders deed and an employment agreement.

Restraints against employees

It is, however, often harder to see that there are legitimate interests which will support a restraint of trade against a former employee of an employer. One of the interests often suggested as supporting the reasonableness and validity of the restraint of trade against a former employee is the protection of confidential information of the employer. However, information which is genuinely confidential can be protected by other actions, as it is an obligation of a former employee not to use or to disclose confidential information of the former employer.



Although an action to prevent misuse of confidential information by a former employee may be available, this is often difficult to ascertain or enforce in practice, and a restraint of trade may be valid for this purpose.

An example of a case in which a restraint of trade against a former employee for competition (in general, other than soliciting specific customers) was invalid and unenforceable was ***Marlov Pty Ltd v Murat Col & Anor*** [2009] NSWSC 50. The purported restraint was contained in an employment contract of a real estate agent. It was for a period of 6 months, and an area of 7.5 kilometres from the location of the agency. Although this restraint was not substantial, the Court found that it was not reasonable because of a number of factors, including:

- the fact that the agency did not have a substantial number of recurring customers, and Mr Col, the former employee, had not developed any special relationships with customers;
- Mr Col was only one of a number of employees, and there was no particular evidence that he had contributed substantially to establishing goodwill of the business;
- very little of the agency's business was confidential.

"If a restraint of trade is justified, as being reasonable in the circumstances, the enforceability and extent of the restraint will depend on the terms of the contract containing the restraint. Accordingly, it is important, for a party seeking to rely on a restraint, that this be drawn carefully."

The judge (Debelle AJ) considered that the restraint was simply directed to restricting competition, not to protecting any legitimate interest.

There were other factors, but the case does illustrate that simply attempting to restrain an employee from competing after termination of employment may not be reasonable.

Similarly, in ***Blackmagic Design Pty Ltd v Ian Overliese*** [2010] FAC 13 an IT company producing software for TV and film production was unsuccessful in restraining former employees from engaging in "*a business activity, or operation that is the same as, or substantially similar to, or competitive with the Company's business or any material part of it*". The Court, however, did impose restraints on use of confidential information.

The terms of the contract

If a restraint of trade is justified, as being reasonable in the circumstances, the enforceability and extent of the restraint will depend on the terms of the contract containing the restraint. Accordingly, it is important, for a party seeking to rely on a restraint, that this be drawn carefully.

An example of a case in which the contract may not have served the party relying on it particularly well is ***WPS Enterprises Pty Ltd v Peter Frederick Radford*** [2009] VSCA 22. A company sold a wheel repair business, and the respondent Peter Radford, a director, was a party to the agreement, which contained a restraint, for a period of five years within Victoria which, among other things, required that the vendor and the director should not:

- *be competitive, carry on or be financially or otherwise engaged in any undertaking which in any capacity whatsoever carries on a business which is competitive with the business;*
- *on their own account or for any other business or undertaking compete or seek to compete with the business of the Purchasers or interfere with the relationship between the Purchasers and its clients or employees.*

A further clause of the contract expanded the meaning of "*carry on or be financially or otherwise interested, engaged or concerned with*" to include concepts such as:

- *management without salary, advising or influencing a competitive business whether from time to time or on a continuing basis, whether or direct remuneration or benefit or otherwise; or*
- *establishing or being interested in or influencing a competitive business through any association with any person, relative, nominee or trust… .*

Unfortunately for the plaintiff, however, the words "*interested*" and "*or concerned with*" did not appear in the restraining clause.

"Although an action to prevent misuse of confidential information by a former employee may be available, this is often difficult to ascertain or enforce in practice, and a restraint of trade may be valid for this purpose."

Accordingly, the expanding clause did not have the effect of extending the scope of the restraint.

The respondent Peter Radford assisted his son and a partner to establish a competitive wheel repair business in various ways which were held by the Court, whether separately or in the aggregate, not to infringe the terms of the contractual restraint. This was a close call, and Robson AJA of the Victorian Supreme Court found that although Mr Radford had succeeded in defending the action, his actions were similar to those in other cases where defendants had been criticised as dishonourable for assisting others to do what they could not do themselves, and he indicated that this may be reflected in denying costs to Mr Radford (although this was not determined in the Judgment).

Cascading/ladder clauses

Because of the difficulty, particularly in advance, in establishing whether the scope of a restraint trade is valid, this has given rise to a practice of drafting contracts containing restraints of trade which include a range of restraints for different areas, periods and subject matter. These various elements of restraints are intended to be combined, and to be severed from the contract if they are too wide to be reasonable. These are known as "*cascading*" or "*ladder*" clauses. These have not always found favour with Courts. Templeman J in the Supreme Court of Western Australia in ***Workpac Pty Ltd v Steel Cat Recruitment Pty Ltd*** [2008] WASC 238 cited comments of Spender J in ***Lloyds Ships Holdings Pty Ltd v Davros Pty Ltd*** [1987] 72 ALR 643 when he said that, whether a contract with clauses in the nature of *cascading* or *ladder* clauses:

> "*… is successful in defining enforceable restraints or is unsuccessful in so doing, comes down to whether the exercise amounts to a genuine attempt to define the covenantee's need for protection, with the agreement as to severance as a precaution against the 'all or nothing' nature of the Court's tests for reasonableness, or whether the exercise is simply one where the parties have left to the Court the task of making their contract for them.*
>
> *One might think the more numerous the variables, and the more mechanical and indiscriminate the combination of variables, the more likely would be a conclusion that the exercise is of the latter kind*".

The Court in the ***Workpac*** case said that:

> "*A factor which suggests that a series of cascading covenants is not a genuine attempt to define a covenantee's need for protection is that the restraint of trade provisions are in a standard form*".

Cascading or *ladder* clauses have, however, received some recent support in ***OAMPS Insurance Brokers Ltd v Hanna*** [2010] NSWSC 781. The defendant, Mr Hanna, was an insurance broker who had been employed for a substantial time, some 30 years, and on his resignation commenced employment with a competitor. A restraint deed contained a combination restraint clause with some 9 different restraints

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Use Restraint in Restraints of Trade

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ranging from 15 months to 12 months and from across Australia to across metropolitan Sydney. The Trial Judge decided that a restraint specifically relating to 17 clients and for a period of 12 months was reasonable and enforceable. This was upheld by the Court of Appeal of the NSW Supreme Court.

Restraint clauses do not always have to be expressed in an obvious "*cascading*" or "*ladder*" fashion, with distinct elements in separate clauses, for a Court to select elements of the restraint which may be upheld. In ***Positive Endeavour v Madigan & Ors*** mentioned above, the Full Court of the Supreme Court of South Australia found that a "*blue pencil*" approach could be used to excise some elements of a restraint which were considered to be "*offending*" by reason of being too wide and unreasonable. The restraints which were deleted related to customers who had been customers prior to completion of the sale, rather than at completion, and by deleting references to new loans, rather than refinancing.

Parties to the restraint

As a restraint exists only by reason of contract, it will only bind parties to the contract. It is often necessary to consider whether other parties, particularly directors or shareholders of a company which is a vendor, or otherwise parties who are to be restrained, should also be made parties to the restraint.

Severance

If a Court is to be able to select elements of restraints of trade, whether in a *cascading* clause or by a *blue pencil* approach, it is necessary for the Court to determine that it is possible to sever the offending provisions, and for the contract to remain otherwise effective. For this reason, it is common to include a specific clause permitting severance of void provisions in a contract containing a restraint of trade.

Need for restraint in restraints

The message from the numerous cases relating to restraint of trade is that Courts do proceed from the premise that a restraint is void, unless it can be shown to be reasonable, and that it is necessary for the party seeking to enforce the restraint to show that it is reasonable. A party wishing to include a restraint of trade in a contract should ensure that it is carefully drafted, but that it does not go too far.

"A party wishing to include a restraint of trade in a contract should ensure that it is carefully drafted, but that it does not go too far."

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The Principle of Privilege

Shh.....Don't "Waive" it Goodbye

Are your communications privileged?

Privilege is the principle pursuant to which communications between a lawyer and client are considered confidential and cannot be compelled to be disclosed to another party.

However, the principle of privilege is subject to a number of exceptions and rules, which can result in privilege being waived and the confidential nature of the communication being lost.

What communications are privileged?

The rationale behind the principle is that privilege exists to serve the public interest in the administration of justice by encouraging clients to be full and frank in the disclosure of information to their legal advisers.

However, not everything that you tell your lawyer is subject to the principle of privilege.

A privileged communication can be written, for example, a letter, email or other document, or it can be an oral communication such as a conversation between you and your lawyer. However, in either case, the communication has to be made for the dominant purpose of:

1. being provided with legal advice; or
2. for use in current or anticipated Court proceedings.

For example, if a document is already in existence (such as a financial statement of a company), and it was not produced for the dominant purpose of you being provided with legal advice or for use in current or anticipated Court proceedings, that document will not be privileged and excused from production, even if you subsequently provide a copy of it to your lawyer.

"...the principle of privilege is subject to a number of exceptions and rules, which can result in privilege being waived and the confidential nature of the communication being lost."

The communication must also be of a confidential nature. So, for example, the mere fact that you have seen a lawyer is not privileged and your lawyer can be compelled to disclose the names of their clients.

There must also be no vitiating factors which override the need for confidentiality. For example, if the communication was made for the purposes of facilitating the commission of a crime or fraud, it will not be privileged.

"There must also be no vitiating factors which override the need for confidentiality."

"The rationale behind the principle is that privilege exists to serve the public interest in the administration of justice by encouraging clients to be full and frank in the disclosure of information to their legal advisers."

How to keep your privilege?

Whilst lawyers are under a duty to protect their clients' privilege, there are also things that you can do to ensure that your privilege is not waived.

Privilege will be waived when there has been a disclosure of the substance or effect of the communication to another party, which is inconsistent with the maintenance of confidentiality. This is because privilege only protects confidential communications and once the substance of the communication has been disclosed, it is considered to be inconsistent to protect the communication from further disclosure.

Some practical tips to ensure that you do not waive your privilege include:

- not disclosing to another person the nature of legal advice provided to you;
- not providing to another person copies of any written communications received from your lawyer;
- if you are involved in negotiations or Court proceedings with another party, there is no need for you to communicate with them generally your lawyers should deal with them or their legal representatives, as the case may be, on your behalf.

"Privilege will be waived when there has been a disclosure of the substance or effect of the communication to another party, which is inconsistent with the maintenance of confidentiality."

For example, if you were to inform a third party that you had received legal advice, without disclosing the substance or effect of that advice, you will not have waived your privilege. On the other hand, if you were to say "I have spoken to my lawyer and they have advised me that I am not liable because …", then you will most likely have waived your privilege.

Privilege can also be waived when a privileged document (i.e. a letter or email from your lawyer to you, or a written opinion from a barrister) is either intentionally or unintentionally (if fairness dictates) provided to another party.

Consequences of Waiver

Once privilege has been waived, another party (such as an opponent in Court proceedings) can demand that your lawyer disclose the legal advice and provide them with a copy of any documents recording that advice. Obviously, if this were to happen during Court proceedings, it could have a devastating effect on your case.

Some practical reasons for not waiving your privilege are:

- You do not want to disclose your hand before you are ready to. A letter from you to your solicitor may state an amount for which you would be prepared to settle a claim. If this is made known to the other party, you will have lost the chance to negotiate a higher amount.

- You do not want to point out any weaknesses in your case to the other party. A letter of advice from your lawyer or your barrister may say that they do not consider your case, or aspects of your case, to be particularly strong. If this information was to get into the hands of the other party, obviously it will significantly reduce your negotiating position and prospects of success.
- You do not want to direct the other party towards a line of enquiry that may assist them in making out their case. For example, your lawyer may have written to you advising that the other side's case for breach of contract was weak but that if they raised a particular issue, which had not yet been raised, then the claim would be stronger.

"Once privilege has been waived, another party can demand that your lawyer disclose the legal advice and provide them with a copy of any documents recording that advice. Obviously, if this were to happen during Court proceedings, it could have a devastating effect on your case."

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CASE IN POINT | Alastair Donaldson

A "Sleeper" for Director Liabilities?

Phoenix Constructions (Queensland) Pty Ltd v Coastline Constructions (Aust.) Pty Ltd and Ors [2011] QSC 167

Former rugby league player and high-profile businessman, Jarrod McCracken, has launched an appeal against a decision of the Queensland Supreme Court **(Phoenix Constructions (Queensland) Pty Ltd v Coastline Constructions (Aust.) Pty Ltd and Ors [2011] QSC 167)** ordering him to pay $1.5 million in damages, more than $500,000 in interest and a further amount for costs (taking the total figure close to $3 million).

Justice Kerry Cullinane, in a judgment delivered in Townsville, handed down the orders after McCracken, the former sole director and shareholder of Coastline Constructions (Aust.) Pty Ltd [the Company], executed a variation of a joint-venture agreement that enabled his wife to benefit from the release of land from the joint venture, and deprived the Company of an asset, in an attempt to defeat any claims by the plaintiff against the Company.

What makes this decision very unusual – if not unique – is the application by the court of section 1324 of the *Corporations Act 2001(Cth)*. Previously, directors have been held to have no duty to creditors (although directors have long been liable for insolvent trading in proceedings brought by a company liquidator) and, as such, creditors have had no standing themselves to bring proceedings directly against a director in respect of the director's management of the company.

Section 1324

Section 1324 of the Corporations Act deals with *injunctions* which can be ordered against persons (such as a director) who may engage in conduct contravening the Act, or aiding abetting, counselling, procuring, inducing or attempting to induce another person (including a company) to breach the Act.

At the end of section 1324 is subsection (10), a "sleeper" provision that has not previously been used against directors. It reads:

> *Where the court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, whether in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.*

"Section 1324 of the Corporations Act deals with injunctions which can be ordered against persons (such as a director) who may engage in conduct contravening the Act, or aiding abetting, counselling, procuring, inducing or attempting to induce another person (including a company) to breach the Act."

In McCracken's case, the Court applied subsection 1324(10) in ordering McCracken to pay damages to a creditor of the Company, in respect of an alleged breach of duties owed by McCracken to the Company.

If the Queensland Supreme Court decision is left standing or is upheld on appeal, it will extend the potential liability of directors and, in doing so, will override long standing limitations on the classes of persons to whom directors personally owe duties.

It is possible that directors and officers' insurance cover may not extend to claims by creditors against a director of a company. Moreover, if the conduct of a director is considered *"wilful"*, section 199B of the Corporations Act prohibits a company from paying premiums on an insurance policy insuring an officer (current or former) of the company against a liability (other than for legal costs) arising from a wilful breach of their duty. A lack of insurance coverage in respect of such claims could render it unviable to sue a director in certain instances, and also makes it less attractive to accept an appointment as a director.

"A lack of insurance coverage in respect of such claims could render it unviable to sue a director in certain instances and also makes it less attractive to accept an appointment as a director."

"Previously, directors have been held to have no duty to creditors (although directors have long been liable for insolvent trading in proceedings brought by a company liquidator) and, as such, creditors have had no standing themselves to bring proceedings directly against a director in respect of the director's management of the company."

"If the Queensland Supreme Court decision is left standing or is upheld on appeal, it will extend the potential liability of directors and, in doing so, will override long standing limitations upon the classes of persons to whom directors personally owe duties."

We will keep you updated with the progress of the appeal and the development of the law in this area.

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INSIGHT | Megan Langford

Bearing the Brunt in FWO Prosecutions

Did You Know?

Directors and executive officers are often popular targets in prosecutions by the Fair Work Ombudsman ('FWO') for breaches of provisions of the Fair Work Act ('the Act'), and it is often assumed that they are the only people in an organisation who are potentially liable for such a breach.

In fact, the Act allows a contravention to be attributed to *any* person who is involved in the act or omission leading to the breach, and not just the manager or director who gave the order or instruction.

Being *involved* in a contravention of the Act essentially means that a person has aided, abetted, counselled, procured or induced the contravention in some way, or conspired with others to do so. The person may have been directly or indirectly involved, but ultimately must have knowingly been a party to the breach. So, as a rule of thumb, a person is *involved* if they are consciously complicit in some way to an act or omission that contravenes a provision of the Act.

The recent prosecution of *Centennial Financial Services Pty Ltd* serves as a reminder that compliance and breach of an employer's industrial obligations is usually a team effort, and the courts will treat it as such. In this case, both the company's sole director/shareholder and its human resources manager were found to have contravened a number of provisions in the Workplace Relations Act relating to 'sham contracting', when they agreed to convert a number of employees into private contractors, but made no changes to their day-to-day work arrangements. This was a measure entirely designed to deny the staff certain entitlements that they were due as employees, by avoiding the Australian Fair Pay and Conditions Standard, in an attempt to stem the company's financial losses.

"...the Act allows a contravention to be attributed to any person who is involved in the act or omission leading to the breach, and not just the manager or director who gave the order or instruction."

"...compliance and breach of an employer's industrial obligations is usually a team effort, and the courts will treat it as such."

While the court recognised that the director was the head decision-maker and bore principal responsibility for the breaches, it also held that the human resources manager should have been aware of the company's obligations under the Act, and should have at least attempted to advise the director accordingly. The penalties were similarly allocated, with the director ordered to pay $13,200 and the human resources manager $3,750.

In short, working as a team means that directors are not the only potential defendants in a FWO prosecution. All employees should ensure that they do their part in ensuring industrial compliance.

So what can a manager do when they have concerns that their organisation may be acting in breach of the Fair Work Act (or indeed, any law)? The manager in question should ensure that his or her views are communicated to the relevant decision maker. This should preferably be done in writing but, if that is not possible, a written record should be made (for example, in a work diary) at the time of any verbal communication. The manager should also, so far as they are able, attempt to influence the relevant decision maker to act in accordance with the law and, again, ensure that any communications are in writing or, if verbal, make a written record at the time.

"...working as a team means that directors are not the only potential defendants in a FWO prosecution. All employees should ensure that they do their part in ensuring industrial compliance."

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INSIGHT | Joan Miller & Deb Carroll

CTP Excess

Excessive Excess?

CTP (compulsory third party) insurance provides compensation to persons injured in road crashes caused by the owner or driver of a South Australian registered motor vehicle. It only covers personal injury and not property damage.

If you were the driver totally at fault you are not able to make a claim for personal injury or seek treatment costs. If you and the other party both contributed to the collision, you may be able to seek some compensation and treatment costs. If you were more than 25% at fault for causing the injury to the other driver (or passenger/pedestrian) you are liable to pay an excess to the CTP insurer. In South Australia the CTP insurance scheme is managed by Allianz on behalf of the Motor Accident Commission.

"If you were the driver totally at fault you are not able to make a claim for personal injury or seek treatment costs."

Many people are unaware that the CTP insurance policy provides for an excess to be paid by persons who are more than 25% at fault for causing the injury of a CTP claimant.

"Many people are unaware that the CTP insurance policy provides for an excess to be paid by persons who are more than 25% at fault for causing the injury of a CTP claimant."

The ability of the insurer to recover an excess is provided for by section 124AB of the *Motor Vehicles Act 1959*. The maximum amount of the excess payment was recently increased to **$460.00**. The Act also now provides for this payment to be indexed in line with CPI increases, with adjustments occurring on the 1st January of each year, beginning on 1 January 2012. This is a significant increase from the previous maximum excess amount of $300.00, which had remained static for some time.

If you receive a request for an excess payment from the CTP insurer (currently Allianz) and dispute that you were more than 25% at fault for the collision, you should notify them of your views and request that payment be deferred to await the outcome of settlement negotiations or any Court determination of liability.

Also not widely known is that Gophers (electric wheelchairs) have CTP cover, which is provided at no cost by the Motor Accident Commission as a service to persons with disabilities.

*"...it is also important to remember that in some circumstances the CTP insurer is able to recover from the person at fault the **full** amount of compensation paid to an injured person."*

As we have a fault based system in South Australia it is also important to remember that in some circumstances the CTP insurer is able to recover from the person at fault the **full** amount of compensation paid to an injured person.

Examples of where this might happen include where the person at fault for the crash was under the influence of alcohol or drugs, speeding or driving dangerously, driving without the permission of the vehicle owner, driving an unroadworthy or overloaded vehicle, or where injury was caused to another intentionally. As well as compensation, the insurer can also recover claims management costs. This could total many thousands of dollars.

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Litigation Searches

As Part of Due Diligence

If you are considering entering into a contract, purchasing a business, acquiring shares or units, entering in to a joint venture or any other commercial dealings with another party, it may be useful for you to be aware of any current or past litigation involving that party as a defendant, or perhaps as a plaintiff.

As part of your prudent due diligence, current and historical litigation searches can be performed in almost all court jurisdictions throughout Australia (with the sole exception of the Northern Territory). While the process and statutory fees for each search vary between the States/Territory and court jurisdictions, these searches can be carried out, at a low cost and generally quite quickly.

Litigation searches may well be prudent to ascertain potential liabilities or other "skeletons in the closet" for the party with whom you are dealing. Donaldson Walsh can assist in obtaining litigation searches, where necessary.

For further information, please contact Christopher Bruce, Madeleine Crawford or Tim Duval who can (straight) talk you through the process.

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INSIGHT | William Esau

Extinguishment of Rights-Of-Way

What You Need to Know

Is part of your land subject to a right-of-way in favour of a neighbour or in favour of land which is no longer connected to (or contiguous with) your land?

Section 90B of the *Real Property Act 1886* provides circumstances in which you can apply to extinguish a right-of-way. The section provides that the Registrar General can, on application, extinguish a right-of-way. However, this cannot happen unless the person who has the benefit of the right-of-way (called the "dominant owner") has consented to the extinguishment.

What this means is that if your land is affected by a right-of-way, you can seek the consent of the dominant owner to the extinguishment of the right-of-way. If the dominant owner consents, then you can make application to the Registrar General accordingly. However, often the dominant owner will only consent if some money changes hands.

It is possible for the Registrar General to dispense with the consent of the dominant owner if the Registrar General is satisfied that a notice has been given to the dominant owner in a form approved by the Registrar General. The notice must include details of the extinguishment and invite the dominant owner to make representations to the Registrar General in relation to the proposal within twenty eight days. Twenty eight days then needs to elapse from when the notice is given. It is also necessary that the dominant owner's interest in the right-of-way will not be detrimentally affected by the extinguishment.

"...if your land is affected by a right-of-way, you can seek the consent of the dominant owner to the extinguishment of the right-of-way. If the dominant owner consents, then you can make application to the Registrar General accordingly. However, often the dominant owner will only consent if some money changes hands."

"...the Registrar General can on application extinguish a right-of-way. However, this cannot happen unless the person who has the benefit of the right-of-way (called the "dominant owner") has consented to the extinguishment."

What this means is that if your land is affected by a right-of-way, you have the opportunity of sending a notice to the dominant owner setting out details of your proposal to extinguish the right-of-way and invite a comment. If the dominant owner objects, then it is likely that the Registrar General will not extinguish the easement. However if the dominant owner does not respond to the notice, the Registrar General may extinguish the right-of-way, provided that the Registrar General does not consider that the land held by the dominant owner will be adversely or detrimentally affected by the extinguishment.

There are some cases in which a right-of-way is "non-contiguous". This means that there is land in-between the land held by the dominant owner and your land, which means that the dominant owner cannot practically use the right-of-way. This can happen when land is subdivided. In this case, the extinguishment becomes more straightforward. It is more likely that you can convince the Registrar General that the dominant owner's land will not be detrimentally affected by the extinguishment because the dominant owner is not able to practically use the right-of-way in any event.

Donaldson Walsh can assist in the preparation of an application for the extinguishment of a right-of-way.

"There are some cases in which a right-of-way is "non-contiguous". This means that there is land in-between the land held by the dominant owner and your land, which means that the dominant owner cannot practically use the right-of-way."

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INSIGHT | John Walsh

WorkCover Update 2011

The Year of Uncertainty - WorkCover Out of the Spotlight or Rabbit Stew?

In March and again in May, I reflected upon a range of issues that were likely to impact upon the WorkCover Scheme.

We now know the outcome of the *Campbell, Yaghoubi* and *Davey* decisions and the "Cossey Review" has been released. It is fair to say that an assessment of each provokes more questions than answers and promotes the validity of my assessment that, so far as WorkCover is concerned, 2011 will continue to be a year of uncertainty but it is also fair to say that overall WorkCover would be pleased with the results.

COSSEY REVIEW

Too Early To Tell

The authors of the review found that, "*no firm conclusions can be drawn at this time, (and) Parliament or the Government may wish to consider a further review at an appropriate time in the future*".

"It is fair to say that an assessment of each provokes more questions than answers and promotes the validity of my assessment that, so far as WorkCover is concerned, 2011 will continue to be a year of uncertainty but it is also fair to say that overall WorkCover would be pleased with the results."

The Good

The reviewers found that, *"Fortunately, more than 90% of people who are injured at work incur very little by way of medical costs or experience significant time away from the workplace. The amendments to the Act in 2008 were not designed to impact on these injured workers and, by and large, have had no impact".*

The Bad

"…the uncertainty which surrounds the status of some of the key changes because of legal challenges yet to be finalised has had a reported impact on injured workers to the extent that a system which is not particularly easy for all to comprehend is, at this point, even more difficult to comprehend".

Lump Sum Compensation - The Winners

Injured workers assessed as having more serious injuries received an average of 20% more compensation than previously.

Lump Sum Compensation - The Losers

Injured workers whose injuries are not assessed as severe missed out if the degree of impairment or disability fails to meet the 5% WPI (whole person impairment) threshold.

Lump Sum Compensation - What Next

The reviewers point out that "*a key risk for this change is the extent to which the 5% threshold may be eroded over time and the degree of subjectivity that may emerge in assessment of the level of WPI*".

There is no doubt that a significant degree of subjectivity is emerging in assessments but I expect that a greater risk will come from claimants establishing impairment of other body parts which have been affected as a sequelae of the original disability. Overall I expect the costs of lump sum compensation in the scheme to rise.

"I interpret the reviewers' conclusions to mean that step downs have saved money for the Scheme, but they have not promoted better return to work outcomes and it has come at a cost to injured workers and their families, and particularly lower paid females in the workforce who, perhaps, can least afford to be financially affected."

Step Downs

The amendments "*were proposed as encouraging injured workers to return to work as early as possible. ...The rationale put forward at the time of the amendments was that some injured workers needed an 'incentive' to do so. The 'incentive' was the prospect of reduced income*".

The reviewers concluded that, "*it is too early to tell whether these amendments have had any long-term impact on return to work rates… (but) …there is evidence that the impact of the step downs has been most strongly experienced by the lowest paid female workers (those earning less than $500.00 per week)*". The step downs have not been successful in "encouraging" injured workers to return to work at an earlier point in time and, in fact, "*The numbers active at 50 weeks is not very different to those active at 13 weeks*". This contrasts with more favourable experience for the December 2007 and June 2008 half years (i.e. before the amending Act).

I interpret the reviewers' conclusions to mean that step downs have saved money for the Scheme, but they have not promoted better return to work outcomes and it has come at a cost to injured workers and their families, and particularly lower paid females in the workforce who, perhaps, can least afford to be financially affected.

Disputes

The reviewers conclude that "*there is a slight trend towards faster resolution for matters resolved at conciliation, but no overall trend towards earlier resolution is yet apparent*".

It may sound counter-intuitive, but I pose the question whether disputation is necessarily a bad thing, in the context of a workers compensation scheme which was designed to be a pension scheme and, despite a number of amendments since its inception in 1987, remains essentially a pension scheme. There will always be people prepared to take advantage of such a scheme and a level of disputation is necessary to create tension in the scheme and discourage less meritorious claims.

"A reduction in the number of disputes over a 10 year period correlates with a dramatic increase in the unfunded liability over the same period, from a scheme that was fully funded to one that is at best 66% funded. Perhaps there has been an unintended consequence associated with a "reduce disputation at all costs" approach."

A reduction in the number of disputes over a 10 year period correlates with a dramatic increase in the unfunded liability over the same period, from a Scheme that was fully funded to one that is at best 66% funded. Perhaps there has been an unintended consequence associated with a "reduce disputation at all costs" approach.

Work Capacity Reviews

The reviewers conclude that, "*The extent of legal challenges in relation to work capacity reviews and the authority of medical panels has made any assessment of the overall impact of these legislative amendments extremely difficult… (and) the ultimate effectiveness of the changes will be determined by the extent to which the intent of the legislation is sustained in the dispute process… (and) coincident with this will be the success of focused return to work initiatives".*

I expect that Work Capacity Reviews will continue to be challenged in the Tribunal and the Supreme Court will be called upon to clarify more issues of a technical nature. The whole process will be "on hold" until we finally have clarity around the operation of the legislation.

Redemptions

"*The revised redemption provisions have been in operation for a limited time (less than 2 years for claims after 1 October 2009)… (and) it is not possible to assess their full impact*".

I think that the amendments to restrict the ability of the compensating authority to redeem claims will need to be reviewed because the Scheme will need a mechanism to enable potential high cost claimants to exit the Scheme equitably if the "tail" is not to grow, and, with it, the unfunded liability.

"I think that the amendments to restrict the ability of the compensating authority to redeem claims will need to be reviewed because the scheme will need a mechanism to enable potential high cost claimants to exit the scheme equitably if the "tail" is not to grow, and, with it, the unfunded liability."

"There can be little doubt that WorkCover and the Government intended that Medical Panels were to be utilised as an efficient way to transition long-term claimants from income maintenance to social security without the intervention of the Tribunal."

Medical Panels

The introduction of Medical Panels by the 2008 amendments was fundamental to the achievement of savings in the scheme and the reduction of the unfunded liability.

There can be little doubt that WorkCover and the Government intended that Medical Panels were to be utilised as an efficient way to transition long-term claimants from income maintenance to social security without the intervention of the Tribunal.

The reviewers conclude that, "*The full implementation of the legislation related to Medical Panels has been affected by several factors*" and the most important of these relates to legal challenges to the constitutional validity and authority of Medical Panels.

The uncertainty will continue for a very long time, as the "*very real issues*" referred to by Mr Justice White in *Campbell* are identified and work their way through the judicial process to be ultimately decided by the Supreme Court, if not the High Court.

Sufficiency of the Fund

The reviewers have concluded that a cautious view should be taken in estimating the financial impact of the amendments, primarily because "*the key amendment (WCRs) is at an early stage and that there are challenges to some aspects of the legislation*".

There are some key conclusions:

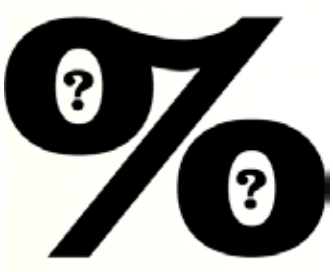
"*(f) The funding level of the scheme has increased from 61% at 30 June 2008 to 66% at 31 December 2010.*

(g) Were it not for favourable claims experience, the funding level at 31 December 2010 would have been 58% only.

(h) The favourable claims experience derives essentially from a focus on paying lump sum redemptions to long tail claims, a 'window' existing for such redemptions until 30 June 2010."

That "favourable claims experience" will not be replicated in the future, because of the limiting effect on redemptions of the amendments and WorkCover policy.

A reduction in the funding level to 58% would be unacceptable and make it extremely difficult to maintain a levy rate of 2.75%, never mind reduce it further within the target range of 2.25% to 2.75%.



Employers should not expect any reduction in the levy rate any time soon. There is no material difference between the hindsight levy rates before and after the amending Act and, whilst the reviewers conclude that, "*There is still the potential for reductions in break-even levies in the future*", that potential rests upon the extent to which "*the full intent of the amending Act can be realised*".

"Employers should not expect any reduction in the levy rate any time soon."

I frankly doubt that the "*full intent*" of the amending Act will ever be realised.

Continued on page 14

WorkCover Update 2011

"The approach is radically different and there will be winners and losers out of the change, hidden risks and unintended consequences!"

Continued from page 13

CAMPBELL AND YAGHOUBI

The Full Court determined in these cases that any opinion provided by a Medical Panel is binding and to be accepted as final and conclusive, with the specific exception that it is not binding on the Workers Compensation Tribunal which retains, "*the overall supervisory responsibility for the dispute resolution process*" and "*it remains for the Tribunal to determine what weight shall be given to an opinion (of the Medical Panel)*".

Each party in the proceedings came away with something of a win and it now appears that neither party will appeal to the High Court.

WorkCover will take heart from the fact that the Supreme Court accepted unreservedly their contention that a compensating authority may refer a medical question to the Medical Panel at any time.

The Government will presumably be satisfied that its submission that a "*body or person*" does not include the Tribunal was accepted by the Supreme Court, which neatly did away with the need for much of the argument on the constitutional validity of the Medical Panels.

The outcome, whilst settling some of the questions surrounding Medical Panels and their operation, will nonetheless raise many others and, in particular, the extent to which an opinion of a Medical Panel is binding on the Workers Compensation Tribunal.

In my view, the greatest impact of the Supreme Court judgment in the cases of *Campbell* and *Yaghoubi* relates to the impact upon WorkCover's ability to efficiently utilise the medical panel to cease payments of income maintenance because of a work capacity review at 130 weeks. It can be expected that many persons whose payments have ceased because of a work capacity review at 130 weeks will lodge a Notice of Dispute with respect to the assessment and, once in the Tribunal, the process will be protracted and the outcome uncertain.

"The Government will presumably be satisfied that its submission that a "body or person" does not include the Tribunal was accepted by the Supreme Court, which neatly did away with the need for much of the argument on the constitutional validity of the Medical Panels."

"It can be expected that many persons whose payments have ceased because of a work capacity review at 130 weeks will lodge a Notice of Dispute with respect to the assessment and, once in the Tribunal, the process will be protracted and the outcome uncertain."

DAVEY

This matter came to the Supreme Court as an appeal in a matter involving WorkCover's determination that the worker had a current work capacity pursuant to section 35B of the Act. The Tribunal had taken the view that the determination was voidable on the grounds of procedural irregularity in that the worker had been denied procedural fairness because he had not been provided with the opportunity to make any meaningful submission or provide further material to WorkCover before it made its section 35B determination.

The Court pointedly gave direction to the Tribunal that it should get on with determining the substantial merits of each case. It said that: "*It may be observed that had the worker proceeded to litigate his dispute considering his work capacity and addressed the substantive merits of his case through proceedings in the Tribunal, that dispute would, in all likelihood, have been resolved by now. Instead, the Tribunal is yet to embark on that dispute. More than 12 months has been spent dealing with issues other than the substantial merits of the dispute*".

What remains to be seen, is whether workers' solicitors will continue to pursue technical arguments which, in turn, will need to be disposed of by the Full Supreme Court and further delay the full and effective implementation of the worker capacity reviews.

MORE TO COME

On 23 May 2011, WorkCover announced its intention to commence a procurement process for the provisions of future claims management services and claims legal services for the scheme. The current contracts expire in December 2012.

WorkCover's new IT claims management system is being constructed to deal with more than one agent and it can be expected that CGU, QBE and Allianz will be interested in returning to the scheme and Gallagher Bassett will likely seek a berth. EML will, no doubt, seek to continue but I doubt that any more than three contracts will ultimately be offered.

WorkCover has also committed itself to the introduction of a new employer payments scheme. The new approach is proposed to take effect for the 2012/2013 financial year but will require legislative amendments towards the end of 2011.

The approach is radically different and there will be winners and losers out of the change, hidden risks and unintended consequences!

We will have more to say about the proposed changes later in the year.

Suffice to say the changes will put the rabbit in the spotlight once again!

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NEWS & VIEWS | Hedy Babi

DonaldsonWalsh Workplace Solutions

More on WorkCover

WorkCover Employer Payments System

WorkCover recently released a Position Paper on their proposed new approach to employer payments.

As expected, the approach includes the introduction of a mandatory Experience Rating System for medium and large registered employers, with the introduction of an optional Retro-Paid Loss arrangement for large employers.

Drafting of an Amendment Bill is required with WorkCover aiming to introduce the new system for the 2012/13 financial year.

While some more detail on the proposed system has been provided, there are still unknowns which prevent any modelling of the potential financial impact on an employer.

We will be monitoring the situation closely and will provide further updates as more detailed information is released.

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NEWS & VIEWS | Kieren Moore & Alastair Donaldson

New R&D Tax Credit

Mixed Fortunes for Australian Innovators

Expected to be passed through parliament anytime soon and effective from 1 July 2011, the new R&D Tax Credit will replace the existing R&D Tax Concessions and provide eligible companies with a tax offset for eligible R&D expenditure incurred after 30 June 2011. For expenditure incurred prior to 1 July 2011, the previous R&D Tax Concessions will continue to apply.

While existing R&D Tax Concessions provided for accelerated deductions of 125% *non-refundable* (sometimes up to 175%), or, for smaller companies, an equivalent tax offset to the above, the new R&D Tax Credit will take the form of either a 45% *refundable* tax offset (for companies with an aggregated turnover of less than $20 million) or a 40% *non-refundable* tax offset (for all other companies). Companies accessing the non-refundable 40% tax offset can carry forward any unused offsets to a later income year.

The new R&D Tax Credit effectively gives rise to an after tax benefit of 15% for SME's (turnover < $20mil) or 10% for larger companies, when compared with the outright deductions available under existing R&D Tax Concessions. While the changes will therefore be favourable for all companies that were only eligible for the 125% accelerated deduction under the current provisions (7.5% after tax benefit), those companies that were eligible for the 175% accelerated deduction under the current provision (22.5% after tax benefit) will be worse off under the new system.

"The new R&D Tax Credit effectively gives rise to an after tax benefit of 15% for SME's (turnover < $20mil) or 10% for larger companies, when compared with the outright deductions for under existing R&D Tax Concessions."

"The new R&D Tax Credit will be available to all industry sectors and will operate on a self-assessment basis, requiring companies to determine for themselves whether their activities constitute eligible R&D."

The Government has also announced the introduction of *quarterly payments* (refunds) of the offset, for small and medium businesses, from 1 July 2014.

Similar to the current R&D Tax Concessions, the new R&D Tax Credit will be available to all industry sectors and will operate on a self-assessment basis, requiring companies to determine for themselves whether their activities constitute eligible R&D.

The new system will, however:

1. be administered jointly by the ATO and Innovation Australia (assisted by AusIndustry);
2. aim to provide a clearer definition of R&D activities, breaking them down into "core" and "supporting" activities;
3. It attempts to ensure greater certainty in R&D Investment, with companies able to seek an advance finding from AusIndustry, where they are uncertain of the eligibility of the activity; and
4. require companies to register their activities annually within 10 months after the end of the income year in which the activity was conducted.

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Stepping up to the Plate

"..a life of all games"

Mark Gowans, Senior Associate

It would be unfairly flippant to say all life's a game to DW Insolvency and Reconstruction specialist Mark Gowans. Although known for his laidback demeanour, his sense of honour and dignity runs deep. But rearrange the statement to read "a life of all games" and you'd be onto something. This former baseballer is a bonafide sports tragic.

Born into an active family - his older sister represented Australia in swimming and trained at the AIS - sport has dominated much of his 35 years.

The peak came in high school. During summer he played cricket on Saturdays and baseball on Sundays. In winter it was Australian Rules footy for his school on Saturdays and his club side on Sundays, along with Rugby Union mid-week. Then there were all the mid-week training sessions and regular pilgrimages to The Parade to watch his beloved Norwood Redlegs play in the SANFL.

"Now that I think about it, I didn't do much else," laughs Mark. "Other than schoolwork, of course. I must owe mum and dad a tanker-full of petrol for all the driving around they did, not to mention a crate or 10 of Weet-Bix!"

Unusually for a strapping young Aussie lad, it was Mark's love of baseball that stuck. Following high school he determined to make a career out of it and took his burgeoning talents to the US in 1994.

Initially the signs were all good. He performed admirably at the College level and attracted considerable interest from the big leagues. Then injury set in. Recurrent knee and shoulder problems made it impossible for him to establish his place, and after a couple of frustrating, stop-start seasons he was forced to hobble back on the plane.

"Unfortunately that was about the only time the words 'home' and 'run' were used in conjunction with my name over there," he grins.

It was at this point that he decided to pursue a legal career. Having always admired and modeled himself on sportspeople who played "hard, but fair" - Essendon Australian Football League legend and current coach James Hird was his idol - Mark saw law as an opportunity to apply those same fighting instincts for the betterment of others.

"I just loved the way Hirdy went about it," says Mark. "He always carried himself with such dignity, but never took a backward step. So I wanted to take that same approach in court, redressing injustices and 'saving the world'.

"Not that I was idealistic or anything."

After a brief stint in criminal law, in which he discovered that if he never had to visit another client in the uplifting surrounds of a jail he'd be just fine, thanks very much, he switched to Commercial Litigation and Insolvency in 2003 and hasn't looked back.

In 2010, while working at Tindall Gask Bentley (TGB), he helped their Litigation & Insolvency team earn a recommendation in the 2010 Doyle's Guide to the Australian Legal Profession in the areas of Insolvency & Reconstruction and Commercial Litigation & Dispute Resolution. While individually, he received recognition in the same edition as a "Recommended Lawyer" in Insolvency & Reconstruction.

That result caught the eye of some senior practitioners here at DW and ultimately led to him being recruited to our firm, along with fellow TGB Litigation & Insolvency team members Liam McCusker and Sarah Annicchiarico, earlier this year.

Naturally, Mark's proud of his achievements so far. But equally unsurprisingly, he has them well in perspective, both professionally and personally.

"I have no intention of resting on my laurels now," says Mark. "I want to continue growing professionally year in and year out. Besides, it's hard to get too carried away with industry recognition, as nice as it is, when the most important people in my life are at home."

Mark was married to his wife Olivia in 2008 and they have an 18-month-old little boy, Fergus. His face lights up when talking about them.

"I'm not sure I could say I'd rather have a dirty nappy in my hand than a baseball glove on it," he quips, "but on every other count I couldn't be happier being a family man. Spending time with Ferg' really is magic."

As you'd expect, the young dad's now keen to pass on his honourable streak to his son. "Of course, we want Ferg' to live with integrity," says Mark. "We want him to have the strength to be himself.

"But failing that, another Jimmy Hird wouldn't be too bad either."

LIKE TO TALK?

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