

February 2009

Business News



Legal Issues update for Canberra Businesses

Snedden Hall & Gallop
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A YEAR OF CHALLENGES & OPPORTUNITIES

It seems hard to believe that we have been in our new premises in Deakin for about 18 months. During that period, we have come to appreciate our location out of the city and our feedback from clients and other contacts is that the accessibility of the Deakin office is a very positive thing.

The gloomy global economic climate means that all businesses will be focused on working in a smart and efficient fashion during 2009. Snedden Hall & Gallop is committed to assist individuals and businesses in making appropriate plans for the year, so as to avoid what might be expensive disputes and problems down the track. In that sense, our Business team are happy to advise on planning strategies in areas such as employment, industrial relations and compliance with government and other requirements.

Where problems do occur, we remain ready to assist in the resolution of those problems in the most timely and cost-efficient way, and will always look at, and where appropriate, recommend alternative dispute resolution mechanisms.

The firm continues to be heavily involved in litigation with the Commonwealth government on behalf of numerous previous and current government employees who were misled or not provided with correct information about their eligibility to join the Commonwealth superannuation schemes. It is amazing how many people were affected by what appears to be a lack of understanding, even at the highest levels of government in some circumstances. If you or any colleague require further information, please feel free to contact us.

As we embark on what may be a difficult year for many of you, we look forward to our ongoing association with you and encourage your feedback at any time as to how we might improve the legal services that we provide.

IN THIS ISSUE:

Employer Beware: The Forces of Employee References

Tough Times & Tough Measures: Terminations & Redundancies

Recent Developments For Human Rights in the ACT
p2

Superannuation Death Benefits

Meet Our Superannuation Team

ACT Civil & Administrative Tribunal
p3

Wills & Powers of Attorney
• Capacity to Make a Will
• Superannuation
p4

SHG STAFF: COMING & GOING



LARA RADIK

Solicitor, Business Services & Personal Injury
Lara returned to SHG in October 2008, after a stint with Defence. Lara is about to commence the Directors training Programme 2009.



SUZANNE SHARWOOD

Solicitor, Business Services
Suzanne is currently on maternity leave and has recently given birth to a baby boy, Roy. Congratulations Suzanne and family.

What is Meritas? Meritas is one of the world's largest and most respected legal resources - an integrated, non-profit alliance of more than 170 independent commercial law firms located in over 60 countries. Snedden Hall & Gallop are proud to be apart of this worldwide law firm alliance.

EMPLOYER BEAWARE: THE FORCE OF EMPLOYEE REFERENCES

While employers are not under any obligation to provide a reference for an employee, they must exercise caution in situations where they choose to do so.

The courts in both Britain and Australia have found that a former employer can be liable for a negligently prepared reference that prevents their former employee from obtaining employment. The Courts have ruled that employers must exercise care when providing employment references: they must take into account the factual content and the ability to verify that content. It is possible that a failure to do so may render an employer liable not only to their former employee (who might fail in a job application as a result) but also that employee's future employers (who rely on an incorrect reference).

Other possible dangers for employers providing references include the National Privacy Principles and defamation. The risk of breaching these provisions can be avoided if an employer provides a reference only when asked by their employee, as this signifies the consent of the employee.

If you are concerned about your rights and obligations in relation to providing references for your employees, please do not hesitate to contact our skilled workplace relations team.

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TOUGH TIMES & TOUGH MEASURES: TERMINATIONS & REDUNDANCIES

The global financial crisis is putting the squeeze on Australian Businesses. In turn, businesses are increasingly forced to consider terminating staff. As an employer, are you aware of your legal rights and obligations when it comes to termination?

Before terminating the employment of an under-performing staff member, you should first tell that staff member how they are underperforming and what they can do to improve performance. You must then give the staff member a reasonable chance to improve. If, after a reasonable time, you are still not satisfied with their performance, you may terminate their employment by giving them the amount of notice required under their contract or the relevant Award, or by making a payment in lieu of notice. To avoid liability for an unfair dismissal claim and as a general rule of good practice, a detailed paper trail should be kept.

As distinct from termination due to under-performance, "redundancy" occurs where the decision to terminate a staff member is made as a result of a downturn forcing a position to be cut. Where a position is made redundant, you must pay the employee their full redundancy entitlements set out in their employment contract or in the relevant Award.

This article is of a general nature and, if you need assistance with restructuring your business, please contact us for a full range advice on employment related matters.

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RECENT DEVELOPMENTS FOR HUMAN RIGHTS IN THE ACT



The ACT was the first Australian state or territory to introduce legislation concerning human rights. In 2004 the Human Rights Act ("Act") was introduced which protects fundamental civil and political rights. Since 2004, Victoria has also implemented a Bill of Rights. No other jurisdictions have.

Until 1 January 2009, the only bodies affected by the Human Rights Act were the Courts, the legislature and the ACT Government, however 1 January 2009 amendments to the Act mean that it now includes all government agencies and also any private entity that carries out a public function. There may be many factors that contribute to whether your business falls within this scope or not.

Any private enterprise may elect to be governed by the Human Rights Act. The benefits in doing this include the ability to comply with corporate social responsibility, to gain a competitive edge over other firms, to encourage a workplace culture that is tolerant of human rights and to ensure compliance with the Human Rights Act when it is unclear if the business is performing a public function or not.

In light of the amendments, we encourage our clients to consider whether or not they fall within the scope of the Act or if they would be interested in opting-in to those provisions in any event. We would be delighted to assist you with any queries or issues you may have.

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SUPERANNUATION DEATH BENEFITS

Did you know that proceeds in your superannuation fund may not be dealt with by provisions in your will? When a member of a superannuation fund dies, the rules of their super fund – rather than their will - direct how the proceeds of the member's fund (known as a "death benefit") will be paid and to whom the benefit will be paid.

Most super funds allow members to nominate the beneficiary that they want to receive the death benefit.

A **binding death nomination** compels the super fund to pay the death benefit to the nominated beneficiary, however, such a nomination is only valid for a three year period and so needs to be kept updated.

A **non-binding death nomination** is not binding on the super fund, however, the super fund will give consideration to the nomination in making a decision as to who to pay the death benefit to. It is possible to make a nomination in which you elect to have super death benefits paid to your estate and in this way, the death benefit can then be dealt with by provisions in your will.

If you want certainty as to who will receive your super death benefits, you should ensure you have an up to date binding death nomination.

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MEET OUR SUPERANNUATION TEAM



Photo (Left to Right): Raquel Batmanovich, Richard Faulks, Emily Faulks and Catherine Blair.

Richard and his team are busy bringing to conclusion a large number of compensation cases bought on behalf of retirees who received incorrect advice during their employment with the Commonwealth about their superannuation rights.

This follows our successful appeal in the case of Cornwell. For further information regarding this matter please visit: [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2007/16.html?query=title\(Commonwealth%20%20and%20%20Cornwell%20\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2007/16.html?query=title(Commonwealth%20%20and%20%20Cornwell%20))

**For all Superannuation legal advise
call our Free Hotline: 1800 646 672**

ACT CIVIL & ADMINISTRATIVE TRIBUNAL



On 2 February 2009 the newly formed ACT Civil and Administrative Tribunal ("ACAT") is due to commence hearings.

In an effort by the ACT Government to increase efficiency and cost-effectiveness the tribunal has consolidated 16 formerly independent tribunals into one central tribunal.

Tribunals incorporated into ACAT include:

1. Administrative Appeals Tribunal
2. Architects Board
3. Chief Surveyor
4. Commissioner for Fair Trading
5. Construction Occupations Register
6. Consumer and Trader Tribunal
7. Credit Tribunal
8. Discrimination Tribunal
9. Essential Services Consumer Council
10. Guardianship & Management of Property Tribunal
11. Health Professionals Tribunal
12. Legal Professional Disciplinary Tribunal
13. Liquor Licensing Board of the ACT
14. Mental Health Tribunal
15. Residential Tenancies Tribunal

Small Claims Jurisdiction For our clients these changes will allow a more streamlined approach to matters requiring tribunal attendance.

At Snedden Hall & Gallop our business and litigation team have been preparing for the introduction of ACAT.

If you believe you have a claim that requires attendance at ACAT please do not hesitate to call us on 6285 8000.

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WILLS AND POWERS OF ATTORNEY

CAPACITY TO MAKE A WILL

“John came to see me to ask me whether I could draft up a Will for his mother, appointing himself and his brother as executors and trustees and leaving everything to his brother and himself. He explained that that was his mother’s wishes, that she is suffering from early dementia but she could recognise the Will if it was put in front of her for signature. I replied that I could not.”
This raises the issue of identifying whether someone is capable of making their own decisions and how important that is.

It is, in fact, extremely important and only a person who is capable of making a decision about their affairs should be making it. While they are capable of making a decision, a person can make a decision that they want someone else to look after their affairs in the future, but a person can only draft a Will for themselves when they are capable of deciding, otherwise a Will can never be drafted by someone else on their behalf.

It is important, in considering the question of capacity, to determine whether the person is capable of managing their own property and affairs. If a person hasn’t been near a bank (or on the Internet doing their banking) for months, if not years, and have someone else pay their bills for them and look after them and provide meals and help them shower, it could be significant information towards determining whether they are capable or not of managing their own affairs.

Secondly, people may appear to be quite lucid and be able to hold a conversation with you but may still suffer from early onset of dementia, preventing them from being able to manage their own affairs or, indeed, being able to recall the fact that they have just had a conversation with you or what they decided.

Thirdly, but not too often, a doctor is prepared to state that a person is incapable of managing their affairs.

In all those circumstances a Will should not be drafted on their behalf and the relatives should seek advice as to how to deal with a person’s estate.

In relation to Powers of Attorney, they cannot be drafted but there are procedures in place, such as the Guardianship Tribunal or the Mental Health Review Tribunal which will allow you to obtain guidance as to how a person’s affairs can be managed.

A well-drafted Will would make a provision in the event that superannuation assets come into the estate but a testator cannot will away their superannuation benefits or indeed other trust assets outside of superannuation.

SUPERANNUATION

A superannuation fund is effectively a trust in which a member of a super fund enters into an arrangement with a fund manager (trustee) to manage their superannuation on their behalf. As such, it is not an asset to be disposed of in a Will in the same way as cash in a bank or shares on the stock exchange.

The Superannuation legislation has been amended over the years to allow for what are known as “binding nominations.” These are written documents instructing the trustee to whom to pass the benefits of a super fund on the death of the member. However they are limited to spouses or dependents (usually children) and they cannot simply be left to anyone as is the case of other personal assets.

Usually binding nominations last for three years except in self-managed super funds in which case they can be for longer periods of time, depending on the trust rules.

A well-drafted Will would make a provision in the event that superannuation assets come into the estate but a testator cannot will away their superannuation benefits or indeed other trust assets outside of superannuation.

WHERE TO FIND US?

