DWFoxTucker Lawyers

DWFT Report

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DWFoxTucker

CLIENT PROFILE

Erizon: Leading the Way in Environmental Solutions

Comprehensive turnkey solutions

Erizon stands at the forefront of large-scale revegetation, dust suppression, and erosion control projects, offering a complete turnkey solution encompassing specification, application, and ongoing monitoring and reporting. This comprehensive approach allows Erizon to guarantee the quality of their work. Coupled with the fact that they are the only supplier in Australia delivering a start-to-end service solution, Tom Corkhill, the company's General Manager, says it makes them the preferred choice for industries seeking reliable and effective environmental solutions for these types of projects. "Clients that partner with Erizon know that every project is managed with the utmost expertise and accountability and backed by our service guarantee."

From humble beginnings to industry pioneers

The story of Erizon's inception is one of vision and adaptability. Initially founded in the Northern Territory, the company began by spraying lawns for domestic use. Recognising an opportunity to integrate technology into a traditionally low-tech industry, Erizon relocated to South Australia, rebranded, and expanded significantly. The new direction focused on large-scale revegetation, dust suppression, and erosion control services for major mining and civil projects, with Hillgrove Resources, Kanmantoo, and Port Augusta Power Station among their first significant clients. As the company has grown, it now proudly supports many of Australia's largest companies, including tier-one entities such as Glencore, Rio Tinto, the Department of Defence, Alcoa, Newmont, BMD, Ventia, and Coleman Rail.

Despite the challenges of such a significant shift, Erizon's founders remained steadfast, investing heavily in new technology to support traditional methods of application. This strategic focus on innovation and adaptation enabled the company to grow steadily and establish itself as a leader in the field.

Cultivating a collaborative culture

A foundational element of Erizon's success is its inclusive workplace culture. Tom Corkhill emphasises the importance of ensuring that their staff enjoy their work and feel part of something bigger: "By fostering a sense of collaboration and a family-like atmosphere, Erizon creates an environment where ideas and solutions can flow freely from all levels of the organisation. Our inclusive approach means everyone, from the owners and managers to the operations team and field staff, is encouraged to contribute their ideas and suggestions. This collaborative culture is integral to what we do. All of the people at Erizon are exceptional at what they do. They bring their own unique perspective, experience, and expertise to help us find

innovative solutions to complex problems and ensure the company's continued success."

Innovation and industry leadership

The diversity of Australia's environmental conditions necessitates a flexible and adaptable approach, and Erizon is dedicated to developing a broad range of solutions to meet these varied needs. Their ability to adapt solutions according to a project's environmental or unique conditions, whether through trialling new application mediums or refining existing methods, has helped them build an enviable reputation as an industry leader. Erizon is always looking for ways to improve and expand its capabilities to remain at the cutting edge of environmental technology.

The company's commitment to innovation is reflected in its core values, constantly seeking smarter, better, and more cost-effective ways to address complex problems. This dedication to excellence was recognised with a commendation award for innovation and collaboration in the 2022 SA Premier Awards in Energy and Mining for a project on a tailings storage facility near Orange, NSW.

Erizon's recent research and development achievements include significant investments in new technologies, such as low-bearing capacity equipment and advanced drone applications. These advancements enable the company to operate in

challenging conditions without compromising soil integrity, ultimately improving growth rates and environmental outcomes.

Protecting intellectual property

In a competitive market with many similar-sounding products, protecting intellectual property is crucial for Erizon, and it's what led them to DW Fox Tucker Lawyers. Tom explains, "We worked with DW Fox Tucker Lawyers to safeguard our solutions and ensure our branding remains unique and protected. This process was essential in maintaining Erizon's identity and competitive edge."

Company highlights and challenges

The most challenging aspect of rehabilitating large areas of land lies in understanding the substrate. Erizon's success is primarily due to its rigorous approach to analysing the biological elements of the substrate and environment. "By conducting thorough soil tests and analysis, Erizon develops tailored amelioration plans that ensure successful revegetation," Tom says. This scientific approach is a hallmark of their work and a key reason for their high success rate.

One of Erizon's standout projects is the large-scale rehabilitation work at the Kanmantoo mine. This local project is a source of pride for the company, showcasing Erizon's ability to restore a large site to its natural environment. Another significant achievement is the extensive revegetation and dust suppression project in Orange, covering 700 hectares. This project involved the use of purpose-built equipment and required careful coordination of numerous moving parts, highlighting Erizon's expertise in managing large-scale, complex projects. The project was particularly challenging for Erizon due to the need to manage cross-border travel, quarantine, and stricter

hygiene requirements during the COVID-19 crisis. “This was a really difficult period for our company and staff. Deploying our personnel and equipment to perform essential services at various sites across the nation, particularly in Orange, tested all of our capabilities. If our obligations to dust management weren’t met, our clients faced the very real possibility of their sites being forced to close by the Environment Protection Agency. Failure, in our eyes, was simply not an option. By working closely with our staff – who were immense during this period – DW Fox Tucker Lawyers and the relevant authorities, we developed COVID-19 risk mitigation plans and a range of other new policies and procedures. We also had to regularly submit Cross Border Traveller applications for all of our staff and carefully review travel routes to avoid hotspots in states outside of South Australia. Keeping up with the legislative and Emergency Management (Cross Border Travel) COVID-19 Direction 2020 changes was incredibly challenging. Having DW Fox Tucker Lawyers on call to provide advice and guidance throughout this period was integral to ensuring our team could continue to provide these essential environmental services.”

Staying at the top of their field

Erizon’s journey from a small lawn-spraying business to a leader in environmental solutions is a testament to the company’s vision, innovation, and commitment to excellence. By offering comprehensive, start-to-end services and fostering a collaborative workplace culture, Erizon continues to set the standard in large-scale revegetation, dust suppression, and erosion control. As they look to the future, their ongoing investment in new technologies and commitment to understanding the unique challenges of each project ensures they remain at the forefront of the industry.

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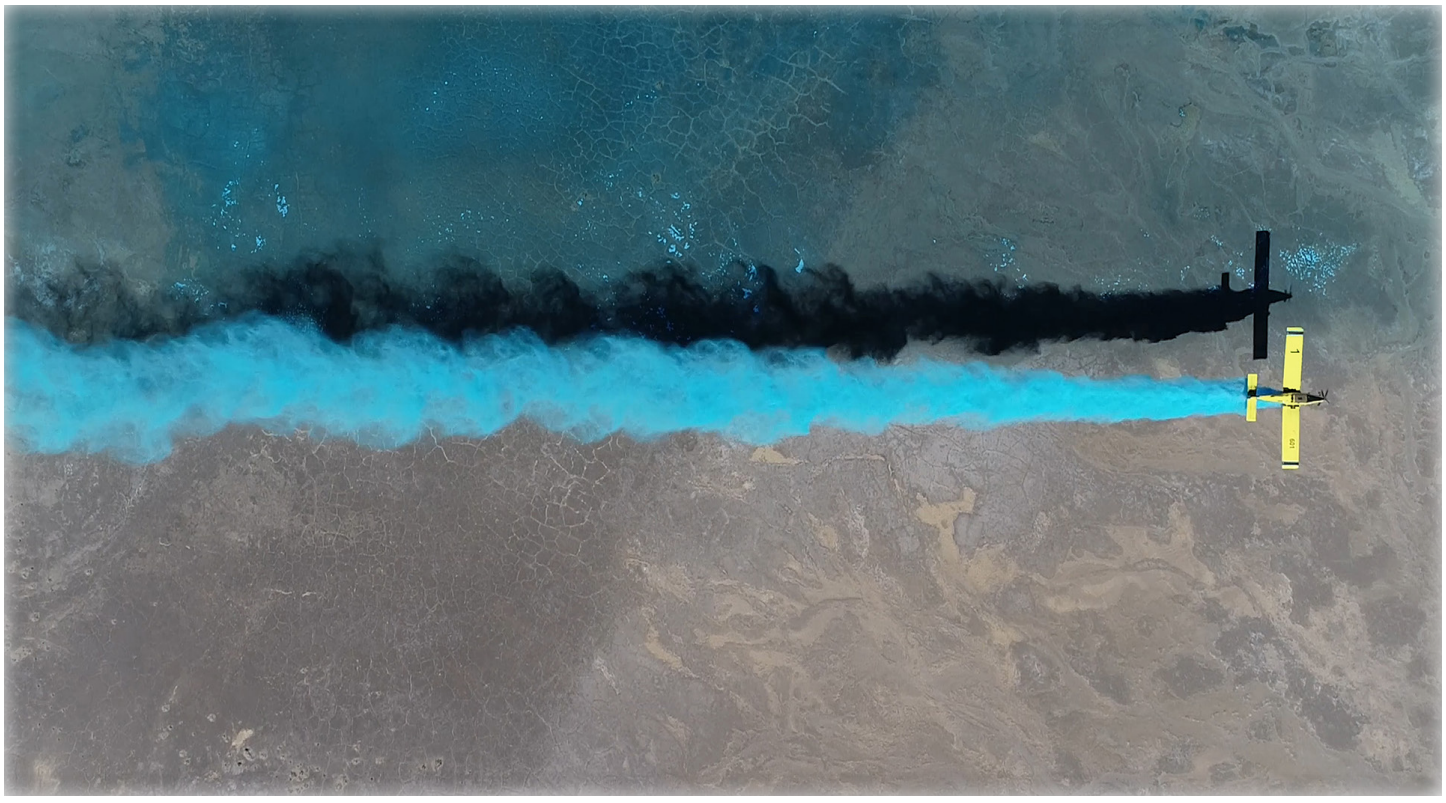

INSIGHT | **By Daniel Idema**

Schools and Payroll Tax: Assessing the Possibility for an Exemption

For non-profit schools and colleges (providing education at or below, but not above, the secondary level) with health and recreational facilities available for use by students of the school or college as well as the community, the recent Supreme Court decision of *Trinity College Gawler Inc. v Commissioner of State Taxation* [2023] SASC 178 may be of interest.

The case concerns the College's liability for payroll tax in respect of wages (**STARplex wages**) paid and payable to staff (**STARplex staff**) employed by the College in the conduct of their "STARplex centre" (**STARplex**), a health and recreational facility which includes a Swim Centre, Fitness Centre, Indoor Courts, Theatre, Shop and Creche.

The STARplex staff were employed separately from the professional teaching staff (they included sports instructors and coaches, light and sound technicians, managers, assistant managers etc), though they or some of them did engage with students of the College as part of their curricular and co-curricular activities, as well as with those members of the community who accessed and used the facilities at STARplex. The community-use aspect of STARplex was a focal point of whether the STARplex wages were exempt under the schools exemption ground as outlined in section 49 and section 10 of Division 1 of Part 3 of Schedule 2 of the *Payroll Tax Act 2009* (SA) (**PTA**).

Trinity contended that the STARplex wages were exempt because the STARplex staff to whom they were paid and payable were exclusively engaged in work of the College of a kind ordinarily performed in connection with the conduct of schools or colleges providing education of that kind. In other words, it being contended by Trinity that the presence of the sorts of facilities at STARplex, and of staff working in those facilities, and of their use by students of the school or college and the community was commonplace amongst primary and secondary schools. Trinity also contended that the STARplex wages were exempt under the health services exemption as outlined in section 51 of the PTA.

Ultimately, Trinity succeeded in its contention that the STARplex wages paid to those staff working in the Fitness Centre, Swim Centre, Indoor Courts and Theatre were exempt under the schools exemption ground on the basis that these STARplex staff were engaged exclusively in work of the College of a kind ordinarily performed in connection with the conduct of schools or colleges providing education of that kind. The Court found that to fall within the schools exemption ground, it was not necessary that the work of the STARplex staff comprise the provision of formal, compulsory school education, as was contended on behalf of the Commissioner. Nor was it necessary for Trinity to demonstrate that such work was performed in a majority of other schools or colleges, just that such work was commonplace amongst

"Assessing the possibility of an exemption will depend on a variety of factors, including whether the particular staff member is exclusively engaged in the relevant work, the subject of the contended exemption, which can be tricky where staff split their time across facilities or endeavours of the school."

schools and colleges providing education at or below, but not above, the secondary level. Though the Court did not find the schools exemption ground applied to those STARplex staff working in the Creche or the Shop (and in relation to the Shop, the Court not being satisfied with the evidence that the supply of giftware and other non-school items was commonplace amongst schools or colleges) or those staff working in the areas of reception or memberships, nor was it available to those staff servicing the whole of STARplex on the basis that by servicing areas within STARplex not common to schools or colleges, they were not exclusively engaged as required by the PTA.

Trinity was also successful in its contention that the wages paid and payable to those STARplex staff working in the Fitness Centre were exempt under the health services ground, the Court relevantly finding that the definition of health services under the PTA encompasses a proactive concept of a service whose purpose is to advance a person's good health, it not being necessary for the services to be of a kind commonly provided in hospitals and other health care settings.

For non-profit primary and secondary schools and colleges with health and recreational facilities similar to those at Trinity, and who pay payroll tax on wages paid to staff working within those facilities who might initially have been considered to form part of a non-school endeavour, now could be an appropriate time to review those arrangements and take legal advice on whether an exemption under the PTA might be available.

Assessing the possibility of an exemption will depend on a variety of factors, including whether the particular staff member is exclusively engaged in the relevant work, the subject of the contended exemption, which can be tricky where staff split their time across facilities or endeavours of the school.

DW Fox Tucker Lawyers are experts in taxation law and can advise you with respect to your payroll tax obligations.

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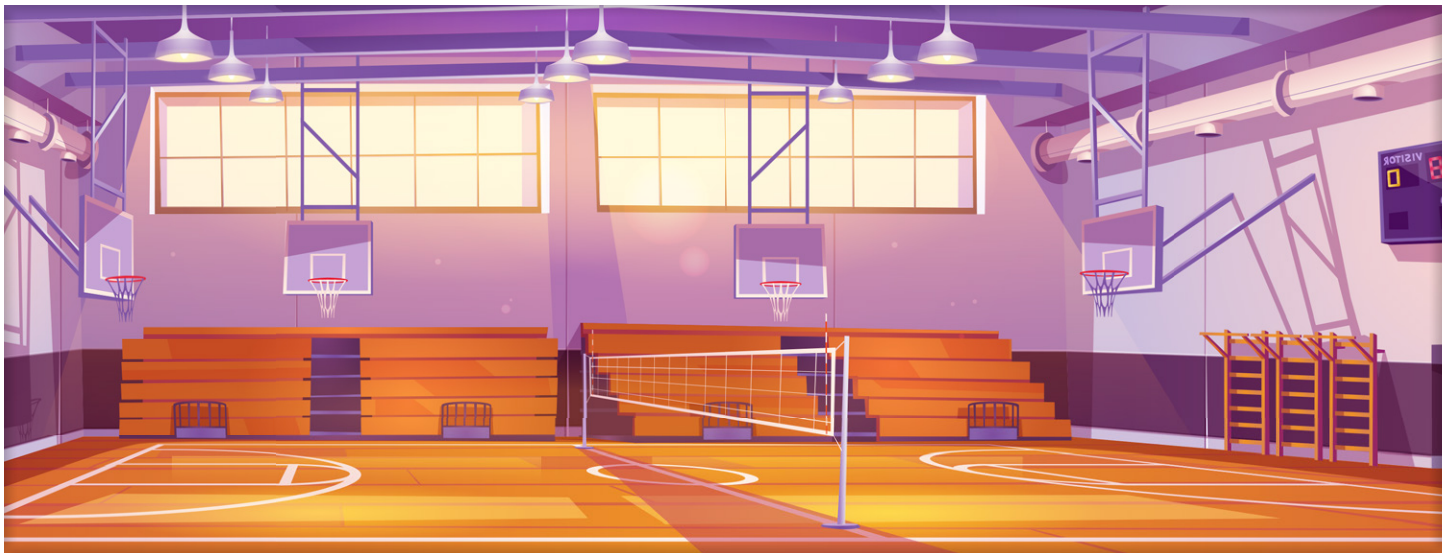


INSIGHT | **By Sandy Donaldson & Amy Bishop**

When Are Goods or Services Acquired by a "Consumer"?

When Do Guarantees Under the Australian Consumer Law Apply?

Can Suppliers and Manufacturers Liability Be Limited?

The *Australian Consumer Law* (**ACL**)[1] contains a number of guarantees (**consumer guarantees**) which apply to the supply of goods or services to a *consumer*. These are in Part 3-2, Division 1, Sections 51-68 of the ACL.

Consumer in the context of the ACL has a broader application than might be expected and suppliers need to be aware that business-to-business transactions can also be included.

The consumer guarantees cannot be excluded, restricted or modified by terms of a contract (Section 64).

Suppliers and acquirers of goods and services, and manufacturers of goods, may not realise that these non-excludable guarantees apply to a very wide range of supplies.

When is a supply made to a consumer?

The sections that contain the consumer guarantees apply where goods or services are supplied to a ***consumer***. In some, but not all, cases, the supply must be made in *trade or commerce*.

Section 3(12) of the ACL provides that:

> *"…a reference to a supply of goods or services to a consumer is a reference to a supply of goods or services to a person who is taken to have acquired them as a consumer" (emphasis added).*

Sections 3(1) and 3(3) specify when a person is "*taken to have acquired*" particular goods/services as a ***consumer***.

Sections 3(1), for goods, and 3(3), for services, start:

"*A person is taken to have acquired particular [goods/services] as a* ***consumer*** *if, and only if:…*"

No ordinary concept of consumer/business-to-business

The opening words of subsections 3(1) and 3(3) mean, accordingly, that the conditions which follow dictate when goods or services are acquired "*as a consumer*" and when the consumer guarantees apply. There is no normal concept of a "*consumer*". Goods or services can be *taken to be acquired by a consumer*, even if it is a business-to-business transaction and even if the acquirer of the goods or services is a large corporation.

There is no limitation in the concept of acquisition of goods by a consumer to a *small business* or any concept of a "*consumer contract*" or a "*small business contract*". These are terms that are relevant in relation to the unfair contract terms provisions of the ACL in Part 2-3 (Sections 23-28A), but not the consumer guarantees in Part 3-2.

1 contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

Requirements for acquisition by a consumer

For particular goods or services to be *taken to be acquired by a consumer* in subsections 3(1) and 3(3), one of the following must apply:

- the *amount paid or payable* must not exceed a threshold of $100,000.00;
- the goods/services are of a kind *ordinarily acquired for personal, domestic or household use or consumption*; or
- if goods, these are a *vehicle or trailer acquired for use principally in the transport of goods on public roads*.

Exceptions

There are some limited exceptions in Section 3(2) for goods acquired for:

- *re-supply*, or if gift cards, *re-supply in trade or commerce*; or
- the purpose of using them up or transforming them in trade or commerce in "*a process of production or manufacture*" or "*repairing or treating other goods or fixtures on land*".

The exception for "*re-supply*" means that the benefit of the consumer guarantees is not available to a distributor, wholesaler or retailer of goods from the manufacturer or other party supplying the goods to the re-supplier. There may, however, be a right of indemnity against a manufacturer under Section 274 (see below).

Presumption that persons are consumers

Section 3(10) of the ACL provides that if it is alleged in any proceeding in relation to the ACL that a person was *a consumer in relation to particular goods or services*, then "*it is presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services*".

This imposes an onus, usually on suppliers of goods or services rather than an acquirer, to prove a relevant exception or the application of the relevant threshold amount so as to exclude the presumption.

Mixed supplies

Questions are frequently asked in relation to contracts for the sale or supply of goods or services which are made for one price or fee but relate to a number of goods or services, or both goods and services, as to whether the up-front single price determines the threshold amount for application of the consumer guarantees, or whether this must be broken down in some way for particular goods or services.

The answer is that the single or total price or fee is not determinative. Section 3(11) contains the concept of a ***mixed supply*** and reads:

> "*A purchase or other acquisition of goods or services is made by a **mixed supply** if the goods or services are purchased or acquired together with other property or services, or together with both other property and other services.*"

Subsections 3(5), 3(6), 3(7) and 3(8) prescribe the way that the amount paid or payable for the goods or services is determined.

These subsections draw a distinction between goods or services that are *purchased* and those that are *acquired by a person other than by way of purchase*. There is no guidance as to ways in which

"The exception for "re-supply" means that the benefit of the consumer guarantees is not available to a distributor, wholesaler or retailer of goods from the manufacturer or other party supplying the goods to the re-supplier. There may, however, be a right of indemnity against a manufacturer"

goods or services may be "*acquired…other than by way of purchase*".

Amount paid for goods or services

If the supply of goods or services is not a *mixed supply*, or if a specified price is allocated to goods or services acquired in a *mixed supply*, the amount paid or payable is taken to be:

- the price paid or payable for the goods or services (Section 3(4)); or
- if goods or services are acquired *other than by way of purchase*, then the amount is taken to be the price at which the goods or services could have been purchased from the supplier, if these could have been so purchased (Section 3(6)).

Under subsection 3(5), the amount paid or payable for goods or services in a *mixed supply* will be:

- if the goods or services could have been purchased from the supplier other than by mixed supply – the price at which they could have been purchased (Section 3(5)(a));
- where the goods or services could not have been purchased other than in a *mixed supply* from the supplier, but could have been purchased from another supplier – the lowest price at which goods or services of that kind could reasonably have been purchased from another supplier (Section 3(5)(b)); or
- if goods or services could not have been purchased from any supplier except by *mixed supply* – the ***value*** of the goods or services.

Acquisitions other than by purchase

Where goods or services are not purchased but are acquired *other than by way of purchase* and could not have been purchased from the supplier or only in a *mixed supply*, the amount will be the ***lowest price*** at which goods or services of that kind could have reasonably been purchased from another supplier, if available from another supplier other than by *mixed supply* (Section 3(7)).

Where goods or services acquired *other than by way of purchase* could not have been purchased from any supplier other than by a *mixed supply*, the *amount paid or payable* is taken to be the ***value*** of the goods or services (Section 3(8)).

Issues and uncertainties

The rules for determining the *amount paid or payable* in subsections 3(4)–3(8) may be convoluted and confusing. However, it appears, in summary, that unless there is a separate price or consideration specified for the supply of particular goods or services, the amount will be taken to be:

- the amount the goods or services could have been purchased, other than in a *mixed supply*, from the supplier;
- the lowest price the goods or services could have been purchased from other suppliers;
- if not available from any supplier, except in a *mixed supply*, the *value* of the goods or services.

There are obviously some potentially vague or uncertain concepts in these rules, particularly the circumstances in which goods or services may be acquired other than by way of purchase, the ascertainment of a "*value*" for goods, and the application of the rules to suppliers of services. It also appears that the quality of the goods available from another supplier is not taken into account, provided they are goods or services 'of the kind' supplied.

What are the consumer guarantees?

The consumer guarantees are not all onerous and reflect terms or warranties that may otherwise appear or be implied in contracts or otherwise by law. However, some may go beyond warranties that a supplier or manufacturer may otherwise be happy to provide.

A description of the consumer guarantees follows, but these descriptions are only brief, and it is necessary to look at the terms of each guarantee in the ACL to ascertain the full meaning and effect. The guarantees are divided into those that apply to goods (Subdivision A) and those that apply to services (Subdivision B).

Guarantees relating to the supply of goods

- **Guarantee as to title** (Section 51). A guarantee or warranty that a supplier has good title to goods, which will pass to a party acquiring the goods, is normal. There are exceptions relating to a supply of limited title, and also to supplies by way of hire or lease.

- **Guarantee as to undisturbed possession** (Section 52). It is also normal that if goods are supplied, the party acquiring them should have rights to undisturbed possession. Exceptions apply for disclosed encumbrances and for supplies of limited title, and confirmation that the guarantee only applies during the term of hire or lease.

- **Guarantee as to undisclosed securities etc.** (Section 53). A guarantee or warranty that goods are free from undisclosed securities is also to be expected. Exceptions apply for a floating charge (unless it becomes fixed and enforceable) and a guarantee for the supply of limited title that securities were disclosed. The section does not apply to a supply by hire or lease.

- **Acceptable quality** (Section 54). This guarantee only applies to supplies of goods in trade or commerce and not by auction. The guarantee of *acceptable quality* can go beyond warranties which a supplier may otherwise wish to provide. What is *acceptable quality* is described in subsections (2) and (3):

  2. Goods are of ***acceptable quality*** if they are:

     a. fit for all the purposes for which the goods of that kind are commonly supplied;

     b. acceptable in appearance and finish;

     c. free from defects;

     d. safe; and

     e. durable;

     as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).

  3. The matters for the purposes of subsection (2) are:

     a. the nature of the goods;

     b. the price of the goods (if relevant);

     c. any statements made about the goods on any packaging or label on the goods;

     d. any representation made about the goods by the supplier or manufacturer of the goods; and

     e. any other relevant circumstances relating to the supply of the goods.

  This guarantee may be the guarantee that is of most concern to a supplier, and which the supplier may be most concerned about limiting, where possible (see below).

  There are exceptions where defects are drawn to the attention of a consumer before supply, but even if the consumer examines goods before agreeing to the supply and examination ought reasonably to have revealed a defect, the goods will still fail to be of *acceptable quality* (Section 54(7)).

- **Fitness for disclosed purpose** (Section 55). There is a guarantee of fitness for a *disclosed purpose*, or for any purpose which a supplier represents the goods are reasonably fit for.

This only applies where the supply is in trade or commerce and does not occur by way of auction. There is also an exception if it can be shown that the consumer did not rely on, or it was unreasonable to rely on, the skill or judgment of the supplier.

- **Supply of goods by description** (Section 56). As may be expected, there is a guarantee that goods supplied by description must correspond with the description. This only applies to supplies in trade or commerce and not by way of auction.

- **Supply of goods by sample or demonstration model** (Section 57). There is a guarantee that goods correspond with a sample or demonstration model in quality, state or condition. Where the supply is by sample, a consumer must have a reasonable opportunity to compare the goods with the sample. There is also a guarantee that the goods are free from any defect of acceptable quality not apparent on reasonable examination. This applies to supplies in trade or commerce and not by way of auction.

- **Repairs and spare parts** (Section 58). There is a guarantee that the manufacturer of goods "*will take reasonable action to ensure*" that facilities for repair of goods and parts for goods are "*reasonably available for a reasonable period after the goods are supplied*". What is "*reasonable*" may not be certain.

  A manufacturer, however, can give written notice before a consumer agrees to a supply that facilities for repair, or parts for goods, will not be available, or not available after a specified period.

- **Express warranties** (Section 59). If a manufacturer gives an express warranty in relation to goods, there is a guarantee that the manufacturer will comply with the express warranty. Similarly, if a supplier gives an express warranty, there is a guarantee that the supplier will comply with the warranty. These guarantees apply to supplies in trade or commerce and not by way of auction.

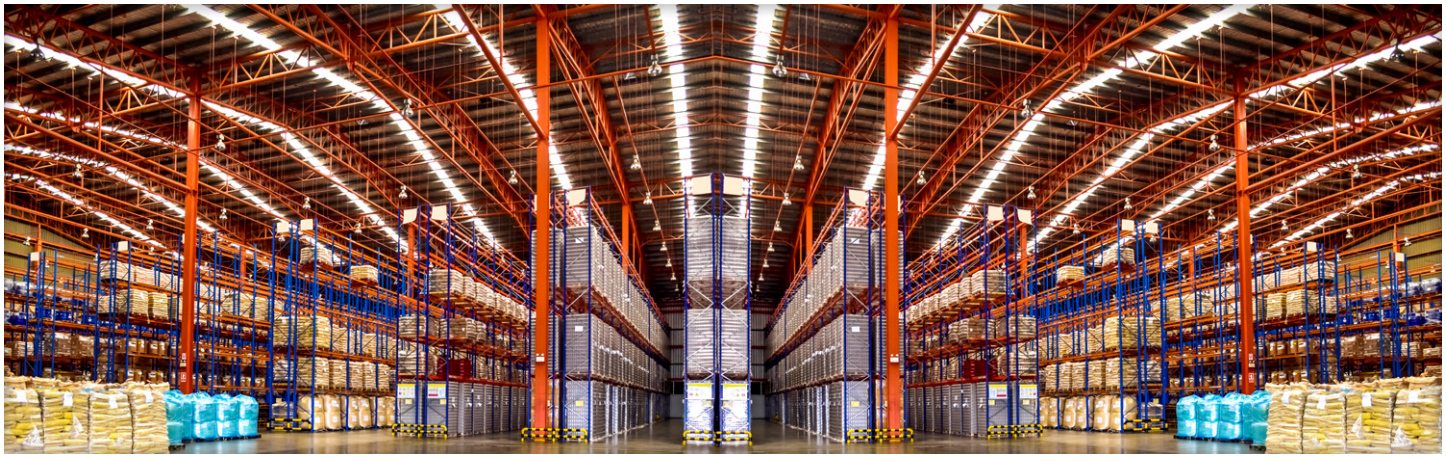
  Section 102 of the ACL requires that any express warranty against defects must contain a notice in a form prescribed by the Regulations[2]. Regulation 90 sets out the requirements, including that a warranty against defects must be in a document that is *transparent* and contains the details required by the Regulation and display **mandatory** text to the effect that guarantees under the ACL cannot be excluded.

Guarantees relating to the supply of services

- **Due care and skill** (Section 60). For supplies in trade or commerce, there is a guarantee that services will be rendered with due care and skill.

- **Fitness for a particular purpose** (Section 61). Where a consumer, expressly or by implication, makes known to a supplier any particular purpose for which services are being acquired, there is a guarantee that the services, and any product resulting from the

2 *Competition and Consumer Regulations 2010*



services, will be reasonably fit for that purpose.

Where what is made known is a "*result that the consumer wishes the services to achieve*", the guarantee is that the services "*will be of such a nature, and quality, state or condition that they might reasonably be expected to achieve that result*".

These guarantees only apply in trade or commerce and not if the circumstances show that the consumer did not rely on, or it was unreasonable to rely on, the skill or judgment of the supplier.

- **Reasonable time for supply** (Section 62). If a time for a supply of services is not fixed or cannot be determined by contract or agreement, there is a guarantee that the services will be supplied "*within a reasonable time*".
- **Exceptions to guarantees for services**. Section 63 provides that these guarantees for services do not apply in relation to contracts for transportation or storage of goods for the purpose of a business, trade, profession or occupation or to a contract of insurance.

Importers are manufacturers

Section 7 of the ACL contains an expansive definition of "***manufacturer***". This includes an importer of goods into Australia if the person is not the actual manufacturer and, at the time of importation, the manufacturer of the goods does not have a place of business in Australia.

The definition of "*manufacturer*" means that distributors of products from overseas manufacturers will be liable under the consumer guarantees that apply to a manufacturer (Sections 58 and 59) and other provisions of the ACL that apply to manufacturers.

Exclusion or limitation of guarantees

Guarantees may not be excluded (Section 64).

A term of a contract is void if it purports to exclude, restrict or modify the guarantees or rights conferred by the guarantees or liability for failure to comply with the guarantee.

Limitation of liability (Section 64A).

Importantly, however, for a supplier or manufacturer, it is possible for a contract to limit the liability of the supplier or manufacturer for goods or services (not ordinarily acquired for personal, domestic or household use or consumption) other than guarantees relating to title, possession and securities, to one or more of:

for goods:

- the replacement of the goods or supply of equivalent goods;
- the repair of the goods;
- the payment of the cost of replacing the goods or acquiring equivalent goods; or
- the payment of the cost of having the goods repaired,

or for services:

- the supply of the services again; or
- the payment of the cost of having the services supplied again.

A limitation of liability, however, will not be effective if the party to whom the goods or services are supplied establishes that it is *not fair or reasonable* for the supplier to rely on the limitation (Sections

"Compensation for the consumer receiving the supply can go beyond direct costs or expenses and can include compensation for losses such as loss of profit, loss of time or loss of productivity. These claims can be very substantial, particularly if the recipient of the supply is engaged in business."

64A(3) and (4)). Regard is to be had to the circumstances, including the strength of bargaining positions and whether a buyer knew or ought to have known of the term of the contract imposing the limitation, and other matters. Also, in the case of a "***major failure***" to comply with a guarantee, consumers may have rights which supersede any attempt to limit liability, such as to reject goods or terminate the services (Sections 259(3) and 267(3)).

The limitations of liability permitted by Section 64A seem to be at odds with Section 276, which provides that terms of a contract may not exclude, restrict or modify any of the provisions of Part 5-4, which provide for rights of action and damages against suppliers and manufacturers. However, to the extent that there may be a conflict, presumably, the provisions of Section 64A, inserted in the ACL after Section 276 will prevail to the extent of any inconsistency.

Suppliers liability for manufacturer

If a supplier is liable to a consumer for damages under Section 259(4) in circumstances where the manufacturer would be liable under Section 271 for failure to comply with the guarantee of acceptable quality under Section 54, the supplier will be entitled to an indemnity against the manufacturer. This indemnity may not be excluded by the term of a contract (Section 276).

However, under Section 276A, the liability of the manufacturer to the supplier may be limited to the lesser of:

- the cost of replacing goods;
- the cost of obtaining equivalent goods; or
- the cost of having goods repaired.

Consequential loss

If guarantees apply in relation to either a supply of goods or a supply of services, and there is a breach of the guarantee without an effective limitation of liability, this may expose a supplier to liability for consequential loss arising from the breach of the guarantee. Compensation for the consumer receiving the supply can go beyond direct costs or expenses and can include compensation for losses such as loss of profit, loss of time or loss of productivity. These claims can be very substantial, particularly if the recipient of the supply is engaged in business.

Section 259 provides that damages that a consumer may recover against a supplier for failure to comply with a guarantee include:

> *"…damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such failure."*

Similarly, damages for reasonably foreseeable loss or damage may be recovered against a manufacturer (Section 272(1)(b)).

Terms for limitation of liability

Suppliers of goods and services, and manufacturers, would be well advised to consider very carefully whether terms and conditions for sale or supply of goods or services do adequately limit liability, to the extent permitted by Section 64A.

It may also be prudent for manufacturers, including those deemed to be manufacturers, to ensure that there is an appropriate limitation under Section 58 in relation to the availability of facilities for the repair of goods and spare parts.

DW Fox Tucker can assist with the review or drafting of terms and conditions and limitations of liability, where appropriate or possible.

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DISSECTING DECISIONS | **By Helene Chryssidis & Amy Bishop**

When Reputation Assists in Protecting Your Brand

A case analysis of *Bed Bath 'N' Table Pty Ltd v Global Retail Brands Australia Pty Ltd* [2023] FCA 1587

Bed Bath 'N' Table Pty Ltd (**BBNT**) and their competitor "House" have co-existed for over three decades, each building a substantial reputation in the homeware retail space.

However, the relationship between the two retailers reached a turning point in May 2021 when Global Retail Brands Australia Pty Ltd (**GRBA**) launched a new soft homewares sub-brand using the below logo (**House B&B Mark**):

House
BED & BATH

The proceedings

BBNT commenced proceedings in the Federal Court of Australia alleging GRBA had infringed BBNT's various 'BED BATH 'N' TABLE' trade marks, engaged in misleading and deceptive conduct and made false and misleading representations in contravention of the *Australian Consumer Law (***ACL)**, and engaged in the tort of passing off.

GRBA denied the allegations, contending, amongst other things, that the use of the words 'BED' and 'BATH' were merely descriptive and used to describe categories of soft homewares.

Reputation

Both BBNT and GRBA accepted that the other has a substantial and independent reputation in their respective marks: 'BED BATH N' TABLE' and 'House'.

Since 1976, BBNT has sold soft homewares. BBNT claims to have a unique store presentation that conveys an upmarket feel through its white walls, wooden floors and large glass windows with no discount signage. Each store includes prominent display signage with 'BED BATH N' TABLE'.

BBNT has been the only retailer in Australia to use the words 'BED' and 'BATH' in its name for over 40 years. BBNT's branding is carefully managed through regimented brand guidelines, and its branding has consistently been as follows:

BED BATH N' TABLE

Meanwhile, since 1978, GBRA and its predecessors have operated retail stores in Australia under the 'House' brand. In May 2021, the 'House' brand was well-established in the hard homeware market, with approximately 100 physical 'House' branded stores open throughout Australia.

In comparison to BBNT, 'House' stores typically feature discount marketing with crowded displays and discount signage. The signs are a prominent feature, often covering most of the shopfront windows, and are hung as bunting across the tops of store doorways.

Adoption of the House B&B mark

The Court heard that around June 2020, GBRA acquired the "MyHouse" business, which sold soft homewares and initially planned to open 50 'MyHouse' branded stores. However, at the "*very last minute*" (only days before the first 'MyHouse' store was scheduled to open), it was decided to use the House B&B Mark to identify these new soft homewares stores. While emails outlining potential names

"Although the reputation associated with a trade mark is not relevant to determining trade mark infringement, it is a relevant factor (albeit not a mandatory factor) under the ACL."

stated that they would "*have Bed bath and table running scared*", the key decision makers from GRBA contended that the proposed name was not derived from BBNT. Rather, the words "BED" and "BATH" are common descriptors of all soft furnishings.

Ultimately, without seeking legal advice, the name 'House BED & BATH' was selected out of other possible names, including 'HOUSE BATH AND BED' and 'HOUSE BEDWORKS', and the House B&B Mark was created.

GRBA applied for the registration of the House B&B Mark on 12 May 2021, which has since been opposed by BBNT.

On 14 May 2021, GRBA launched its first soft homewares store using the House B&B Mark. Shortly after the opening of this store, BBNT raised the prospect of confusion with GRBA. GRBA was determined not to change the name, relying on the position that the sub-brand was a "*clear brand extension*" of the iconic 'House' brand and the words 'BED' and 'BATH' were used as category descriptors.

Findings

The Court's observation of three of GRBA's key witnesses was damning.

In one instance, a witness conceded that a statement in his affidavit that he had not visited a BBNT store as part of his research was false. In a "jury style" reveal, the witness was taken to one of his photographs, which showed him reflected in a mirror, taking a photo while standing inside a BBNT store. In another instance, the Court held that one of GRBA's witnesses was "*unimpressive*" and "*gave some frankly unbelievable answers*".

The Court observed that the witnesses' common catchphrase during evidence that "*the words bed and bath are common descriptors in the category of all soft furnishings*" came across as "*contrived and an attempt to reverse engineer the thought process behind selecting the House B&B Mark*".

In these circumstances, the Court held that GRBA's witnesses' "*refusals to acknowledge, or even conceive, that there was any prospect of consumers being confused by the House B&B Mark and BBNT was untenable*." Nevertheless, the Court held that the evidence fell short of demonstrating a commercially dishonest intention on the part of GRBA to appropriate part of BBNT's trade or reputation. Rather, the Court categorised GRBA's conduct as more in the nature of wilful blindness to any potential confusion. This factor was relevant in the ACL claim but not as to whether the two marks were deceptively similar.

Trade mark claim

Ultimately, BBNT failed in its trade mark infringement claim. Justice Rofe concluded that, on a comparison of the marks, not taking account of reputation, the House B&B Mark was not substantially identical or deceptively similar to BBNT's 'BED BATH 'N' TABLE' registrations.

The Court held that an ordinary consumer is not to be credited with any knowledge of the actual use of the registered trade mark or any reputation associated with that mark. Thus, any reputation that BBNT had in its BBNT mark

was put to one side, together with any factual distinctiveness that may have accumulated with respect to the mark over the four decades of use. It is the BBNT mark as registered, which is subject to the test of imperfect recollection.

Importantly, Justice Rofe determined that the House B&B Mark was one composite mark, meaning 'BED & BATH' was not operating as a separate trade mark.

An analysis of BBNT's registered trade marks found the 'N' Table' to be a key feature of these marks. BBNT, therefore, did not establish that it had the use of 'BED and BATH' alone (that is, without the word 'TABLE').

Therefore, the comparison was not between 'BED & BATH', as a separate trade mark - as argued by BBNT - and 'BED BATH 'N' TABLE'. Rather, it was a comparison between 'BED BATH 'N' TABLE' and the House B&B Mark as a whole.

While Justice Rofe did consider that the House B&B Mark contained the same words 'BED' and 'BATH' and used a similar font for those words, the presence of 'House' was considered the more dominant visual cue. Justice Rofe ultimately concluded that the marks had sufficient differentiation to conclude that there was no trade mark infringement.

ACL claim

Although the reputation associated with a trade mark is not relevant to determining trade mark infringement, it is a relevant factor (albeit not a mandatory factor) under the ACL.

BBNT alleged that by adopting the House B&B Mark, GRBA engaged in misleading and deceptive conduct and made false and misleading representations that stores displaying the House B&B Mark were somehow associated or affiliated with BBNT.

The Court considered BBNT's extensive reputation, accumulated for over 40 years in the soft homewares market, as well as the appearance and style of BBNT's stores and the fact that no other retailers had used the words 'BED' and 'BATH' in their store name. The Court found that despite the use of somewhat descriptive words, 'BED', 'BATH' and 'TABLE', 'BED BATH N' TABLE' had become factually distinctive.

"The Court held that GRBA had breached the ACL by engaging in misleading and deceptive conduct and making false and misleading representations that the stores displaying the House B&B Mark were associated or affiliated with BBNT."

GRBA's adoption of a name that appropriated two of these words in the same order from one of its largest competitors and the similarities in the way they presented their stores (as compared to the original cluttered and discounted look of 'House' stores) were seen as potentially leading consumers to an association between the two brands. The Court considered that a reasonable consumer would not recognise it as a 'House' store of the kind they are used to seeing and may wonder if there is some association with BBNT. While the prominence of 'House' in the House B&B Mark was highly relevant, it was not considered sufficient to dispel this confusion.

The Court held that GRBA had breached the ACL by engaging in misleading and deceptive conduct and making false and misleading representations that the stores displaying the House B&B Mark were associated or affiliated with BBNT.

Passing off claim

The tort of passing off protects a right of property in business, goodwill or reputation.

The elements of the tort of passing off are well established and comprise three core concepts: reputation, misrepresentation, and damage.[1]

It was clear and undisputed that BBNT had an established reputation in 'BED BATH N' TABLE'. Given the findings in

1 *State Street Global Advisors Trust Co v Maurice Blackburn Pty Ltd* (No 2) (2021) 164 IPR 420

"This is important for businesses that may not yet have a reputation in their brand because, if they have a registered trade mark, a substantially identical or deceptively similar later used mark will infringe regardless of the other trader's reputation."

relation to the ACL claim, it was determined that GRBA misrepresented an association between GRBA and BBNT. That deception may have, on occasion, led a consumer to purchase products from a store displaying the House B&B Mark in the mistaken belief that it was a BBNT or a BBNT-related store. Since all three elements were made out, GRBA's conduct amounted to passing off.

Takeaways

This case reiterates, following *Self Care IP Holdings Pty Ltd v Allergen Australia Pty Ltd*[2] and *McD Asia Pacific LLC v Hungry Jack's Pty Ltd*,[3] that reputation is not to be considered in undertaking an assessment of substantially identicality or deceptive similarity in a claim for trade mark infringement. Reliance on the similarity of the marks being used with the registered mark is the paramount consideration. This is important for businesses that may not yet have a reputation in their brand because, if they have a registered trade mark, a substantially identical or deceptively similar later used mark will infringe regardless of the other trader's reputation.

Reputation in a registered trade mark may be considered when opposing a trade mark application.[4] As noted, BBNT is opposing GRBA's trade mark application. During this process, BBNT will be able to rely on its reputation.

In comparison, reputation is an important and required component to establish passing off. It is also a highly relevant factor in assessing whether conduct is misleading or deceptive or a false and misleading representation of association or affiliation in breach of the ACL.

A further point of interest in this case is the finding that 'BED & BATH' was not purely descriptive. Since the products being sold under the trade marks were soft homewares and not beds and baths per se, these words were found to be *"more allusive than directly descriptive"*. This not only assisted Justice Rofe in concluding there was trade mark use of the House B&B Mark but also led to the finding that 'BED & BATH' should not be discounted as being descriptive in assessing the deceptive similarity of the trade marks. Although this did not ultimately result in a finding that the marks were deceptively similar, it is an important distinction to note.

The case between BBNT and GRBA is not closed. As mentioned, BBNT is opposing GRBA's Headstart application, and GRBA has appealed the Honourable Justice Rofe's decision. We anticipate this to be heard in August 2024 and will examine the case further once a judgement has been given.

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2 (2023) 171 IPR 20
3 [2023] FCA 1412
4 Section 60 of the Trade Marks Act

NEWS & VIEWS | **By Ben Duggan & Nicholas De Pasquale**

Do Not Disturb: What Employers Need to Know About the Fair Work 'Right to Disconnect'

A deal to give employees the right to disconnect has been struck with the Greens to ensure the Federal Government has support for their second tranche of Closing Loopholes reforms.

The Fair Work right to disconnect will commence on 26 August 2024 for all employees except those employed in a small business (less than 15 employees).

Modern Awards will also require a right to disconnect term, which is expected to be similar to the Fair Work workplace right, and will be inserted into Awards in the coming months.

What is the Fair Work 'right to disconnect'?

The Fair Work right to disconnect will allow employees to refuse to read or respond to contact from their employer or a third party about work matters outside of their normal working hours.

All forms of communication, including emails, calls, texts and any other work-related communication platform such as Slack, Microsoft Teams or Zoom, are covered by the right to disconnect.

The amendment makes it explicit that the right to disconnect is a workplace right and that the general protections provisions prohibit employers from taking adverse action because of a workplace right. However, an employee does not have an unfettered ability to choose whether to connect in response to contact from their employer or a third party, as the right to disconnect is not activated if the refusal to connect is unreasonable.

Comment

Importantly, the Fair Work right to disconnect does not prohibit an employer (or another party, e.g. a customer) from contacting an employee after hours about a work matter.

Rather, the right to disconnect gives the employee a choice, subject to the 'unreasonable' test, to decide whether they connect with their employer or customer after they are contacted after hours.

The Fair Work 'employee choice' model for the right to disconnect follows the same model for casual conversion chosen for other amendments brought about under the second Closing Loopholes reforms.

When may a refusal be deemed unreasonable?

If an employee's refusal to connect is unreasonable, the right to disconnect is not activated.

A refusal is deemed unreasonable when an employee chooses not to connect in response to contact or attempted contact about work related to an obligation/ responsibility under Federal, State or Territory law.

In other situations, the amendment identifies a list of 5 matters that must be taken into account in the determination of whether an employee's refusal to connect is 'unreasonable', as follows:

- the reason for the contact or attempted contact;

- the manner in which the contact is made;
- the level of disruption caused to the employee;
- the extent to which an employee is compensated:
    - to remain available to work during the period when contact or attempted contact is made; or
    - for working additional hours outside the employee's ordinary hours of employment;
- the nature of the employee's role and their level of responsibility; and
- any relevant personal circumstances, including family or caring responsibilities.

Comment

It is reasonable for an employer (or client) to contact an employee when workplace issues arise, such as seeking coverage for another employee who has an unexpected illness after hours in the future.

The employee contacted would, by reference to the 5 listed matters, need to consider whether their refusal to connect is 'unreasonable' before they choose not to connect, which seems overly complex. Many employees may choose to connect because of this complexity and to avoid conflict with their employer.

What powers will the Fair Work Commission have?

A dispute may arise in relation to the practical application of the Fair Work right to disconnect, and the intention is for these disputes to be discussed at the workplace in the first instance.

If an employee and employer can't resolve the dispute at the workplace, either party can make an application to the Fair Work Commission asking them to deal with the dispute.

The Fair Work Commission would be expected to seek to conciliate the dispute in the first instance in a manner that is consistent with its normal practice.

A hearing would take place in the absence of a conciliated outcome, after which the Fair Work Commission has the ability to make orders to prevent:

- an employee from unreasonably refusing contact with their employer;
- an employer from contacting an employee outside of work hours; or
- an employer from taking disciplinary action against an employee as a result of the employee refusing contact outside of their normal working hours.

Comment

The Greens have suggested that the new right to disconnect will not lead to a large number of disputes before the Fair Work Commission. Due to a restriction of the Fair Work Commission's powers to the making of 'preventative' orders, it may mean that, like anti-bullying (where there are only 'preventative' orders), there will not be a rush of disputes. However, employers will, of course, be more concerned about creating a new workplace right to disconnect because if it is not managed properly, it could result in legal action based upon allegations of contraventions of the general protection provisions of the Fair Work laws.

How to prepare for the Fair Work right to disconnect

The upcoming commencement of the Fair Work right to disconnect has resulted in many employers seeking guidance on how to respond to this change.

In preparation for the commencement of the right to disconnect, all employers may wish to consider:

- a review of employment contracts and position

"employers will, of course, be more concerned about creating a new workplace right to disconnect because if it is not managed properly, it could result in legal action based upon allegations of contraventions of the general protection provisions of the Fair Work laws."

descriptions, specifically clauses pertaining to salary, remuneration and duties, in order to ascertain if employees are remunerated with an expectation to be contactable outside of normal working hours;

- a review of current policies and procedures regarding employees being contactable outside normal working hours;
- the provision of training to managers to ensure they are aware of the introduction of the right to disconnect and the management of after-hours contact in the future; and
- the preparation of workplace policies on working outside an employee's agreed upon working hours.

If you have any questions in relation to the right to disconnect or any of the other recently announced Closing Loopholes workplace reforms, please get in contact with one of our employment law experts.

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INSIGHT | **By Mark Minarelli**

Navigating New Relationships After Loss: Understanding Legal and Financial Implications

If you are entering a new relationship after divorce or the death of your spouse or partner, then take the time to understand the landscape. Carefully assess the assets/liability profile and how that will likely expand in the next ten years. This is your carry bag. Not understanding the landscape will expose you to commercial destruction or, at the least, a diminution of your carry bag.

A landscape is distinguished by three types of relationships:

1. Marriage – governed by the Family Law Act (Cth)
2. De facto relationship – governed by the Family Law Act (Cth)
3. Domestic relationship – governed by the Family Relationship Act (SA)

The climate in this landscape will change if, during the relationship, you (1) separate / divorce or (2) die.

This article deals only with death during the course of a de facto relationship or a domestic relationship.

In this scenario, you will either die with a Will in place or with no Will in place. In either case, the surviving party may have the basis for a family provision claim.

A Will, at this point, is crucial, not only for the protection of your estate but also for the beneficiaries you want to benefit from the estate.

Take, for instance, a mature couple coming together after the death/divorce of their respective former spouse/partner – each with their personally owned assets and no desire to marry or part with those assets.

In the early stages (Stage 1) of the relationship, they will not qualify as de facto or domestic partners, but from 2 to 4 years and beyond, they may qualify (Stage 2).

Not providing for each other in Stage 1 would mean that it would be difficult for the surviving partner to mount a claim. From Stage 2 onwards, a survivor claim has the potential to gather strength.

One way of dealing with this situation is to have a clear understanding of when the transition from Stage 1 to Stage 2 is likely to occur and then to have an agreement, preferably in writing, setting out the reasons for the desire of the parties to keep their assets separate. Their respective Wills would reflect an integral part of their agreement and could include a detailed reference as to the reason and basis for keeping their assets separate in their respective estates. It is to be noted that this fact scenario would allow the parties to enter into a Financial Agreement under the Family Law Act made either during or after the breakdown of a de facto relationship.

The alternative is that there is no transition from Stage 1 to Stage 2 during the course of the relationship. This would be because the parties have no desire to have a relationship as a couple living together on a genuine domestic basis. This is sometimes described as having a friend with benefits.

The main point to understand in this landscape is that it is populated with complexities and financial traps. The quality and scope of your Will is a first step in addressing the complexities and the dangers that lie in wait for your carry bag. It may not, however, be the only or final step you require. Good legal advice will be the nightcap. So, as well as seeing your doctor, see your lawyer.

Additionally, the landscape is changing. The recently introduced Succession Act sets out a deliberate bias towards the Will maker's wishes in family provision claims. Section 116(2)(a) of the Act states that "in determining whether to make a family provision order the wishes of the deceased person is the primary consideration of the Court". How this will be interpreted in practice by the courts remains to be seen.

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INSIGHT | **By William Esau**

Distraint for Rent – What Landlords Need to Know

Distraining for rent can be a very effective remedy to recover unpaid rent when a tenant is in default.

Most commercial leases provide a landlord with the right to re-enter premises and terminate a lease if rent is due but unpaid. A lease will often provide that this right arises if rent is unpaid for longer than, say, 14 days or 21 days. However, exercising a right of termination does not give a landlord the ability to go into the premises and sell goods, plant and equipment owned by the tenant in satisfaction of the outstanding rent.

A distraint for rent may be a better alternative to terminating the lease.

Distraining for rent is not a process issued in a court. The procedure is regulated by Part 2 of *The Landlord and Tenant Act*. The process is straightforward. A Warrant to Distrain is prepared. The Warrant authorises a process server to attend at the premises to distrain the goods in the premises on behalf of the landlord. The Warrant to Distrain will stipulate the amount of rent outstanding. It should be noted that distraint can only occur for unpaid rent. It cannot occur for unpaid outgoings or other costs and interest.

The Warrant to Distrain is signed for and on behalf of the landlord. Accompanying the Warrant to Distrain is an inventory whereby the process server certifies that a distraint had taken place at the premises for the unpaid rent. It is also common to include an amount of costs of the distraint as part of the total claim. These costs will include costs of the preparation of the Warrant, together with the process server's costs. The Inventory has a Schedule of Goods which is completed by the process server. The distraint is then posted on the premises or handed to the tenant.

A distraint can only occur between the hours of 6.00am and 6.00pm.

Distraining for goods, including plant and equipment etc ultimately allows those goods to be sold at public auction in order to recoup the unpaid rent and costs.

If goods or plant and equipment in the premises are owned by another party, then that other party can provide a declaration as to their ownership and those goods must then be released to that other party.

Five days after the distraint, if the full amount of the rent and costs has not been paid, then the landlord has the right to sell the goods at auction for the best price that can be obtained.

Sometimes, a landlord will terminate a lease at the same time as the distraint is taking place. However, it is important to note that the distraint must occur before the lease has been terminated.

There may be issues arising in which a distraint may not be possible, particularly if a company is under a Deed of Company Arrangement or under administration. There may also be issues arising if the tenant has given security over its assets in which there are secured creditors involved.

However, subject to some of the complexities that arise in the case of insolvency or where goods are subject to a registered security, distraining for goods can be an effective remedy to recover unpaid rent.

DW Fox Tucker is able to advise on all aspects of distraining for rent.

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DISSECTING DECISIONS | **By John Walsh & Tiffany Walsh**

"Combination" Clarity on Causation or Query on "Consequential"

The recent decision of the Supreme Court of South Australia Court of Appeal, *Return to Work Corporation (SA) v English; Williams v Return to Work Corporation (SA)* [2023] SASCA 125, has significant implications for injured workers who are seeking to undergo a permanent impairment assessment, and potentially even for the scheme itself as a whole.

The vexed issue of which "injuries" must be assessed together and combined seems finally to be clarified, but there remain evaluative judgements to be made. Why does it matter?

Combination and seriously injured workers

When a worker who has suffered a compensable injury has reached "maximum medical improvement" (their injury has stabilised and there is not likely to be any further deterioration or recovery), they can have their level of permanent impairment as a result of that compensable injury assessed. All impairments are assessed separately. There is no entitlement to lump sum compensation where the permanent impairment is less than 5%. There may be several consequential "injuries" which arise from one incident. If assessed separately and compensated separately, those that are assessed at 5% WPI individually do not give rise to an entitlement to lump sum compensation. If, however, they are combined, each one is taken into account and may make the difference between an injured worker achieving or not achieving seriously injured worker status and, therefore, the entitlement to receive weekly payments to retirement age and medical expenses for life.

An example scenario is a 50 year old full-time worker who suffered compensable injuries to both legs and arms in 2022. The impairment of each leg would be separately assessed, and in our example, the worker was assessed as having 17% whole-person impairment of the right lower extremity, 15% whole-person impairment of the left lower extremity, 4% whole-person impairment of the left upper extremity and 4% whole-person impairment of the right upper extremity. The age of the worker and the hours they worked prior to their injury are relevant for the purposes of calculating their entitlement to a lump sum payment for economic loss.

If these impairments were <u>not</u> capable of combination, the worker would be entitled to the following lump-sum compensation:

- Right Lower Extremity, 17% WPI

  Economic loss: $85,004.50

  Non-economic loss: $42,107.00

- Left Lower Extremity, 15% WPI

  Economic loss: $69,212.50

  Non-economic loss: $36,168.00

- Left Upper Extremity, 4% WPI

  Economic loss: Nil

  Non-economic loss: Nil

- Right Upper Extremity, 4% WPI

  Economic loss: Nil

  Non-economic loss: Nil

- Total: $232,492.00

As their highest assessment of whole-person impairment is only 17%, they have not reached seriously injured worker status and are only entitled to weekly payments for 104 weeks from the date of incapacity.

However, if the impairments were capable of combination, this particular worker would have reached 35% whole-person impairment and would be a seriously injured worker. It is worth noting that combination is not as simple as adding each of the impairment assessments together, and there is a "*Combined Values Chart*" which is used to calculate the combination of multiple impairments. As such, they would be entitled to lump sum compensation for non-economic loss in the amount of $200,958, as well as weekly payments at 80% of their average weekly earnings until they reach retirement age.

"impairments from related injuries or causes are not to be disregarded in making an assessment of permanent impairment"

English

Mr English, an arborist, was injured at work on 4 March 2019 when he cut a rope line that he had attached to a heavy branch. The rope swung and hit the back of his neck, which pushed him forward and pinned his head and neck against a cherry picker. As a result of this injury, Mr English was prescribed and took Lyrica (pain medication).

On 10 May 2019, Mr English again injured himself at work when he fell and injured his right quadriceps. The fall was a result of light-headedness, which was caused by the need for medication (Lyrica) to treat the initial injury.

Whilst Mr English was entitled to lump sum compensation for both impairments, the Corporation determined that the impairments could not be combined. Mr English, however, argued that the impairments arose from the same **cause** and, as such, should be combined.

Williams

Mr Williams, an electrician, experienced a sudden sharp pain in his right knee while climbing scaffolding while at work in May 2013. It was found that he had sustained a "*tear of the medial meniscus in the context of severe osteoarthritis within the right knee*".

After being made redundant in June 2014 and securing new employment in September 2014, Mr Williams was required, from early May 2015, to perform more physically demanding work, "*including work that required he repeatedly climb up and down both fixed ladders and stairs, and A-frame ladders*". From the time he changed duties, Mr Williams experienced an increase in his right knee symptoms and then began to experience pain in his left knee. Both injuries were given a date of injury of 18 August 2015, and in September 2018, it was determined that Mr Williams was entitled to lump sum compensation for each knee injury – assessed

separately. Mr Williams argued that the impairments for each knee should be combined.

Relevant case law and legislation

His Honour Justice Doyle considered the legislative history with respect to combination of impairments, which included the decisions of *Marrone v Employers Mutual Limited* (2013) 116 SASR 501, *Return to Work Corporation (SA) v Mitchell* (2019) 135 SASR 315, and *Return to Work Corporation (SA) v Preedy* (2018) 131 SASR 86, and *Return to Work Corporation (SA) v Summerfield* (2021) 138 SASR 175 ("***Summerfield***").

In *Summerfield*, it was held that "*impairments from related injuries or causes are not to be disregarded in making an assessment of permanent impairment*" and, importantly, that:

> *The causal test permits an impairment from a consequential injury to be combined with an impairment from another injury where, as a matter of common sense, the impairments are so connected that the trier of facts is satisfied that the impairments are from the "same cause".*

His Honour also noted the recent amendments to the *Return to Work Act 2014 (SA)* ("**RTW Act**") through the *Return to Work (Scheme Sustainability) Amendment Act 2022 (SA)* ("**the Amendment Act**").

The Amendment Act inserted a legislative note to follow Section 22(8) of the RTW Act, which reads as follows:

> *Note –*
>
> *The Parliament confirms that this subsection is to be interpreted and applied in accordance with the principles enunciated in the reasons of the Full Court of the Supreme Court in Return to Work Corporation of South Australia v Summerfield [2021] SASCFC 17.*

The Amendment Act also amended Sections 22(10), 56(5), 56(8), 58(6), and 58(9) of the RTW Act to remove the reference to combining injuries that arose *"from the same trauma"*, replacing this with provisions which allow impairments *"from the same injury or cause"* to be combined, bringing these sections into line with the test set out in Section 22(8)(c) of the RTW Act.

Although the applicable law for both the *English* and *Williams* disputes predated the Amendment Act, given that the relevant portion of the Amendment Act was the confirmation that Section 22(8) of the RTW Act is to be interpreted in accordance with the principles of *Summerfield*, and as the parties had already agreed that *Summerfield* was applicable, there was no practical significance.

It should also be noted that the Amendment Act has increased the threshold to be considered a seriously injured worker from 30% whole-person impairment to 35% whole-person impairment in the case of a physical injury but remains at 30% for a psychiatric injury.

Consideration

His Honour Justice Doyle concluded that:

> *In considering whether a later impairment qualifies for combination, it is necessary to consider the causal explanation for each of the impairments, in order to determine whether those explanations possess the requisite sameness. This requires an evaluative assessment of the causal explanations, and in particular any differences between them. It requires an evaluative assessment of whether any additional events or integers in the causal explanations are of a nature or significance that means the impairments cannot be said to arise from the same injury or cause.*[1]

Specifically, with respect to the *English* matter, His Honour further concluded that:

> *… while the causal explanation for the second impairment involves additional events or integers (the ingestion of pain medication resulting in light-headedness and a fall), there is a direct and straightforward relationship, or causal chain, between the two injuries and hence the two impairments. The additional events are each the natural and foreseeable consequence of the preceding event. The causal chain does not involve, let alone depend upon, any additional event which can be said, as a matter of common sense, to have undermined the directness of the causal chain between the events causing the first injury and the occurrence of the second injury and impairment. In my view, it is appropriate to characterise both impairments as sharing the same causal explanation, and hence arising "from the same injury or cause" for the purposes of s 22(8)(c).*[2]

With respect to the *Williams* matter, the Court also considered that the worker's right and left knee impairments were capable of combination.

This means that where there are multiple impairments, and the question of combination comes up, what is required is an evaluation of how each impairment has arisen and whether there are any additional events or integers involved in the causation of each impairment such that the second can be said to be a natural and foreseeable consequence of the first.

Another example may help to illustrate this point. Take a person who falls at work and twists their knee, with the knee injury being accepted as compensable under the RTW Act. Then, a month later, when they are back at work, they suffer a blow to the head as a result of a falling object. The head injury is also accepted as compensable under the RTW Act. However, as having an object fall on a person's head is not a natural and foreseeable consequence of having an injured knee, then the two impairments would not be capable of combination.

However, if the same worker's

"The impact of this decision will be significant as the definition of 'same injury or cause' has arguably been broadened. When considered with the Amendment Act, which brought the terminology in Sections 56 and 58 of the RTW Act in line with that in Section 22(8)(c) – namely the 'same injury or cause' test – the implications are even more far-reaching."

1 [139]

2 [155]

"Even though the threshold for seriously injured worker status has been raised to 35% WPI, diligent worker advocates will investigate the existence of other consequential injuries, and inevitably, the number of workers reaching seriously injured worker status will increase with a consequential impact on the viability of the scheme."

knee injury made the knee unstable such that they were prone to becoming unbalanced and falling, and they were to fall and hit their head at work, resulting in a compensable head injury, then it would be argued that the head injury was a natural and foreseeable consequence of the knee injury. It would follow that combination of the two impairments would be required.

Practical implications of decision

The impact of this decision will be significant as the definition of 'same injury or cause' has arguably been broadened. When considered with the Amendment Act, which brought the terminology in Sections 56 and 58 of the RTW Act in line with that in Section 22(8)(c) – namely the 'same injury or cause' test – the implications are even more far-reaching.

When the concept of a seriously injured worker was introduced, it was anticipated that very few injured workers would reach seriously injured worker status. However, that has not proven to be the case with a significant number of workers achieving the status, and those numbers will increase with a compounding effect on the financial performance of the scheme.

The Amendment Act has raised the seriously injured worker threshold from 30% whole-person impairment to 35% whole-person impairment at relatively the same time as the *English* and *Williams* decision, and the decision has arguably broadened the definition of 'same injury or cause'. It will be interesting to see how the interplay of the increased threshold with the broader definition plays out and whether there will be any impact on the number of workers who reach seriously injured worker status.

In our view, the result is inevitable. There will likely be more litigation as compensating authorities investigate multi-body part impairments, and in carrying out a "common sense" evaluative exercise, they look for differences in the causal elements leading to each individual impairment.

Even though the threshold for seriously injured worker status has been raised to 35% WPI, diligent worker advocates will investigate the existence of other consequential injuries, and inevitably, the number of workers reaching seriously injured worker status will increase with a consequential impact on the viability of the scheme.

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DISSECTING DECISIONS | **By Helene Chryssidis**

The Implications of Bankruptcy: Barry Decision Provides Insights into Corporate and SMSF Affairs

As seen *in the matter of an application* by Barry [2024] FCA 13 (**Barry**), bankruptcy can have a ripple effect on the management of corporations and a superannuation entity. *Barry* serves as a warning of the importance of understanding the far-reaching implications of bankruptcy. It also demonstrates the Court's ability to make orders validating actions in circumstances where a bankrupt acts bona fide and without the intention to defeat creditors.

Summary of facts

The matter of Barry concerned two plaintiffs who were directors of two entities. One entity acted as the trustee of a SMSF. The other entity acted as a trustee of a trust fund. During their involvement in these entities, the trust acquired assets, including an investment unit located in Queensland (**Property**).

Both members became bankrupt. Arising from their bankruptcy, the plaintiffs ceased to be directors of the two entities as undischarged bankrupts are disqualified from managing corporations and from acting as responsible officers of a trustee of a superannuation entity.[1]

"unwittingly or labouring under misapprehension of the legal position took steps to sell the Property but did not take such steps dishonesty."

The plaintiffs received advice from external advisors that they should roll over the benefits held in the SMSF into an industry superannuation fund and wind down the SMSF.

Acting on this advice, the plaintiffs took steps to sell the Property, being the SMSF's principal asset. A contract for sale was ultimately signed by the plaintiffs and exchanged with respect to the sale of the Property. However, by signing the contract for the sale of the Property, the plaintiffs committed an offence as they were disqualified from managing the two entities and from acting as responsible officers of a superannuation entity.

Immediately after realising their mistake or "misapprehension", the plaintiffs filed urgent proceedings in the Federal Court. In summary, relying on the provisions contained in the *Corporations Act and the Superannuation Industry (Supervision) Act 1993* (Cth), the plaintiffs sought (amongst other things):

1 *Corporations Act 2001* (Cth) s 206B(3) (Corporations Act); *Superannuation Industry (Supervision) Act 1993* (Cth) s 120(1) (SISA).

"settle on the sale of the property, roll over their member benefits and lodge all necessary documents to comply with financial reporting requirements and to bring the fund to an end."

1. Orders granting them leave to act as directors of the two entities in order to give effect to the sale of the Property, and to wind up the SMSF.

2. A declaration to the effect that any act, matter or thing that they had done or purported to do in their capacity as officers of the two entities since becoming undischarged bankrupts was not invalid.

Findings by the Court

The Court considered the plaintiffs intentions behind the orders and concluded that they were acting *bona fide* and without intending to defeat creditors. The Court was satisfied that the plaintiffs either "*unwittingly or labouring under misapprehension of the legal position took steps to sell the Property but did not take such steps dishonesty.*"

Ultimately, the Court made orders sought by the plaintiffs under the *Corporations Act* and the *Superannuation Industry (Supervision) Act 1993* (Cth). The Court did not consider the orders to be contrary to the public interest, nor did it risk any contraventions of the *Corporations Act* and the *Superannuation Industry (Supervision) Act* 1993 (Cth).

"Barry helps demonstrate the importance of obtaining advice and understanding the implications of bankruptcy on managing your corporate and SMSF affairs."

The Court further ordered an extension of time to allow the plaintiffs to "*settle on the sale of the property, roll over their member benefits and lodge all necessary documents to comply with financial reporting requirements and to bring the fund to an end.*"

Takeaways

Barry helps demonstrate the importance of obtaining advice and understanding the implications of bankruptcy on managing your corporate and SMSF affairs. It also highlights that there may be avenues available through the Court for persons acting bona fide to continue to assist in certain SMSF actions and to ensure that a SMSF remains compliant.

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DISSECTING DECISIONS | **By Helene Chryssidis & Alice Lynch**

Revisiting Legal and Ethical Standards: Lessons From Henderson for Financial Advisers

Mr Sam Henderson was once one of the most prominent figures in the financial planning industry as CEO of Henderson Maxwell, television show host, and an occasional columnist for the Australian Financial Review. However, in April 2018, Mr Henderson was subject to questioning by the Banking Royal Commission after reports of bad advice being issued by his firm, his staff impersonating clients, and attempting to silence the claim with the Financial Planning Association (**FPA**).

Allegations of flawed advice

In late 2016, Ms Donna McKenna sought financial planning advice from Henderson Maxwell. She was drawn to Mr Henderson because of the 'Financial Adviser of the Year' award he received from the Association of Financial Advisers (**AFA**) and his regular media appearances on Sky Business.

Despite her deferred benefit superannuation scheme, which would have incurred significant penalties if certain actions were taken prematurely, Mr Henderson advised her to make decisions detrimental to her financial interests. He advised her to roll over all her superannuation into a Henderson Maxwell managed self-managed super fund (**SMSF**), sell her shares and investments to his financial planning business, Henderson Maxwell, and give the firm all her cash.

Ms McKenna's deferred benefit superannuation scheme meant if she had rolled over all her balance before the age of 58, she would have forfeited her right to $500,000. Mr Henderson's statement of advice presented to Ms McKenna did not take this into account.

The recommendation to switch to all in-house products had various costs, including plan preparation, establishment, brokerage, and ongoing fees. This also meant that notwithstanding the $500,000 lost, if the advice had been taken, Ms McKenna would have also been paying significantly higher fees than she would have been paying on her existing superannuation account and other investments.

This advice not only contravened Section 961B of the *Corporations Act (2001)* (Cth), which provides that a financial advisor must act in the best interests of the client in relation to the advice, but it also breached the FPA Professional Code's "client first" provision, which mandates prioritising clients' interests over the personal gain of the financial advisor.

Impersonation of clients

Damning evidence was presented during the Banking Royal Commission, revealing instances where employees of Henderson Maxwell impersonated Ms McKenna in telephone conversations with her superfund.

"serve as a reminder of the imperative for financial professionals to maintain the highest standards of ethics, honesty, and professionalism in their practice."

During these telephone conversations, the employee was told that a half-a-million-dollar penalty would be applied if the fund was rolled over. Despite being aware of these actions, Mr Henderson failed to take appropriate disciplinary measures. He refused to terminate the employment of the customer service officer who impersonated Ms McKenna because the firm "*was like family*". This violated the integrity principle within the FPA code, which demands honesty and good faith in professional dealings.

Communication with the FPA

Throughout the investigation, Mr Henderson maintained communication with the FPA, often requesting confidentiality and disparaging Ms McKenna. In the emails to the investigating officer, he personally criticised Ms McKenna's career, labelled her as "*aggressive*" and "*nitpicking*", and referred to the situation at hand as a "*storm in a teacup*". He also emailed the CEO of the FPA, complaining about the process and investigating officer and described the matter as minor. Such conduct breached the professionalism principle outlined in the FPA Professional Code, which requires respect and courtesy towards clients and fellow professionals.

Additional findings and legal ramifications

In 2020, Mr Henderson was brought back into the spotlight for the wrong reasons after he pleaded guilty to charges of dishonest conduct and making false representations. These are offences pursuant to sections 1041G and 952D(2)(a)(ii) of the *Corporations Act (2001)* (Cth). This resulted in a monetary fine of $10,000 and a recognisance bond, further underscoring the seriousness of his misconduct for a period of two years.

As a consequence of these actions, Mr Henderson was banned from the finance sector for three years, and his reputation was irreparably damaged.

Takeaways

This matter serves as a cautionary tale, emphasising the legal and ethical obligations of financial advisers to act in the best interests of their clients. The case against Henderson Maxwell underscores the importance of adherence to both statutory laws and professional codes of conduct in the financial services industry.

The regulatory actions taken against Mr Henderson and Henderson Maxwell demonstrate the commitment of authorities to uphold integrity and accountability within the financial sector. They also serve as a reminder of the imperative for financial professionals to maintain the highest standards of ethics, honesty, and professionalism in their practice.

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INSIGHT | **By Joanne Cliff**

Spousal Maintenance

Spousal maintenance is the financial support given by one spouse/partner to a former spouse in circumstances where they are not able to support themselves due to factors such as age, illness or caring responsibilities.

Spousal maintenance is not child support or adult child maintenance. These payments are made to financially support the children of a marriage or relationship.

Spousal maintenance is not automatic. If it is not to be paid by agreement between the parties, then a Court application is issued where two matters have to be established, namely:

1. one party is unable to support themselves financially; and
2. the former partner has the financial means to be able to support them financially.

Therefore, to be successful with an application for spousal maintenance, one spouse has to show the "need" for financial support and demonstrate that the other spouse has the ability to pay. A person who makes a lifestyle decision not to work or to work only part-time would not be successful with an application for spousal maintenance unless they could point to one or more of the factors mentioned below.

Applying for spousal maintenance

The application is accompanied by a detailed form that itemises weekly spending by the spouse who is seeking financial support. The form will need to show that there is a shortfall in funding to meet living expenses.

The Court will, in determining whether maintenance should be paid, give consideration to the following factors:

- The income expenses and financial resources of each spouse.
- The age and health of each spouse and whether each spouse has the ability to earn an income from employment.

- The care arrangements for any children of the marriage. Care arrangements may affect someone's ability to work or work full time.
- The standard of living experienced by the party which is reasonable in the circumstances.
- The length of the marriage, contributions made by each spouse to the marriage and whether the length of marriage has affected one person's ability to earn an income. For example, the mother may not have worked for many years and, therefore, not have the skills to obtain employment without training.
- Whether spousal maintenance may assist a person in undertaking training or re-skilling.
- Any other relevant factors.

When should an application be made?

An application for spousal maintenance can be made after separation and leading up to the making of final property orders.

If the parties have divorced, any application has to be made within 12 months of the divorce order taking effect.

If a party needs to apply for spousal maintenance out of time, then you first have to obtain leave of the Court to explain why the application was not made within the relevant time period.

With a de facto relationship, any application for de facto maintenance has to be made within two years of the breakdown of the de facto relationship, but again, if you are out of time, then you have to seek the leave of the Court explaining why the application was not issued within time.

If a Court has ordered that your marriage was a nullity, that is void, an application can still be made for spousal maintenance, but it has to be made within 12 months of the decree of nullity being made.

How is spousal maintenance paid, and for how long?

Spousal maintenance payments can be made:

- as a lump sum or periodic payments, depending on the circumstances of the case;
- it can be made in a period leading up to final property orders being made;
- it may be paid for short periods of time to enable the spouse to become financially self-sufficient; or
- it can be paid for more extended periods or even indefinitely if, for various reasons, one spouse cannot become financially self-sufficient due to such things as health and age.

The payments can be cash payments or payments of expenses for daily living costs such as mortgage instalments or payments of rates, utilities, health care costs and other household expenses.

Alternatively, a lump sum final cash payment can be made as part of a property settlement.

If the spouse who has been receiving spousal maintenance remarries, then they are no longer entitled to spousal maintenance. If the de facto partner commences a new de facto relationship, a court will consider the financial relationship that exists to determine whether that party can now support themselves.

Binding financial agreements (BFA) and spousal maintenance

A widely held view is that you can avoid paying spousal maintenance if you resolve a financial settlement with a BFA. Such agreements can be made prior to, during or after a marriage or relationship has ended. It allows parties to devise their own financial split, which, if done properly, will oust the jurisdiction of the Family Court to determine how property should be divided between the parties.

Spousal Maintenance can be included in a BFA with the parties stating that neither of them will make a claim for spousal maintenance against the other. It is usually accompanied by a provision in the BFA to pay, by way of spousal maintenance, a small sum (with the monetary figure being stipulated) to each other.

However, the Family Law Act does state that the provision can be void if the Court is satisfied that when the BFA came into effect i.e. at the time of separation, and taking the terms and effect of the BFA into consideration the party is not able to support themselves without an income tested pension, allowance or benefit. A court would then make an order for spousal maintenance.

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SUITS OFF | **Staff Profile**

Daniel's Journey: Balancing Career, Family, and Passion

Daniel Idema
Director

Beginnings and specialisation

Daniel's journey into the legal profession began with a spark ignited by his high school legal studies teacher. Captivated by the intricacies of the law and the impact it could have on people's lives, he made a promise to himself to pursue a career in this field. His first step into the legal world was as a clerk at a boutique law firm on the outskirts of the city. This initial role provided him with a comprehensive introduction to the legal industry, offering him a chance to observe and learn from experienced professionals. During this time, Daniel was exposed to a variety of legal matters, ranging from family disputes to commercial transactions. However, it was in the realm of commercial law that he found his true calling. Working closely with a seasoned lawyer, Daniel delved deeper into the complexities of commercial transactions. His fascination grew as he navigated through intricate legal frameworks and regulations.

A pivotal moment in Daniel's career occurred during a significant tax dispute case. The challenge of unravelling complex tax provisions and advocating for his client's interests was both intellectually stimulating and rewarding. This experience reinforced his decision to focus on tax law in addition to his existing commercial practice.

Professional growth and achievements

Daniel's professional journey has been marked by continuous growth and development. After his formative years working for a boutique practice, he sought new opportunities that would broaden his expertise and challenge him further. His career path took him through various firms and jurisdictions, each experience enriching his understanding of the legal landscape and honing his skills.

A notable milestone in Daniel's career was his decision to join DW Fox Tucker Lawyers. The allure of working with John Tucker, a leading figure in the field, played a significant role in this decision. At DW Fox Tucker Lawyers, Daniel found a perfect fit for his career aspirations, allowing him to deepen his knowledge and expand his practice, including through involvement in complex tax disputes and the provision of strategic advice to businesses navigating the intricate tax landscape. His commitment to excellence and his holistic approach to client matters has earned him a reputation as a trusted advisor and a skilled advocate.

For Daniel, professional fulfilment lies in the journey of each client matter. From the initial consultation to the final resolution, he cherishes the opportunity to be deeply involved in every aspect of the case. Ensuring client satisfaction and success is at the core of his practice. He takes pride in the positive outcomes he achieves for his clients.

Balancing career and family

While Daniel's professional life is demanding, he places immense value on his role as a dedicated father and partner. His family, consisting of his partner Sammie and their young son Archie, is the cornerstone of his life. Balancing career and family requires a commitment to prioritising both professional and personal responsibilities. He credits Sammie's terrific support with enabling him to achieve this balance.

Family activities play a central role in Daniel's life. Together, they enjoy exploring nature, taking hikes, and visiting parks. One of their favourite pastimes is indulging Archie's fascination with animals by frequenting the zoo. These outings provide opportunities for bonding and create joyful moments that Daniel cherishes.

Archie's budding interest in sports has also become a source of family fun. Daniel and Sammie actively support and participate in Archie's activities, fostering his enthusiasm and encouraging his development. Whether it's playing sports in the backyard or mucking around at one of the local ovals, these shared experiences strengthen their family bond.

Personal pursuits and life lessons

Beyond his professional and family commitments, Daniel values personal pursuits that provide relaxation and rejuvenation. Physical exercise is a significant part of his routine, offering a way to unwind and maintain his well-being. Whether that is running, soccer or playing a round of golf, these activities provide a healthy balance to his demanding career.

Daniel's journey is underscored by valuable life lessons that he imparts to aspiring legal professionals. One of the key lessons he emphasises is the importance of seizing opportunities and staying prepared. His early experiences in court taught him the value of thorough preparation and adaptability. These lessons have shaped his approach to the legal profession and continue to guide his practice.

Reflecting on his journey, Daniel shares anecdotes highlighting the necessity of being prepared for any situation. From unexpected court appearances to published decisions, these experiences have reinforced the importance of readiness and adaptability. He believes that success in the legal profession requires a combination of knowledge, preparation, and the ability to navigate unforeseen challenges.

We're delighted that Daniel has found this balance and success at DW Fox Tucker Lawyers.

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DWFoxTucker Lawyers

End of Financial Year

As we approach the end of the financial year, we want to take a moment to extend our thanks for your continued trust in our team.

Wishing you all the best as we wrap up this financial year and look forward to new opportunities and continued growth in the year ahead.

Thank you once again for your support.

Joe De Ruvo
Managing Partner

Narelle Lee
CEO

DWFoxTucker