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# business

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# DIRECTORS PROSECUTED FOR THE LACK OF A QUESTIONING MIND

TONY HOGARTH AND AMBER VARIO

Middleton J of the Federal Court of Australia recently handed down a landmark decision regarding directors' duties. The case of *Australian Securities and Investments Commission v Healy* (2011) FCA 717 thoroughly reviews the law pertaining to directors' obligations to perform their duties with a sufficient degree of care and diligence.

**The facts**

The case concerned a prosecution brought by ASIC against eight directors, both executive and non-executive, of the Centro Group. The prosecutions related to the contravention of the *Corporations Act 2001* (Act), specifically a director's duty to exercise their powers with care and diligence.

The contraventions occurred in 2007 and concerned the directors' failure to properly and accurately disclose the Group's annual financial reports, as follows:

1 AUD$1.5 billion of short term liabilities of the Centro Properties Group and $500 million of short term liabilities of the Centro Retail Group by classifying them as non-current liabilities; and

2 US$1.75 billion of guarantees on short-term liabilities that the Centro Properties Group had given after the balance date.

The ASX requested that the Group explain the apparent differences in the classifications of the amounts disclosed. The Group advised that the amounts were wrongly classified and would be re-classified as current liabilities.

The error occurred, not as a result of any malicious intent, but as a result of the directors accepting the financial reports prepared by the Group's auditors, without properly reviewing the reports for themselves.

**The Issues**

Middleton J held that all directors have a duty to carefully read and understand financial statements before they form opinions. This involves properly considering whether the financial statements are consistent with the director's knowledge of the company's financial position. His Honour said "the reading of financial statements by a director is for a higher and more important purpose: to ensure, as far as possible and reasonable, that the information included therein is accurate".

Middleton J noted that all directors should:

1 Have at least a rudimentary understanding of and familiarity with the business of the company;

2 Be sufficiently informed about the company's activities;

3 Monitor the corporate affairs and policies of the company;

4 Maintain familiarity with the financial status of the corporation by regular review and understanding of the financial statements; and

5 Have a questioning mind.

Middleton J found that the directors breached the Act by choosing to blindly rely on the advice of their auditors. Instead each director should have turned their own minds to the financial statements to determine if they were consistent with the director's knowledge of the company.

**The lesson**

Above all, Middleton J notes that "a director should always have a questioning mind and never be too quick to accept advice or reports without turning his or her own mind to it".

This decision raises the bar for directors to ask sufficient questions so that they fully understand the true financial position of the company.

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# DRUGS AND ALCOHOL IN THE WORKPLACE

JONATHAN MAMARIL

Rolling out drug and alcohol testing policies are of great importance in workplaces where activities may involve major hazards or where safety is particularly critical.

Employees who come to work under the influence of illicit drugs or alcohol put the safety of co-workers (and sometimes the general public) at risk. Employers have an obligation under the *Workplace Health and Safety Act 1995* (WHSA) to prevent a workplace incident occurring. The WHSA effectively requires immediate steps to be taken to, if necessary, eliminate the hazard, prevent the risk from occurring and minimise risks in the workplace. In the event of an incident, substantial penalties may apply against the employer and individual management personnel.

Fair Work Australia (FWA) have provided some guidance to effectively implement a drug and alcohol policy, especially if an employer intends to implement random drug testing. FWA will not allow employers to rely on drug policies to reprimand an employee if the employer has not taken pro-active steps to educate and train employees on the policies and procedures. An appropriate policy coupled with appropriate training of staff, which alerts them to the dangers, are more likely to be effective in minimising risk of injury or death.

The drug testing itself needs to be non-invasive and although there has been some debate as to the method that should be used, FWA's view is that oral fluid swabbing (as opposed to urine testing) is the more acceptable practice.

When developing a policy, it is fundamental that employers consider the following:

- Policies and procedures should be directed at safety and not primarily at discipline;
- Define the disciplinary outcomes based on testing protocols including formal counsellings for employees who return a non-negative test and more serious sanctions for repeat non-negative tests;
- Keep the results of the tests confidential;
- Provide adequate education and training of employees on the relevant policy and procedures;
- Ensure all employees know the procedure for any tests (especially if it is random testing); and
- Apply the policy and procedure universally across the workplace.

# ELIMINATE SEXUAL HARASSMENT FOR THE WORKPLACE

PAT MULLINS

Instances of sexual harassment in the workplace are (unfortunately) becoming more prevalent. One particular issue which arises quite often in the workplace is where a more senior employee takes illegitimate advantage of an imbalance in the power relationship. A disparity in age or seniority in employment can change the nature of an interaction from something quite innocent into something quite sinister and inappropriate.

In work places where junior employees interact with more senior ones, it is wise for employers to be alive to the possibility of sexual harassment. The modern employee acting reasonably but conscientiously should alert all staff to the need to be vigilant in relation to interpersonal dealings in the workplace. The key is that everyone is entitled to be treated with respect. It is far better for an employer to go on the front foot and provide appropriate training to all staff. This will assist in reducing the possibility of inappropriate interactions. When sexual harassment occurs, the work performance of both victim and perpetrator will be adversely affected until the problem is addressed and resolved. This means that productivity in the workplace can be reduced quite significantly.

In providing the training all staff need to be made aware that no form of sexual harassment will be tolerated. The employer needs to spell out the consequences of such behaviour for the offender. A serious case of sexual harassment of a junior employee by a senior employee should result in the dismissal of the offender. Such consequences need to be spelt out to staff during the training provided.

All workplaces need to have a sexual harassment policy. They should also have a written procedure for dealing with complaints, for their proper investigation and for a decision to be reached following such an investigation. If a complaint is upheld and the breach of the policy has been serious, then disciplinary consequences should follow for the offending employee. It is only if such a process is properly followed that sexual harassment can be eliminated from the workplace. It all comes down to treating everyone with respect.

# NATIONAL BUSINESS NAMES **REGISTER**

AMBER VARIO

For some time now the State and Territory governments have been working with the Federal government to devise a national business names register. Currently, the State and Territory governments govern the registration of business names. However, under the new system all business names will be registered with and administered by ASIC.

The national register is due to come into operation in 2012 at which time all existing business names will automatically roll over to the national register. Business names will expire on the original date as listed in the State or Territory register. Upon expiry, renewals will be issued by ASIC. It is expected that the registration and renewal fees will decrease under the national register.

Unlike the State and Territory registers, under the national register details of a business will be publicly available. Details will include the business contact details, principal place of business and the ownership of the business name. Further information about a business will be made available for a fee.

# **THE PPSA -** ARE YOU READY?

MARK MADSEN

The *Personal Property Securities Act 2009* (Cth) comes into general operation in October 2011. The Act, which will introduce one national regime and register, will have an impact upon any business which deals in personal property (any tangible or intangible property apart from land). Whilst the Act will not commence for a couple of months, it is important that businesses understand now its impact and prepare themselves.

This will entail a consideration of at least the following:

1. Developing and documenting policies and procedures to account for the new regime to ensure that your interests are protected, including the level to which authority is to be delegated to deal with security interests. It will be necessary to train your staff accordingly; for example, in receiving credit applications and registering interests on the Personal Properties Securities Register.
2. It is essential that businesses review their records and external documents. The new regime will rely heavily upon what is contained on the Register and what is contained in security agreements between parties. Accordingly, businesses need to ensure that their documentation correctly reflects the following:
   - 2.1 At all times, correct details of your own business and of each customer, together with the means by which to update those details (which provision should be contained within the agreement);
   - 2.2 What should occur if your own business or a customer's business is restructured;
   - 2.3 Having regard to your own business or that of a particular customer, whether you should be seeking to contract out of certain provisions in the Act or whether it is more beneficial to retain those provisions within your agreements;
   - 2.4 Whether your agreements should contain a business purpose declaration;
   - 2.5 How any "cease supply" provision should be drafted;
   - 2.6 Whether your security agreements contain clauses dealing with registration and enforcement costs.
3. Consider, not only any current security interests you or your customers may have in personal property (such as charging clauses and retention of title provisions), but also how you must now "perfect" any securities which will otherwise not be enforceable under the new regime, such as directors' guarantees and indemnities, which may not contain the appropriate provisions or which otherwise must be separately registered.

The new regime will rely heavily upon what is contained on the Register and what is contained in security agreements between parties.

4. If your documentation has been correctly redrafted and your revamped procedures followed to ensure your security interest is "perfected", you will then still need to understand your rights of enforcement, the options available to you and the obligations which you must follow. This will entail understanding what is a complex matrix of priorities under the Act. You will also need to include procedures for proper documenting of any enforcement action to ensure that action can be justified and not overturned.

Whilst there is a lengthy transitional period of two years under the Act to allow the country to come to terms with the new regime, the quicker that businesses understand it and adjust their procedures and documentation, the better protected their interests will be.

# VISA PROGRAM HELPS LOOMING SKILLS SHORTAGE

TONY HOGARTH

As the Australian economy rebuilds, business is again foreshadowing a looming skills shortage in Australia. The shortage is already evident in the mining and resource sector and is expected to spread to other industry sectors as business slowly claws its way back from the impacts of the global financial crisis.

The Department of Immigration and Citizenship's (DIAC's) visa program for 457 Visas has been heralded by DIAC as a success in creating employment for the Australian labour market. DIAC claims that as areas of labour shortage are filled, overseas workers filling these positions are creating other employment opportunities elsewhere in the economy.

The 457 Visa program provides for highly skilled overseas workers to come to Australia and work for sponsoring businesses here for periods of up to four years. There are many occupations on the gazetted list covering management, professional, trade and technical skilled occupations. The 457 Visa program drives businesses to hire locally first and is subject to compliance monitoring. This includes businesses having to demonstrate that they have expended funds either employing trainees or recent graduates or in training their Australian permanent resident and Australian citizen staff.

The process of sponsoring a skilled overseas worker involves a 3 phase application process. The first 2 phases are the employer's responsibility, namely the Sponsorship and Nomination applications. The third phase is the Visa Application itself by the overseas employee.


All three Applications can be lodged simultaneously electronically with the Department. Processing times vary depending upon a variety of factors.

The 457 Visa program also features the possibility for an employer, who may require a larger number of overseas skilled workers to fill positions in their business, to negotiate a Labour Agreement with DIAC. These agreements can be complicated to negotiate and are also subject to ongoing monitoring. Labour agreements are useful where the worker skills required for the business are not readily available from the Australian labour force, or, where the skill set required is outside the gazetted list of skilled occupations.

457 Visa holders can in certain circumstances become Permanent Residents through the Employer Nomination Scheme (ENS) and Regional Sponsored Migration Scheme (RSMS) visa categories. Currently there are different skilled occupation lists for Permanent Residence visa categories which differ slightly from the 457 Visa gazetted list. There are fewer occupation categories on the Permanent Residence list. However, there are moves afoot within DIAC to amalgamate the several gazetted skilled occupation lists currently in use.

If your business is considering sponsoring an overseas worker, or you would like to know more about Australian Visa possibilities, we can assist. Tony Hogarth is a registered migration agent with more than 20 years' experience in all facets of business migration.

Tony Hogarth, MARA Registration No. 9357386

DAVID WILLIAMS
EDITORIAL

Since our last newsletter the firm has welcomed two new partners being Tony Hogarth (Business Services Group) and Michael Potts (Property Group). Tony is an Accredited Migration Specialist and has included an article in this newsletter that highlights this area of the law.

In recent forums where I have been co-presenting with State Government officers they have been warning of the increasing skills shortage that is going to impact upon businesses from 2015. Many of the mining industry groups have already highlighted it as an issue but it will become even a bigger skills shortage issue for all of us in Business.

Recent legislative changes such as the *Personal Properties Securities Act 2009* and the Federal Court decision of Centro highlight continuing obligations that are being imposed on business owners that are making it extremely difficult to navigate the legal maze.

Since 2008 business owners and operators have been under extreme pressure due to the prevailing economic conditions. The recent downgrading of the United States credit rating and the continuing pressure of inflation imposes significant risks to business.

There must be a point in time where we all become more confident in our future. I always thought 2012 would be the turning point but with the threat of State and Federal elections together with the looming carbon tax, politics is likely to do more damage to confidence than the world economic conditions.

One of the biggest obstacles to the economic resurgence of the South East Queensland market will be very much when the confidence of the consumers returns to lead the recovery of business in the non-mining sectors, we all look forward to confidence returning.

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