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PARENTAL LEAVE
WHAT ARE EMPLOYERS OBLIGATIONS?

JONATHAN MAMARIL

It is important that all employers are aware of their obligations under the *Paid Parental Leave Act 2010* (Parental Leave Act) and the *Fair Work Act 2009* (FW Act). A breach of the applicable legislation exposes an employer to significant penalties.

Paid Parental Leave

The Parental Leave Act provides for 18 weeks paid parental leave to eligible primary carers on the birth or adoption of a child. Paid parental leave is fully funded by the Australian Government and is paid at the national minimum wage, which is currently $589.40 per week before tax.

To be eligible for paid parental leave the employee must apply directly to the Family Assistance Office (FAO) and must meet specific criteria to be eligible.

Importantly, employers will not decide who is eligible for paid parental leave. This is approved and paid for by the FAO. The FAO upon approval will notify the employer in writing and make the payments to the employer.

The employer needs to ensure that they respond to the notification by FAO within 14 days.

The responsibility of the employer is to ensure that the payments are paid to the employees. All of the paid parental leave will be fully funded by the FAO.

Employers who currently have obligations under awards, agreements and contracts of employment will be required to continue meeting these obligations in addition to any payments made by the FAO.

Unpaid Parental Leave

The FW Act provides for an entitlement to a period of up to 12 months unpaid parental leave if the employee has completed at least 12 months service with the employer. Also, if agreed between the employee and employer the

unpaid parental leave can be extended up to a further 12 months.

The unpaid leave will not affect any paid parental leave (or vice versa), essentially, an employee can take 12 months unpaid parental leave and for the first 18 weeks of leave be paid by the FAO via the employer under the paid parental leave scheme.

Both parents of the child (or adopted child) will be eligible for parental leave but it is only available to the primary care giver.

Whether an employer gives an employee leave under the Parental Leave Act and the FW Act is a statutory obligation for all employers. An employer cannot, for example draft into a contract of employment to opt-out of their obligations for parental leave.

Importantly, employers need to ensure that they comply with the Parental Leave Act and FW Act. Breaches of either legislation is subject to a maximum fine of $33,000 for the company and $6,600 for each individual involved in the breach (this will include directors, human resources and managers).

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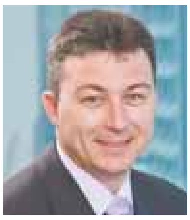
BINDING DEATH NOMINATIONS AS PART OF ESTATE PLANNING

MICHAEL KLATT



Wealth held in superannuation has increased in recent times. This is because of the generous tax concessions on the income earned on superannuation funds during the accumulation phase and then the opportunity to take a pension on retirement, tax-free. Superannuation benefits need to be considered as part of the estate planning process.

A person's superannuation entitlements on death are referred to as "death benefits". Death benefits do not automatically form part of a person's estate. This is the case because, generally, Superannuation Trust Deeds provide that the trustee of the Fund has a discretion as to who the death benefits will be paid to. There are, however, restrictions in the Trust Deed and by legislation limiting who the trustee can pay the death benefits to. Death benefits may be paid to a person's spouse, children, dependents and the legal personal representative of their estate.

Many Superannuation Trust Deeds, however, allow a member to execute a Binding Death Nomination, which is binding upon the trustee of the Superannuation Fund provided it is properly executed and nominates a spouse, child, dependent or the person's estate. This can be useful where it is likely that a person's estate may be subject to a claim or has significant debts. The person can execute a Binding Nomination to ensure that the trustee does not pay the death benefits to the estate. In some circumstances, however, it may be appropriate for the person to nominate their estate to take the death benefits so that the superannuation can be distributed to testamentary trusts allowing for asset protection and tax benefits for the intended beneficiaries.

There are some circumstances where our advice is that the client should not complete a Binding Death Nomination at all. This may be where there is a self-managed superannuation fund and allowing the trustee of the Fund the discretion as to where the superannuation death benefits are paid is appropriate.

An important consideration not to be overlooked in the planning process is taxation consequences of where the death benefits are paid. If death benefits are paid to a spouse or infant children, there is no additional tax payable. If death benefits are paid to adult children or

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to the estate and then, ultimately, for the benefit of adult children or non-dependents, then generally tax at the rate of 15% plus the Medicare levy is payable. However, tax at the rate of 30% plus the Medicare levy may be payable on superannuation life insurance proceeds paid to adult children or non-dependents.

Whether a person should make a Binding Death Nomination or not depends on a range of factors and needs careful consideration and appropriate advice. Binding Death Nominations may have to be renewed every three years depending on the terms of the Trust Deed. Binding Death Nominations should also be reviewed as circumstances change.

UNDERSTANDING GUARANTEES

MICHAEL HOBSON

Almost everyone has heard of a "guarantee" (or a "guarantee and indemnity" as they are sometimes called). But what are the consequences of signing a guarantee?

It is common for creditors to request guarantees. Instances include guarantees by company directors or a guarantee to assist a third party to obtain finance. For example, parents will often provide guarantees to support the borrowings of their children to purchase their first home.

In most circumstances, guarantors will be liable for all the obligations of the debtor including interest and enforcement expenses. The total liability could greatly exceed the amount of the original financial accommodation.

There are several consequences of signing a guarantee that are commonly misunderstood:

- The guarantee could become enforceable even though the debtor continues to meet their repayment obligations. It is possible for the creditor to call in the debt due to a breach of a financial covenant or warranty in the credit documents – possibly in circumstances beyond the control of the debtor.
- Generally, the creditor is not required to seek recovery of the debt from the debtor prior to seeking repayment from the guarantor. A creditor can usually demand immediate repayment and sue the guarantor.
- Where there are multiple guarantors they will be "jointly and severally" liable. If one of the guarantors die or become bankrupt the other guarantors will remain liable for the full amount of the debt.

Before signing a guarantee you should carefully read the documents and seek independent advice to ensure that your interests are protected. Creditors often use guarantees to enable recourse to income or assets that are one-step removed from the debtor. As such, the ill-advised execution of a guarantee can negate a guarantor's otherwise carefully planned asset protection strategy.

There is potentially some good news for guarantors. The Code of Banking Practice and the National Credit Code provide some protection for guarantors in limited circumstances. It may also be possible for a guarantor to negotiate limitations to the extent of their liabilities under a guarantee. For example, liability may be limited to a fixed amount, a certain time period, or the proceeds of a particular asset.

If you would like any further information or assistance regarding guarantees please contact us.

HIGH COURT SAYS THE CHIPS ARE DOWN FOR WOOLWORTHS

GRAHAM SCHROEDER

The High Court in the matter of *Strong v Woolworths Limited [2012] HCA 5*, involved an assessment of systems of cleaning in a commercial shopping centre environment near a food hall.

The injured Appellant suffered spinal injuries when she slipped and fell at the Centro Taree Shopping Centre. Prior to the injury she was disabled (an amputee) and walked with the assistance of crutches. She slipped and fell when her right crutch came into contact with a greasy chip lying on the floor of a sidewalk sales area inside the Shopping Centre, but under the control of Woolworths.

The sidewalk sales area was immediately outside the entrance to the Big W store. Woolworths had exclusive control over the area including the system of inspection and cleaning.

Woolworths did not have a system of inspection or cleaning. It was accepted the sidewalk sales area had not been inspected for around 4 hours before the incident. There was also no dispute in the evidence that had the area been inspected, the chip that caused the Appellant to fall would have been detected and removed.

The Trial Judge at first instance in the District Court of New South Wales found for the Appellant. Woolworths appealed the decision in the New South Wales Court of Appeal on the issue of causation.

The Court of Appeal found in favour of Woolworths on the basis it was not open for the Court to infer the chip had been on the ground long enough for it to have been detected or removed if an adequate system of cleaning or inspection had been in operation.

The Appellant appealed to the High Court which confirmed there was a difficulty in slipping cases of establishing a causal connection between the absence of an adequate cleaning system and a Plaintiff sustaining an injury, in circumstances where the precise timing of when the slippery substance was deposited was unknown.

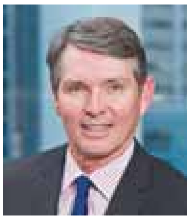
The High Court assessed the system put in place by the Shopping Centre for the remainder of the Centre, (excluding the area under control by Woolworths), was adequate. That system provided for inspection and cleaning at 20-minute intervals. This included the area adjacent to the food hall, where likely sources of floor contamination may originate.

The High Court found that reasonable care required the inspection and removal of slipping hazards at intervals not greater than 20 minutes in the sidewalk sales area under the control of Woolworths. Accordingly the Court found in favour of the Appellant.

Applying the decision of the High Court in *Strong*, requires an application of the decision to the factual circumstances of individual slip/fall claims. The case provides useful *prima facie* authority that a system of inspection and cleaning at 20-minute intervals in a Shopping Centre may be an adequate system to discharge the responsible parties' duty of care.

POTENTIAL CONFLICT FOR UNIT OWNERS

MICHAEL POTTS



A number of body corporate disputes due to escalating body corporate levies has attracted considerable media attention recently. Existing unit owners and potential buyers should ensure that they are aware of the implications of legislative amendments to the *Body Corporate and Community Management Act 1997* (BCCMA) regarding the calculation and imposition of lot entitlements which form the basis of determining body corporate levies.

Since the BCCMA was passed in 1997, owners of units in a community titles scheme could apply to have the lot entitlement altered if it was just and equitable to do so. Many buildings went through this process as the original lot entitlement nominated by a developer did not necessarily reflect a fair basis of contribution to the body corporate levies.

The *Body Corporate and Community Management and Other Legislation Amendment Act 2011* (the Act) came into effect on 14 April 2011. Where there has been a post-1997 adjustment to lot entitlements, the new legislation allows a unit owner (provided that they were a body corporate member at the time of adjustment), to have the adjustment revoked causing a reversion of lot entitlements to the pre-adjustment rates as determined by the original developer. To do that, any owner who was a lot owner before the adjustment order was made need only propose a motion to the Committee or, if there is no Committee, to the Body Corporate pursuant to section 379 of the Act, within three years of the commencement of the amending legislation. The remaining lot owners have no recourse and cannot challenge the re-adjustment back to the original entitlements.

Cases of re-adjustments to lot entitlements are now coming to light. Many unit owners are facing increases in body corporate levies, having earlier acquired their properties based on what they believed to be a lot entitlement calculation, which would not be subject to further change.

With the recent election of the LNP government, there is likely to be pressure from a number of property groups to bring about a reversal of the legislation and a return to the system of determining lot entitlements based on just and equitable grounds.

If you have any questions about how this legislation may affect you, please telephone Michael Potts on 3224 300 or email mpotts@mullinslaw.com.au.

JOHN MULLINS
EDITORIAL

The recent state election produced a resounding win for the LNP. We now have a dominant LNP government, with a new premier and a strong mandate from the people of Queensland to bring about change.

Already the new government has commenced high profile cost cutting measures and has announced that the budget will not be brought down at the normal time. It has appointed a committee to review the financial position of the State.

All of this is in the context of pressure on the Reserve Bank to reduce interest rates and the upcoming commencement of the carbon tax on 1 July. The Federal Government is committed to a surplus budget so there will need to be some serious changes made to enable this to occur.

The business environment continues to be mixed but the situation appears to be reasonably stable in the south-east corner of the State even if that stability is part of a slow moving economy.

This edition of the report deals with a wide range of issues that we believe are topical and hopefully of interest to you.

The article on guarantees is a salient reminder to us all that we need to think long and hard before providing guarantees for any financial commitments. Importantly we really need to understand exactly what that guarantee is and on what circumstances we will be asked to pay and the extent to which we can be liable. There are many horror stories about people entering into these agreements without taking the time and the care to ensure that they completely understand and are subsequently badly affected by the documents they have signed.

For those of you who have superannuation schemes I strongly advise you to read our article on binding death nominations and consider the impact of these on you.

We welcome Michael Hobson to the Firm as a Senior Associate. Michael is a highly skilled Banking & Finance Lawyer. His experience will strengthen our practice in this area substantially.

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