

## NATIONAL BUSINESS NAME CHANGES

ANDREW NICHOLSON



**F**rom 28 May 2012, businesses will no longer need to undertake the task of registering a business name in a number of States/Territories. Under the new system, the Australian Securities and Investments Commission (ASIC) will also maintain a national business names register.

Both company and business names will then be administered by ASIC, Australia wide.

Existing business names will be transferred to the new register, with the same renewal date. We suggest that you review the register to ensure that your details have been correctly recorded.

### Registering New Names

There are a number of changes to the registration process and it will be necessary to pass a number of criteria before the name is accepted. The online process will also contain links to the trademarks database and the domain name registry, the importance of which is discussed below.

### What is the Risk?

Registering a business name is all about compliance and it is required if you are using a trading name other than your own. However, registering a business name will not give you ownership of, or any proprietary rights in, the name. Rather, business name registration merely prevents others from registering an identical or similar name. It is a common misconception that registering a company or business name conveys ownership or an exclusive right to use. That is not the case. The only way to obtain those rights is through trademark registration.

*Put simply, the risk is:*

If you register a business name (or adopt a name/brand) which infringes the rights of others (commonly through trademark infringement, misleading or deceptive conduct or passing off) then you may find yourself the subject of



legal action. The consequences may include one or more of having to rebrand, shutting down while you do so, facing embarrassment with clients/customers and having to pay damages to the other party.

The online system now indicates that applicants should search the trademarks database (to consider whether they are infringing any earlier marks). There are a number of tricks for young players and professional advice should be sought prior to spending time, effort and money in the development of a new name.

You should consider whether it is possible to protect your name through trademark registration, which provides an exclusive right to use the name in relation to your goods and services. Existing businesses should also take care when adopting names for new products or service lines.

Undertaking the necessary searches and protecting your name/brand through trademark registration is relatively inexpensive. Preferably this work should be undertaken prior to using the name or as soon as your new name/brand and/or logo has been developed.

We can assist you in the above process.



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# WHAT'S IN AN IMAGE?

AMBER NIPPERESS



**D**o privacy laws apply to photographs and video recordings? In short, yes they do.

The National Privacy Principals (NPP) governs privacy law in Australia. The NPP take the form of overarching principles, designed to offer guidelines for dealing with an individual's personal information.

Because of this, there can often be some uncertainty as to the application of the NPP.

The NPP seeks to protect personal information, being information that could be used to identify a person. This includes any images of individuals in photographs or film, in which a person's identity is identifiable.

It is therefore important to turn your mind to the NPP when publishing photographs or films containing images of individuals. For example:

- Uploading photographs of employees or colleagues on the work intranet or on the business website;
- Placing photographs of students in the school newsletter, advertisements or uploading them on the school website;
- Uploading video recordings of students performing at school concerts, sports carnivals or public speaking events;
- Placing photographs of sports club members in the club newsletter, advertisements or uploading them onto the club website or Facebook page.

Generally an organisation is not required to obtain a person's express consent before they take a photograph or film a person or before they publish the photograph or film. However, there are exceptions, including where the image records sensitive information about a person.

While an individual's consent is not strictly required, the general principles promoted in the NPP encourage organisations to obtain an individual's consent before publishing any photographs or films containing that person's image.

In respect of photographs and film containing images of children, the Office of the Australian Information Commissioner strongly encourages organisations to take particular care in handling such images. Organisations should seek the consent of the parent or guardian before publishing. It is also important to consider requirements under other legislation that protects children.



## MISCONDUCT BY CO-EMPLOYEE NOT COMPENSABLE

TONY ROSENTHAL



*Serra v Couran Cove Management Pty Ltd (2012) QSC 130*

In the Supreme Court decision of *Serra v Couran Cove Management Pty Ltd (2012) QSC 130*, His Honour, Mr Justice Douglas dismissed a claim where the Plaintiff was assaulted by a co-employee.

### Background

The Plaintiff, who worked as an Electrical Mechanic at Couran Cove Resort was attacked by a co-employee, Peter Markan.

The Plaintiff alleged that Markan should have been dismissed prior to the date that he was assaulted, or alternatively, reprimanded or counselled for earlier misconduct.

The Plaintiff argued that had the employer done this, his injuries would not have occurred. He alleged the Defendant was negligent and in breach of its employment contract. The Plaintiff alleged a number of factors that had to be taken into account which demonstrated the employer's failure to act in a proper manner to sanction Mr Markan.

The Plaintiff's supervisor gave evidence to the effect that nothing that he had observed of Mr Markan's prior behaviour suggested Mr Markan was likely to assault the Plaintiff.

The Court, after consideration of the evidence was not satisfied Mr Markan should have been dismissed by the

employer or sanctioned beyond what was already done prior to the date the Plaintiff was assaulted.

### The Decision

The court applied the reasoning in *Antoniak v The Commonwealth 1962 4FLR 454*.

Where an employee "is not merely incompetent but by his habitual conduct is likely to prove a source of danger to his fellow employees, the duty lies fairly and squarely on the employers to remove the danger".

Each case will turn on its own facts.

The assault in this case was serious and Mr Markan was sentenced to four years' imprisonment after his trial for the offence.

The interaction between Mr Markan and the Plaintiff prior to the assault was not seen by the court to be serious enough to lead to Mr Markan's dismissal or reprimand beyond what was given to Mr Markan by management.

In a New South Wales case of *Gittani Stone Pty Ltd v Pavkovic 2007 (NSWCA) 355* the Plaintiff did succeed where he had been assaulted by a co-employee. The employer failed to take adequate action to reprimand the violent co-employee, and later, the Plaintiff was shot by the rogue employee as he left work.

### Comment

Misconduct by an employee is a serious issue for employers and should be closely reviewed. Failure to act appropriately to sanction the offending employee could lead to a successful common law claim by an employee who may be injured by a future indiscretion of that employee.

# REDUNDANCY: WHAT EMPLOYERS NEED TO CONSIDER

JONATHAN MAMARIL



Redundancy occurs when an Employer decides they no longer want an Employee's job to be performed by anyone (and terminates their employment) or the Employer becomes insolvent or bankrupt.

For Employers, it's important to remember that it's the position or job that is being made redundant not the Employee. Employers need to ensure that redundancy of the position (and therefore the termination of employment of the Employee) is genuine and not a termination of employment for misconduct or underperformance.

Examples of what may be a genuine redundancy are:

- the job or position is replaced due to the Employer introducing new technology (for example, a machine is developed or available to do the job the Employee performed);
- business downturn due to poor sales and production;
- the business relocates to a new geographical location;
- a merger, sale or takeover happens;
- the business restructures or reorganises.

The test will not be whether the duties of the job survive but whether the job previously performed by the Employee still exists.

If an Employee files an unfair dismissal application, an Employer can rely upon a genuine redundancy as a full defence to the application. It is important to document the reasoning behind the redundancy such as business plans and meeting minutes as these documents may need to be relied upon in arguing that there is a genuine redundancy.

When making an Employee's position redundant an Employee will be entitled to certain entitlements. Under the National Employment Standards (NES) in the *Fair Work Act 2009* (Cth) an Employee may be entitled to:

1. Redundancy pay;
2. Notice period;
3. Accrued but untaken Annual Leave;
4. Long Service Leave (under the applicable state legislation);
5. Wages up to and including the day of redundancy.

An Employee will be entitled to redundancy pay if they have more than 12 months continuous service and work for an Employer that employs 15 or more Employees.

There may also be other entitlements owed to the Employee under an applicable industrial instrument such as an Enterprise Bargaining Agreement, Modern Award or Employment Contract.

## CHANGES TO THE CALCULATION OF EXIT FEES FOR RETIREMENT VILLAGES

STUART LOWE



Retirement villages have gained prominence in recent years as an accommodation option for seniors and retirees. They typically offer age-appropriate, low maintenance housing in a relatively secure environment surrounded by people of similar age and interests. Units in retirement villages range from the

very basic to high end luxury units in "lifestyle villages" offering a wide array of facilities and services.

Residents entering a retirement village usually pay a lump sum upon entry. This amount is known as the "ingoin contribution" and is often equivalent to the market value of the unit. When a resident leaves the unit or passes away, the resident (or their estate) usually receives an "exit entitlement" from the operator. How the exit entitlement is calculated depends on the terms of the residence contract between the resident and the operator. However, operators typically deduct from the exit entitlement an "exit fee" (also known as a deferred management fee), which represents the operator's primary source of profit from operating the retirement village.

Usually, exit fees increase the longer the resident has resided in their unit. Also, most operators have traditionally calculated exit fees on an annual, quarterly or other incremental basis. For example, an operator may charge an exit fee equivalent to 5% of the resident's ingoin contribution for each year, or part thereof, which the resident has resided in their unit. Until recently, this would have meant that a resident who resided in their unit for

two years and one day, would pay the same exit fee as a resident who resided in their unit for three years.

From time to time, residents in this situation (or their executors) felt aggrieved by having to pay an entire extra year's exit fee simply because their period of residency had ended only a few days after an anniversary of their entry into the village. Residents advocacy groups lobbied the State Government for legislative change.

As a result, the *Retirement Villages Act 1999* was amended with effect from 1 March 2012. For residence

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contracts entered into on or after that date, exit fees, where they are based on the period of residency, must be calculated on a daily pro-rata basis. Retirement village operators cannot contract out of this requirement.

The amendment may also apply to residence contracts entered into before 1 March 2012, unless the contract "provides a way of working out the exit fee that is not on a daily basis". While not entirely apparent from this wording, it appears that Parliament did not intend the legislative change to apply to pre-existing contracts which make it sufficiently clear that exit fees are not calculated on a daily basis.

# NRAS EXPLAINED

REBECCA CASTLEY



Perhaps you have noticed an increase in property advertisements referring to "NRAS properties for sale". The supply of affordable rental housing hitting the market continues, as projects constructed as a result of NRAS reach completion.

The National Rental Affordability Scheme ("NRAS") was put in place by the Federal Government in 2008. The purpose is to increase the supply of affordable rental housing by 50,000 dwellings by the middle of 2014. The thinking is that this will go some way to fill the housing gap for low to moderate income household, who are not at the point of needing social housing assistance but who may struggle to afford urban rents, in what has been a rising market.

To encourage investors to purchase NRAS properties, the Federal Government provides an incentive (currently \$7,143 per dwelling pa) offered as a refundable tax offset or payment. In addition, the Queensland State Government contributes an indirect or in-kind financial support (currently \$2,381 per dwelling pa) although there is no State legislation in place. (This is mainly achieved by separate funding agreements with participating developers). The incentives are available for ten years and are indexed annually by CPI.

To be eligible for NRAS, a dwelling must:-

- Be rented to an "eligible tenant" (determined by the tenant's income);
- Be rented at a rate that is at least 20% below the prevailing market rate; and
- Not have been previously lived in as a residence.

The theory is that investors will be encouraged to participate because, in certain markets, with the addition of the tax free incentive, a better return can be achieved. Also, there is potentially a strong supply of "eligible tenants", reducing the risk of vacancies. It is believed that up to 1.5 million households may be able to demonstrate eligibility. For example, for a couple with two children, the household income must be equal to or less than \$90,277 pa to be eligible to become an NRAS tenant.

There are of course some additional risk factors for NRAS when compared to a normal residential property investment. For example, there is the possibility of legislative change, leading to some uncertainty as to what may occur in the future. Statutory reporting responsibilities also apply.

Any decision to participate involves a careful review of the property, the approved provider, the NRAS lease and tax consequences for the investor's circumstances. An investment adviser, accountant and/or lawyer should be consulted.

The latest report card published by the Department of Families, Housing, Community Services and Indigenous Affairs in April 2012 confirms that the total number of incentives allocated and reserved for the Queensland market is 11,284 dwellings. Only 2,025 of these are now tenanted or available for rent so you can expect to see more NRAS properties for sale in your local real estate guides in the future.



PAT MULLINS  
EDITORIAL

Mullins Partner Andrew Nicholson writes with authority in this issue about National Business Names changes. Andrew's experience in relation to business/corporate branding is long and practical. He is also our go-to person on issues relating to intellectual property and the safeguarding of trade secrets.

Amber Nipperess discusses the application of National Privacy Principles to the publication of photographs of children – an issue that arises for our school and sporting club clients on a regular basis.

Tony Rosenthal is one of our experienced Personal Injury Law Accredited Specialists and discusses a recent decision with (perhaps) a surprising outcome.

Redundancy is an area where there is a considerable amount of misinformation circulating. Associate Jonathan Mamaril helps dispel some of the commonly held errors.

Property Partner Rebecca Castley and Property Senior Associate Stuart Lowe cover topics relating (respectively) to Affordable Housing and Retirement Village accommodation. Both have extensive experience in these areas – Rebecca as a Director of brick housing company and Stuart as a member of Aged Care Queensland's retirement living committee.

We encourage our lawyers to be engaged in the community outside their legal practice. Stuart's involvement in the retirement village industry association and Rebecca's service on the Board of a not for profit affordable housing provider exemplifies our firm's pro bono community involvement. It also enhances their specialist expertise in these increasingly important legal practice areas.

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