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Investor visas bring high net worth investors to Australia

TONY HOGARTH PARTNER

SINCE THE LAUNCH OF THE SIGNIFICANT Investor Visa (SIV) in November 2012, $1.5 billion in foreign capital has been injected into Australia's economy. After the slow down of the mining sector, our nation is transforming itself across various industry sectors.

Under this scheme, migrants need to invest $5,000,000 into complying investments in Australia for a minimum period of four years. As at 31 July 2014, a total of 343 SIV visas have been granted. There are another 602 pending applications, through which a further three billion dollars is expected to be invested in Australia. This could just be the tip of the iceberg. Interestingly, 88% of the approved SIV applications have been processed in Hong Kong, reflecting a high volume of applications from China which must be lodged in Hong Kong at the Australian High Commission.

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There has been speculation in the print media that Australia's SIV scheme may follow the footsteps of the Canadian investor visa program. However, the Canadian program only required an investment amount of $800,000 and closed its doors to 59,000 applications. This was largely due to the fact that the scheme had never been studied against the demand and impact on the economy. To the contrary, Australia's migration policies are driven by genuine needs of the market such as capital and talent. For example, even though the SIV scheme is still at a developmental stage, our government has already conducted a review to improve its efficiency, streamline the application process and address inherent weaknesses in the program. We are confident our SIV initiative is heading in the right direction to stimulate economic growth and job creation.

Recently, the government announced the creation of the new Premium Investor Visa (PIV), which is scheduled to come into effect on 1 July 2015. This visa is for investors who can invest $15,000,000 and will require approval and nomination by Australians. The visa has no residency requirements and successful applicants will be eligible for permanent residency after holding a complying investment for at least twelve months.

The SIV scheme is a tremendous scheme to source high net worth Chinese entrepreneurs to invest in Australia. In addition to their incisive business minds, these SIV applicants are the conduit to new business ties which will be forged with Australian business and government, and workers are poised to benefit from the influx of Chinese capital, experience and new markets being opened.

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Pre-existing injury disclosure forms. How much do employees need to confess?

DANIEL SULLIVAN ASSOCIATE

IMAGINE THAT AN EMPLOYEE SUFFERS A back injury at work and makes a claim. As the claim is processed, it comes to light that the employee suffered a back strain some years prior to starting work. The employer produces a disclosure form (signed by the employee upon induction) which makes no mention of a pre-existing back injury. The employer says, "*Your injury is really an aggravation of your old back injury. You can't claim for that.*" This scenario will become more and more common with recent changes to the *Workers' Compensation and Rehabilitation Act 2003*.

Since 29 October 2013, employers have had the right to request that prospective employees disclose pre-existing injuries or medical conditions. If the employee knowingly makes a false or misleading disclosure in relation to an injury or condition, he or she is disentitled from seeking statutory compensation or common law damages for any aggravation of the injury or condition.

An employee may well be confused about how much of their medical history they are required to disclose. In order to narrow this down, the employer must carefully set out in writing the nature of the duties required in the job. The employee must then disclose existing injuries or medical conditions which the employee suspects (or ought reasonably to suspect) would be aggravated by performing those duties.

One problem with the new rules is that employees are left to make this call without much guidance from the legislation.

When is an injury serious enough to disclose? What if an employee has niggling knee pain from time to time and that knee pain is aggravated by a significant accident at work – will the employee be denied the chance to make a claim if the knee pain was not disclosed? The consequences of getting this wrong are serious.

An unintended consequence of requests for disclosure will be that employees who pursue injury claims will argue they have slim chances of finding a new job. If this argument is accepted by the Courts, future economic loss awards could be significantly increased to compensate the employee for future loss of employment.

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Employees need to think carefully about what they disclose yet the new rules provide only limited guidance. The prospect of being barred from making a claim will probably lead to further litigation. This may, in time, provide a more detailed picture of what level of disclosure is required.

Directors' duties – how do you spot a company on the path to insolvency?

MARK MADSEN PARTNER

THE GLOBAL FINANCIAL CRISIS BROUGHT the issue of cash flow (and more effective credit control) to the forefront of virtually every business, not only in terms of managing an organisation's debtors but, for many, the task of appeasing creditors.

Insolvency is a crucial element of many claims under the *Corporations Act*. Directors have a duty to prevent their company from trading whilst insolvent. The consequences of not doing so can result in Court orders against the directors personally for compensation, civil penalties and even criminal consequences.

Insolvency is also critical to recovery actions by liquidators. For example, a liquidator may seek to claw back from a creditor a payment said to be made in preference to other creditors. However, the liquidator must prove that the debtor company was insolvent at the relevant time.

These are some of the consequences of a company trading whilst insolvent. Regardless of whether you are a debtor or a creditor, it is important for directors to be able to recognise the indicators of insolvency. The earlier these factors are acknowledged and the issue dealt with, the less likely it is that the more dramatic consequences will become reality.

The Courts and ASIC have recognised several factors which tend to indicate that a company is in financial difficulty. We have summarised them below:

Money problems: Poor cash flow, lack of cash flow forecasts and other budgets, ongoing losses, issuing post-dated cheques or dishonouring cheques, increasing debt (liabilities greater than assets), overdraft limit reached or defaults on loan or interest payments, overdue taxes and superannuation liabilities or unrecoverable loans to associated parties.

Lack of direction: Absence of a business plan or an expectation that the "next big job/sale/contract" will save the company.

Bad books: Incomplete financial records or disorganised internal accounting procedures.

Erratic billing: Creditors being paid outside usual terms, payments to creditors of rounded sums that are not reconcilable to specific invoices, special arrangements with selected creditors.

Lack of trust from suppliers: Suppliers placing a company on cash-on-delivery (COD) terms, increased level of complaints or queries.

No buyers or investors: Problems selling stock or collecting debts or an inability to raise funds from shareholders.

Avoidance by funders: Problems obtaining finance, change of bank, lender or increased monitoring and/or involvement by financier.

Negative mail: Solicitors' letters, demands, summonses, judgments or warrants issued against the company.

Unhappy board or management: Board disputes and director resignations or loss of management personnel.

If your company is experiencing some of the above, or you become aware of these indicators in one of your debtors, we suggest you seek legal or accounting advice with a view to addressing what may well be a solvency issue.

The ACCCs pro-forma liquor accord
– what it means for your favourite watering hole

CURT SCHATZ PARTNER

AS MANY READERS WOULD BE AWARE, liquor accords are agreements between licensed premises, local government, police and other local stakeholders designed to help develop safe and well managed environments in and around licensed premises.

The purpose of an accord is to collectively address issues facing the industry and the community. They support harmonisation and responsible serving principles and operate as a component of an overall strategy to ensure safety in the local community. They implement strategies to combat underage drinking, improve security for patrons and promote the responsible service of alcohol.

The Australian Competition and Consumer Commission (ACCC) has recently issued a draft determination proposing to conditionally authorise a pro-forma liquor accord arrangement which is proposed to form the basis of liquor accords between stakeholders in local areas in Queensland.

The pro-forma liquor accord includes measures such as a ban on discounts and promotions that encourage rapid or excessive drinking. The ACCC considers that these types of price and supply restrictions may raise issues under the ACCC legislation. Accordingly, and to minimise any detriment, liquor accords that contain these types of restrictions require authorisations.

Only local liquor accords that are registered with the Office of Liquor and Gaming (OLGR) will be protected by the authorisation. To ensure that price and supply controls are only adopted where there are relevant identified harms, the ACCC will impose a number of conditions on the approval of the pro-forma liquor accord documents. What this means is that price and/or price controls may only be adopted where relevant liquor related harm in and around the licensed premises have been identified.

The ACCC considers that there is a public benefit in allowing local accord bodies to agree to implement arrangements containing price and supply controls to minimise alcohol related harms. The ACCC also considers that there is public benefit in enabling the OLGR to pursue community based harm minimisation strategies, one being the restriction on the price and supply of drinks.

... liquor accords are agreements between licensed premises, local government, police and other local stakeholders designed to help develop safe and well managed environments in and around licensed premises.

The OLGR will not be a signatory to any individual accord but does advise on and oversee their implementation. Participation in local liquor accords is voluntary and accord bodies can choose to adopt the OLGR's pro-forma accord in whole or in part. Currently, the Townsville Liquor Accord Body is the only liquor accord where members have agreed on price and supply restrictions. There are more than 100 other local liquor accords in Queensland which do not currently include price and supply restrictions and accordingly these do not need to be registered.

The overall benefit of authorisation is that immunity from Court action for conduct that might otherwise raise concerns under the competition provisions under the *Competition and Consumer Act 2010*, is granted.

The ACCC is currently seeking submissions from interested parties in relation to this draft determination.

Testamentary trusts are an "appropriate" way to protect your children's inheritance

MICHAEL KLATT PARTNER

WHEN SOMEONE LOSES (OR NEVER GAINS) THE CAPACITY to make a will, the Court has the power to authorise a Will or amendments to a Will (known as a codicil) to be made on that incapacitated person's behalf. In doing so, the Court must be satisfied that it is "appropriate" to authorise the proposed Will or codicil. Parents regularly incorporate testamentary trusts into their Wills primarily to protect their children's inheritance from potential claims by creditors and possibly Family Court property settlement proceedings. Testamentary trusts are recognised as an "appropriate" estate planning and asset protection tool.

In the case of *ADT v LRT* (2014) QSC 169 the Supreme Court of Queensland was recently asked to approve a codicil to an incapacitated woman's Will by which the woman had gifted valuable real estate to her son.

The woman had lost capacity and did not have a long life expectancy. Her son was separated from his wife and his wife had initiated Family Court property settlement proceedings. The application to the Supreme Court was made by the woman's husband who submitted that; if his wife had capacity and knew that her son was involved in Family Court proceedings, she would have altered her Will to ensure that her son's future inheritance would not be taken into consideration during the Family Court property settlement proceedings. The son's wife was a respondent to the application and opposed the application.

The proposed codicil submitted to the Court replaced the gifts to the son with gifts to a testamentary discretionary trust in favour of the son, his children and other family members. The trust did not include the son's wife.

If the codicil was approved, the matrimonial property pool that the son and his wife were fighting over in the Family Court would decrease by up to $5,000,000.

Even though Justice Flanagan agreed with the husband that if the incapacitated woman knew that her son was involved in Family Court proceedings she would have altered her Will to protect her son's future inheritance, he did not think it was appropriate to authorise the codicil as its intention was to impact on the pending family law proceedings.

The Court also found it was an appropriate case for the identities of the parties to be protected, thus the title of the case does not reflect the parties' names.

The case, which has now been appealed to the Court of Appeal, highlights the need to consider including testamentary trusts in your Will even at a time where your children's marriage seems solid, because you may not have capacity to change it later on if your child's marriage breaks down.

Editor's note: At the time of publication, the Court of Appeal has overturned the decision of Justice Flanagan, however the judgement has not been published.

JOHN MULLINS

EDITORIAL

THE FIRM HAS ENTERED THE AGE OF electronic communication albeit slowly and in some cases reluctantly. Whilst we have chosen electronic communication as a means of being able to communicate quickly and effectively with our clients, we still believe that there is a place for "old fashioned" paper communication.

To that extent whilst we have made some of our newsletters obsolete, we have maintained Mullins Report which is now up to issue number 73. You can find electronic copies of all current and past newsletters on our website under the heading Publications. You will also find there access to our new eCommunications which are being published under the headings of Business, Insurance, Employment, Insolvency, Sport, Education, Churches & Charities, Construction, Bankruptcy, Leasing, Wills & Estates, Property Development, Hospitality, Environment, Retirement Villages, Intellectual Property and Banking & Finance.

Due to the specific nature of these eCommunications they are being forwarded to a small mailing list of people who we know have direct interest in these topics. If you would like to receive any of these, you can either subscribe via our website or send an email to our Business Development and Marketing Manager, Katherine Gilbey, at kgilbey@mullinslaw.com.au and she will see that you are added to the relevant list.

You will find the Firm and our Partners are on LinkedIn, and soon we will be launching a Facebook page. Some law firms have been into social media for a long time. Our view is that the best forms of communication are effective, timely and personal. So whilst moving into this new space, we are intent on ensuring that those critical aspects of our communication remain in place.

It is clear that, whilst social media may have some benefits, it needs to be used carefully and appropriately. I understand that the Queen and the Pope are both engaged in some form of social media communication! We have seen everyone from sports people to celebrities to politicians get themselves into trouble by poorly timed or inappropriate use of modes of social media.

When properly used it is a quick, effective and inexpensive way to communicate with a mass audience. But in my opinion, at least for the time being, it doesn't replace a personal word, a meeting, a handshake, a smile or a handwritten note. Certainly the world of electronic communication is evolving faster than social norms or the law can keep up. We all know and have seen that harm can be done by irresponsible or inappropriate use of social media and electronic communication. The smartphone is a brilliant device but in the wrong hands at the wrong time it can do a lot of damage to a lot of people.

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