Macrossan & Amiet Solicitors
news update
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Lawful Discrimination

By Andrea Green

In the current times, employers have to walk on egg-shells to ensure their conduct is politically correct. In the headlines we have recently seen outrageous claims against employers for their discrimination. This provokes memories in the minds of many people of the conduct that they have been subject to from their past employers, and whether they too could claim an exuberant amount of money in compensation. Employer's actions may be warranted. I am certainly not condoning *unlawful* discrimination, but in some circumstances, dismissing or demoting an employee because of certain personal attributes is necessary in order to get the job done, or to make the job safe.

An employee may bring a claim under the *Fair Work Act 2009* (Cth) where the employer has discriminated against that employee on the grounds of the employee's race, colour, sex, sexual preference, age, physical or mental capacity, marital status, family or carer's responsibilities, pregnancy,

Andrea Green

religion, political opinion, national extraction or social origin. In order to succeed in a claim, the employee must prove discrimination according to the relevant anti-discrimination law, such as State legislation.

The *Anti-Discrimination Act 1999* (Qld) provides that an employer is exempt from the anti-discrimination laws in a workplace, if:-

1. there is a genuine occupational requirement for the position;
2. the discrimination is reasonably necessary to protect the health and safety of the fellow workers;

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news

Money Owed by Insolvent Builder

By Steven Hayles

The unfortunate reality of the housing industry is that from time to time builders experience financial difficulty and become insolvent during construction projects.

While the BSA's insurance is a measure of protection for property owners, a builder's subcontractors (plumbers, bricklayers, electricians, tilers, painters and concreters) are often left unpaid.

And for those subcontractors who do in fact receive payment in the six months preceding the insolvency, there is the prospect that a liquidator appointed to wind up the company may seek to recover payments made in preference to other creditors.

There are measures which subcontractors can take to minimize their exposure to insolvent builders. Apart from securing the terms on which they provide credit, these measures include: -

1. *Subcontractors' Charges Act* Claims; and
2. Retention of Title Clauses.

This article will focus on the effect of *Subcontractors' Charges Act* Claims.

An article in the next edition of the newsletter will deal with Retention of Title Clauses.

Subcontractors' Charges Act Claims

The charge provides a subcontractor with some protection from an insolvent builder by securing the monies owed by the customer (described in the Act as "the employer") to that builder before the builder receives them.

Any subcontractor of a builder as defined by the Act is entitled to charge monies payable to a builder or a superior contractor. The monies must be owed to the subcontractor for "relevant work". Monies owed for work that falls outside relevant work cannot be the subject of a charge.

The Act's definition of 'relevant work' has been the subject of several Court decisions and advice should be sought from a Solicitor as to whether the work performed fits within the Act's definition.

A notice of the subcontractor's charge must be given to both the builder and employer. The notice must specify the amount and particulars of the claim in relation to the relevant work. It must be certified by a "prescribed person" (usually an Engineer) and supported by a statutory declaration from the subcontractor.

A subcontractor's charge must be lodged with 3 months of the completion of the work.

Steven Hayles

Within fourteen days after the notice of charge is received, the builder must give a "contractor's notice" to the employer, stating that the builder:

a) Accepts liability to pay the claimed amount;

b) Disputes the claim; or

c) Accepts liability to the amount stated in the "contractor's notice", but otherwise disputes the claim.

When a builder provides a notice accepting the liability the employer will pay the amount to the subcontractor. If the builder does not accept the liability, the subcontractor must take the next steps to enforce the charge by commencing court proceedings within 1 month after a notice of claim of charge has been given. For claims in respect of retention monies only, court proceedings must be commenced within 4 months after such retention money or the balance thereof is payable.

If you believe you are entitled to make a *Subcontractors' Charges Act* Claim we recommend that you make an appointment with one of our Solicitors to discuss your claim further.

news

Playground mates are Trainees together

Danielle at school

Paul at school

By Paul Formosa and Danielle Fitzgerald

Danielle Fitzgerald and Paul Formosa commenced employment at Macrossan & Amiet Solicitors on the 13 December 2010 as Trainee Solicitors for 2011. The two new trainees have been learning together for quite some time and are looking forward to embracing the challenges of their respective traineeships in the coming year.

Danielle and Paul attended primary school together at St. Francis Xavier Catholic School from preschool to grade seven. They each remember attending school discos, free-dress days and the most coveted day of the year, the end of year break up at Harbour Beach.

In 2002, after the pair had parted ways, Danielle went off to complete her senior schooling at Mercy College and St. Patricks College in Mackay. It was her legal studies classes that led her to James Cook University to complete a Bachelor of Laws. During this time, Danielle was appointed social representative for the James Cook University Law Society which involved interacting with staff, fellow students and the profession. Danielle has also spent time travelling the world, visiting family and friends in the South Pacific, North America, Europe, and Asia.

In her final year of study, Danielle was provided with the opportunity to gain legal experience with the Townsville Community Legal Centre.

Paul attended Whitsunday Anglican School for senior and, like Danielle, gained a desire to enter the legal profession whilst completing legal studies in Grades 11 and 12. In 2007 Paul moved to Townsville to complete his Bachelor of Laws at James Cook University. Paul completed his four year degree alongside Danielle with the two remaining good friends despite being bitter college rivals.

Paul gained valuable experience working as a summer clerk at Macrossan & Amiet from 2009 to 2010 and it was this experience which greatly assisted him in his final year of his degree. Outside of work, Paul is a fishing tragic and enjoys nothing more than spending a Saturday out in the boat bickering with his father.

Danielle and Paul are extremely appreciative of the opportunity to commence their traineeships with the Macrossan & Amiet team. Danielle and Paul are eager to meet the requirements of the Supervised Traineeship Scheme and are excited by the challenges they expect to face in the coming year in becoming qualified solicitors.

Paul Formosa and Danielle Fitzgerald

profile

In the spotlight - Graeme Crow S.C.

By Paul Stasuik

Vince Lombardi, a great coach, once said *"The achievements of an organization are the results of the combined effort of each individual"*.

Macrossan & Amiet Solicitors has been serving Mackay and its surrounding areas since 1895. This achievement has only been possible by ensuring our legal team consists of experienced individuals, who are dedicated to achieving the best results for you, our clients.

It is with great pleasure and honour that we acknowledge two such individuals: Graeme Crow and Peter Roney. They have both been recognised by the Senior Counsel Consultation Group, a group of their peers, and appointed to the inner circle of Senior Counsel.

The Bar Association of Queensland states: "The appointment of Senior Counsel is only possible after many years of outstanding practice as a barrister and is granted because of their experience, learning, seniority and standing as an advocate".

This month, we focus on Graeme Crow. Graeme was born in Rockhampton on the 19th May 1967. He attended St. Josephs CBC and Emmaus College in Rockhampton. Graeme graduated from the University of Queensland with an L.L.B. Honours and a Bachelor of Commerce. He was admitted to the bar in 1991 and has spent a number of those years practicing in Central Queensland.

Graeme is one of only three Senior Counsel who reside north of Brisbane and has represented many of our clients in such successful cases as *Craddock v Anglo Coal, Curren & Ors v McGrath*, and *Appo v Stanley & Anor*. He has on countless occasions provided valuable advice and counsel to our legal team and clients. As a result of this teamwork, dedication, and hard work, Graeme Crow proves achievements are possible through the combined efforts of individuals working towards a common goal.

Graeme Crow

We would like to congratulate both Graeme and Peter on their appointment to Senior Counsel and thank them for the outstanding counsel they have provided over the years and will continue to provide in the future at Macrossan & Amiet Solicitors.

Criteria for Appointment as Senior Counsel

The designation of Senior Counsel provides a public identification of barristers whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as advocates and advisers, to the good of the administration of justice.

As a recognition based on the opinions of those best placed to judge barristers' qualities, the designation of Senior Counsel also provides a goal for the worthy ambition of junior counsel, and should encourage them to improve and maintain their professional qualities.

1. Applicants are normally expected to have at least twelve years experience at the Bar before they apply. Applicants with less than this time in practice are unlikely to have sufficient experience to enable them to fulfil the criteria and are therefore unlikely to be successful in their application.
2. Unless there are exceptional circumstances, appointment as Senior Counsel will be restricted to practising barristers.
3. The qualities required to a high degree before appointment as Senior Counsel are skill and learning, integrity and honesty, independence, diligence and experience.

news

A New Year and a new Associate - Macrossan & Amiet welcomes back Erin Sellentin

Paul Formosa

By Paul Formosa

The Directors and staff of Macrossan & Amiet Solicitors are pleased to announce the return to work of one of our experienced solicitors, Erin Sellentin.

Erin has been on maternity leave since the birth of her second child last year.

Erin studied at James Cook University in Townsville and graduated in 2001 with a Bachelor of Art and Bachelor of Laws Degree. She was also awarded the Butterworths Book and the O'Shea & Dyer Family Law prizes for her academic achievements. Being born and raised here, Erin moved back to Mackay upon completion of her studies and took up employment at Macrossan & Amiet in early 2002 as an Articled Clerk. She was admitted as a solicitor in February 2004. Other than taking time out for maternity leave, Erin has been working at Macrossan & Amiet since.

Erin Sellentin

Erin's specialist areas of practice include business and residential conveyancing, property transactions including leases, body corporate law, wills and estates.

Erin's pursuits outside of work include netball and looking after her family. Erin and her husband Aaron welcomed a new addition to their family last year. Their second son, Jack, is doing well and his big brother, Riley, is excited to have a mate to play with.

Erin will start work on the 18th January 2011 and will be seeing clients in our Mackay office on Tuesdays and Wednesdays each week. In recognition of her contribution to the firm, Erin has been appointed an Associate. We congratulate her on this achievement.

If you would like to speak to Erin about your legal affairs don't hesitate to call us or email Erin at esellentin@macamiet.com.au

news

The Discretionary Family Trust - Is it right for you?

By Chris Roberts

When acquiring assets it is worth thinking about what kind of business structure would best suit your needs. A discretionary family trust is one of the more popular small business structures in Australia. The main reason for its popularity is it provides families with flexibility in allowing the tax burden to be shared among family members and goes some way in protecting family assets.

What is a discretionary family trust?

A trust is a relationship whereby a Trustee holds property in a trust fund for the benefit of beneficiaries. The terms of the relationship are defined by the Trust Deed entered into between the Trustee and Settlor. The Trustee acts in accordance with the Trust Deed and has the power to carry out transactions and sign documents on behalf of the trust. An Appointor is also listed in the Trust Deed and has the power to appoint or stand down the Trustee.

In accordance with the family discretionary trust, the Trustee has the discretion as to how to allocate the trust property to the beneficiaries. The beneficiary therefore has no legal entitlement to any part of the property unless and until the trustee allocates some part of it to the beneficiary.

Why use a discretionary family trust?

By using a discretionary family trust certain tax liabilities can be avoided. This is because the Trustee has the discretion to distribute trust funds between family members in order to allow for reduced tax rates to apply. This is particularly helpful where some family members earn substantially more incomes and are more likely to incur higher taxes. Further, there are certain concessions to capital gains tax that apply to a discretionary family trust where the beneficiaries are individuals that would not otherwise apply to a company.

Chris Roberts

A discretionary family trust also has the benefit of providing some form of asset protection. For example, creditors who have outstanding debts with a person as trustee cannot attack assets held by a trust unless the debt is a debt of the trust itself.

A discretionary family trust can operate for up to 80 years and can be tailored to your needs. Please consult a solicitor to determine if a discretionary family trust is right for you.

Our January chuckle: *We like to have a laugh at ourselves...*

At a convention of biological scientists, one researcher remarks to another,

"Did you know that in our lab we have switched from mice to lawyers for our experiments?"

"Really?" the other replied, "Why did you switch?"

"Well, for three reasons. First we found that lawyers are far more plentiful, second, the lab assistants don't get so attached to them, and thirdly there are some things even a rat won't do."

news

Lawful Discrimination

Continued from page 1

3. the employer will suffer unjustifiable hardship if it restrains from discriminating; or
4. the discrimination is caused by the employer's compliance with existing legislation.

The following are some real cases that have been determined by the Federal Courts and the Queensland Anti-Discrimination Tribunal (now the Queensland Civil and Administrative Tribunal) regarding some of the above exemptions from anti-discrimination laws:-

Cosma v QANTAS Airways Ltd

In 2002, the Federal Court of Australia heard a claim against discrimination by a former employee of QANTAS Airways. Mr Cosma, the claimant, commenced working at the Melbourne Airport for QANTAS as a porter. A porter is required to load and unload the aircraft while it is on the tarmac, which is essentially moving baggage from the baggage room to the aircraft in groups of six people. Depending on the size of the aircraft, the group of porters have to use tugs and conveyors, and also have to manually maneuver bags inside the aircraft and on the trailer of the tug. The members of the group rotated jobs in the interests of fairness, as some jobs were more difficult than others.

In 1991, Mr Cosma injured his shoulder when lifting a heavy bag into the aircraft. The injury was later aggravated when he attempted to return to work. Although QANTAS has an extensive rehabilitation program, by 1997, QANTAS could not place Mr Cosma in alternate permanent work. QANTAS gave him a written notice of termination. The Court looked at several issues:-

1. What did the employment entail?
2. What were the inherent requirements of the employment?
3. Was Mr Cosma unable to carry out those inherent requirements because of his disability?
4. What services or facilities could QANTAS implement to assist Mr Cosma to carry out those inherent requirements?
5. Would the provision of such services and facilities impose an unjustifiable hardship on QANTAS?

The Court held that the position necessarily required Mr Cosma to do physical work of loading and unloading baggage and participation in a rotation of tasks. With his shoulder injury, Mr Cosma was unable to perform such work, and there were no services or facilities that could be implemented to assist Mr Cosma. The Court dismissed Mr Cosma's claim against discrimination because there was a genuine occupational requirement that Mr Cosma could not comply with.

Toganivalu v Brown & Department of Corrective Services

In another case in 2006, the Queensland Anti-Discrimination Tribunal decided that an employer reinstate and compensate a Correctional Officer, who was demoted because of a knee injury, because the employer was not genuinely concerned with workplace health and safety and there was no genuine occupational requirement. Therefore the statutory exemption did not apply.

The Correctional Officer, Mr Toganivalu, has a 20% permanent disability to his right knee after he slipped on fruit peelings in a grocery store. It was aggravated after a food trolley on an aircraft rolled into his knee. The employer had put Mr Toganivalu on a rehabilitation program, but did not let him complete the program because, after a medical assessment was conducted, he was not showing improvement. The employer subsequently demoted him because he was allegedly unable to "hurry and make haste" towards the scene of an emergency, and restrain prisoners, amongst other tasks. The member for the Tribunal held that Mr Toganivalu is capable of walking quickly (which the other employees did) and that emergencies and restraint of prisoners were infrequent.

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If you have any queries about any of the articles in this newsletter, please feel free to email mac@macamiet.com.au or phone 4944 0333 (Mackay) or 4948 4500 (Whitsundays) to speak directly with the author of the article.

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The member said:

> "I accept the [Mr Toganivalu's] performance may be *"less competent than another prison officer not so afflicted"*, however, I consider it is significant that there is no testing, either on entry or during the course of a [Correctional Officer's] employment, to determine or set a benchmark for performance of these aspects. ... If [the employers] were genuinely concerned about the exposing inmates and fellow officers to the risk of injury by reason of the unfitness or otherwise of a particular [Correctional Officer], surely a regime of regular testing for physical proficiency would be in place to ensure that all [Correctional Officer's] employed at the Centre were capable of responding in accordance with a relevant standard determined by the [Dept. Corrective Services]."

Mr Toganivalu was re-instated and awarded $44,852.44 in compensation.

A couple of points that are commonplace these cases is that the employers were clear about, and had documented, the requirements of the position held by the employee. Further, the employers had procedures and policies for managing issues that arise from certain attributes of the employees.

While it would be ideal that employers and employees work around the issues causes by such attributes, employees need to be aware that employers are sometimes warranted to take certain action for the safety and proficiency of the workplace.

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