

Macrossan & Amiet Solicitors

news update

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“Genuine Redundancy” or just bad luck?

By Andrea Green

The idea behind redundancy pay is to help former employees financially bridge the gap until they find a new job. This is only fair considering that the employee would have lost their job through no fault of their own. But what happens when the termination of employment is not the employee's, nor the employer's, fault? Can the employer avoid paying redundancy pay? Employers may not have to pay redundancy pay if the fluctuation of work is standard to their business.

A genuine redundancy occurs when:

1. The former employee was dismissed; and
2. The dismissal was not on the account of any personal act or default; and,
3. The dismissal was because the employer no longer wished the job the employee had been doing to be done by anyone,

or because the employer has become insolvent or bankrupt.

Employers are liable to provide redundancy pay if the



Andrea Green

employment agreement, award, or legislation that governs the employment requires them to. For instance, employers who are a “small business” (i.e. one that is with less than 15 employees) do not have to pay redundancy pay. Also, employers are also not liable to pay redundancy pay when the employee has been working with the same employer for less than 12 months. The most important point of call to determine whether redundancy pay applies in a certain circumstance is to look at the award or agreement that governs the employment relationship.

An employer may no longer wish the job that the employee was doing to be done by anyone because of technological change,

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Trespassers Will Be Prosecuted! Or will they?

By Jodie Mason

We have all walked or driven past properties that display a sign stating that TRESPASSERS WILL BE PROSECUTED. Is this a fear tactic or a legal warning? Let's explore.

1. What is trespass?

Any deliberate or careless act that directly interferes with someone else's land is considered a trespass. It is a private wrong, and a trespasser can be sued, regardless of whether there was any actual damage caused.

The most common example of trespassing is entering another's land without their permission. Some other examples where a Court has found that a person has trespassed are: -

- Firing a gun into the soil of someone's property;
- Placing a ladder against someone's building;
- Driving a nail into the wall of someone's building;
- Encouraging a dog to run on someone's land;
- Removing the doors and windows from someone's house; and
- Throwing a person (!) onto someone's land.

2. The law

To bring a private action against a trespasser, you must have an exclusive right of possession (rather than ownership) of the

land on which the trespass has occurred. Therefore in the case of a rental property, it is the tenant that has the right to sue, not the owner.

3. Prosecution

The word prosecution can be misleading, as a person can only be prosecuted if they commit a crime.

The crime of trespass in Queensland is governed by the *Summary Offences Act 2009* (Qld). A person can be guilty of trespass if they unlawfully enter a residential or commercial property. It is unlikely however that a person would be prosecuted by police for a trespass that has not caused any significant damage, due to the time and cost involved for the State.

Failing prosecution by the police, a person can commence a 'private prosecution'. These types of actions are rare due to the high costs involved in running a



Jodie Mason

prosecution, the fact that legal fees are not recoverable and if a fine is imposed, the money is paid to the State.

4. Liability as a land occupier

There is a story circulating the rumour mill about a burglar that cleaned out a 95 year old widower's house, taking everything she owned. Whilst fleeing the house, the robber tripped on granny's cat, breaking his leg. Some weeks later, granny receives court papers stating that she is being sued for the robber's medical expenses. The robber wins and granny has to sell her home to pay for the robber's rehabilitation. This story causes outrage amongst those who hear

it. This story poses the question; do you have the responsibility to ensure the safety of a trespasser on your land?

Displaying a sign that trespassers may be prosecuted informs people that they are not



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Trespassers Will Be Prosecuted! Or will they?

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welcome on the property, thereby revoking what is known as an implied licence to enter the land. An implied licence gives a person a right to enter someone else's land for a specific purpose. For example, leaving a front gate unlocked can give a person the right to enter the gate and go to the front door of the house. Just as easily, locking a front gate can revoke this right. By displaying a sign, any person entering your land could be considered a trespasser.

So what if a trespasser falls over your collection of garden

gnomes? The Courts have stated that an occupier owes a duty to all entrants of land, both visitors and trespassers. The Court's approach to an occupier's liability to a trespasser is largely unresolved, however the general position is that a duty owed to a trespasser may be less than that of a visitor, especially if you are not aware that the trespasser is on your land.

5. Time to Revise

As alluded to, the term 'prosecuted' is not accurate and as such, I would like to suggest a

revision to the old classic. Perhaps something as simple as 'NO ENTRY, PRIVATE PROPERTY', or if you are particularly concerned about accuracy 'IF YOU ENTER THIS LAND YOU ARE A TRESPASSER! I RESERVE MY RIGHTS TO PURSUE YOU FOR DAMAGES AND CLAIM MY LEGAL FEES SHOULD I BE SUCCESSFUL. FURTHER I HAVE THE RIGHT TO PRIVATELY PROSECUTE, AND THE POLICE MAY EVEN BE INTERESTED IF YOU BREAK SOMETHING. PLEASE DON'T TRIP ON THE WAY OUT.....'

Macrossan & Amiet congratulates Vicky Gillam

Vicky Gillam, secretary to Andrew Telford in our Airlie Beach office, has recently travelled to the Gold Coast to be assessed for her next black belt by Master Instructor Ross Hartnett - 7th Dan. She passed her grading and in doing so, successfully achieved her 4th Dan Black Belt which now qualifies her to be a Head Instructor and Examiner under the World Taekwondo Federation.

In her spare time, Vicky doubles as a Taekwondo instructor and she has recently opened her own club, Whitsunday Taekwondo Oh Do Kwan.

Vicky first began her training in martial arts as a teenager and has been studying Taekwondo for over 11 years. She is a former 3 times Western Australian State Champion and has since made the Whitsundays her home.

The Club conducts classes in both Airlie Beach and Proserpine catering to students of all levels and ages from 5 through to Adults. For more information about class training times, please

contact Vicky on 0416 350 439 or 4947 3467 A/H or at info@whitsundaytkd.com.au

Macrossan & Amiet congratulates Vicky on her achievement.



New Laws for Child Restraints

By Francesco Maconi

Many people use child restraints to protect their children while driving. A child restraint can be a capsule, child car seat or booster seat that secures a baby, infant or child while travelling in a vehicle.

The Queensland Government has recently introduced new laws to improve children's safety by making child restraints compulsory. From 11 March 2010 all children up to the age of seven must be secured by a child restraint. A child can stop using a child restraint only at the age of seven, or before turning seven if their eye-level reaches the top of their restraint.

The Government's new laws are designed to give parents more

clarity on how to restrain their children. They are also aimed at reducing the number of inappropriately-restrained children, who could suffer serious injuries in car accidents.

To enforce these new measures drivers can now be fined up to \$300 and 3 demerit points for travelling without a child restraint or with an incorrectly installed restraint. These penalties apply for each unrestrained or incorrectly restrained child, so it's important to comply with these new rules.

Parents should remember to use different child restraints, according to the age and size of their child. Specific requirements are set out in the following table:-

Age	Weight	Child Restraint
0 - 6 months	Less than 8kgs	Rearward facing baby capsule infant restraint
6 months to 1 year	8 to 12 kgs	Rearward or forward facing infant restraint
6 months to 4 years	8 to 18kgs	Forward facing child restraint with built-in harness
4 years to 7 years	14 to 26kgs	Booster seat with H-harness or a booster seat with a secured adult seatbelt



Before buying a new restraint parents should be mindful that the restraint is properly certified. Only child restraints that comply with Australian Safety Standards AS1754 or AS/NZS1754 should be fitted into your vehicle. It's also important to have your child restraint periodically checked. This can be done quite easily by



Francesco Maconi

someone at the RACQ, Queensland Ambulance Service or at Kidsafe Queensland.

Some exemptions to using child restraints do apply. If you believe your child has a medical condition and shouldn't be restrained, you can obtain an Exemption Form from the Department of Transport and Main Roads. The form is valid for 12 months, it must be signed by a doctor and should be kept in the car at all times.

Another exemption applies to taxi drivers. Taxi drivers are not required to fit child restraints inside their vehicle. However, if the taxi does have a child restraint then the driver must place your child in the restraint.

Ultimately, it is your responsibility as a parent and a driver to make sure your children are safe. Please ensure everyone is securely fastened the next time you drive.

For more info please see:

QLD Government Information:-

- *Child Restraints - Questions and Answers*, Department of Transport and Main Roads (2010)

- *New Queensland road rules and child restraint legislation*, Queensland Government, (September 2009)

RACQ Information-

- "Child Restraint Rules Change", *The Road Ahead*, RACQ (Apr/May 2010) at p 39

- General information at the RACQ website: www.racq.com.au/childseats

When Your Will Won't Do: Superannuation, is your nomination binding?

By Jodie Mason

Almost every person who has held a job in Australia will have superannuation. It can often be one's principal (and sometimes, only) asset. Many people believe that their superannuation will form part of their estate to be distributed in accordance with their will. This however is not the case, and as such, special consideration needs to be given and certain procedures undertaken, to ensure that your superannuation is dealt with pursuant to your wishes.

1. Super normally does NOT form part of your estate

As your superannuation is held by your super company's Trustee and not actually held by you, it does not form part of your estate dealt with by your will. Upon death, it is the Trustee that has the decision, and discretion, on how to distribute the superannuation. The only instance in where superannuation will form part of your estate is where the nomination has been made out to the estate or the legal personal representative of the estate.

2. Binding v Non Binding Nominations

There are two types of superannuation beneficiary nominations. There is a binding nomination, which a Trustee is compelled to comply with, and a non-binding nomination, which a Trustee may elect at its discretion whether to act in accordance with.

A binding nomination is a written notice to the Trustee of the super fund which directs the Trustee how to distribute the superannuation entitlements upon the fund holder's death and is only valid if: -

- a) it is in writing;
- b) it is signed and dated by the fund holder in the presence of two witnesses (similar to a will);
- c) contains a declaration by the two witnesses that the notice was signed and dated by the fund holder in their presence; and
- d) is provided to the Trustee of the super fund.

A binding nomination can only elect a dependant to be the beneficiary. Superannuation law defines the word 'dependant' to include: -

- a) a spouse;
- b) a child;
- c) any person in an interdependency relationship (someone you share a close personal relationship with, live with, or provide financial or domestic support to); or
- d) any other person who the Trustee considers was dependant on you for maintenance or support at the date of your death.

It is common for binding nominations to expire three (3) years after the execution date, making it essential that you carefully monitor your nominations and update as required.

A non-binding nomination acts as a guide for the Trustee in deciding how to pay the death benefit and superannuation entitlements. The Trustee has a responsibility to make sure benefits are distributed in an appropriate manner and generally can only make a distribution to a dependant. If the deceased left no surviving dependants, the Trustee will then be able to make a



Jodie Mason

distribution to a non-dependant, which in reality is a rare event.

3. Contesting a Trustee's Decision

If you are unhappy with a Trustee's decision, the first step is to notify the relevant super company. If the matter is not resolved to your satisfaction, you may appeal to the Superannuation Complaints Tribunal. The SCT is an alternative to the Court system and to access the SCT, you must have first made a direct complaint to the superannuation company. The complaint to the SCT must be made within 28 days of receiving a response from the super company.

To be eligible to make a complaint to the SCT, the person must have a direct or in-direct interest in the death benefit and must also be a dependant or legal personal representative of the fund holder.

4. What Can You Do?

Many people would be uncomfortable with someone that does not know them, or their family, making a decision about who should receive a large portion of their assets. The best way to avoid this is to be fully aware of what you own and how you wish to distribute it upon your death. If you are a member of a managed fund, you should contact your superannuation company (or companies, if you have not amalgamated your funds) to determine the specific process the Trustee of your superannuation company requires to make a binding nomination or non-binding nomination. Remember to check how long the nomination is valid for, and make a reminder to yourself to update it upon expiration.

Taking Care of Business - Buying a business in Queensland

By Chris Roberts

Operating a business can be a very rewarding experience. However, due to the risks involved it is important that all facets of a business are thought through and professional advice is sought. The following article provides a brief overview of some of the main issues to consider when buying a business in Queensland.

Business Structures

One of the most fundamental building blocks from which to develop a business is establishing a solid business structure from which to operate. The best business structure is one suited to your particular needs, taking into account factors such as your tax positions, legal liabilities and available capital. The various business structures at your disposal are:-

1. Sole proprietor;
2. Partnership;
3. Company;
4. Trust; or
5. Combination of the above.

The Contract

Traditionally, the Contract will be prepared by the Seller and presented to the Buyer for consideration. Before signing a contract it is advisable to seek legal advice in order to protect your interests.

A solicitor will be able to explain your rights and liabilities under the contract and negotiate any amendments to the contract on your behalf. Things that will need to be considered include:

1. Transfer of licenses, permits and consents required for the running of the business

- It is important to be aware of what is required for the business to operate and understand any conditions attached to any licenses.

2. The price of existing stock as well as any plant and equipment to be transferred with the business

3. Transfer of the lease of business premises

- Generally, a Contract will allow for an existing lease to be transferred to the Buyer or be subject to the Buyer entering into a new lease with the Landlord. Where an existing lease is in operation and being transferred, careful consideration will need to be made to the tenancy period and any options to renew.

4. Tuition from the Seller on the running of the business

- The Buyer may negotiate to receive training on how to operate their new business before and/or after settlement



Chris Roberts

so that they are familiar with the business.

5. Restraint of trade on the Seller to prevent direct competition

- In order to maintain the goodwill of the company a Buyer may negotiate to prevent the Seller from operating a similar business within a prescribed area for a certain period of time.

6. Tax liabilities

Various factors will need to be taken into account in determining whether GST and/or Stamp Duty is payable under the Contract. This is important as certain concessions or exemptions may apply.

7. Insurance

- The Contract should specify when the business assets become the risk of the Buyer. Before risk is transferred it is vital that a Buyer considers insurance against fire, burglary, public liability, personal disability, and loss of profits.

The Best Start

Ensuring professional advice is obtained is crucial to the viability of any business. This is particularly true for those purchasing a business.

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relocation, and re-organisation of the business structure, to name a few.

It is also the case that an employee is not entitled to redundancy pay where the employment is terminated because of the business’s *ordinary and customary turnover of labour*. There have been many State and Federal Court cases that revolve around the question of: when is a termination because of the business’s “ordinary and customary turnover of labour?”

In one case in 1992, the Judge said: “In my opinion, the phrase [“ordinary and customary turnover of labour”] is intended to cover such employees as seasonal workers, or those who, by virtue of the industry in which they work, know that their employment is intended to be of limited duration...”

This attitude has been long-standing. In 1984, the New South Wales Industrial Relations Commissioner held that: “When a contract was lost the labour that was required to service that contract had to go as well...loss of labour in such circumstances was part of the ordinary and customary turnover of labour.”

But, it’s not that simple. For employers to be able to claim that terminations are in the ordinary and customary turnover of business, the Courts have developed some conditions. Although each case will be determined on its own merits, the Courts will look into:

- Whether the employees knew that their work was subject to the employer holding contracts;
- Whether the employer has made reasonable efforts to obtain new contracts;
- Whether the fluctuation of contracts is a normal feature of the business;
- Whether the employer has made reasonable efforts to relocate the employees in a new section or workplace; and,
- Whether the employer has made an economically sensible decision to terminate the employees.

Although this may seem unfair to employees who have been fired through no fault of their own, consideration must be given to the principle behind the rule. To be able to claim that a termination is because of the ordinary and customary turnover of business, such termination must be because of circumstances beyond the control of the employer. Furthermore, employees must have some

knowledge of the way the business operates. For example, if a person in the construction industry is employed for one particular development, that person should not anticipate continuous and indefinite work, and therefore should not anticipate redundancy pay every time they finish up work on a job.

Redundancy pay is a great concept to most. Some view redundancy pay as “free money” and a blessing, particularly when it will be easy to find a new job. Unfortunately for those, it is a “privilege” that should not be abused, and subsequently, the law has followed and made it difficult to obtain the entitlement to redundancy pay.

If you think you may have an issue with redundancy in your workplace and wonder if redundancy pay applies to you, the Fair Work Australia website (www.fwa.gov.au) has some very useful information. You could also contact Fair Work Australia on 13 13 94, or your local law firm.



last word



Kylie Davies

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Do you have unclaimed Super?

I was recently at my grandfather's house when he had a thought (as he does) that he contributed once upon a time (when I was a twinkle in my mother's eye no doubt) to superannuation for himself and my late grandmother.

I dismissed it as nonsense as Pop never had an inkling to financially contribute to anything unless it was required by law (we used to have money buried under the strawberry patch which in hindsight, made the strawberries taste even sweeter).

However my curiosity (and guilt) got the better of me so I went home and logged on to the Australian Tax Office website (www.ato.gov.au) and by following the links, and providing a few basic details, I discovered that Pop's flashback was not

nonsense, and in fact there was some 'lost super' recorded under his name.

Feeling on a roll, I entered my own details and lo and behold, there was unclaimed super from a job I had briefly while at university!

I have since filled out the claim forms and rollover forms required to combine my super and for a refund of Pop's, and the cheque is in the mail.

I encourage everyone, for the sake of a couple of minutes, to jump online and plug in your details. You never know what you might find!

Until next month,
Kylie.

Our June chuckle:

Two new surgeons at the hospital were discussing the qualities of their favorite patients. *"I like contractors myself"* says one. *"They don't even flinch when I tell them I underestimated the cost and length of surgery."* *"Well, I had an electrician yesterday"* another says. *"It was beautiful everything inside well marked and color coded!"* An older surgeon passing by heard them, and cut in. *"You fellas ain't seen nothing yet"* he tells them *"By far the best patients are lawyers- they have no heart, no spine, little guts, and the head and butt are fully interchangeable!"*

If you have any queries about any of the articles in this newsletter, please feel free to [email mac@macamiet.com.au](mailto:mac@macamiet.com.au) or [phone 4944 0333 \(Mackay\)](tel:0749440333) or [4948 4500 \(Whitsundays\)](tel:0749484500) to speak directly with the author of the article.