

CLIENT NEWS

A FREE QUARTERLY LEGAL UPDATE 2ND QUARTER 2009

HOW TO SURVIVE A RECESSION

Bank manager slow to return your phone calls? Customers tardy in paying their bills? Worried about sales forecasts or what key staff are up to?

Welcome to the new world order that has seen cash replace credit and insolvency experts replace merchant bankers as the corporate sector's top earners.

Weaker sales and gloomy forecasts, coupled with the ageing of debtors' ledgers and tighter credit from lenders, has already sent many businesses reeling. White collar fraud is also expected to rise as the downturn continues.

More than ever, you are going to need clear and practical advice on how to survive a recession. Understanding the legal issues facing your business is critical, especially when your own home or personal assets could be at risk.

Lawyers are reporting an increase in the number of clients seeking help with writs for possession, facility guarantee claims, personal guarantees and other complex litigious problems involving negotiations with the major banks.

Often where a bank security has included residential property, the asset has not sold in the timeframe necessary. When it has, the price has often been relatively low, fetching nothing like the prices in recent years. This has led to significant shortfalls which are being picked up under personal guarantees by directors and related entities.

As a business owner, if you want some form of enforcement on your debtors' ledger or you are keen to issue statutory demands or resolve disputes which may have been on the back burner, now is the time to talk to your lawyer – before you go bankrupt.

Recovery and insolvency experts point to good planning as the way to "recession proof" a business. This should include strategies to protect your personal as well as business assets.

Preparing solid financial documents such as cashflow statements and budgets will also go a long way towards ensuring you survive any downturn.

And keeping a close eye on business assets

such as stock and inventory can be the difference between a company that survives an economic downturn and one that fails.

Reviewing costs will highlight any inefficiencies and should include an examination of existing contracts, leases and financial agreements. A lawyer can help you with this.

Redundancies also need to be handled carefully to avoid claims of unfair dismissal and the resulting damage to your reputation.

Fraud is another issue to be aware of. According to a recent survey of executives by Deloitte, most expect accounting fraud to increase during the next two years as pressure to meet earnings targets intensifies.

Sectors most at risk include computer, retail, telecommunications and health care, the Deloitte report claims.

False invoicing, plant and inventory theft, stealing of cash, diverting of sales to an employee's own business, identity and credit card theft, kickbacks and manipulation of data can occur when there are poor internal controls.

"A slowing economy may increase pressure on companies to meet – and often exceed – short-term performance goals (sometimes at the detriment to the organisation in the long-term) or to demonstrate that shareholder value has improved due to management's leadership. In some instances, organisations may expect results that can be achieved only in a thriving economy. It is this mindset in slower economic times that can contribute to increased fraudulent activity," the Deloitte report states.

If you are a non-executive director of a company – big or small – remember you can be personally liable for the misconduct of your fellow directors.

Seek legal advice if you are concerned about fraud risk in the changed financial environment as the number of prosecutions and class actions are expected to rise when the accounts of insolvent companies are opened to forensic scrutiny. ■

More information

From the LIV Bookshop: *Wall Street: America's dream palace*, by S Fraser, 2008, \$35



IN THIS EDITION

How to survive a recession	1
Bullying is always unacceptable ..	2
Property laws change for de facto couples	2
Human rights legislation for Australia?	3
Where there's a will	3
Legal profession rallies to help	4

BULLYING IS ALWAYS UNACCEPTABLE



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High levels of bullying and sexual harassment in the workplace are going unreported because employees fear losing their jobs if they speak out.

As the economic crisis puts more pressure on the workplace through increases in redundancies and workplace cutbacks, concerns are held that bullying incidents will increase and be more likely to go unreported.

A survey of 788 workers by CareerOne found that 62 per cent had been bullied by a senior person at work and that only 59 per cent had reported it. Similarly, 74 per cent of sexual harassment cases went unreported because of the fear of reprisals, including the possibility of losing the job.

Bullying can be subtle or overt. It can include name calling, public humiliation,

deliberately leaving someone out of the communication loop, assigning meaningless tasks, stealing ideas and spreading rumours.

People being bullied can suffer anxiety disorders, stress, depression and insomnia; and for the employer it can mean lost productivity and staff loyalty, a damaged reputation, higher staff turnover and poor morale.

Under the various Occupational Health and Safety Acts, employers and employees have a legal responsibility to comply with any measures that promote health and safety in the workplace.

The Human Rights and Equal Opportunity Commission says that because of this duty, employers need to eliminate or reduce the risks to employees' health and safety caused by workplace bullying, discrimination and harassment.

It is in employers' interests to act on cases of bullying and to have internal policies in place to make it easier for people to report such incidents.

A recent publication by Worksafe Victoria – *Preventing and addressing bullying at work* (February 2009) – is a practical guide for employers and employees that provides information on addressing and responding to bullying in the workplace, risk management

strategies for employers as well as policies and procedures to manage bullying at work.

If the bullying relates to one of the attributes covered by federal or state anti-discrimination laws – such as sex, race or disability – then it will also be unlawful and a complaint can be made to the Victorian Equal Opportunity and Human Rights Commission.

It is not always easy for workers to speak out about illegal, immoral or improper practices because of the potential personal repercussions.

In the public sector, the federal government has moved to address greater protections for whistleblowers and has recently released a report into its inquiry on this matter.

The report is available at www.aph.gov.au/HOUSE/committee/laca/whistleblowing/report.htm.

For information on bullying, go to www.hreoc.gov.au/info_for_employers/fact_workplace.html.

Remember, if you have any concerns about your rights and responsibilities at work, your lawyer will be able to assist you. ■

More information

From the LIV Bookshop: *Bullying and Sexual Harassment: A practical handbook*, by Stephens & Hallas, 2006, \$52

PROPERTY LAWS CHANGE FOR DE FACTO COUPLES

The legal landscape has changed for de facto couples who separate and face the often difficult task of dividing up their assets.

Under new federal laws which came into effect on 1 March this year, property settlements for separating de facto couples will be in line with those for married couples.

The Family Law Courts can order division of any property that a de facto couple owns either separately or together.

The superannuation of each partner can now be split, and spouse maintenance ordered.

The Family Law Courts can make these orders if satisfied of one of the following:

- the de facto relationship is at least two years duration;
- there is a child of the de facto relationship;
- one of the partners made substantial financial or non-financial contributions to



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their property or as a homemaker or parent and serious injustice to that partner would result if the order was not made; or

- the de facto relationship has been registered in a state or territory with laws for the registration of relationships.

A de facto relationship is where two people – either of the opposite or same sex – are not married or related by family but live together on a “genuine domestic basis”.

The new laws apply to de facto relationships

that break down on or after 1 March 2009, and applications for a property settlement must be made within two years of the relationship ending.

However, couples whose relationship has broken down before this date can choose to have the new laws apply to them if they opt in to the new legislation and each obtains independent legal advice.

De facto couples who are about to enter – or are already involved in – a de facto relationship may want to consider a binding financial agreement which outlines property distribution and maintenance if a relationship breaks down.

Binding financial agreements can only be entered into after both parties have obtained independent legal advice.

Remember, your lawyer can help you with any of these issues. ■

HUMAN RIGHTS LEGISLATION FOR AUSTRALIA?

In Australia, we pride ourselves on our ethos of equality and fairness for all – giving everyone a “fair go”.

Now the federal government is looking at whether it should enshrine such values in legislation to ensure human rights and responsibilities are protected.

Victoria has led the way in this field by introducing the Victorian *Charter of Human Rights and Responsibilities Act 2006* which came into full effect on 1 January last year.

This formal recognition of human rights ensures law-makers and public decision-makers take account of human rights.

And a recently released analysis by the Victorian Equal Opportunity and Human Rights Commission (VREOC) shows it is having an impact.

VREOC CEO Dr Helen Szoke said people had used the Charter to gain access to vital services, to challenge government policy and to improve the way organisations operate.

Dr Szoke said the Charter had helped ordinary people receive better services and resolutions to problems. For example, people with an intellectual disability were able to exercise their right to vote and young people with brain injuries were saved from being placed into aged care facilities.

As part of the federal government’s initiative, a national human rights consultation process has been set up to give all Australians the chance to share their views on human rights.



Federal Attorney-General Robert McClelland said the 60th anniversary of the Universal Declaration on Human Rights was an appropriate time to reflect on the effectiveness of Australia’s current system of human rights protections, to see if gaps exist, and to explore a range of ways in which human rights protections could be enhanced.

The consultation will look at three key questions:

- which human rights (including corresponding responsibilities) should be protected and promoted?;
- are these human rights currently sufficiently protected and promoted?; and
- how could Australia better protect and promote human rights?

The Law Institute of Victoria is preparing a submission supporting a national human rights charter based on the Victorian Charter but inclusive of economic, social and cultural rights and appropriate proceedings and remedies. You can share your views directly with the government’s consultation committee by making a written submission either online or by post. ■

More information

See www.humanrightsconsultation.gov.au and www.equalopportunitycommission.vic.gov.au.

From the LIV Bookshop: *Australian Bills of Rights: The law of the Victorian Charter and ACT Human Rights Act*, by Evans & Evans, 2007, \$95

WHERE THERE’S A WILL ...

You may be keeping a daily watch on the stock prices or regularly checking your local housing market, but when was the last time you thought about your will? Or considered whether you need to make a power of attorney?

At a time when our attention is gripped by the daily surges in our investment portfolios, it can be easy for other considerations, such as updating a will or appointing a power of attorney, to get pushed into the background.

Yet planning for future contingencies is just as important.

A will should be reviewed every five years or when a significant life event occurs – such as marriage, separation or divorce.

Other circumstances that can affect wills include the death of the executor or benefi-

ciary under the will, a change in relationship, the birth or death of children and the acquisition or sale of assets bequeathed in a will.

Your lawyer can help make or update your will, ensuring beneficiaries are provided for (for example, through the creation of a trust), ensuring your wishes are clearly expressed and advising on circumstances where your will could be contested.

Similarly, your lawyer can provide advice on preparing a power of attorney, which authorises a trusted person to act for you when you are overseas, hospitalised or no longer capable of looking after your own affairs.

There are three main types of power of attorney – a general power of attorney, enduring power of attorney (financial) and an enduring power of attorney for medical treatment.

The Victorian Parliament’s Law Reform Committee will be conducting an inquiry into powers of attorney aimed at streamlining and simplifying the process to enable more people to plan for their financial, lifestyle and healthcare needs.

In the meantime, your lawyer can advise you on making or updating your will and whether a power of attorney can assist in your current circumstances and, if necessary, draft the appropriate legal documentation. ■

More information

See www.liv.asn.au/public/legalinfo/wills and www.parliament.vic.gov.au/lawreform/inquiries/Powers%20of%20Attorney.

From the LIV Bookshop: *The Essential Guide to Will Making*, by Kaufman & McNab, \$125

LEGAL PROFESSION RALLIES TO HELP

11 to 17 May 2009

**Law
Week**



Bushfire Legal Help volunteer Joel Townsend at the Diamond Creek centre

The legal profession has a long history of providing free help when needed to ensure individuals or groups understand their rights and can seek justice.

This spirit of pro bono came out in full force in the aftermath of the devastating February Victorian bushfires.

Within hours of the full scale of the disaster becoming apparent, Victoria's legal profession was considering how it could help.

The result was a coalition of legal groups, Bushfire Legal Help (BLH), which has offered legal advice to victims via a telephone hotline and clinics conducted in fire-affected areas.

Nearly 600 lawyers have offered free services and dealt with more than 1000 inquiries through BLH which is supported by the Law Institute of Victoria (LIV), Victoria Legal Aid, the Federation of Community Legal Centres, the Victoria Law Foundation (VLF) and PILCH.

LIV public affairs manager and BLH spokesperson Kerry O'Shea has described the legal profession's response as heartening.

"There was an immediate and spontaneous outpouring of offers of free assistance from all levels of the profession which was incredibly gratifying to see," she said.

"We have experienced lawyers from all practice areas ready to give their advice at no cost to Victorian bushfire victims," she said.

Initial inquiries from bushfire victims included re-establishing identity, housing and tenancy issues, dealing with creditors, insurance information, reconstructing and tracking down wills, paying mortgages and accessing emergency government grants and benefits.

Victorian Attorney-General Rob Hulls has praised the enthusiasm and willingness of lawyers to volunteer their time and expertise, saying it had been "an impressive example of the legal fraternity at its best".

The need for legal assistance is expected to continue over the coming months as people return to their communities and start rebuilding their lives.

It is predicted the main specialties will be insurance, property and housing law, with issues including re-surveying, rental complaints and rebuilding homes under changed planning schemes.

But it is not just when disaster strikes that lawyers offer free advice. Many lawyers provide pro bono services throughout the year and also hold forums to ensure people properly understand their legal rights.

At a statewide level, the upcoming Law Week (11-17 May) has a number of free legal seminars on offer to help Victorians understand their

rights across a range of legal issues.

The free seminars include topics such as helping older Victorians safeguard their savings, providing tips on best practice to committee members of community organisations, unfair and unlawful job termination, enduring powers of attorney and the rights of older residents in relation to accommodation and care options.

A new guide to free and low cost legal services has also been developed. The *Law Help Guide* lists general and referral agencies (such as Victoria Legal Aid), more specialised legal agencies that deal with particular areas of law, and complaint investigation bodies.

The free, 6-page guide can be downloaded from www.victorialawfoundation.org.au or a printed copy is available from Information Victoria on ph 1300 366 356.

Law Week, coordinated by the VLF, brings together 200 organisations including law firms, courts, government departments and a range of public benefit organisations in more than 250 events across the state.

Other highlights include:

- Courts Open Day with tours and mock trials of the Supreme, County, Magistrates' and Children's Courts;
- cemetery tours, visiting the graves of law makers and law breakers;
- public library displays, with free legal brochures; and
- Careers in Law Expo.

A full program of Law Week events is available at www.victorialaw.org.au.

For fact sheets and information available to bushfire victims, go to www.bushfirelegalthelp.org.au and the Bushfire Legal Helpline on ph 1800 113 432. ■

For more information, please contact:

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