

In the Loop

The Hicks Oakley Chessell Williams Newsletter

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Domestic Building Matters

IN 2010, 1060 matters involving a domestic building dispute were initiated in the Victorian Civil and Administrative Tribunal (VCAT) - 19 per cent higher than 2009. Although this only represents approximately one per cent of domestic building permits, many more complaints never reach the point of litigation but are nonetheless costly, both financially and emotionally.

This is the first in a series of articles about domestic building matters intended to minimise the likelihood of a dispute.

Did you know?

- You must have a 'major domestic building contract' for building works worth more than \$5,000.
- Domestic building insurance (also known as builders warranty insurance) must be taken out for you by your building practitioner for works valued at \$12,000 or more.
- Only registered builders can reblock, restump or remove a home, regardless of the value of this work.

Getting the basics right

Before engaging a building practitioner or tradesperson, it is prudent to undertake some due diligence

that will help you later, if there is a disagreement.

1. Ask for traceable contact details such as a physical address, landline telephone number, registered business name, licence details if their trade is licensed.
2. Always ask for a quote for the works. Take notice of any period for which the quote is valid.
3. Ask to see a certificate for public liability insurance.
4. Check that the building practitioner is registered with the Building Practitioners Board (registration is not required for works less than \$5,000 or for works over \$5,000 that involve certain single trades such as painting, glazing, attaching external fixtures).
5. For all plumbing work valued at \$750 or more, make sure that the plumber gives you a compliance certificate.
6. For any electrical installation work, make sure that the electrician gives you a certificate of electrical safety.

If you require assistance with a building matter, call Antoinette Daley at our city office on 9629 7411.

Antoinette Daley
Lawyer

Work Health and Safety Bill 2011 - a brief summary

THE *Work Health and Safety Bill 2011* (Commonwealth) will come into effect on 1 January 2012. It will harmonise Occupational Health and Safety obligations across Australia and will affect Victorian employers.

PCBUs

The legislation introduces the notion of a person conducting a business or undertaking (PCBU). A PCBU replaces the term 'employer' and embraces new and evolving work arrangements, including the traditional employer/employee relationship.

A PCBU has a positive duty to ensure health and safety in the workplace. A PCBU must eliminate risks to health and safety or, if not reasonably practicable to do so, must minimise those risks as far as reasonably practicable. A PCBU owes this positive duty to workers as well as to other persons.

Workers

The notion of 'employee' has been replaced with the term 'worker'. A worker is a person who carries out work in any capacity for a PCBU, including a work experience student of a volunteer. While at work, workers must take reasonable care for their own health and safety; and ensure that they do not adversely affect the health and safety of others.

Duty of consultation

Workers must be consulted whenever a PCBU is identifying hazards and assessing risks or otherwise making decisions about work health and safety. A PCBU must, so far as is reasonably practicable, consult with workers who are, or are likely to be, directly affected by an issue relating to work health or safety. Workers should be given reasonable opportunity to discuss work health or safety

issues and to contribute to health or safety decisions.

Officers' duties

Officers must exercise due diligence to ensure that the PCBU complies with the health and safety rules. Due diligence includes taking reasonable steps to acquire and keep up-to-date knowledge of work health and safety matters. Businesses should implement policies and procedures based on an understanding of the nature of the operations and on the hazards and risks associated with those operations. Officers have a positive duty to be proactive and continuously aware of the duties and obligations under the Act, having regard to the nature of the business.

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Client Alert

Personal Properties Securities Register (PPSR) postponed until early 2012.

For more information visit:

www.ppsr.gov.au

or contact Harvey Bowlt 9550 4600

We are pleased to announce the launch of our new website:

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Increase in penalties

Under the new legislation, penalties for offences increase. There are three categories:

1. An offence is committed if the person's failure to comply with a health and safety duty exposes an individual to a risk of death or serious injury or illness, and the person is reckless as to that risk.
2. An offence is committed if the person's failure to comply with

a health and safety duty exposes an individual to a risk of death or serious injury or illness.

3. An offence is committed if a person fails to comply with a health and safety duty.

The maximum fine for an offence is \$3 million in the case of a corporate offender and \$300,000 in the case of an individual, which may include a term of imprisonment.

Guidance

To minimise exposure to legal risk associated with the incoming health and safety legislation, businesses should review their current health and safety framework and identify gaps where present processes differ from obligations under the new legislation.

Shayne Barnett
Trainee Lawyer

Directors Duties – Raising the Bar?

THE RECENT case of *ASIC v Healey & Ors [2011] FCA 717 (Centro Case)* has highlighted the duties of directors of listed public companies in relation to the companies' financial statements.

ASIC instituted proceedings against the directors and financial officers of the Centro Group on the basis that they had failed to take all reasonable steps to comply with the companies' financial reporting obligations in terms of the Corporations Act and had breached certain other statutory duties of care and diligence. In brief, the allegations by ASIC related to the incorrect classification of substantial liabilities of about AU\$2 billion in the 2007 annual report as non-current liabilities and a failure to disclose substantial post balance date guarantee liabilities in the financial statements.

The Federal Court ultimately found that the defendants had not been dishonest in carrying out their responsibilities, but found that they had *'failed to take all reasonable steps required of them, and acted in the performance of their duties as directors without exercising the degree of care and diligence the law requires'*.

ASIC sought orders disqualifying the directors for periods from six months to three years, as well as pecuniary penalties between \$30,000 and \$100,000. The Court recently ordered the former CEO, Thomas Scott, to pay a penalty of \$30,000 plus a share of the legal costs and the CEO, Romano Nenna, to be disqualified as a director for two years, from 10 October 2011. The Court decided not to disqualify or fine the non-executive directors.

Significance of the judgment

Arguably, a director's duty of care requirements are now more significant and include:

- applying their own minds to and carrying out a careful review of the proposed financial statements;
- considering whether the information in financial reports is consistent with the director's knowledge of the company affairs and does not omit material matters;
- having sufficient knowledge about conventional accounting practice in order to carry out duties adequately; and
- making appropriate enquiries if they are uncertain.

Reliance on advice by others

The Court found that:

- There is a core, irreducible requirement for directors to take all reasonable steps to be in a position to guide and monitor the company.

- Directors must approach their tasks with an 'inquiring mind'.
- Directors require a level of scrutiny that is more akin to supervision, rather than detailed direct involvement in operational matters.
- Directors may rely on advice without independently verifying the information on which the advice is based, *provided* there is no cause for suspicion or circumstances demanding critical and detailed attention. Directors cannot rely on advice and management as a substitute for examination of important matters falling within the board's responsibilities.

The Court held that the errors were so obvious that the directors were negligent and this 'Blind Freddy' proposition occurred because the directors relied exclusively on the internal financial processes in place and on their advisers. In short, they should have looked at and considered the financial statements for themselves.

What level of financial literacy is required?

The Judge emphasised that the directors knew or ought to have known the effect of various accounting notes, enabling them to ascertain that the liabilities in question were current and should have been classified as such. Directors do not require intimate knowledge or understanding of accounting standards, but merely need to read the accounting notes to be informed of the test that was to be applied.

How to manage the information overload

The Court was not sympathetic with the directors' argument that they could not be expected to carefully check Board packs which varied between 450 and 1000 pages each month. The Judge indicated that they could control the information they received and directors who do not read, understand and focus on all the information provided to them are at risk of breaching their duty of care and diligence.

Summary

This case deals with a fairly discrete area of law, namely directors' duties in relation to financial statements for large listed public companies. Accordingly, it remains to be seen to what extent such duties will be imposed on smaller private companies. However, the provisions of the Corporations Act are clear and directors and other officers need to exercise care and diligence in ensuring that they comply with their financial reporting duties.

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