

In the Loop

The Hicks Oakley Chessell Williams Newsletter

Spring 2015

HICKS
OAKLEY
CHESSELL
WILLIAMS
Lawyers & Notary



Sarah Lindsey, former Senior Associate with our firm, has recently been appointed as a Principal.

Congratulations Sarah!



Dianne Hodge, has been granted accreditation as a Law Institute of Victoria Accredited Specialist in Commercial Tenancy Law.

Congratulations Dianne!

Inside this issue:

HOCW News -
Sarah Lindsey - Principal
Dianne Hodge, Accredited
Specialist - Commercial
Tenancy Law 1

EPA Financial & Personal
Matters 1

Smart business - are your
T & Cs in order? 1

Consumer Protection
Extending to Small
Business 2

Subpoenas 2



Law Institute of Victoria
Accredited Specialists in

- Business Law
- Commercial Litigation
- Commercial Tenancy Law
- Family Law
- Wills and Estates



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Our website has recently been redeveloped. We look forward to your visit and hope you find the new look website easy to navigate, engaging and informative.

www.hocw.com.au

To receive our newsletter by email please subscribe via our website or email Sarah Hicks - sarah.hicks@hocw.com.au

Enduring Powers of Attorney - Financial Matters & Personal Matters

Enduring powers of attorney in Victoria changed on 1 September 2015, with the commencement of the *Powers of Attorney Act 2014*. Now powers of attorney appointments must be made under the new *Powers of Attorney Act* using the new forms. The enduring power of attorney (medical treatment) is the only power of attorney that has not changed.

Enduring powers of attorney (financial) and enduring powers of guardianship made before September 2015 remain valid.

Phone Lachlan Vallance, Principal - Accredited Specialist - Wills & Estates - 9550 4600 to find out more.

Smart business - Are your terms and conditions of trade in order?

It's essential that whatever your business, the basis on which you do business with your customers or clients is properly regulated and that both parties to the agreement understand their rights and obligations. I'm often amazed how some fairly substantial companies have poorly drafted terms and conditions of trade or other essential contracts, which can cost significant lost revenue. The risk of lost revenue can be minimised by having proper documents drawn up by a lawyer.

Terms & Conditions Checklist... Do your T & Cs:	YES	NO
• Adequately describe what products or services you will be providing?		
• Clearly describe prices and payment terms?		
• Specify the scope of any guarantees or warranties?		
• Indicate when risk in any goods will pass to the purchaser, particularly if goods are being transported long distances within Australia or internationally?		
• Properly specify retention of title terms and your rights in terms of the Personal Property Securities Act (PPSA), when you provide goods on payment terms or consignment?		
• Set out which law will be applicable, particularly if you do interstate or international work?		

This list is not exhaustive and there is no "one size fits all" solution, but if you answered "No" to more than one of the above questions, (or even worse don't have any proper terms and conditions at all!), then please contact Harvey Bowlt, for further advice on suitable documentation for your business. It could make a significant difference to one of the most important issues to most businesses - cash flow.

Harvey Bowlt

Senior Associate - Accredited Specialist - Business Law

Consumer Protection extending to small business

The Competition and Consumer Act 2010 (C'th) amendments provide for an extension of the unfair contract term protection for consumers to be extended to businesses employing fewer than 20 employees.

The amendments will apply where one of the parties is a small business and where the parties have agreed to standard form contract provisions valued at less than a prescribed threshold.

The legislation was introduced in Federal Parliament in late June and finally passed both houses on 20 October 2015.

It is expected that the extension of protection to standard form small business contracts will not preclude existing protections for consumer contracts including where there is

any overlap (e.g. one party is a consumer and the other party is a small business).

The definition of small business is understood to be a business employing fewer than 20 persons. Casual employees not employed on a regular or systematic basis are excluded.

Further discussion in the business community can be expected as there will be a 12 month period of grace from when the Bill receives Royal Assent.

This period of 12 months will give all businesses an opportunity to review standard form contracts with the aim of modifying terms and conditions in standard form contracts which might be regarded as unfair. It has been recognised that existing laws have largely addressed "unfair"

behaviour in business dealings rather than unfair contract terms. Similarly the protections available under the ASIC Act for unfair contract terms only assisted consumers and not businesses.

In summary, the new laws are expected to extend the consumer unfair contract term provisions in the ASIC Act to cover small business contracts that are standard form and valued less than a prescribed threshold. In addition, the amendments will allow for the exemption of small business contracts that are standard form and are subject to prescribed laws deemed equivalent to the unfair contract term provisions in the ASIC Act, which are enforceable.

Tony Oakley
Principal
Accredited Specialist - Business Law

Subpoenas - what is a subpoena and what to do if you receive one

Subpoenas made headlines recently when media reports emerged of allegations that the Construction Forestry Mining & Energy Union (CFMEU) may have destroyed documents around the time they had been requested to produce them to the Royal Commission into Trade Unions.

News outlets reported the Royal Commission had heard evidence that documents at the CFMEU Brisbane office were removed on the day the Commission issued a subpoena. CFMEU officials stated that nothing relevant was removed, according to the reports.

So what are subpoenas and how should you respond to one if you or your company receives one? This article examines the law relating to subpoenas as set out in the Supreme Court Rules.

What is a subpoena?

A court can issue a subpoena to require someone to give evidence at a proceedings or order them to produce documents at trial or before a trial date is set. It is important to note that if you receive a subpoena asking you to produce documents, these must be given to the court and not to the party seeking the information.

Must I comply?

If you receive a subpoena, you must comply with it. If you fail to do so, a court could issue a warrant for your apprehension or order you to pay a fine under s 194 of the *Evidence Act 2008* (Vic). You could also be found to be in contempt of court for failing to answer a subpoena.

However, you may be able to have the subpoena set aside if details, such as the person or company identified in the subpoena, are incorrect. It is important to note that if the subpoena requests you to produce documents, it must clearly identify them. Further, the subpoena must be served on you in the timeframe required by the court.

What about the cost of complying?

If you have received a subpoena to give evidence in court, you must be given "conduct money". This is an amount that aims to meet your reasonable expenses of attending court. You can also apply to the court to cover

the reasonable costs associated with the subpoena process. Costs associated with the production process could include copying or collating documents or seeking legal advice in relation to privilege. (*Sheraton v Albeth*, Unreported, VSC, 9 September 1993; *Fuelxpress v L M Ericsson* (1987) 75 ALR 284; *Pyramid Building Society v Farrow Finance Corporation* [1995] 1 VR 464; *ANZ Banking Group v Actus Australia* [2000] WASC 244).

How can I have a subpoena overturned?

You can apply to have a subpoena overturned on a number of grounds, including:

- the amount of information being requested is so great that it is oppressive. Further, a subpoena can be oppressive when an extensive examination of documents is required in order to ascertain if there is any relevant information (*R v Robertson* (1983) 21 NTR 11)
- the process is being used as a "fishing expedition". A fishing expedition is one in which documents are sought by a party to ascertain whether or not they have a case. (*Commissioner for Railways v Small* (1938) 38 SR (NSW) 564)
- the information has no legitimate forensic purpose (*WA v Christie* (2005) 30 WAR 514)
- the information is subject to client legal privilege. Under s 118 and 119 of the *Evidence Act 2008*, evidence will be privileged when it contains confidential communication between a lawyer and client for the dominant purpose of professional legal advice or legal services relating to proceedings.
- the information will lead to self-incrimination under common law or s 128 of the *Evidence Act*.
- disclosing the information is not in the public interest under s 130 of the *Evidence Act*.

The Royal Commission into Trade Union and Governance Corruption continues this month.

Please contact Matthew Hicks, Principal - Accredited Specialist - Commercial Litigation in the first instance should you receive a subpoena.

Kate Williams
Trainee Lawyer