

## In the Loop - Summer 2019

The Hicks Oakley Chessell Williams Newsletter

### We Welcome Petra Thomson to our Family Law team...



We are delighted to welcome Petra Thomson as a Principal Lawyer, to HOCW's growing Family Law practice. Petra joins our Family Lawyers Simone Wunderlich and Chimène Vaughan.

Petra has been practising in the area of family law since 1996 and is a highly skilled and well regarded practitioner.

She has expertise in property settlement and parenting matters under the *Family Law Act* including de facto property matters; residence, relocation, child support and child maintenance; spousal maintenance and divorce.

She is skilled in dealing with complex financial structures involving high net worth parties and legal issues relating to fraud, tax liabilities, intricate corporate and trust structures and transactions.

Petra has a passion for family law and has developed an excellent understanding of the desires and needs of her clients in relation to their assets.

### Separation, property & death – the crucial first steps to take in order to protect your property after a relationship breakdown

Parties to a marriage or de facto relationship are generally entitled to a property settlement following separation, as provided for in the *Family Law Act (1975)*. This is the case regardless of whose name property is held in. An adjustment of each person's respective interest in property is permitted pursuant to the Act.

#### What if the title is in my spouse's name?

If prior to the relationship, your spouse purchased the home in which you subsequently lived together and the title remains in your spouse's name at the date of separation, your spouse is not necessarily solely entitled to the home. Neither does this dictate who should stay in the home following separation.

#### What if both our names are on the title?

This is similarly the case where both of you have a specific legal interest in the property, for example both of you appearing on title as joint proprietors or tenants in common. Just because two people are listed as joint proprietors which, pursuant to property laws, entitles each to an equal share in the property, does not mean each party is entitled to 50% of the property (if any at all) under the Act.

#### Lodge a Caveat - how unquantified interest can be protected

It is important to first and foremost ensure that any unquantified interest of the party whose name does not appear on the title of the home is protected such that the other party (the sole proprietor) cannot sell or transfer the property and 'pocket' or otherwise disburse the sale proceeds. Securing any such interest is relatively simple when compared with determining the value and acquiring the interest through property settlement. It can be addressed as urgently as may be required by lodging a caveat against the title to the home with the Land Titles Office.

#### Determine the value of the property - ASAP

It is advisable to know the financial circumstances of both parties and to gather all documentation and information relevant to property ownership as soon as possible. For example:

- What are the assets – obtain bank statements, share statements, title searches;
- What debts are attached to these – obtain credit card/home loan statements; and
- What income is derived by both parties?

Once this information is known, a decision can be made regarding whether any steps need to be taken to preserve your interest in any property.

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## Separation, property and death – the crucial first steps to take in order to protect your property after a relationship breakdown... (cont.)

### Why you need to update or make a valid Will ASAP after separation

It is also important for all separating parties to be aware that, until a formal settlement as between parties, or until Court proceedings pursuant to the Act have been commenced, a joint proprietorship will remain effective in the event of either party's death. Even if negotiations have been on foot at the time of one party's death the laws of intestacy apply. This means that if you were to unexpectedly (or, sometimes, expectedly) die before either formalising an agreement or commencing Court proceedings, the surviving party will be automatically entitled to the entirety of any jointly held property. This is a problem particularly for couples where one or both parties have children from previous relationships whom they wish to provide for in their Will.

If you expect that you may not survive to the end of negotiations and you do not wish for your ex-spouse to retain all of the property, it is important to discuss your

options with an appropriately qualified family law solicitor.

In the case of married parties where there is no Will, a legal spouse is likely to be deemed to be the person with the greatest single interest in a deceased person's estate, which is problematic even if there is no joint property. There is no distinction between spouses in an intact marriage and separated but not yet divorced spouses. To avoid this occurring, it is advisable to execute a valid Will as soon as possible after separation.

Separation and death are not generally events that we can or want to foresee and it's important to know what the crucial first steps are that you should take in order to protect your property interests following a relationship breakdown. Our family lawyers and wills and estates lawyers can help. Contact us on 9550 4600.

*Chimène Vaughan - Family Lawyer*



## Unpaid Owners Corporation Levies - the onus is on you as lot owner



If you are a 'lot owner' you may own an apartment, flat, unit, townhouse or office and are therefore liable for Owners Corporation levies that take care of the common property expenses such as insurance, cleaning and maintenance for gardens, stairwells, driveways, lifts and fences, etc.

Non-payment of Owners Corporation levies is a recurrent problem for many Owners Corporations and it's important that the process of recovering levies is handled correctly.

### "I've changed my address"... a common excuse for non-payment of levies

As a lot owner and member of the Owners Corporation, it is your duty to update your details with the Owners Corporation and ensure payment of fees is on time.

Lot owners who have failed to pay levies raised by the Owners Corporation will frequently find themselves in unpaid Owners Corporation levy recovery proceedings. Commonly, the lot owner's justification for non payment of fees is this – "I have moved homes. I did not receive any fee notices. I did not know I was in arrears." There is a simple answer for this. In accordance with section 135 of the *Owners Corporations Act 2006* (The Act), the onus is on the lot owner to advise the Owners Corporation of any changes to the address for service of notices. By sending the fee notice and final fee notice to the owner's last known address, the Owners Corporation has discharged their obligation under The Act.

### The statutory procedure for non-payment of Owners Corporation levies is as follows

1. The Owners Corporation issues a fee notice in the approved form seeking payment for unpaid fees.
2. If after 28 days from the date of the fee notice the fees remain unpaid, the Owners Corporation will issue a final fee notice in the approved form demanding payment within 28 days.
3. On the 29th day from the date of the final fee notice, under Part 11 of The Act, the Owners Corporation has the power to take action at the Victorian Civil and Administrative Tribunal (VCAT) to not only recover authorised raised fees but penalty interest and legal costs. It is not an infrequent practice for Owners Corporation managers to engage solicitors to recover unpaid levies, and on charge the cost of the solicitor's service to the lot owner.
4. If the levy remains unpaid following a VCAT Order, enforcement action can be taken through the Courts (e.g. warrant of seizure and sale and winding-up proceeding). If the lot owner is an individual, a bankruptcy proceeding is possible for debts that exceed \$5,000.

HOCW Lawyers act for many Owners Corporations, owners corporation managers and lot owners. Contact Harish Nair or Nicolle Ang for further information.

*Nicolle Ang - Lawyer*

## "Why not Litigate?" - the trend towards white collar prosecutions



The Australian legal scene is witnessing a steady increase in prosecutions by the prosecuting agencies against businesses. We are also finding that most legislation now provides for the potential personal liability of directors and officers for offences committed by their companies.

**In an era of increased penalties and increased funding available for enforcement action by regulators, and a starting point of "why not litigate?" we advise all our business clients to take the following steps:**

1. Review your compliance within the regulatory framework in which you operate;
2. Consider what is happening with regulation in your industry generally;
3. Consider in what areas you are at risk;
4. Deal with and respond quickly to any enquiries by regulators.

**Consider these steps in the light of what's been happening lately and what is being proposed:**

**Ultra Tune has been ordered to pay a penalty of over \$2 million**

- A recent Federal Court of Australia decision found the franchisor, Ultra Tune Australia Pty Ltd, guilty of breaches of the disclosure requirements to its franchisees under the Franchising Code, and misleading or deceptive conduct. Ultra Tune was also ordered to pay the ACCC's costs of the proceeding on an indemnity basis. Further, Ultra Tune would be required to comply with the requirements of the Franchising Code in having to refer to the conviction in every disclosure document created to existing and prospective franchisees over a five year period. Ultra Tune has indicated that they may appeal the decision.

**Proposed increase in financial and imprisonment penalties**

- Under the *Treasury Laws Amendment (ASIC Enforcement) 2018* Bill, it is proposed to amend the *Corporations Act*, *ASIC Act*, *Credit Act* and the *Insurance Contracts Act* to introduce a stronger penalty framework. The Treasurer, Hon. Josh Frydenberg MP stated that the *"proposed changes would double maximum imprisonment penalties and significantly increase financial penalties for some of the most serious 'white-collar' criminal offences, bringing Australia's penalties in closer alignment with leading international jurisdictions."*

**Commitment to more Court actions**

- *"In its submission to the Royal Commission interim report, ASIC committed to accelerating enforcement activities, conducting more civil and criminal Court actions against larger financial institutions and, as a starting point for all enforcement matters, asking the question "why not litigate?""* (ASIC media release 4 February 2019).

**Government provides millions to help restore trust in Australia's financial systems**

- *"The Government agrees [that deterrence relies on the judiciary's effectiveness and capacity to do its job] and has already provided an additional \$70.1 million to boost ASIC's enforcement capabilities and supervisory approach and \$41.6 million to the Commonwealth Director of Public Prosecutions to prosecute briefs from ASIC,"* Mr Frydenberg wrote in the government's 'Restoring trust in Australia's financial system' document.

*"Extending the Federal Court's jurisdiction will boost the overall capacity within the Australian court system to ensure the prosecution of financial crimes does not face delays as a result of heavy caseloads in the Courts."*

Our commercial lawyers can assist you and your business from falling victim to what is fast becoming a trend against businesses – personal liability and litigation.

**Matthew Hicks - Director & Principal Lawyer  
Accredited Specialist - Commercial Litigation**