In the Loop - Autumn/Winter 2019

The Hicks Oakley Chessell Williams Newsletter

HICKS OAKLEY CHESSELL WILLIAMS
Lawyers & Notary

Tony Oakley & Vincent Caruso

We announce two recent changes to the senior management of the firm. Tony Oakley has stepped down as a Director and is now a Consultant. Vincent Caruso has become a Director and Principal Lawyer of the firm. Many of our clients will be aware that Tony was one of the original founders of the firm Hicks & Oakley, with John Hicks.

As a Consultant, Tony's continued guidance and depth of knowledge is appreciated by clients and staff alike. Vincent now heads our commercial and business law department. With a wealth of experience in corporate law, franchising, company secretarial and employment law, he brings that valuable expertise to the firm as a Director.

Welcome Deborah Kliger to our Wills & Estates Team

Deborah joined the firm in April 2019 as an Associate.

Prior to joining, Deborah worked at several long-established suburban firms, practising principally in wills and estates. Deborah also gained broad experience in family law and property law, giving her a well-rounded understanding of, and holistic approach to, wills and estates matters.

Since commencing her legal career in 2015, Deborah has dedicated her practice to meeting the needs of private clients. As an experienced wills and estates lawyer, Deborah conducts matters with patience, understanding and a focus on commercial outcomes.

Identifying and Responding to Elder Abuse

As shocking stories of abuse emerge from the Royal Commission into Aged Care, public concern over elder abuse in Australia heightens. 15 June 2019 marks World Elder Abuse Awareness Day. In this article, we outline the common forms of elder abuse and how to protect yourself and others from abuse.

What is elder abuse?

The World Health Organisation defines elder abuse as "a single, or repeated act, or lack of appropriate action, within any relationship where there is an expectation of trust which causes harm or distress to an older person".

Elder abuse can take various forms such as neglect or physical, financial, psychological and sexual harm.

Institutional abuse

The transcripts from the Royal Commission into Aged Care reveal that there are some systemic issues with the quality of care provided to residents. The reports raise human rights concerns about the use of physical restraints and sedative drugs on residents to control their free movement and reduce the risk of injury or harm to other residents and staff.

The Royal Commission also uncovered incidents of physical abuse and neglect, including failures to properly maintain residents' personal hygiene. The federal government is taking several measures to address these problems including introducing the Aged Care Quality Standards, a uniform set of standards for the aged care sector, from 1 July 2019. On this same date, new regulations will take effect to minimise the use of physical and chemical restraints on residents. Under these rules, aged care providers must obtain a medical assessment and informed consent of the resident (or their representative) before using physical restraints, except in the case of an

Inside this edition

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Business Law;
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Family Law;
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Identifying and Responding to Elder Abuse (cont.)

emergency. With regard to chemical restraints, a medical assessment may be conducted by a medical practitioner or nurse.

Misuse of powers as attorney

While the impact of elder abuse in aged care is significant, the vast majority of older Australians do not live in aged care facilities and instead receive home-based care and support. Relatives and friends are often those who provide care to their ageing loved ones. In many cases, they are in a position of control as an attorney for financial or personal matters.

The person who makes an enduring power of attorney in favour of someone else is known as the "principal". An attorney bears a responsibility to act in the best interests of the principal. However, we have seen many instances of attorneys acting beyond the scope of their authority by:

- Misusing the principal's funds for their own benefit;
- Transferring the principal's assets into their own name; and
- Borrowing money from the principal without the principal's informed consent (or in circumstances where the principal does not have capacity to give consent).

To prevent this type of abuse, you should appoint a trusted friend or relative to act as attorney. You may appoint two or more people as joint attorneys, which would require all named attorneys to agree on any decisions made on your behalf.

For convenience or if you have mobility issues, you can make an appointment of supportive attorney by which you authorise your supportive attorney to access information from third parties (such as banks). The supportive attorney is not authorised to make decisions for you. This document will cease to have effect if you lose capacity.

Depending on your chosen attorney(s), it may be prudent to specify some limits on their powers to manage your finances or accommodation. For example, you may want to restrict your attorney's power to sell property.

Who can you turn to?

We recommend speaking to an experienced Wills and Estates lawyer about your enduring powers of attorney and personal circumstances, including family dynamics.

Our Wills & Estates team can prepare enduring powers of attorney, and any other documents that may be necessary, to meet your future needs and minimise the risk of abuse by attorneys.

Where an attorney is abusing their powers, an application can be made to the Victorian Civil and Administrative Tribunal to remove the attorney and replace them with a relative or friend of the principal (or an independent person or body if appropriate). If you have any concerns about the conduct of an attorney, or your position as attorney, please contact us for advice and assistance.

Deborah Kliger - Associate

Unfair Preference Claims - Challenging Claims for Repayment

Have you received a demand from a liquidator to repay money you received from a client or customer? Not all is lost, as there may be potential defences available to you under the *Corporations Act 2001* (Act).

Part 5.7B of the Act gives liquidators the power to claw back certain transactions made by an insolvent company to unsecured creditors. Unfair preferences are the most common type of voidable transaction. The rationale behind these provisions is to ensure creditors are not provided a preferential advantage over other creditors who are also owed money from the insolvent company.

In general terms, for a transaction to be deemed as an unfair preference, subject to a number of criteria, the transaction made to the creditor by the insolvent company, must be within the six months period prior to the date liquidation commenced, also known as the relation back day. In determining whether a transaction is an unfair preference, the liquidator will look at evidence such as: the company's payment history, if the transactions were paid outside the payment terms, payment arrangements, demands by debt collectors or lawyers and the cessation of supply or work until payment is made.

Generally a Court may not make an order requiring repayment against a person where:

- the person became a party to the transaction in good faith;
- they and a reasonable person in their circumstances, would have had no grounds for suspecting that the company was insolvent; and
- the person provided valuable consideration or changed their position in reliance on the transaction.

An unfair preference claim demand from a liquidator should not be taken lightly, as time limits in responding will likely apply. Please contact our commercial litigation lawyers as there are effective ways to respond, which may allow you to retain the payment or reduce any amount to be paid.

Nicolle Ang - Lawyer

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Financial Agreements - Prenup/Postnup Anyone?

Most people are happy to make financial plans for the future – to obtain and follow advice – to have a succession plan – and to consider what is to occur when they die. Wills are entered into and are the subject, though sometimes uncomfortably, of discussion within families and between spouses. It is generally clearly considered and known who will receive a person's assets when they die. But there is rarely a discussion or a plan as to what occurs should a marriage or de facto relationship break down. As part of any financial plan, consideration should be given to whether spouses (or intended spouses) need a binding financial agreement ("agreement").

The question then turns to who needs an agreement?

Younger couples living together or marrying who have similar earning capacities and minimal assets possibly wouldn't enter into an agreement. But that is a very small percentage of the population. Even in that scenario – what if one of the spouses was in line to inherit or receive a gift from their family? What if their parents wanted to assist financially * but wanted some protection? In those circumstances, an agreement should be contemplated.

Anyone who is entering into a second or subsequent marriage or de facto relationship should seriously consider an agreement. With de facto relationships, time passes very quickly and it only takes two years to 'qualify' for a claim for a de facto property settlement – and a de facto relationship can exist even if the parties are not living together full-time. There may be children of a previous relationship to provide for; there may be significant assets on one side but not the other; there may be long held family assets that need to be preserved and protected.

Agreements are binding

Agreements are binding, provided the requirements are met (and a lawyer is essential to formalise the agreement). They have the effect of ousting the jurisdiction of the Family Court – allowing the spouses to determine what happens to their assets and what happens financially, in the event of a separation.

An agreement can be entered into between spouses or intended spouses (married or de facto) either prior to their marriage (prenup) or cohabitation (de facto agreement) or during their de facto relationship or marriage (postnup).

Agreements are also entered into by separated couples, finalising their property settlement.

The agreement can be looked at as a form of 'insurance', with the hope that it is never called upon. But, if it is, it can then reduce any uncertainty/anxiety/stress associated with the breakdown by clearly setting out what is to occur financially between the spouses. If a breakdown occurs, it substantially reduces costs (both financial and emotional) as the 'deal' has already be done (and the 'deal' which is detailed in the agreement was most likely negotiated years earlier, when the spouses were happy and wanted the best for each other).

Footnote:

* If parents want to, or have, financially assisted their child, and that assistance was intended to be a loan, the loan should be properly documented. "The Bank of Mum and Dad" is used by an ever increasing number of young adults to assist them to buy homes and to get a start financially and these financial advances are usually provided with all the best and agreed intentions, but rarely documented. Parents then can become embroiled in their children's divorces and in family disputes if appropriate steps are not taken to document the advances.

Petra Thomson - Principal Lawyer

New Laws to Better Protect Victorians Living with a Disability

The Victorian Parliament has this week confirmed sweeping reforms of Victoria's guardianship and administration laws as the Guardianship and Administration Bill 2018 was passed.

The *Guardianship and Administration Act 2019* (Vic) will replace existing legislation which was introduced over 30 years ago. These changes serve to bring guardianship and administration legislation up to date with contemporary views on disability and impairment. It is hoped that the changes will better protect the rights of persons with a disability who may have impaired decision-making capacity, and enable them to participate in decisions that affect their lives.

Key changes include:

- The introduction of the presumption that a person has decision-making capacity unless proven otherwise, a concept mirrored in the *Powers of Attorney Act 2014* (Vic).
- The introduction of criminal offences for guardians and administrators who dishonestly use their position to obtain a financial advantage or cause loss;
- The introduction of a supportive guardian and/or administrator to help a person to make their own decisions;
- Increased powers to the Victorian Civil and Administrative Tribunal (VCAT) including:
  - ◊ The making of limited appointments of guardians and administrators to tailor the order to the person's circumstances;
  - ◊ The ability to order compensation where a guardian or administrator has caused loss by breach of duty.

The new laws are expected to come into effect on 1 March 2020 (unless proclaimed earlier).

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New Electronic Regime for Conveyancing & Property Transactions

Traditional paper-based property settlements, where title and transfer documentation is exchanged, are being replaced with an electronic process.

Property Settlements on PEXA

Property Exchange Australia (PEXA) is the electronic settlement platform where the majority of property settlements now occur. In a few short months all property transactions will occur electronically.

Safeguarding your Settlement Funds

In an ever increasing era of online scams HOCW Lawyers have developed rigorous checks and balances to minimise risks associated with electronic conveyancing. Be assured that your property transactions are handled with utmost security and attention to detail and our Accounts team works hand in hand with our Property and Conveyancing Lawyers to verify all account details at the time of settlement.

State Revenue Office - Duties Online

The State Revenue Office (SRO) has also implemented an online assessment system (Duties Online). The applicable Transferor and Transferee Duties Statements are now created for the parties to sign electronically, thus replacing the old paper-based statutory declarations and statements.

Duties Assessment for complex property transactions

Currently, the SRO requires manual assessment of stamp duty for complex transactions e.g. transactions between related parties/entities as opposed to straight-forward sale/purchase transactions. Presently complex transfer documentation must be submitted to the SRO for complex assessment, which can take several weeks to assess. Once the assessment is issued, the stamp duty can then be paid and the paper transfer and associated documentation lodged at the Land Titles Office.

From August 2019, the assessment of stamp duty for complex transactions will need to occur on the Duties Online electronic platform. Accordingly, PEXA and SRO have integrated their systems so that complex property transactions, i.e. that require complex stamp duty assessments, will also be lodged and registered through PEXA.

The new integration of PEXA and the SRO Duties Online assessments systems are aimed at providing a more streamlined process with a view to eliminating any delays caused by the paper-based system.

Have you paid off your loan but are still holding an original paper Certificate of Title and a Discharge of Mortgage?

Following a mandatory requirement from 22 October 2016, the four major banks (CBA, ANZ, Westpac and NAB) have converted all paper-based titles in their possession to electronic titles. Consequently, if you currently hold the original title with a paper-based discharge of mortgage and have not lodged and registered these documents previously with the Land Titles Office, these documents will no longer be valid. Please contact us so we can advise you of the steps you will need to take to facilitate an electronic discharge of mortgage and the return of the paper title by the bank to you.

Are you holding a clear or unencumbered (no mortgage) original paper Certificate of Title?

From 2020, a bulk title conversion will take place and all paper certificates of titles will automatically be converted to electronic titles. Currently, only PEXA-registered entities, such as our law firm, are able to facilitate the electronic conversion of paper titles as part of the sale process. At this stage individuals are not able to be PEXA-registered.

Please turn your mind to the question of whether you would like us to have electronic control of your title, in which case, it would be advisable to call and make an appointment to bring your paper title into our office, so that it can be electronically converted by our office in a timely manner, and well prior to the bulk title conversion.

Contact our Property and Conveyancing Lawyers - Sarah Lindsey and Lisa Yong on 03 9550 4600 for further information.

Lisa Yong - Associate

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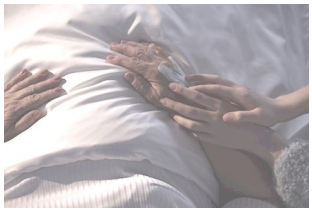
Voluntary Assisted Dying Act comes into effect on 19 June 2019



Terminally ill Victorians will soon be able to end their lives with medical help as the state becomes the first to legalise voluntary assisted dying this month.

The *Voluntary Assisted Dying Act 2017* (Vic), which comes into effect on June 19, allows someone with a terminal disease or condition who is experiencing intolerable suffering to access prescribed medication that will end their life.

Who can apply?

Only people who meet strict eligibility criteria will be able to access the scheme.

They must be over 18 and have decision making capacity. They must also be experiencing an illness, disease or medical condition that:

- is incurable;
- is progressive;
- they consider to be intolerable; and
- is expected to cause death within six months or 12 months for neurodegenerative conditions.

The person must be:

- an Australian citizen or permanent resident, and
- have been living in Victoria for at least a year.

How does it work?

Anyone wanting to access voluntary assisted dying must first ask a suitably qualified doctor. In a bid to ensure the scheme is a voluntary one, the Act does not permit anyone else to make this request on another person's behalf.

The doctor, who is known as the "coordinating medical practitioner", must then conduct an assessment of the person to determine if they are eligible. If the doctor determines the person meets the eligibility requirements, they must refer them to a second medical practitioner for another assessment.

Both doctors must ensure the person:

- is making a fully informed decision;
- is aware of palliative care alternatives; and
- is aware that they may discontinue the assisted dying process at any stage.

If assessed as eligible by the second doctor, the person must make a written declaration confirming the voluntary and enduring nature of their request to access voluntary assisted dying. Two witnesses must sign the document in front of the coordinating medical practitioner.

A person must then make a final request to access the scheme.

After undertaking a final review to ensure the process has been complied with, the coordinating medical practitioner may then apply for a permit that will enable the person to administer the substance that will end their life. If the person is physically unable to administer the medication themselves, the doctor may apply for a medical practitioner administration permit.

Both doctors involved in the process must be either specialists or vocationally registered general practitioners and have undertaken training in the area. Other requirements include that one of the practitioners must have the relevant expertise in the person's disease, illness or medical condition. No doctor is obliged to take part in the process.

The Act requires the doctors to provide reports relating to each stage of the process to the Voluntary Assisted Dying Review Board which is responsible for oversight of the operation of the legislation.

Kate Williams - Lawyer