

## In the Loop - Autumn 2020

The Hicks Oakley Chessell Williams Newsletter

### A message from Matthew Hicks, Director & Principal Lawyer

With the expansion of our firm to include the team from Boothby & Boothby (see below), we now employ over 50 people between our two offices. This presents an exciting challenge. Our aim is to maintain the high quality and timely service that we strive for. Communication with our clients is an important aspect of this, and our **In the Loop** newsletter is one important avenue of communication. Our website is regularly updated too – [www.hocw.com.au](http://www.hocw.com.au)

Please do not hesitate to contact our team concerning any of the topics raised in **In the Loop** or another legal issue.

On our website, we recently published a Special Bulletin regarding Coronavirus (COVID-19). We are working to ensure the health and safety of our team, clients, associates and wider community. As the situation changes we will endeavour to keep our clients and associates up to date by posting information on our website.

### Boothby & Boothby merge with HOCW

The principals and team at Hicks Oakley Chessell Williams Lawyers are very pleased to welcome the team from Boothby & Boothby to our firm.

Boothby & Boothby has a long and proud history of providing legal services. Brooke Boothby is joining us as a consultant with many years of practice in his own right, as well as familial links with the people involved from the foundation of the firm. His great uncle was one of the founders. Brooke's grandfather, father and uncle have been partners. Boothby & Boothby started in the 1890s in Collins Street but moved to Dandenong Road, Caulfield East in 1954. For many years the firm had branch offices throughout South Gippsland, including at Loch and Korumburra.

John Kyne and Neville Sampson also join us as consultants. John arrived at Boothby & Boothby in 1968 and was a partner for many years. He retired as a partner but then returned on a part-time basis. Neville started as an articulated clerk in 1976 and became a partner in 1983.

We are pleased to welcome Brooke, John, Neville, Steve Shelley (associate lawyer), Jessica Staben (law graduate), Andrea Day (probate clerk) and Janis Schneider (personal assistant to Neville). They are based at our Mount Waverley office and practise predominantly in our property and wills and estates departments, bringing with them a tremendous wealth of experience. Wills and other deeds that were held by Boothby & Boothby are now held by HOCW.



(Pictured back row left to right: Brooke, John, Neville, Janis, Steve and front row left to right: Jessica and Andrea.)

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Family Law;  
Wills & Estates



## Deborah Kliger appointed President of Victorian Women Lawyers (VWL)

The Principals and the team at Hicks Oakley Chessell Williams congratulate Deborah Kliger, Associate in our Wills & Estates team, on her appointment as President of Victorian Women Lawyers (VWL).

VWL is the peak representative body of women lawyers in Victoria. VWL provides a network for social interaction, education and reform within the legal

profession and broader community. As President, Deborah oversees a host of events and projects including submissions to government for law reform.

Earlier this month, VWL hosted its flagship International Women's Day event in honour of Dame Roma Mitchell: the first Australian woman to be appointed Queen's Counsel, judge, chancellor of an

Australian university and State Governor. We were pleased to see Deborah in her element, speaking before an audience of 230 guests including members of the judiciary and heads of other legal bodies.

We commend Deborah on her leadership qualities and wish her a successful year ahead.



*(HOCW staff at the International Women's Day event in honour of Dame Roma Mitchell: pictured left to right: Kate Williams, Irina Watson, Nicolle Ang, Deborah Kliger, Lachlan Vallance, Chimene Vaughan and Vincent Caruso.)*

## Welcome Irina to our Commercial Litigation Department

Irina Watson (*pictured right*) joined the firm in December 2019. She brings with her over 14 years experience in building and construction law, both in residential and commercial areas.

Irina is involved in the Housing Industry Association and is Vice Chair of the Legal Services Committee, therefore she has the insights of the latest developments in legislation relating to the domestic building industry. Irina has acted on behalf of builders and owners, so she understands the issues relating to the construction of a house from the owner's perspective as well as the builder's position.



## Adding 'bio'wood to fire in cladding disasters

*Harish Nair, Senior Associate & Irina Watson, Senior Associate*

### What is cladding?

Cladding is often used to make a building's exterior look more attractive. The term 'cladding' refers to components that are attached to the primary structure of a building to form non-structural, external surfaces. This is as opposed to buildings in which the external surfaces are formed by structural elements, such as masonry walls, or applied surfaces such as render.

Whilst cladding is generally attached to the structure of the building, it typically does not contribute to its stability. However, cladding does play a structural role, transferring wind loads, impact loads, snow loads and its own self-weight back to the structural framework. Cladding can also provide sound and thermal insulation as well as fire resistance.

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## Adding 'bio'wood to fire in cladding disasters (cont.)



### What is cladding made from?

Wood, metal, brick, vinyl, glass, composite materials that can include aluminium, wood, blends of cement and recycled polystyrene, wheat/rice straw fibres.

### Latest development in the area of cladding – Biowood cladding

Just when everyone thought that there was a thorough understanding on what type of cladding is considered non-compliant because it is combustible, in 2019 the NSW Civil and Administrative Tribunal handed down its decision of *The Owners Strata Plan No 92888 v Taylor Constructions Group Pty Ltd and Frasers Putney Pty Ltd*. This dispute did not involve the ill-reputed aluminium composite panels that were declared as being highly combustible and caused the Victorian Government to create the organisation "Cladding Safety Victoria". Rather, this matter considered proprietary architectural product called Biowood.

If you are not familiar with this product, just picture McDonalds with its wood-like façade. Biowood consists of at least 70% of pulped wood and 23% of polyvinyl chloride (PVC). It has been marketed as a safe product, to be used for private screening, balconies and façade. The NSW Tribunal however, decided that this material, when installed on the façade of the building poses an unacceptable risk of spreading fire.

The Owners Strata Plan No 92888 (the Applicant) argued that the Biowood cladding installed as an embellishment on the external walls of the building is a defect, as it is combustible. In support of its argument, the Applicant referred to Clause 2.4 of the Building Code of Australia (BCA), Specification C1.1, and stated that the installation of the combustible material is a breach of statutory warranties contained in Section 18B(1) of the *Home Building Act 1989 (NSW)* – the equivalent of the Victorian section 8 of the *Domestic Building Contracts Act 1995 (Vic)*.

The Applicant successfully defeated the Respondents' argument that the material is compliant with the relevant Australian Standard (AS/NZS 1530.3) and stated that the composite panels in the Lacrosse building complied with the same Standard however, proved to be highly flammable when subjected to the full scale of fire.

The Tribunal accepted the expert opinion given by CSIRO for the Applicant that the AS/NZS 1530.3 is not applicable to the materials used for the external attachments, wall lining and cladding. It held that the Respondents breached the statutory warranties and decided that "*any risk of fire spread is sufficient to satisfy the measure of undue risk*".

### What are the repercussions of the above decision?

If you want to purchase a property, particularly a unit with cladding, engage an expert to inspect your prospective purchase with a specific emphasis on the cladding type.

If you are a builder, you need to ensure that you examine specifications that you are given by the owner (or a developer) and ensure that the cladding is not combustible. You, as a builder, will be held liable for breach of warranties in respect to the suitability of the product that you install, in line with the *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Lacrosse Tower)* decision and ordered to pay the full amount claimed by the owners. You will be however, able to apportion the liability to the professionals, who design and certify the project and construction (i.e. the architect, fire engineer and the building surveyor), in full or almost in full – again, in accordance with the Lacrosse Tower decision, when the liability was allocated as follows:

- the Building Surveyor: 33%
- the Architect who specified the type of cladding: 25%
- the Fire Engineer: 39%

If you are a professional in any of the above categories, ensure that you research products that meet the current BCA standards before finalising your design and/or before you sign off on any compliance certification.

For further information contact Harish Nair and Irina Watson who are both Senior Associates and specialise in Building and Construction Law.

## Latest Guardianship Laws protect rights of adults with limited ability to make decisions

*Kate Williams, Lawyer*

People with limited decision-making capacity now have more power to manage their own personal and financial affairs under legislation which has recently come into effect in Victoria.

The new guardianship laws aim to strike the balance between empowering and protecting Victorians whose capacity to make decisions is limited because of a disability.

*The Guardianship and Administration Act 2019* (Vic) governs the appointments and powers of guardians and administrators and introduces supportive guardian and administrator appointments.



### What are guardians and administrators?

The Victorian Civil and Administrative Tribunal (VCAT) can appoint a guardian or administrator for someone who has a disability and does not have decision making capacity in relation to at least some financial and/or personal or lifestyle matters.

**Decision making capacity could be impaired because the person, who is known as a represented person, has:**

- a mental illness,
- dementia, or
- an intellectual disability.

When making an appointment, VCAT must be satisfied that it will promote the person's personal and social wellbeing.

Under the new guardianship laws, VCAT is also able to make appointments known as supportive guardians for personal matters and supportive administrators for financial matters where a person with a disability does have decision making capacity if they are provided appropriate support. The role of a supportive guardian and/or administrator is to support a represented person to obtain information and make decisions.

### What is decision making capacity?

Under the new guardianship laws, a person is presumed to have decision-making capacity unless proven otherwise. This new presumption mirrors recent changes to the *Powers of Attorney Act 2014*.

**They will also be taken to have decision-making capacity if they are able to make a decision with appropriate support and will be deemed to have capacity if they can:**

- understand the information relevant to the decision,
- retain that information, and
- communicate the decision and their views and needs relating to the decision in some way, including by speech or gesture.

### What sort of decisions can guardians and administrators make?

**Guardians can be appointed to make decisions relating to a represented person's lifestyle. These might include:**

- where the represented person might live,
- what support services they might access, and
- what medical treatment they might receive.

**Administrators can be appointed to make decisions relating to a represented person's finances. They might be appointed to:**

- pay bills on behalf of a represented person,
- buy or sell property on their behalf, and/ or
- manage their bank accounts.

Under the new laws, VCAT now has the power to tailor orders to suit the represented person's needs. For example, an administrator's role may be limited to buying a property on behalf of a represented person.

### What if a guardian or administrator has done the wrong thing?

Guardians, administrators and supportive guardians and administrators who dishonestly use their appointments for financial advantage or dishonestly cause loss to the represented person or another person face fines and up to five years in prison.

### How can I make an application?

Anyone can apply to VCAT on behalf of someone who has impaired decision making capacity, particularly in cases where that person might be vulnerable to the influence of others.

## Make your pool or spa compliant in four simple steps

*Lisa Yong, Associate*



The Building Amendment (Swimming Pool and Spa) Regulations 2019, imposing new compliance requirements on all owners with swimming pools and spas, commenced on 1 December 2019.

It applies to all swimming pools and spas that are capable of holding more than 300 mm of water. This includes outdoor and indoor swimming pools, outdoor and indoor spas, portable, relocatable, bathing, wading and above-ground pools.

### Four simple steps to making your pool or spa compliant

#### 1. Register

- Existing Permanent pools or spas must be registered by 1 June 2020.
- New permanent pools or spas (currently in progress or if construction commences after 1 June 2020) must be registered within 30 days of the Occupancy Permit or Certificate of Final Inspection for the swimming pool or spa (whichever is later).
- Existing relocatable pools or spas (erected before 1 June 2020 and remaining erected for three or more consecutive days) must be registered by 4 June 2020.
- New relocatable pools or spas (erected on or after 1 June 2020 for three or more consecutive days) must be registered on the fourth day after the pool or spa is erected.

Once the pool or spa is registered, the relevant Council will give a written notice of the date by which the certificate of pool or spa compliance is required to be lodged with the Council.

#### 2. Inspect

Arrange an inspection for the pool or spa fencing by a registered building surveyor, registered building inspector or a Council building surveyor.

#### 3. Lodge the certificate

Pool or spa construction date:	Certificate of Compliance must be lodged by:
On or before 30 June 1994	1 June 2021
From 1 July 1994 to 30 April 2010	1 June 2022
From 1 May 2010 to 31 May 2020	1 June 2023
On or after 1 June 2020	Within 30 days of the Occupancy Permit or Certificate of Final Inspection together with the registration application.

#### 4. Pay

Pay the registration fee to the relevant Council.

#### Ongoing obligation for compliance

Owners will need to arrange an inspection and lodge the inspection Certificate of Compliance with the relevant Council every four years to ensure that the pool or spa is compliant.

On-the-spot fines or penalties will apply if the pool or spa is found to be non-compliant or if registration or inspection does not occur within the required deadlines.

The new regulations will affect a buyer or seller of a property with a swimming pool or spa.

If you have any queries, please free to contact our property and conveyancing department on 03 9550 4600.

## Getting un-married - applying for a divorce

*Chimene Vaughan, Family Lawyer*

Separating married couples will likely wish to apply for divorce. This is completely separate to negotiating a property settlement or children's arrangements. Some couples wish to obtain a divorce order as soon as possible, and others may neglect to turn their minds to this process altogether.

**An application for divorce can be made by both parties together, or by one party solely. The Court will grant an order for divorce, so long as the following factors are satisfied:**

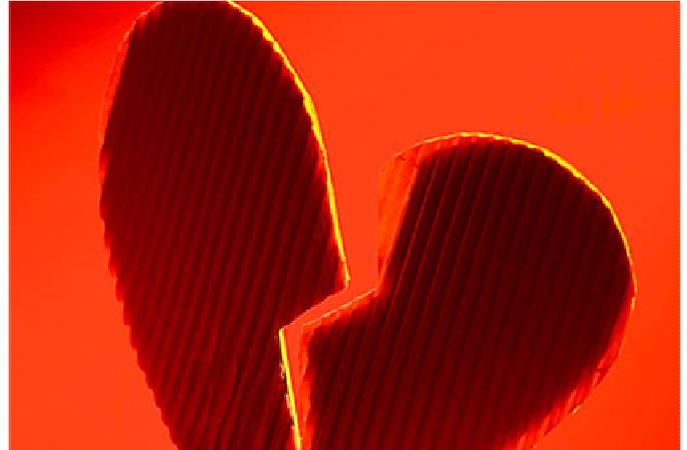
- There was a marriage – a copy of the marriage certificate must be located and filed with the application;
- The marriage has broken down irretrievably, whether separation was instigated by one party only, or was otherwise mutual – if separation was 'one-sided', it must have been communicated to the other party;
- There is no reasonable likelihood of the relationship recommencing; and
- The date of separation is no less than 12 months before the date of applying.

The Court must also be satisfied of a connection with Australia, for example one or either party is residing in Australia. Further, if the application for divorce was not made jointly, there are requirements that it be served upon the other party within a specified period of time and no later than 28 days before the date of the hearing.

It is generally advisable that applying for a divorce comes second in priority to negotiating a property settlement, for one critical reason; the divorce initiates the running of the limitation period for commencing proceedings for property settlement and maintenance (if those matters have not already been addressed). This limitation period is 12 months from the date the divorce order is made, after which time the parties are each prevented from bringing any application for property settlement in the Federal Circuit Court or the Family Court of Australia. Conversely, applications to the Court in relation to children's/parenting matters can be made at any time.

**A divorce is needed for a number of reasons, including:**

- In order to re-marry (in Australia, a person cannot be married to more than one person at the same time); and
- If no formal divorce order is obtained, it may have an effect on the way a deceased estate is dealt with if no valid Will exists at the time of death.



Unless there are exceptional circumstances, an application for divorce cannot be made if the marriage took place less than two years before applying. In this scenario, the Court will usually require counselling before accepting an application for divorce. Separation can occur less than two years after the marriage, but the application cannot be made until two years later. Further, separation must have occurred no less than a period of 12 months before applying. Separation can be physical separation, but it can also include the situation where the parties have decided the relationship is over, but, perhaps for financial reasons, have continued living together in the same house (which is referred to as "living separately and apart under the one roof"). It is important to prove that separation occurred more than 12 months before you filed your application for divorce, which may require producing evidence by way of affidavit.

Once the Divorce Application is filed, a hearing date before a Registrar in the Federal Circuit Court of Australia is obtained – this may be a considerable period of time after filing the application. The applicant may or may not be required to attend the divorce hearing.

The marriage is not legally terminated until one month and one day after the Registrar grants the Order. This means that you cannot re-marry until one month and one day after the Order is made by the Court. It is not advisable to plan a wedding until a Divorce Order has been granted as some issues may arise which will prevent the new marriage from going ahead.

The Divorce Application itself is a user friendly, questionnaire-type Court form which can be completed without legal assistance. This said, if queries in relation to a more complicated situation in respect to applying for a divorce exist, an expert family lawyer should be consulted.