



Firm News

A New Partner!

On 1 July Simon French was made a Partner of Coulter Roache. Simon joined us from major law firm Blake Dawson Waldron in Melbourne. Prior to that he practiced in London where he was born.



Simon has now established a thriving practice in Geelong in Planning & Regulatory law. He mostly deals with Government Departments, Local Councils and Statutory bodies with regard to Regulatory Law issues and provides advice on decision making procedures, licence/permit applications, the exercise of statutory powers, statutory interpretation and conducting judicial reviews. He has expertise in drafting secondary legislation, codes of practice, industry guidelines and delegations. He has a particular interest in Human Rights issues and is the Chair of the Law Institute of Victoria's Charter of Rights Committee.

A natural golfer, husband of local Geelong girl Nicole and father of 3 young children, Simon has made Geelong his home and we look forward to a long and successful partnership with Simon at Coulter Roache Lawyers.

Senior Lawyer

We are also pleased to announce that Andrew Faull has been promoted to Senior Lawyer.

A commercial lawyer, Andrew has been involved in litigation matters including a major Federal Court case brought by the ACCC regarding alleged petrol price fixing, and also a range of property and commercial matters. He now acts for one of Australia's largest medical imaging companies based in Melbourne, including their substantial lease portfolio.



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Future Leader

Alicia Carroll, a Senior Family Lawyer and Acting Head of Department, has been accepted into the Committee for Geelong Leaders for Geelong program



which aims to foster leadership skills and training in some of the regions' future business people to benefit the community. Part of a two year program, Alicia joins 25 other young business people completing the program.

Kevin Roache, Chairman of Partners

Breach of OHS Act

In a recent decision, the Court of Appeal dismissed an appeal by Commercial Industrial Construction Group Pty Ltd against the penalty of \$35,000 imposed on it by the County Court for a breach of the *Occupational Health and Safety Act*. The company had pleaded guilty for breaching its duty under s. 21(1) of the *Occupational Health and Safety Act 1985* to; "provide and maintain so far as is practicable for employees a working environment that is safe and without risk to health."

The company Site manager directed an employee to erect some scaffolding beneath a first floor roof. The employee had no scaffolding qualifications and erected scaffolding that was unsafe and in the wrong place, so that the roof work had to be done from the roof itself. In breach of the company's safety management system, the site manager did not carry out a job safety analysis (JSA) before the roof work began. Also, a builder's labourer was sent up onto the roof, without fall protection or safety instructions. The labourer's foot slipped through the opening in the roof, and he fell 3 metres to the concrete floor below.

The following morning, the site manager directed another employee to finish the job. Again, the manager did

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not give the employee any safety instructions, did not carry out a JSA, and did not put in place any additional safety procedures or fall protection. Work continued on the roof for about an hour and a half until Union Officials stopped the work on the roof because of safety concerns.

The Court said that the employer has a statutory duty to provide information, instruction, training and supervision to its employees, so as to ensure that they performed their work in a safe manner. Purchasing a written safety management system does not discharge the employer's duty.

The employer must closely monitor the system to ensure employees actively and positively comply with the procedures and instructions.

Importantly, the Court concluded that an employer's obligations under the Act will not be fulfilled unless the employer takes *"an active, imaginative and flexible approach to potential dangers in the knowledge that human frailty is an ever present reality"*.

This case illustrates that a safety management system must be accompanied by active implementation in the workplace. Not only must employees be appropriately trained but there must be ongoing supervision and compliance audits to ensure that the system is being applied in practice.

For more information call **Martin Reid, Workplace Relations Lawyer, on 5273 5236.**



Workplace Seminars

The next seminar is on "Agreement Making post WorkChoices" to be held on 19 July at 7.30am. To register call Wendy on 5273 5236.

Directors' Insurance

A number of recent cases have highlighted the potential for Company directors to be personally liable where they are found to breach their duties under the *Corporations Act*, the *Trade Practices Act*, and Occupational Health and Safety Laws. Liability for directors can also extend to common law causes of action in negligence and defamation.

Due to the broad reach of directors' liability it is common for a company constitution to confer a right of indemnity on directors and for companies to enter into a Deed of Indemnity with individual directors. Protection afforded to a director by the company constitution, or an individual Deed of Indemnity, is constrained by Corporations Act. Obviously, any indemnity provided by the company may be rendered useless in the case of insolvency. In these circumstances insurance for directors assumes great significance.

Most commonly directors' insurance policies contain alternate clauses which provide an indemnity to directors and officers for 'wrongful acts' in respect of which the company is not permitted to pay.

Wrongful act is usually defined in reference to any breach of duty, trust or neglect. Directors' policies may or may not include protection for liability for employment practices such as wrongful dismissal, breach of employment contract or breach of discrimination laws. Policies often provide for the insurer to pay the legal costs of representing the insured party at any official inquiry or hearing. Commonly excluded from protection are claims arising out of fraud, dishonesty, improper use of information, or criminal or malicious acts or omissions.

Directors insurance is usually based on 'claims made' policies. This means that a company or director is only covered for claims made whilst holding the policy. If a claim arises after the policy has lapsed no cover will be available.

For further information call **Peter Flanagan, Commercial Partner on 5273 5231.**



Insolvency Changes

The Corporations Amendment (Insolvency) Bill 2007 was introduced into Parliament on 31 May 2007. The Bill includes a package of reforms to improve the operation of Australia's Insolvency Laws, and is the first comprehensive update of the Bankruptcy Act 1966 (Cth) since 1992.

In summary, the Bill aims to provide better information to creditors, in order to assist them with decisions such as the appointment of an insolvency practitioner and the practitioner's remuneration. The Bill also aims to streamline insolvency proceedings, thereby reducing costs and improving the likely returns to creditors. Furthermore, the new bill introduces reforms to deter corporate misconduct, by providing ASIC with new powers and providing for more flexibility in disciplinary proceedings.

Importantly, the Bill introduces stronger protection for employee entitlements in insolvency, most notably in relation to the standing of Superannuation Guarantee Charge (SGC) money.

Under the previous insolvency regime, there was uncertainty about the standing of SGC payouts upon corporate insolvency. The new changes provide that SGC is accorded the highest priority along with employee wages, which reforms are hoped to significantly improve the prospects of recovering employee Super entitlements.

The Coulter Roache Litigation Department can provide expert bankruptcy advices to clients and is fully conversant with the new insolvency reforms. If you believe you would benefit from our expertise in this area please do not hesitate to contact Simone Welsh or Bernie Cummins for further information.

For further information call **Simone Welsh, Litigation Lawyer, on 5273 5291.**



Contract Nasties!

The Property Group has recently seen a number of Contracts for the sale of land which include some harsh and unusual terms which have been unfairly designed to advantage one party over the other. Example of such clauses are:

- A dispute resolution clause which compels a Purchaser to complete a Contract regardless of a dispute and that the dispute was to be mediated after settlement through the VCAT jurisdiction only.
- A default clause with a penalty interest rate of 20% above the currently prescribed penalty interest rate (which, at the time of publication, was 11%).
- A clause setting out that a Purchaser who breaches a Contract must pay to the Vendor on demand 'the full amount payable, whether due to be paid or not'.
- A clause where the Purchaser agrees that the Vendor will not be liable for any damages, costs or interests 'whatsoever and howsoever arising'.

It is important that the parties to a transaction, particular those relating to land, do not assume that all contracts are in standard form. Each agreement should be read carefully to ensure that the interests of both parties are fairly protected.

For further information call Vaughan Lamb, Property Partner on 5273 5243.



Child Support Changes

After a major review of the child support system, a new system is now being introduced. As detailed in our earlier newsletter, Stage 1 of the changes commenced on 1 July 2006. In January 2007, Stage 2 of the changes commenced, including:

Independent Review of Child Support Agency Decisions

The Social Security Appeals Tribunal has now been given the power to conduct independent reviews of Child Support Agency ("CSA") decisions. Previously, after an internal review of a decision was conducted by the CSA, a party wishing to object further was required to make an application to a Court. This change allows a party to apply to the Social Security Appeals Tribunal to review a CSA decision if they remain dissatisfied after an internal review. This is intended to improve the accountability and transparency of the CSA and their decisions and provides parties with a less expensive and more informal review procedure.

Increased Enforcement Powers

The Court's powers to ensure child support obligations are met have been broadened. Parents are now able to take enforcement action themselves though the Court to recover child support debts. Previously, only the CSA could take such action. The Court's powers to obtain information when determining child support matters have been increased and their power to make Stay Orders has also been broadened. These changes are intended to make the process simpler and more responsive to parents' needs to enforce child support.

Allowing Parents to Make Their Own Arrangements

Separated parents now have 13 weeks after separation to make their own arrangements or take action to obtain child support before their Family Tax Benefits payments are affected. Previously, if a parent did not take action to obtain child support within 28 days, their Family Tax Benefit may have been affected. This change allows parents to reach an agreement on parenting arrangements or reconcile prior to their payments being affected.

Stage 3 of the child support reforms, being the final and most significant

stage, is scheduled to commence in July 2008.

For further information call Alicia Carroll, Senior Family Lawyer, on 5273 5281.



Company Details

The Australian Securities and Investments Commission (ASIC) are targeting Officeholders of Companies who breach the Corporate Law.

Recently a South Australian property developer was been sentenced to 320 hours of community service for failing to notify ASIC of a change of his residential address and a change of registered address of his 28 companies. The defendant pleaded guilty to the charges of failing to update the Australian Securities and Investments Commission register with his correct details.

The problem lies where creditors of the company are not able to locate individuals involved due to outdated information in the ASIC register. The maximum penalty for each of the offences is a \$550 fine, however the court imposed a community based order due to the fact that the defendant was declared bankrupt last year.

Most changes to company records need to be made within 28 days of the change occurring. Common changes include residential address of officeholders or members, registered office, principle place of business, resignations or appointments of officeholders and share registry changes.

Companies are given a 28 grace period in which to notify ASIC of any changes. If ASIC are notified of a change up to month after this grace period then a \$65 late lodgment fee will be payable. If ASIC are notified more than a month after the grace period then a \$270 late lodgment fee will be payable.

The firm's corporate structuring service CR Corporate can assist you in notifying ASIC of any changes and preparing the relevant documents to ensure that your company is not in breach of the Corporations Act.

For further information call Tom White, Commercial Partner, on 5273 5271.

