

Getting Down to Business

This newsletter is published by The NSW Young Lawyers Business Law Committee

The view from the Chair

It is with great pride that I can lead with the news that one of our long-standing Committee Members, William Onishi has been named NSW Young Lawyer of the Year for his years of dedication to our CLE programme.

William became the CLE Representative for the Business Law Committee several years ago, taking on that role from me when I was elected as Vice-Chair of the Committee. William took to the role enthusiastically and diligently set about organising a range of interesting CLEs about every month or so. Over the course of his time as CLE Representative, William has organised and chaired over twenty CLEs. In addition to this he has also regularly contributed articles to this publication, and you can read another in this issue.

The CLE programme for NSW Young Lawyers is of vital importance, as it is in the primary source of income for the organisation, and so contributing to its growth enables NSW Young Lawyers to undertake all the activities it does, and the services provided to young lawyers and the broader community.

William was up against a number of very worthy candidates, and it is a real credit to him that he was selected for the award by the NSW Young Lawyers Patron for 2011, the Honourable Justice Harrison of the Supreme Court of NSW. So please join me in congratulating William on his success!

In this issue it is great to see more articles and contributors – if you have an article that you would like to submit, please do! Also in this issue you can read about a couple of the recent guest speakers at our Committee Meetings. These sessions seem to be very popular and provide fantastic access for young business lawyers to hear from senior lawyers about their journey through the law and their insights to the law and career progression.

Lastly, by popular demand our end of year dinner will return, more details soon.

Tom O'Callaghan
Chair, Business Law Committee



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“Some countries do not recognise trusts as a legal entity for use in estate planning”

Estate Planning for Expatriates

Australia is a nation of migrants. Relative to our population size (of just over 20 million people), Australia has one of the largest diasporas in the world, with some 1 million Australians, or 5 per cent of our population, currently living outside our national borders.

International migration has increased markedly as a result of the rise of the global labour market, more affordable international transport and sophisticated communication technologies. As such, it is not uncommon to have clients who accumulate assets in multiple countries in their lifetime. This creates a special challenge for estate planners as we need to understand the interactions between the legal systems of different jurisdictions.

In the estate planning context, one of the most fundamental questions we need to resolve is whether to have one will dealing with the client's worldwide assets or to have multiple wills dealing with each jurisdiction. My view is clients who have overseas assets should have wills dealing with each local jurisdiction.

Have a local will

Firstly, a well-drafted will in Australia will probably

cover the Australian assets/estate whilst the clients reside in Australia, because most of their assets and interests will still be in Australia. As they move overseas and purchase assets there, they need to think seriously about making a second, local will in the host country.

Although most industrialised countries recognise the basic provisions in each others' estate laws, there are huge and notable exceptions. It is impossible for estate planners to be familiar with the legal systems of overseas jurisdictions, and as such, it is impossible to properly plan for assets in overseas jurisdiction.

No Delay in Administration of Estate

Secondly, where there are two separate wills, one dealing with assets in the forum and the other with assets abroad, the executors may obtain probate in each jurisdiction independently of the other.

Therefore, they may simultaneously apply for probate and therefore reduce delay in the administration of the estate. If a testator/testatrix only has one will his/her executors must obtain probate in one jurisdiction and then a re-seal or another grant in the other.

Reduce Tax

Thirdly, if a resident testator/testatrix executes a local will appointing local executors and beneficiaries, he/she may reduce the estate's tax liability by not inadvertently triggering capital gains tax (CGT) Event K3 on distribution of estate assets.

To illustrate this, we need to firstly understand the concept of "Taxable Australian Property". Pursuant to Division 855 of Income Tax Assessment Act 1997, "Taxable Australian Property" broadly includes direct and indirect real property interests, assets used in carrying on business in Australia through a permanent establishment and a right or option to acquire such assets. A non-Taxable Australian Property is simply an asset that does not fall within the definition of "Taxable Australian Property".

A bequest of a CGT asset that is not "Taxable Australian Property" (such as Australian listed shares) by a resident deceased to a non-resident beneficiary may result in the estate paying CGT (CGT Event K3) which may otherwise have been avoided had the resident deceased nominated a resident beneficiary.

Forced Heirship

The next issue is the difference between common law system and civil law, Islamic law and customary law. For example, forced heirship is essentially a civil law concept. Most civil law countries limit a person's testamentary freedom, by providing that a portion of the estate must be reserved for spouses, descendants and, apparently in some cases, ascendants.

The Australian common law traditions are quite different to the civil law systems of most of Western Europe. The problem with having an Australian will applying in a foreign jurisdiction is forced heirship in civil law countries.

In civil law countries the processes of forced heirship and of succession, which provides for the automatic passage of assets at death, are used rather than a probate system to dispose of the testator's property. These regimes can cause concerns because the testator may not have the same freedom of testamentary disposition that we enjoy in Australia.

Cultural Differences

Some countries do not recognise trusts as a legal entity for use in estate planning and so this common Australian planning device may not work for them. Consequently, in order to effectively serve our client, the estate planner must be sensitive to both the cultural differences and the conflicting legal systems employed worldwide.

Local will minimises administrative headache

Perhaps the best reason for having a local will is that it makes things easier on the survivors. It minimises the administrative headache of moving the client's estate through the courts, and it avoids the trouble of having lengthy documents translated into the local language. This should reduce the need for supplementary affidavit evidence in support of a grant of probate or for judicial interpretation of a foreign document.

Claims under family provision legislation

In preparing a local will a testator needs to ensure that adequate provision is made for the proper maintenance, education or advancement in life eligible persons (e.g. spouse, child, financial dependant) to minimise the risk of a claim by such persons under the family provision sections of the Succession Act 2006 (NSW).

Conclusion

For the above reasons it is recommended to have an Australian will and a local will in the host country for Australians with overseas assets. The Australian will should specify that it will apply solely to the Australian assets; and the host country will apply solely to the assets in that country. This is the preferred approach because you ensure that local laws are complied with (as immovables are determined by local law) and will speed up the probate process.

Questions or Advice

Should you have any questions in relation to Estate Planning for Expatriates please contact Raymond Lim on 9228 9250 or Raymond.Lim@tresscox.com.au.

Guest Speakers

July meeting

Dr Robert (Bob) Austin was our guest speaker at our July meeting. Dr Austin entertained the Committee with some war stories covering his younger days, family life education and career.

During his working life Dr Austin has been a lawyer, academic, consultant and judge. He has spent time working in Australia and overseas. This variety and balance in work and life means that Dr Austin is well placed to have given the following advice to the committee on lessons for young lawyers:

- Select an area of expertise and make a name for yourself;
- You need litigation experience in order to give proper corporate advice;
- Legal Principles (e.g. whether there is a serious question to be tried AND balance of convenience are a protection to judges.

September meeting

Vicki Mullen was our guest speaker at our September meeting. Vicki is a Senior Policy Manager, Life Insurance from the Financial Services Council (FSC).

Vicki spoke about the variety of directions that a legal career may take and gave an overview of the FSC and its current topics of interest.

After graduating from ANU law school with a Bachelor of Arts / Bachelor of Laws, Vicki started her legal career as an Associate / Tip Staff to Justice Brennan of the High Court of Australia, where she undertook research for his judgment in Mabo. From there Vicki's roles have included working for one of the big four accounting firms, legal publishing, legal research, lecturing, and then into public policy and regulatory affairs. In the area of public policy, Vicki has worked for the NSW Cabinet Office, been a policy advisor to a NSW State Minister, and co-authored the Insurance Council of Australia's response to the HIH Royal Commission.

Vicki suggested to the members of the Committee in attendance that they should be open to their career heading in accidental directions. For example, many of Vicki's friends and colleagues who started their careers in private practice have moved to take on in-house roles and roles outside the law, including an artist. Vicki also commented that there are diverse roles and opportunities within the financial services sector, which in her experience has resulted in people from diverse backgrounds working in that sector.

Vicki is now the Senior Policy Manager responsible for the FSC's Life Insurance Board Committee, focusing on matters such as the Future of Financial Advice reforms, and the proposals to establish a National Disability Insurance Scheme and a National Injury Insurance Scheme. The FSC is an industry association that represents the life insurance industry



(L-R) Rebecca Barry (Vice-Chair), Dr Robert Austin (Guest Speaker), Tom O'Callaghan (Chair) and Maxwell Ababio

together with retail superannuation funds and financial advising networks. This is the wealth management area of the financial services sector. From a public policy perspective, the FSC represents its members interests by engaging in dialogue with Government, ASIC, APRA and the media. The FSC works on

ongoing matters, such as anti-money laundering, and sanctions. Vicki discussed with members of the Committee the impact of FOFA on industry and answered a number of questions.

Matthew Payne

Secretary, Business Law Committee

Additional Identification Requirements for Mortgagors and their Witnesses

Introduction

The provisions of the *Real Property and Conveyancing Legislation Amendment Act 2009* ("RPCLA") that introduce additional identification requirements in relation to mortgagees and witnesses have been proclaimed to commence on 1 November 2011.

Obligations of the Mortgagee

A mortgagee must identify the mortgagor before a mortgage is lodged for registration. This requires the mortgagee to take "reasonable steps" to confirm the identity of the mortgagor before presenting a mortgage for lodgement and registration (section 56C of the RPCLA).

"Reasonable steps" was not defined under RPCLA. However, it was stated before the Parliament that "reasonable steps" would include:

1. undertaking a 100 point check of the mortgagor (see below);
2. maintaining a written record of the steps taken to comply with this requirement; and
3. keeping a copy of any documents provided by the mortgagor to prove his/her identity for seven (7) years after the mortgage is registered.

Obligations of the Witness

Under section 117(4) of the RPCLA, a person who witnesses an application, dealing or caveat executed by an individual must:

1. be over 18 years of age;
2. not be a party to the transaction; and

3. either:

- (a) have known the person for at least 12 months; or
- (b) have taken "reasonable steps" to ensure the identity of that person.

The "reasonable steps" required are the same obligations that mortgagees will be required to take to identify mortgagors.

100 Points Check

Category of Documentation	Satisfactory Documents
Category 1 Photographic identification documents	• Australian passport (current or expired within the last two years) • Australian driver's licence • NSW photo card • Overseas passport
Category 2 Documents providing evidence of address	• Current rate notice • Utility account • Current bank statement or credit card statement • Tax assessment notice
Category 3 Additional supporting identification documents	• State or territory birth certificate • Australian citizenship certificate

Extracted from Land and Property Management Authority Consultation Paper entitled "Confirmation of Identity". The witness should sight two original documents, at least one of which should be a photographic identification document.

William Onishi

CLE Representative, Business Law Committee

CLE

The following CLEs were organized by William Onishi, the CLE representative for the Committee during July, August and September:

- Introduction to Australian Covered Bonds, Speakers: Sonia Goumenis, Partner, Allen & Overy & Karolina Popic, Partner, Allen & Overy.
- Who would be a director?, Speaker: Bill Koech, Partner, Blake Dawson.
- Succession Act 2006 – 3 years on, Speaker: Nicholas Confos, Barrister, Mediation and Arbitration Chambers.
- Mediating and Arbitrating in NSW, Speaker: Derek Minus, Barrister, Mediation and Arbitration Chambers.
- Personal Property Securities, Speaker: Peter Faludi, Special Counsel, DLA Piper.

The average attendance at these CLEs was almost 40 people which is an indication of the quality of speakers and topics organised by William Onishi.

Matthew Payne

Secretary, Business Law Committee

What is

Coming up...

Over the next few weeks we have some exciting events that may be of interest. These events are organised by Committee members – to become involved contact us.

Continuing Legal Education Seminar

Issues for directors in public company takeover responses
(29 November 2011)

Following the global financial crises, many organisations have begun investigating opportunities for growth and expansion. 2011 has seen an improving market for mergers & acquisitions and takeover opportunities. Whether a bid is hostile (a 'takeover') or friendly (a 'merger'), there are key legal issues that should be considered regardless of the size of the target entities.

In this CLE seminar, Ewen Crouch, Chairman of Partners at Allens Arthur Robinson and one of Australia's leading M&A lawyers, will discuss the key legal issues which occur for target entities and their directors in responding to public company takeover approaches, including market disclosures, directors duties and Takeovers Panel processes.

A one day CLE is being organised by William Onishi, the CLE representative for the committee to be held on **9 March 2012**. Anyone who would like to assist please contact William Onishi at WOnishi@giblawn.com.au.

Matthew Payne
Secretary, Business Law Committee

Annual Dinner

Last year we had a very enjoyable end of year dinner to celebrate the 20th anniversary of the Committee, and given the success of the event, everyone is keen to repeat this again this year.

Details are still to be confirmed, but we will look to hold this event in the first or second week of December. An invitation will be sent to the email list, so keep an eye out for that.

Tom O'Callaghan
Chair, Business Law Committee



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