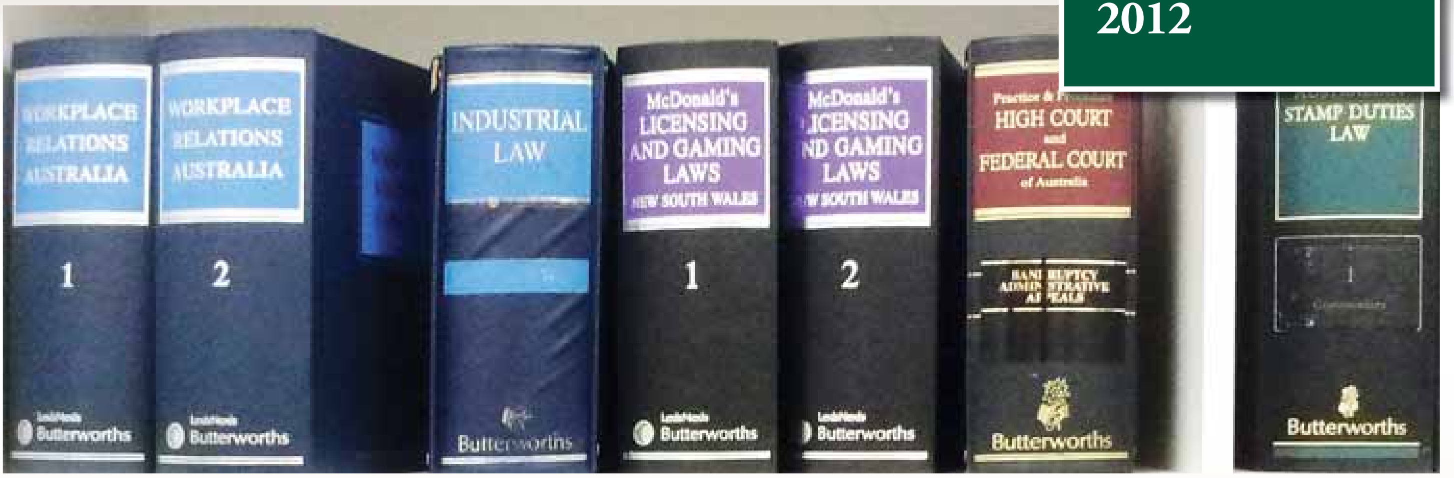
Esplins
SOLICITORS

Esplins Law Report

DECEMBER 2012



Directors' responsibilities

2012 has been a confusing year for directors. The extent of their duties of care and diligence and their requirements to ensure that their companies comply with the continuous disclosure obligations in the Corporations Act and the Australian Stock Exchange Listing Rules have been the subject of some significant recent Court decisions which appear difficult to reconcile.

2011 finished off with the decision in the Centro case where the Federal Court found that non-executive directors of publicly listed companies were liable and in breach of their duties for approving detailed accounts which wrongly classified some of the company's debts as non-current rather than current. Also, in 2011, the Full Federal Court found that Fortescue Metals and "Twiggy" Forrest had contravened the continuous disclosure provisions of the Corporations Act and that "Twiggy" Forrest had also breached his statutory duty of care and diligence.

In 2012 the warnings and repercussions for directors continued when the High Court decided the appeal by James Hardie directors. In May 2012 all seven judges of the High Court of Australia decided that non-executive directors of James Hardie Industries had breached their statutory duty of care and diligence in approving a misleading ASX announcement in 2001 on its corporate restructure.

The James Hardie announcement mentioned the establishment of a new foundation and said that it *"has sufficient funds to meet all legitimate compensation claims anticipated" from asbestos products and "the establishment of a fully-funded foundation provided certainty for both claimants and shareholders."*

Directors then received a reprieve in October 2012 when the High Court handed down its decision in the Fortescue Metals appeal. The High Court judges looked at the statements and announcements which had been made by Fortescue Metals and Mr Forrest in relation to the agreements entered in with Chinese state-owned entities to build and finance large infrastructure in the Pilbara. The High Court looked at the statements and what the persons hearing or reading those statements would understand. The Court decided that there was no evidential basis for assuming that a person hearing or reading these statements would understand that the parties had entered into agreements that would be enforced by an Australian Court according to Australian Law should a dispute ever arise between then.

In its judgement the High Court defended itself from any potential criticism and said that it had not limited the protection afforded to the investing public but had decided the Fortescue case on the specific facts of the case when it looked at what message the announcement conveyed to the intended audience.

One must question whether the High Court would have come to the same decision if as many members of the public were adversely affected by the conduct of Fortescue Metals and its directors as occurred as a result of the conduct of James Hardie when many asbestos sufferers were left without adequate financial compensation.

Notwithstanding the favourable decision in the Fortescue Metals case company directors will still need to be extremely diligent and need to read, question and understand everything their Board approves. They cannot simply rely on management.

Stephen Rush
sjrush@esplins.com.au

Esplins Solicitors
LEVEL 7, 16 O'CONNELL STREET SYDNEY NSW 2000 AUSTRALIA
■ **TEL: 02 9251 3999** ■ **FAX: 02 9251 3090**
■ **EMAIL esplaw@esplins.com.au** ■ **WEB www.esplins.com.au**

Directors on notice

Just prior to the end of the 2011/12 financial year the Federal Parliament passed into law several changes to the Director penalty notice tax legislation. One of the stated aims of the new laws, which are set out in Tax Laws Amendment (2012 Measures Number 2) Bill, is to attempt to curtail "phoenix activity". Most simply this involves a company being operated in such a way as to incur debts only for the company to be placed into administration or liquidation to avoid meeting its obligations to repay those debts. Subsequently, the business of the former company "rises out of ashes" as a new company (the phoenix in the metaphor) controlled by the same persons as the first collapsed company and this time debt-free. The obvious victims of such a practice are the employees of the first company, the ATO which misses out on tax debts and the broader commercial community through a loss of business confidence.

The basic purpose and effect of the director penalty notice tax provisions remain, that is when there are outstanding PAYG withholding tax payments due the Commissioner of Taxation can issue a director penalty notice culminating in that director's personal liability for the debt.

Further, if within 21 days of service of the notice the director either pays the debt, places the company into administration or begins winding up the company they will extinguish their personal liability. However, the recent changes to various pieces of legislation tighten the concept a little further and in some cases in very important ways. Set out below is a summary of those changes;

- Directors can now be liable for the company's unpaid superannuation guarantee charge;
- New directors are not liable for a director penalty for company debts until 30 days after they commenced their directorship (previously it was 14 days);
- A director penalty notice can be served on the director's tax agent;
- Directors cannot extinguish a penalty notice by placing the company into administration or liquidation if PAYG or superannuation payments remain unpaid and unreported 3 months after the due date;
- Associates of a director, such as a relatives, partners or spouses, may be personally liable for unpaid PAYG or superannuation on their own personal tax accounts if they knew, or could reasonably be expected to have known, that the company failed to pay its debts and that they did not take reasonable steps to influence the director to notify the ATO, pay the debts or place the company into administration or liquidation.

There has been some commentary to the effect that the above rules will apply to not-for-profit organisations that are set up using incorporated entities, for example a company limited by guarantee. If those structures are used then all directors of those incorporated entities will need to be mindful of the organisation's PAYG and superannuation obligations.

The need to be vigilant of your company's cashflow is always important during a downturn in the economy. The changes referred to above continue a process that the Government started in 1993 with the introduction of a director penalty regime. It is apparent that the Government intends on focusing on the role played by directors when questions of solvency arise. The message is clear – know your business and act promptly – otherwise you might find yourself with not just a business problem but a personal one too.

Hamish Esplin
hesplin@esplins.com.au

The Partners and staff of Esplins wish all our clients a joyous Christmas and a happy and prosperous New Year.

When a husband and wife sign the wrong will

A recent Supreme Court of NSW judgment involving a situation in which a husband and wife mistakenly signed the will which had been prepared for the other clarifies how the NSW Supreme Court will handle such situations. After the death of Mr Daly in 2007 and the death in 2010 of Mrs Daly, her executors sought probate of the will signed by Mrs Daly but which contained the statement "This is the last will and testament of me, Henri Georges Daly".

Initially the executors sought a rectification order to correct the wording of the document signed by Mrs Daly so that it referred to her. However, White J found that despite a history of Courts in other states granting orders to that effect the correct approach was for the Court to make an order pursuant to s8 of the Succession Act (N5W) 2006 that the document which stated "This is the last will and testament of me, Elaine Daly" and which had been incorrectly signed by Mr Daly "purports to state the testamentary intentions of a deceased person, and forms the deceased person's will".

As stated by Justice White in this case, it is *"not an uncommon occurrence"* for a husband and wife to mistakenly execute mirror wills. The lesson? Always check that you have correctly signed your will however if you haven't there might be a way to fix it.

Thomas Kim
tkim@esplins.com.au

Merry Christmas and a Happy New Year

First Home Owner Grant (New Homes) Scheme and the First Home - New Home Scheme

On 1 October 2012 the First Home Owner Grant of $7,000.00 was replaced with the First Home Owner Grant (New Homes) Scheme which entitles eligible first home owners, who buy or build a brand new home, to a $15,000.00 grant from the NSW Government. This is an attempt by the NSW Government to encourage construction of new homes. This means that first home owners who buy an existing dwelling are no longer entitled to any first home owner grants from the NSW Government.

Eligible first home owners can receive the grant regardless of their income or the area in which they are planning to buy or build. However, there is a cap placed on the value of the new home of $650,000.00.

In addition to the First Home Owner Grant (New Homes) Scheme, the First Home – New Home Scheme provides exemptions or concessions on transfer stamp duty for people who are buying their first home in NSW up to an amount of $20,240.00. This includes buying vacant land on which they intend to build their first home. The First Home – New Home Scheme provides eligible purchasers with exemptions on transfer stamp duty on new homes valued up to $550,000 and concessions on transfer stamp duty for new homes valued between $550,000 and $600,000. Eligible purchasers buying a vacant block of residential land to build their home on will pay no stamp duty on vacant land valued up to $350,000 and will receive a concession on duty for vacant land valued between $350,000 and $450,000.

For more information on eligibility for the First Home Owner Grant (New Homes) Scheme and the First Home – New Home Scheme please contact Lauren Wiltshire of our office.

Lauren Wiltshire
lwiltshire@esplins.com.au