

## RL NEWSLETTER

FEARLESS LAW

JANUARY - FEBRUARY 2004

## "STAY WELL PROGRAMME"

To All Our Clients,

ROSENDORFF LAWYERS takes the opportunity of wishing you all the best for 2004.

We believe that this is going to be a wonderful year for all who are ready, willing, able and prepared. The emphasis is on prepared. With this in mind, we have devised a "Stay Well Programme" which we will be bringing to you on a regular basis through our newsletters this year. This consists of information that is necessary to keep you ahead and healthy in business.

*"Attitude Is Everything And Everything Is Attitude"*

Joe mentioned to his friend that he was leaving New York to go and live in Los Angeles. Joe asked what the people were like in Los Angeles. His friend replied "How do you find the people in New York?" Joe answered that he found the people in New York selfish and aggressive. His friend responded "that is how you will find the people in Los Angeles!"

Where ever we go we take ourselves with us. With the correct attitude almost anything can be achieved. Our own attitude is either the lock on, or the key to, the door of fulfillment.

Thank you for your support and we look forward to a continuing and mutually successful relationship.

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## NEW EMPLOYMENT CONDITIONS

The passing by the Federal Parliament of the *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* ("the Federal Act"), following the earlier passing by the Victorian Parliament of the *Federal Awards Act 2003* ("the Victorian Act") represented an all too rare exercise in cooperation between federal and state governments.

Schedule 1 A of the *Workplace Relations Act 1996* sets out minimum terms and conditions of employment for employees in Victoria who are not covered by federal awards or agreements (Victorian employees). The Federal Act creates the following new minimum entitlements for Victorian employees with effect from 1 January 2004:

- paid personal leave of eight days for each year worked instead of sick leave of five days per year;
- a bereavement leave of two days on the death of a member of the employees immediate family or household; and
- ordinary time extra if an employee works in excess of 38 hours in a working week at the minimum hourly rate applicable to the employee.

The new personal leave may be taken as clear as leave up to five days of the eight days to care for a member of the employees immediate family or a member of the employee's household. Special rules apply for the approval of personal leave during the first year of employment. Part-time employees accrue personal leave on a pro rata basis. The Federal Act also sets out the following new rules about the taking of annual leave which:

- accrues on a pro rata basis and is cumulative;
- is credited on the anniversary of the employee's employment;
- counts as service for all purposes;
- is to be paid at the rate that, immediately before the leave is taken, is the employees ordinary hourly rate of pay;
- is to be paid when the employee takes annual leave or leaves his or her employment, as the case may be;
- must be taken within 12 months after the end of the year in which it accrued unless otherwise agreed; and
- must be taken by an employee when

directed to take it by the employer, if the employer directs the employee to do so because the employer shuts down his or her business for a period.

These new rules do not affect the annual leave accumulated prior to 1 January 2004.

The Federal Act confers on employers a new statutory right to stand down employees who cannot be usefully employed because of any strike, breakdown of machinery or any stoppage of work for any cause which the employer cannot reasonably be held responsible, and the deduction of pay during that period.

The Victorian Act introduces the following inclusive definition of "industry" into the *Commonwealth Powers (Industrial Relations) Act 1996* which refers the common rules power to the Federal Government:

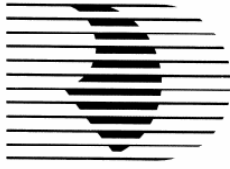
- Any business, trade, manufacture, undertaking or calling of employees;
- Any calling, service, employment, handicrafts, industrial occupation or vocation of the employees; and
- A branch of an industry and a group of industries.

One can expect that the following changes to your situation may be included:

- new pay rates based on the classification structure requiring role grading;
- higher minimum rates of pay, especially for casuals;
- overtime for support staff for work in excess of 38 hours per week or outside the normal hours; and
- other entitlements such as any leave loading of 17.5% and redundancy entitlements.

An award declared to apply to an industry in Victoria by common rule will prevail over terms of conditions of contract of employment to the extent that the contract is less favourable to an employee, but the contract will apply where the terms and conditions are more favourable than in the award.

No matter how large the workforces, it is vital for employers to enter into appropriate contractual arrangements with employees in order to properly protect all parties.



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## CHANGES TO INDUSTRIAL RELATIONS IN VICTORIA

There have been recent changes introduced by the federal **Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003**, that increase the minimum entitlements for Victorian employees on award salaries. The changes provide for:

- payment for hours worked beyond 38 per week;
- an increase in sick leave from 5 to 8 days with up to 5 of those days able to be used as carer's leave; and
- entitlement to two days bereavement leave on the death of a family or household member.

The changes regarding payment for hours worked beyond 38 hours per week require employees to be paid at least the equivalent of the total hours worked multiplied by the minimum hourly rate for their role (based on the Property and Business Services Sector Industry Sector rates). The changes will impact most on employees who are paid at or around the award rates. For these employees, the rate to be paid for additional hours is at least the ordinary rate of pay.

The changes are unlikely to affect employees on salaries well in excess of the award, but records should be kept to ensure that salaries are at least equivalent to or above the award entitlements.

The way in which personal leave will accrue is yet to be confirmed.

For all your employment law requirements please do not hesitate to contact Alan Rosendorff or Trevor Rosenthal of our office who have extensive experience in this field.

## ESTATE AGENTS AND SALE OF LAND ACTS (AMENDMENT) ACT 2003

Dummy bidding will be banned under the **Estate Agents and Sale of Land Acts (Amendment) Act 2003**, which will come into effect on 1 February 2004. A consequence of this is that practitioners seeking court orders for the sale of co-owned land are advised that from 1 February 2004 changes to the law affecting the conduct of public auctions will mean co-owners will be precluded from bidding at public auctions to buy out the interest of other co-owners. The changes are contained in the **Estate Agents and Sale of Land Acts (Amendment) Act 2003**.

The practical effect of the changes will be that auctioneers will be unable to conduct auctions where co-owners want to bid as it will result in conflicts of interest and potential breaches of the **Estate Agents (Professional Conduct) Regulations**. Practitioners seeking court orders for the sale of co-owned land will need to consider whether the order requires a sale by private treaty or by public tender.

Rosendorff Lawyers is a Melbourne based boutique law firm, with origins dating back to 1898 through the historically regarded law firm McCay & Thwaites.

The firm has a strong past, a dynamic present and a future grounded in the belief that solutions provided to our clients must be relevant, pro-active, commercial and above all, beneficial.

Rosendorff Lawyers believes in adopting an innovative and often lateral approach to finding legal solutions which will suit clients' requirements while maintaining the highest quality legal service.

### Commercial and Corporate Law

Alan Rosendorff heads the business and company law section of the practice. The firm provides advice and representation in all areas of commercial and business law, including corporate restructuring and advising on the most efficient business structures to meet the needs of particular clients, preparation of commercial agreements, and the acquisition and sale of companies and businesses.

### Commercial litigation

The commercial litigation section is headed by Trevor Rosenthal and provides advice and commercial support in commercial litigation and insolvency in all jurisdictions.

### Migration

The firm has extensive experience in assisting clients enter Australia under the Skilled Migration category.

### International and Interstate agents.

Through our international and interstate agents and representative firms Rosendorff Lawyers can provide assistance or representation worldwide.

## DIVISION OF MANAGEMENT POWER

The NSW Court of Appeal has provided some clarity in relation to the residual or reserve power of shareholders to act in circumstances where the board of directors is unwilling or unable to act. The decision revisits some fundamental principles of corporate law relating to the division of power between the board and the general meeting.

The power of management is ordinarily vested in the board of directors, except where the Corporations Act or the company's constitution specifically requires the power of the company's shareholders in general meetings. The law had also developed a "residual or reserve" powers doctrine. This doctrine provides that, where the board is unwilling or unable to act, the general meeting of shareholders are able to exercise residual or reserve powers.

The exact scope of the doctrine is subject to some debate. The wider view, that the power exists where the board is unwilling or unable to act without qualification - propositions that seem to emerge from

**Marshall's Valve Gear Co Limited v Manning Wardle & Co Limited [1909]**, **Danish Mercantile Co Limited v Beaumont [1951]** and **Alexander Ward & Co Limited v Samyang Navigation Co Limited [1975]** - has been expressly rejected by the NSW Court of Appeal.

According to the Court of Appeal, the doctrine does exist, but it must be considered a matter of implication or with reference to the presumed intention of the company's shareholders, and taking into account the other provisions of the company's constitution. So, where the company's constitution confers an express power on the general meeting to appoint additional directors, one could not regard a deadlock on the board of directors (eg arising from disagreement) as conferring a general power of management on shareholders in general meeting. In these situations, the appropriate course of action is for the shareholders in general meeting to appoint

additional directors to resolve the deadlock.

The Court of Appeal suggested that even in the absence of an express provision in the company's constitution providing for the appointment of additional directors by shareholders in general meeting, the power of the general meeting to remove directors and replace them with other directors may of itself be sufficient to prevent the implication of any reserve or residual powers in the general meeting.

The decision, which appears to be the highest authority in Australia directly on this point, supports the narrower view of the residual powers doctrine.

The distinction between the two principal decision-making organs of the company, the board of directors and the general meeting, is a distinction which is often not appreciated or understood by directors, particularly in relation to smaller companies where the shareholders and the directors are commonly the same persons.