

## RL NEWSLETTER

FEARLESS LAW

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Web: [www.rosendorff.com.au](http://www.rosendorff.com.au)CHANGES TO ENDURING  
POWERSDemystifying Estate & Succession Planning  
Business Wills

Whilst the term "Business Will" is a relatively new one, the concept is not.

What a "Business Will" is designed to achieve is perhaps better described by the term "Business Succession Agreement". This term gives an insight into only one part of the process of planning for the future of a business, and for how an unexpected death, injury or illness might affect the business and its owners.

Where a business is owned by a family or by one or more people, there is always room for a Business Succession Agreement as part of a business succession plan. A good succession plan will consider:

- what happens in the event of an "owner" or other key person being unable to actively contribute to the business, because of death, injury or illness;
- what happens if it becomes a problem for a key person to remain involved - for example because of relationship breakdown or financial meltdown;
- what happens if one of the "owners" simply wants out;
- who can buy who out when, and how (often narrower Business Succession Agreements are called "Buy/Sell Agreements");
- how buy outs are to be funded, and how payout amounts are to be agreed and paid.

The Business Succession Agreement is merely the document which reflects what the "owners" have agreed to do in each of these, and other, situations that may arise. The issues that arise for each business and each business owner, and how they will deal with each of those issues, are never the same.

However, there are some common issues that all businesses can plan for - namely death, disability, illness and a breakdown of the business relationships. Some businesses can also have the luxury of identifying successors, so that the founders can retire and a "new generation" can take over.

Although these issues are readily identifiable, far too few business owners plan for them, often with the result that relationships (and possibly the business itself) are damaged beyond repair in a fight which could have been avoided.

Depending on the industry, and the owners of the business, one of the simplest and most cost effective arrangements that can be put in place is an *insurance funded* Business Succession Agreement. Whilst this is a bit of a mouthful, all it means is that the key people in the business are insured against death, disability and illness for an amount which is usually roughly equal to the value of their share in the business. If they die or become incapacitated, they can claim on the insurance and be paid out the proceeds, allowing co-owners of the business to take over at minimal cost, and without short changing the exiting owner.

As there are several taxation traps associated with insurance funded buy outs, and the planning can be quite complex, it is important to involve a lawyer skilled at these types of Agreements, as well as your accountant and financial planner.

To find out about more about Business Succession Agreements, contact Alan Rosendorff on 9011 8353 or email [alanr@rosendorff.com.au](mailto:alanr@rosendorff.com.au)

# The Law of Defamation and You

The publication of defamatory material in a permanent form, commonly as a written statement or as broadcast statements, is known as libel, and in a non-permanent form, that is, a spoken statement, as slander.

To succeed in an action for defamation you must show that a statement refers to you, that it is defamatory, and that it has been communicated to persons other than yourself.

1. To prove that the words refer to you, it is not always necessary that you should be actually named. It may be sufficient that a person on reading the words would reasonably conclude that they refer to you.
2. A statement would be regarded as defamatory if it injures your reputation by exposing you to hatred, contempt or ridicule or lowers you in the opinion of right-thinking society.
3. You must show that the statement has been communicated to another person, apart from yourself. Regardless of how untrue or offensive the words may be, if you are the only person who reads or hears them, you could not take legal proceedings for defamation.

Every person who takes part in the publi-

cation of a defamatory statement can be liable for the publication. In the case of statements published by a newspaper, this would include the writer, publisher, editor, printer and distributor. However, a distributor may have a defence if he or she did not know that the publication contained defamatory material.

In proceedings for slander you must also show that you have suffered some loss or injury, known as special damage. This means that you have lost a material advantage which can be measured in monetary terms, such as loss of employment.

You do not have to prove special damage where the statement alleged that you had committed a crime, were suffering from a contagious disease, were unfit to practise a profession or trade or, if you are a woman, that you were unchaste.

To sue for libel, it is not necessary to show that special damage was suffered.

The law provides certain defences to claims for defamation. Truth is a complete defence in Victoria, regardless of how damaging a statement may be to a person's reputation. The defence of absolute privilege applies to statements that are made in parliamentary proceedings and some judicial proceedings.

Communications between certain government ministers are also subject to absolute privilege. Absolute privilege also covers communications between a husband and wife.

The defence of qualified privilege applies where a statement was made honestly and without improper motives. A common situation where this defence would apply would be where a prospective employer makes inquiries about an applicant for a job from a former employer. Even if the opinion given by the former employer is disadvantageous to the applicant, he or she would be protected from defamation proceedings by the qualified privilege provided, of course, that he or she acted in good faith and not from malice, in which case the defence would not apply.

The defence of "fair comment" can be raised by the writer of an article if he or she can prove that the facts on which the writer commented were true and that views he or she stated were expressions of opinion, not conclusions of fact. For the defence to apply, the defendant would also have to show that the statement was honestly held by the writer, was made in the public interest and was not inspired by malice.

## Terminating a worker's employment contract

Terminating a worker's employment contract is a serious step that if handled badly, can result in penalties being imposed on an employer by industrial tribunals, as well as embarrassing and damaging publicity. For this reason, it is essential that managers take the right approach from the outset.

If after it has been determined the problems behind a worker's poor performance are personal, rather than organisational, and counselling and more formal disciplinary procedures have not resulted in an improvement in performance, a decision may be made to terminate the worker's employment contract.

**Manager's checklist for terminating an employment contract:**

- Establish if the organisation is prepared to defend the matter should it be subject to wrongful dismissal proceedings in the relevant tribunal.
- Ensure a senior person from the organisation has investigated the cost of recruitment and training a replacement employee.
- Begin a termination interview with the employee by informing them a serious matter has to be discussed and ask them if they would like a witness present.
- Explain the reasons for termination.
- Show them a copy of any policies they have breached.
- Inform them of previous counselling and

warnings, when these took place, and of any diary notes such as commitments they have given to improve their performance.

- Inform the employee in writing that their employment contract will be terminated on (date) and of the reason(s) for termination, and ask them to sign the document and give them a copy. If they refuse to sign, one of the witnesses should be asked to acknowledge that the termination took place. The employee may also request an Employment Separation Certificate to provide to Centrelink.
- Make a diary note of the interview in case the termination is contested at a later date.

### KEEPING YOU INFORMED

In order for us to assist you with your legal requirements and keep you up to date with legal issues that may be of interest as well as keeping you abreast of all the new and exciting things we are up to at Rosendorff Lawyers please drop us a line and let us have any new contact details!



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## THE NEW WORKPLACE RELATIONS ACT 2003

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 government.

Schedule 1 A. of the Workplace Relations Act 1996 sets out the 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. There are special rules for the approval of personal leave during the first year of employment.

The federal act also provides the following new rules about the taking of annual leave:

- It accrues on a pro rata basis and is cumulative;
- It is credited on the anniversary of the employee's employment;
- counts as service for all purposes;
- It is to be paid at the rate that, immediately before the leave is taken, is the employees ordinary hourly rate of pay;
- It is to be paid when the employee takes annual leave or leaves his or her employment;
- It must be taken within 12 months after the end of the year in which it accrued unless the employee and the employer have agreed otherwise; and
- It 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 which has accumulated prior to first of 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 federal act further clarifies and strengthens the powers of inspectors, the requirements to keep employment records, and treats a failure to comply with the minimum terms or conditions of employment for Victorian employees as a breach of award for the purposes of the

penalty and recovery of wages provisions under sections 178 and 179 respectively of the Workplace Relations Act.

The Victorian act introduces the following inclusive definition of "industry":

- 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 favorable to an employee, but the contract will apply where the terms and conditions are more favorable than in the award. It is now even more vital that employers, no matter how large the workforces, enter into appropriate contractual arrangements with employees in order to properly protect all parties.

## COURT ORDERS ABOUT VOIDABLE TRANSACTIONS - SECTION 588FF CORPORATIONS ACT

Section 588FF of the *Corporations Act* empowers the Court to make orders in relation to transactions which may be voidable because they contravene S 588FE. The application must be made by a company's liquidator - s588FF(1).

Section 588FF(3) stipulates that "[A]n application under subsection (1) may only be made (a) within 3 years after the relation-back day; or (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator within those 3 years."

### Interaction between sections 588FF(3) and 1322(4)(d)

For some time there was a division of judicial opinion as to whether or not the

three-year limitation period in s588FF(3) could be extended through the path provided by s1322(4)(d).

The majority decision of the Queensland Court of Appeal in *Greig & Duff v Aust Building Industries P/L* (2003) 21 ACLC 1,565, and the unanimous decision of the NSW Court of Appeal in *BP Australia Ltd v Brown & Ors* (2003) 21 ACLC 1,535 has probably now resolved the issue. Both courts determined that s588FF(3) was comprehensive and excluded the operation of s1322(4)(d) to extend the three year limitation period.

These cases followed a line of authority that held that s1322(4)(d) cannot be used to extend the limitation period in s588FF

(3)(b). According to these cases, s588FF(3) is a distinctive and self-contained provision in that it provides for the time limit for a proceeding to be commenced under s588FF(1) and also the time limit for making an application for an extension of that period. The adoption of the phrase "*may only be made*" highlights the self-contained nature of the subsection. This construction is consistent with the High Court's interpretation of that same phrase.

The contrary line of authority held that the three-year period in s588FF(3)(b) in which applications for extensions of time must be made may, itself, be extended by s1322(4)(d), subject to the usual criteria applicable to that power of extension.

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If you do not want to receive commercial electronic communications from us, please reply to this message with the word 'remove' in the subject. Your email address will then be removed from our database.

If you do not reply, we will assume that you wish to continue to receive our electronic communications and we will continue sending you relevant information until you request us to remove your email address from our database.