



Northern Focus – Spring 2008

Welcome

In this action packed instalment of Northern Focus, we discuss the legal risks associated with on-selling off-the-plan units. And with all the recent turbulence for Companies at the big end of town we issue a timely warning to all Company Directors regarding the risks they face in their Company's day to day operations. Also, back by popular demand is our estate planning horror story. This time, we cash in on one of October's major sporting events – Bathurst, and discuss the disaster that was, and still is, Peter Brock's Will.

Finally, we profile our Estate Planning Partner **Patrick Sutton** who, with a little help from wife Louise, brought baby number 3 into the world just a few weeks ago.

As always, we love hearing from you so please don't hesitate to **visit us** at www.mackeywales.com.au with your feedback.

Changes at Mackey Wales Law

1. We are expanding...recently relocating our Estate Planning Department to the area beside our main office. We encourage all of you who either do not have Wills or Powers of Attorney or who haven't considered the most tax effective way to distribute your assets upon death to contact either Patrick Sutton or Emma Micola for an obligation free appointment.
2. We are excited to have James Cook University final year law student Rebecca Adams join our high calibre Conveyancing team on a full time basis from 1 December this year. Following some on the job training, Rebecca will be admitted as a Solicitor of the Supreme Court next year.

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ESTATE PLANNING HORROR STORY

PETER BROCK – THE RACE HE DIDN'T WIN



Bathurst has been run and won for another year and most of us would have spared at least a passing thought for the King of the Mountain – Brockie! We all know the tragic story that unfolded on 4 September 2006 in Western Australia, but unfortunately that wasn't the final tragedy in Peter Brock's short but amazing life.

Since his sudden and untimely death, we have witnessed his family and new wife become entangled in lengthy, and very public legal disputes over the validity of a couple of his wills to which no professional legal advice had been sought, as well as claims for further provision from the estate and most recently a legal battle over his ashes. When it came to wills and estate planning it seems Brock was not 'Peter Perfect' as he was on the race track.

Peter made three wills during his lifetime.

- a validly executed will which was prepared by his solicitor in 1984
- a legal will kit in 2003 which was signed but not properly witnessed and
- a legal will kit in 2006 which was not signed at all.

Peter had good intentions and clearly gave the distribution of his estate some thought. Unfortunately for him, his family and wife, the distribution that he intended could not be carried out.

As the legal cases slowly progress through the Court system, Brock's family is watching the value of the estate diminish due to mounting legal and court costs. In addition to this is the emotional distress the families continue to endure, which is impossible to put a price on.

This messy situation could have easily been avoided, or at least minimised, had Peter sought proper legal advice. A resolution could have been reached that would hopefully have been satisfactory to all parties. The estate plan developed would also have included appropriate tax minimisation and asset protection strategies.

It goes without saying that the emotional and financial cost of finalising contested cases such as these far outweighs the minimal cost of developing an up-to-date, clear estate plan with your lawyer.

We are yet to see a conclusion to this unfortunate but all too common scenario, but it represents a gentle reminder to all of the importance of taking, no making the time to obtain professional legal advice to prepare your will and to create a suitable estate plan. We all work far too hard to allow our life savings to slip away so easily. One thing is for sure - the only winners to date in this 'two year' race through the Courts have been the lawyers!

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BUYERS BEWARE – ON-SELLING OFF-THE-PLAN UNITS



We love nothing more than to spend time with our clients to hear about their business and investment experiences – both good and bad! We'd like to share some of the wisdom we've gained along the way from those exchanges.

Hundreds of our clients have pulled the right rein in their property investment decisions in recent years. In the present market we have one main area of concern: clients who speculate in off-the-plan unit purchases with a view to on-selling before they are required to settle them. This is a risky exercise, as almost all attempts that we have seen to achieve a "watertight" contract which will require the end buyer to complete the settlement, have been defective.

For each off-the-plan on-sale, it is necessary to carefully develop a customised contract for the specific project. This requires an enormous amount of time, often in excess of 10 hours for a solicitor. The problem that lawyers for the first buyer (who subsequently becomes the seller) face are that the disclosures which are required to be made are often outside the knowledge and control of a seller in an on-sale contract when the development is still progressing under the control of the original seller (developer). Inadequate or incomplete disclosure will afford an end-buyer ongoing rights of termination.

In our experience, buyers of off-the-plan units will usually fail to have suitable arrangements in place to complete the initial purchase settlement if the on-sale settlement fails. The consequences of this are catastrophic for the original buyer. It is logical that the incidence of buyers wishing not to proceed with settlements could dramatically increase as a consequence of economic or market changes such as the ones we currently face.

What's more, law firms are becoming increasingly reluctant to be involved in transactions involving the on-sale of off-the-plan units because it is we who are exposed to law claims for contracts which could never have been made "watertight" in the first place. Those that do continue to carry out this type of work probably haven't performed a proper risk assessment of the area.

We don't encourage our clients to sign contracts to purchase off-the-plan units if their sole intention is to on-sell before they are required to settle unless of course they have given full consideration to the risks. Not only is it fraught with danger in the present economic climate, but you could be left carrying the can if the end buyer legitimately walks away because of a flawed on-sale contract.

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DIRECTORS DON'T GO DOWN WITH THE SHIP



We have a timely warning for mum and dad Company directors so they don't fall victim to unsound Company practices in these turbulent times.

We see many new clients with companies and trust structures that do not align with accepted and prudent asset protection practices. A prime example is simply where both husband and wife are directors of the family company. The risk of this set up is that it may leave both of them personally liable for debts of the business as well as place at risk all personal or investment assets they may own, including their family home.

These days only one director and shareholder is required for a company to be registered (previously it was two). Company directors have a range of onerous duties that must be observed. These are conveniently located (for Lawyers anyway) in the Corporations Act, Case Law, in our Taxation Laws and in Commercial Agreements such as Leases and Mortgages where the Director agrees to personal liability via guarantees.

With so many sources of risk that Directors invite onto their doorstep, logic suggests it is wise to have just one family member stick their neck out and take on that exposure. Our preference is that one spouse takes on the business risk, usually the person who manages the business, while the other controls the family's personal assets and investment portfolio. This ensures a firewall is created between the two.

Directors may inadvertently trade whilst insolvent, fail to pay insurance premiums on time or their insurance company may even fold, as occurred recently with HIH. Each of these occurrences may leave the personal assets of the directors exposed.

Consider Fred and Wilma who are both directors of their family earthmoving company. In challenging economic times, their rocks sell more slowly which creates a short-term cash flow issue for them. As a result, the company gets to a stage where it has unpaid tax to the ATO and the company fails to remit tax as required. This effectively renders Fred and Wilma liable to a penalty under the Tax Act. The ATO send a letter to Wilma, but to the wrong address as she has failed to update her records with the ATO as required. Fred and Wilma soon find themselves in a position where they must personally pay all the company's outstanding PAYG, superannuation and other expenses within 14 days. Their home and beach house and all other personal assets are now exposed and can be sold to help meet the company's debts.

Being a director is risky and not something anyone should enter into lightly, nor without first obtaining sound accounting and legal advice. Whilst the title may look impressive on your business card you should seek proper advice to ensure you are the most appropriate person to hold that position in the company and then you must stay in tune with the duties that the law requires you to uphold.

For a more detailed information sheet regarding directors' duties, **[click here](#)**.

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STAFF PROFILE – Brodie Luke Sutton



There is a new addition to the Mackey Wales Law family and his name is Brodie Luke Sutton. He was born at the Mater Hospital on 12 September 2008 and has already crashed 2 weddings, including that of Mackey Wales' personal assistant, Katrina Kiely and attended his first Tuesday staff morning tea.

We put a few cutting edge questions to Patrick about the new addition.

Congratulations on the birth of Brodie Luke. How has he changed yours and Louise's lives so far?

Brodie has brought a lot of joy into our lives. He is a very good little baby. Louise does most of the work including the late nights. For me there is less work as a Dad than with the twins.

Speaking of the twins, how are they coping with the new addition to the family?

Liam and Ryan love their little brother to bits. There are many cuddles and hugs for Brodie and comforting when he is crying. There haven't been too many fights yet about who sits next to him in the car.

Is it true that Louise is telling all her friends that you are still the least mature of all her kids?

I can neither confirm nor deny that statement. However I do get in as much trouble as the twins when we are playing a little too loud while Brodie is asleep.

Are you one of those parents who dress their twins the same?

We do not have a firm position on the twins dressing the same and we will leave it up to the boys as to what they each want to wear but in most instances they prefer to wear the same and it certainly cuts down on fights about who is wearing Bob the Builder or Thomas the Tank Engine.

A simple yes would have sufficed.... Will you now be dressing all 3 in the same get-up?

I don't think we will go that far. Brodie has lots of spare outfits now though, in case he messes up the first one....not to mention the hand-me-downs.

Have you any desire to steer your boys into a career in law?

Probably not, I am grooming them for professional careers as golfers, tennis players or something similar. I am quite content to be their Manager and retire to the lifestyle that I am unaccustomed to.

Any chance of going back for a girl?

The official answer is no and I am not keen to trade in the current car for a Tarago. Unofficially we will have to wait and see.

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