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Anderson Rice News
Summer 2007 Edition

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Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

www.andrice.com.au

Level 10, 555 Lonsdale Street
Melbourne Vic 3000 Australia

PO Box 14099
Melbourne Mail Centre 8001

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Document Destruction

Terry O'Connor

Tampering with the Evidence - Recent Developments in Document Destruction

The essence of the Court process lies in establishing the facts, then applying the Law to those facts.

In most, if not all, commercial litigation, determining the facts involves the parties examining and analysing the documents generated in the course of the transaction involved in the dispute. Often the proof of a fact asserted by one party is found in documents held by the other party. In some cases the first party may not have seen those documents at any time prior to them being made available in the course of the litigation.

The process of making documents available to all parties for examination and analysis is known as discovery. Resolving litigation, particularly in the civil arena, depends on the effective operation of the discovery process.

Traditionally the system has relied on the parties meeting their obligations to make documents available in good faith. However, allegations in recent Victorian cases that documents had been destroyed in order to frustrate the claims of opposing parties threatened to undermine confidence in the discovery process.

The Victorian Government responded with legislation, which took effect from 1 September 2006, amending both the Crimes Act 1958 and the Evidence Act 1958 to provide both civil and criminal consequences for illegal destruction of documents.

Civil Consequences – the *Evidence (Document Unavailability) Act 2006*

The Document Unavailability Act addresses the impact of documents being "unavailable" on fairness in the conduct of civil proceedings.

For the purposes of the Act, a document (including an electronic document) is "unavailable' when it is, or was, in the possession of a party and has been destroyed, lost, disposed of, concealed or rendered illegible, undecipherable or incapable of identification.

In circumstances where:

- an original document is "unavailable"; and
- there is no copy of it available; and
- its absence is likely to cause unfairness to a party,

the Act empowers the Court to make such orders or rulings as it considers necessary to ensure fairness.

The Act provides that those orders or rulings made may include:

- Drawing an adverse inference from the unavailability of the document.
- Accepting a fact in dispute as true in the absence of some other evidence to the contrary, or reversing the onus of proof in relation to that fact.
- Directing that certain evidence not be presented.
- Striking out all or any part of a Statement of Claim or Defence

In making any order or ruling the Court is required to consider the circumstances in which the document became unavailable and the impact of its unavailability on the proceeding, including any adverse effect it may have on the ability of a party to prove its case or make a full defence. Otherwise the Court has a broad discretion to ensure fairness to all parties.

The Act applies to all Victorian civil jurisdictions, including VCAT.

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Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

www.andrice.com.au

Level 10, 555 Lonsdale Street
Melbourne Vic 3000 Australia

PO Box 14099
Melbourne Mail Centre 8001

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Criminal Consequences – the *Crimes (Document Destruction) Act 2006*

The Document Destruction Act introduces a new offence of document destruction.

This offence arises when a person destroys or conceals documents (or authorises or permits their destruction or concealment) in the knowledge that those documents are required, or are reasonably likely to be required, in any ongoing or potential future legal proceeding and with the intent of preventing the documents from being so used.

The offence applies to the conduct of individuals and of companies, through their officers and employees. Actions and intentions of officers and employees are attributed to the company, subject to a limited defence of due diligence. The authorizing or permitting elements of the offence may be established by proving the existence of a corporate culture that encouraged, tolerated or led to the destruction or concealment of documents.

The Document Destruction Act makes no attempt to further define documents that "are reasonably likely to be required" in any litigation. This is a matter of fact to be determined in the circumstances of each case.

Upon conviction individuals are liable to imprisonment for a maximum of 5 years, while companies are liable to a maximum fine of $300,000.

Conclusion

As a result of these legislative changes, misplacing documents can have consequences varying from being unable to prove an element of a claim or defence, to being forced to concede a point that would otherwise be disputed, to criminal prosecution.

Accordingly, organizations should ensure they have procedures in place governing the retention and, when appropriate, disposal of documents, including emails and other electronic documents and records. The possibility that electronic documents may be lost in the course of computer system maintenance or as a result of system failure should be addressed.

Document management procedures, whether new or existing, must now include consideration of whether or not documents might be required in connection with litigation at some future point as a precursor to document disposal or destruction. This aspect should involve sign off by a person at an appropriately senior management level, whose department was not involved in the production of the document in question or the transaction or process for which it was generated or received.

In the event that a dispute arises, or seems likely to arise, in relation to a transaction, we recommend that a complete hard copy file be established as soon as possible and kept up to date throughout the course of the transaction or dispute. The file should include printouts of all emails and attachments and any other document or record in electronic form. This practice will minimize the risk of a breach of the document destruction legislation and, perhaps more importantly, assist in obtaining legal advice and in the conduct of any litigation that may arise.

For further information contact:

Terry O'Connor
Senior Associate
toc@andrice.com.au

Top

Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

www.andrice.com.au

Level 10, 555 Lonsdale Street
Melbourne Vic 3000 Australia

PO Box 14099
Melbourne Mail Centre 8001

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CASE NOTE

Tim Donaghey

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7 (16 January 2007)

Background

Harrington Corporation Pty Ltd (**'the Respondent'**) operated a restaurant in Manuka, Canberra. In early 2005, Rosanna Ramirez Cabisidan and Margarito Sorrosa (jointly **'the employees'**) signed contracts of employment and travelled from the Philippines to Australia to commence working for the Respondent. Each of the employees was sponsored for employment for a subclass 457 visa, to enable work in Australia as a chef, pursuant to the Liquor and Allied Industries Catering, Cafe, Restaurant, Etc. (Australian Capital Territory) Award 1998 (**'Award'**).

The Office of Workplace Services (**'OWS'**) found that the Respondent had underpaid the employees by $2,741 and $1,074 respectively. The OWS threatened to institute proceedings for breach of the Award if the underpayments were not remedied. The Respondent sought to settle the dispute by offering payment, in exchange for deeds of release from each of the employees.

The employees signed the deeds and were not paid. The OWS instituted proceedings against the Respondent in the Federal Magistrates' Court of Australia.

Hearing in the Court

The OWS and the Respondent filed an agreed statement of facts, shortly before the hearing. The statement provided substantial agreement as to:

a. breaches of cl 19 of the Award, which provided for classifications and wage rates;
b. breaches of cl 29.2.1 and 29.1.1, both concerning weekend penalty rates;
c. breaches of cl 28, concerning overtime;
d. breaches of cl 34.6 and 34.13, concerning annual leave and annual leave loading;
e. breaches of cl 18, concerning notice of termination,

all of which occurred between 20 August and 7 October 2005.

The admission of facts necessary to establish breaches of the Award removed the need for evidence at the trial of the proceeding. Accordingly, the issues which remained at trial were the quantum of penalty, and other consequential orders.

Findings of the Court

How many breaches?

Section 719(2) of the Workplace Relations Act 1996 (**'WR Act'**), which is the successor to section 178(2) of the pre Work Choices legislation, provides in effect that where breaches of a provision such as the Award arise out of a single course of conduct by the person committing them, then the acts constituting the breaches are to be treated as a single breach. The Federal Magistrate, Graham Mowbray FM found that a single breach of a provision of the Award, even if it involved different employees, amounted to a single breach: TCFUA v Southern Cross Clothing [2006] FCA 325 at [28].

Penalty

Mowbray FM acknowledged that fixing penalty for breaches such as of the Award is imprecise. His Honour took certain factors, including the following matters, into account when determining the amount of the penalty to be ordered:

- the nature and extent of the conduct of the Respondent;
- the circumstances in which the conduct took place;
- the nature and extent of loss and damage, by the underpayment;
- similar previous conduct;
- whether the breaches were properly distinct, or arose out of the same course of conduct; and

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Tel (03) 9672 2666
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- factors such as contrition, deterrence and ensuring compliance with minimum standards.

In addition, the Respondent submitted that there should be some discount for acknowledgement of the breaches. The Court imposed no penalty for the annual leave loading breach as this was seen to be associated with the breach of payment of annual leave. In each other case, the Court imposed a penalty, the total of which was for $58,000, to be paid within 60 days.

Interest

The Court ordered the underpayment be remedied by payment to the employees of $2,741 and $1,074 respectively. In addition to these orders, the Court considered the question of interest to be calculated upon the underpayment.

The Court considered, as did Marshall J in Ardelle v Spastic Society [2001] FCA 220, that the penalty interest rate upon wages was too high. The Court ordered the rate of 6.5% per annum upon the wages from the date of underpayment, to the date of the judgment.

Rationale of the Decision

The Work Choices regime has created a larger number of penalty provisions than has existed in any previous state or federal industrial legislation. This case summarises many principles in relation to breach of an instrument, and penalty and interest. These same principles (applied in pre Work Choices legislation) will be examined and applied in far more than merely award breach and EBA breach decisions, in the future.

Whilst the current award regime does not resemble the law in this decision (as under the Work Choices regime, the wages are not determined by an award rate of pay, such as is contained in the Award, but rather the Australian Fair Pay Commission Standard) the many penalties available under Work Choices means that:

- the principles relating to breaches and penalty remain current; and
- the question of the calculation of interest will remain a necessary one.

For further information contact:

This article is brought to you by Tim Donaghey, Employment and Industrial Law barrister Tim regularly contributes to the Anderson Rice newsletter by providing updates on recent case law and legislation. Tim can be contacted on tim.donaghey@vicbar.com.au.

Chris Pollard
Senior Associate
cjp@andrice.com.au

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Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

www.andrice.com.au

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Melbourne Vic 3000 Australia

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Melbourne Mail Centre 8001

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CASE NOTE

Gus Catalogna and Chris Pollard

***Houghton v Arms* [2006] HCA 59 (13 December 2006)**

In a landmark decision of the High Court, the traditionally held belief regarding the vicarious liability of employers for workers' actions taken during the course of their employment has been significantly challenged.

In a unanimous decision of the High Court, it was held that although two employees were not proprietors of the business that employed them, they were nonetheless found personally liable for damages occasioned by a client who relied upon their incorrect advice in establishing a new business.

Facts

The respondent in this case Mr Arms, wanted to establish a web site, to market wine. He engaged WSA Online Ltd to design, construct and administer the web site. The appellants, Mr Houghton and Mr Student, were employees of WSA Online. They were the Project Manager and Web Designer, respectively.

In January 2000, Mr Houghton recommended to Mr Arms that he incorporate another product called the "ANZ e-Gate" product into his web site. Subsequently, either Mr Houghton or Mr Student told Mr Arms that obtaining the "ANZ e-Gate" product was just a matter of filling in the relevant form and paying a fee.

However, the process in obtaining the ANZ e-Gate product for the website was more complicated than first thought.

In June 2000, Mr Student informed Mr Arms that he was required to do more than just fill out a form and pay a fee. Unfortunately it was too late for Mr Arms to comply with the processing requirements, because the web site was to be launched in 5 days.

As a consequence, Mr Arms had to change the operation of his business and made a loss over the first 7 months of trading. After changing his business structure, Mr Arms eventually began to make a profit from his online activities.

First Instance

Mr Arms issued proceedings in the Federal Court of Australia against WSA Online, Mr Houghton and Mr Student, alleging that they had engaged in misleading and deceptive conduct.

Ryan J found WSA Online liable but dismissed the claims against Mr Houghton and Mr Student. His Honour found that Mr Houghton and Mr Student were not independently engaged in trade and commerce but acted only as employees for WSA Online.

Appeal to the Full Court of the Federal Court

On appeal, Mr Arm's was successful on the ground that an employee acting within the scope of actual authority could be held liable for misleading and deceptive conduct. The Full Federal Court found that in certain circumstances employees can be personally liable pursuant to the Fair Trading Act for engaging in misleading and deceptive conduct. Accordingly, the Court held Mr Houghton and Mr Student liable for the amount assessed against WSA Online.

Appeal to the High Court

The High Court unanimously dismissed Mr Houghton's and Mr Student's appeal, finding that an employee can be found personally liable under section 9 of the Fair Trading Act for misleading and deceptive conduct. It was irrelevant that they were not themselves business proprietors acting in pursuit of their own independent business and were therefore held liable for the representations they made.

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Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

www.andrice.com.au

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Melbourne Vic 3000 Australia

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Implications

The implications of the High Court decision are broad, and as a consequence, Directors and Managers of companies are more likely to be held personally liable for deceptive or misleading conduct and incorrect advice, if that conduct or advice leads to damage to a party with whom they have a contractual relationship.

The decision is also a message to employers, where in certain circumstances, they may join employees in actions against the company, where that employee's behaviour can be regarded as deceptive or misleading or their advice is incorrect, leading to loss and damage to a client.

The High Court's decision is also a reminder to employers to review liability insurance and contracts and agreements regarding indemnities by the company against employee conduct.

It should also be noted that traditionally, claims for misleading and deceptive conduct have only been brought against companies and not the employees responsible for such conduct. This High Court decision increases the potential for such claims to be brought directly against employees of companies. If the appropriate insurance cover is not in place for such employees, then their personal assets may be at risk.

As a result of this decision, companies should re-examine their liability cover to ensure the relevant employees are sufficiently protected against such claims.

For further information contact:

Gus Catalogna
Partner
gnc@andrice.com.au

Chris Pollard
Senior Associate
cjp@andrice.com.au

Top

Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

www.andrice.com.au

Level 10, 555 Lonsdale Street
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Target Collections Pty Ltd

Michael Coldham

Target Collections is a boutique service provider to Anderson Rice's corporate clients. Target Collections is a specialised collections business providing;

- Debt collection
- Stock loss claims
- Property recovery claims
- Investigations, including surveillance
- Claims management service for motor fleet
- Company searches, title searches and skip traces
- Full and comprehensive reporting on-line in Excel or PDF formats

Target Collections distinguishes itself from its competition because it brings to its clients the ability to view, live on the internet, the current status of all the matters that we have under instruction. Comprehensive reports show all activity - and results – right at your fingertips!

This interactive service even allows its client's to add notations to a file or any important facts that may affect its matter. Its client's may wish to add notes about a conversation it had with the debtor. This ensures at all times that there is a complete and accurate record of how the debt recovery process is being managed. This has proved very useful, especially where, for example, people communicate different things to the creditor and to Target Collections about a settlement process.

Target Collections is affiliated with Anderson Rice Lawyers, giving Target Collections the full resources of the legal firm to conclude all matters efficiently. For more information go to www.targetcollections.com.au, email m.coldham@targetcollections.com.au or call 03 9672 2613 and request a demonstration at your office.

For further information contact:

Michael Coldham
Partner
mrc@andrice.com.au

Top

Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

www.andrice.com.au

Level 10, 555 Lonsdale Street
Melbourne Vic 3000 Australia

PO Box 14099
Melbourne Mail Centre 8001

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Trade Marks Amendment Bill 2006

Philip Barton

How will the changes to Australian Trade Mark Legislation effect your Business' Future Trade Mark Applications?

The Trade Marks Amendment Bill 2006 was passed in Parliament on 12 October 2006 and received royal assent on 23 October 2006. The Bill amends the *Trade Marks Act 1995* in an attempt to strengthen the Trade Marks system and provide greater certainty for Australian businesses by aligning it with other intellectual property legislation and reducing administrative burdens.

The key amendments include:

- The ability to conduct simple trade mark transactions over the phone.
- Greater certainty that ownership of and interests in a trade mark have been recorded accurately on the Register of Trade Marks.
- Only persons with legal personality (ie individuals and corporations) may own trade marks. This will not affect the validity of trade marks already filed in the name of, for example, trusts or business names.
- Greater flexibility for the correction of clerical errors and obvious mistakes;
- An express provision that the power of a registered owner to deal with the trade mark is limited only by rights appearing in the register (making the recording of third party interests imperative);
- Any person, rather than only a "person aggrieved", can make an application to have a trade mark removed from the Register due to non-use;
- The grace period within which a trade mark registration can be renewed has been reduced from 12 months to 6 months in line with the periods allowed under *Patents Act 1990*, the *Designs Act 2003* and the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*.
- The Registrar will now be able to initiate court action to amend or remove a trade mark from the Register where it is clearly in the public interest.
- The creation and modification of grounds of opposition to trade mark registration which include:
    - The introduction of an opposition ground where the trade mark has been applied for in bad faith;
    - The lowering of the threshold for the reputation ground of opposition, so that only a likelihood of deception or confusion is required (rather than substantial identity/deceptive similarity between the respective marks);
    - An additional ownership ground of opposition based on prior and continuous use of a substantially identical/deceptively similar mark for similar goods and services (this only applies in oppositions against applications accepted based on prior and continuous use);
    - Clarification that opposition based upon geographical indication only applies where the goods covered by an opposed trade mark are similar to those covered by a geographical indication, or the use of the opposed mark on the goods it covers is likely to deceive or cause confusion; and

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Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

www.andrice.com.au

Level 10, 555 Lonsdale Street
Melbourne Vic 3000 Australia

PO Box 14099
Melbourne Mail Centre 8001

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- Provision for a trade mark found in opposition to have been amended contrary to the Act to be revoked and re-examined.

▪ Notices of objection will now cease after 4 years, whereas previously they had to be renewed every two years.

The amendments resulted from a review which found that the trade marks system was effective, but could be enhanced. The amendments are particularly beneficial to small-to-medium businesses, as more than half of 50,000 trade marks applications are received from this sector.

For further information contact:

Philip Barton
Partner
pnb@andrice.com.au

Owners Corporation Act 2006 (Vic)

Property Update

Melva Cameron

The *Owners Corporation Act* ("the Act") was passed on 14 September 2006 and received assent on 19 September 2006. The Act has not yet come into operation but it must come into operation by no later than 31 December 2007. Some of the provisions of the Act are likely to come into force before that date. The Act will directly effect a vast number of Victorians who own, live in, manage or develop bodies corporate.

The Act changes the structure, function, rights and obligations of bodies corporate and will effect property owners, managers and property developers of residential properties, commercial properties, retirement villages, shopping complexes, office spaces, industrial complexes and mixed use developments.

At present, bodies corporate are created and managed largely under a regime established by the *Subdivision Act*. However since that legislation was enacted, the number and complexity of bodies corporate has increased dramatically.

The Act is intended to address the inadequacies in the *Subdivision Act 1988* in an environment of increasing numbers of bodies corporate and the increasing complexity in the way in which they are structured and managed. The Act represents a shift in policy and intends to create a more certain legal framework for the governance of all bodies corporate in Victoria.

An Owners Corporation ("OC") is created under the *Subdivision Act 1988* (as amended by the Act) in the same way that a body corporate was created, for example, a plan of subdivision may provide for the creation of one or more OC's and a plan of subdivision which contains common property must provide for the creation of one or more OC's. An OC will automatically come into existence upon the registration of a plan of subdivision.

❖ Transition to the Act

The Act contains transitional provisions to allow for changeover to the new regulatory scheme and includes the following:-

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Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

www.andrice.com.au

Level 10, 555 Lonsdale Street
Melbourne Vic 3000 Australia

PO Box 14099
Melbourne Mail Centre 8001

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- Existing bodies corporate will become OC and will be subject to the Act;
- Existing body corporate rules and resolutions will continue to the extent they are not inconsistent with the Act and the regulations;
- Any body corporate certificate issued immediately before the commencement day of the Act will be deemed to be an OC certificate.

❖ **Some key changes in the Act include the following:-**

There are to be three levels of OC's:-

- OC's created by two lot subdivisions; these are exempted from compliance with a number of requirements under the Act;
- OC's generally; and
- Prescribed OC's.

Prescribed OC's will be of a class prescribed by the regulations (the regulations are not yet available), which will have additional obligations and will typically apply to larger OC's.

A prescribed OC will be obliged to:-

- Prepare a maintenance plan and have a maintenance fund;
- Prepare financial statements (subject to audit requirements); and
- Obtain a valuation of any building it is liable to insure, not less than every five years.

An OC will be required to:-

- Keep records of its activities, undertakings and membership and make them available for inspection, free of charge, to current and incoming lot owners;
- Keep a register of information including copies of resolutions and financial statements as well as agreements, contracts, leases entered into; and
- Ensure that the accounts and books of account provide for the making of a true and fair view of reports of the financial situation of the OC.

Any person may apply for an OC certificate on payment of the requisite fee. The OC certificate is required to incorporate information including:-

- Fees payable, proposed or owing in respect of a lot;
- Insurance;
- Repairs and maintenance;
- Funds held by the OC;
- Liabilities of the OC;
- Contracts, leases, licences and agreements affecting common property;
- Services provided to lot owners;
- Notices served on the OC;
- A copy of the rules must be attached to the OC certificate.

The Act will also require a copy of the OC certificate to be attached to the Vendor's Statement (Section 32) in sales of properties affected by an OC.

The Act provides more flexible mechanisms for dispute resolution where an OC is a party to a dispute and can be summarised as follows:-

- First tier - internal dispute resolution process for OC's;
- Second tier - Consumer Affairs Victoria will be able to direct complainants to low cost mediation and conciliation; and

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Tel (03) 9672 2666
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Email lawyers@andrice.com.au

www.andrice.com.au

Level 10, 555 Lonsdale Street
Melbourne Vic 3000 Australia

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- Third tier - VCAT will have broader powers to resolve disputes and make binding determinations.

An OC (including its manager & committee members), proxy holders and also developers will be required to act honestly and in good faith and to exercise due care and diligence in performing their functions.

❖ **Conclusion**.
The Act represents a shift in policy towards greater regulation of OCs by:-

- Addressing both the obligations and rights which are common to all OC's and recognises the different requirements of two-lot OC's, OC's generally and large OC's;
- Outlining the structure, function, rights and obligations of lot owners, OC's, managers and committees; and
- With the information and record keeping obligations and requirement for disclosure, it will ensure potential purchasers can make an informed decision about the property.

Interested parties should consider how they will comply with the Act when it comes into force and seek further advice if necessary.

For further information contact:

Melva Cameron
Senior Associate
mkc@andrice.com.au

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CASE NOTE

John Lancefield

Sons of Gwalia Ltd v Margaretil [2007] HCA 1 (31 January 2007)

In this recent High Court case, it was held by majority that a shareholder's claim against an insolvent company for misleading and deceptive conduct in relation to the company's share price was provable with claims by ordinary creditors.

Facts

The shareholder had purchased shares in the insolvent company shortly before administrators were appointed to the company. He alleged that at the time of purchase the company had breached its disclosure obligations to the market by withholding information that would have rendered the share price nil. The shareholder claimed that he relied on the company's failure to make proper disclosure when he purchased the shares, and sought damages against the company for misleading and deceptive conduct.

The Law

Section 563A of the *Corporations Act 2001* provides, in effect, that in a liquidation the company's debts to its members (including shareholders) in their capacity as members are not to be paid until all of the company's other creditors have been paid. Earlier cases in Australia and England have held that shareholder claims for compensation for misleading representations concerning the company's share value are to be postponed in a winding up to claims by ordinary creditors.

Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

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Level 10, 555 Lonsdale Street
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The Outcome

However, in *Sons of Gwalia* the High Court ruled that the shareholder was entitled to prove his claim with ordinary creditors. The Court found that although the claim related to the value of the company's shares, it was not a debt owed to the shareholder in the shareholder's capacity as a member of the company. Accordingly, the shareholder's claim was not postponed under section 563A.

Implications

The decision promotes the interests of aggrieved shareholders at the expense of ordinary creditors. Given the development of company reporting obligations and shareholder compensation claims, *Sons of Gwalia* has the potential in some cases to significantly dilute the dividends that are paid to ordinary creditors in liquidation. The Commonwealth Parliamentary Secretary to the Treasurer has referred issues arising from *Sons of Gwalia* to the Corporations and Markets Advisory Committee for consideration and advice.

For further information contact:

John Lancefield
Partner
jal@andrice.com.au

Anderson Rice News

New Addition to the Firm

Anderson Rice welcomes Caitlin Tierney, who will commence her Articles with the firm on 1 March 2007.

Caitlin studied Law/Arts (majoring in Politics) at La Trobe University. She completed her studies in November 2006 and has a keen interest in Commercial Litigation, Insurance and Workplace Relations.

Caitlin has worked as a paralegal at Melbourne based firms and has volunteered at several community legal centres. Caitlin also completed a seasonal clerkship at a Melbourne firm at the end of 2006.

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Editor
Nicole Baker
Lawyer, Litigation & Insurance

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Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au

www.andrice.com.au

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