



CLIENT INFORMATION BULLETIN

MACGILLIVRAYS

S O L I C I T O R S

P-PLATE DRIVERS: LOSS OF AUTONOMY?

As a result of the Qld and NSW governments' concern for continued road safety and the NSW government's discussions with the Young Drivers Advisory Panel, legislation affecting P-Plate drivers in both States is planned for introduction on 1 July 2007. It is set to introduce new rules for new drivers, including night curfews, passenger restrictions and the banning of high-powered cars.

The legislation is part of the graduated licensing system that is being slowly phased in across all Australian states. The aim is to reduce the number of motor vehicle related fatalities that occur in the late night and early morning hours.

Under the NSW restrictions first year P1 P-Plate driver will only be permitted to carry one passenger under the age of 21 between the hours of 11.00pm to 5.00am (with some exemptions). These restrictions will be introduced at the same time as a similar scheme is introduced in Queensland providing consistency between the two states.

According to the NSW Minister for Roads and Traffic Authority, Mr Eric Roozendaal, *"P1 drivers account for a massively disproportionate number of fatal accidents in the early hours and one third of these P1 drivers had more than one passenger."*

In the United States, New Zealand and Europe similar programmes have proven to be successful in helping to reduce young driver related motor vehicle accidents.

Research has shown that young drivers are more likely to be affected by their peers late at night when alcohol may play a part, or where passengers may influence the driver's alertness and ability to exercise caution.

The main concern amongst young drivers is the availability and safety of public transport, particularly in rural areas. Although it can be argued that 'night ride' transport is available to major rail stations and central points, it still begs the question as to how young people are able to get home safely at an affordable cost.

Whilst critics of the programme argue that these measures are draconian, every cloud has a silver lining. Undoubtedly, an opportunity now lies with the bus industry to increase the availability of its services in all areas including rural areas. At present, bus night services in both Qld and NSW are limited in scheduling and destinations, generally only servicing main arterial roads and train stops. In light of the new legislative licensing restrictions placed on P-Plate drivers along with the '3am Lockout' regime in Qld, whereby late-trading licensed premises are prohibited from allowing patrons entry or re-entry into their premises after 3am, there is little doubt that an increase in demand on bus services will follow.

Similar to the taxi industry which charges a premium for night services, it is expected that night bus services will too involve an increase in price to cover operating expenses as well as additional security measures likely to be adopted by bus operators to protect their employees and travelling patrons from the small percentage of violent inebriated youth likely to abuse the service.

If you wish to learn more about what opportunities may present to your transport business, please do not hesitate to contact us. (MacGillivrays currently acts for Queensland, New South Wales and Tasmanian bus industry councils).



BY CHRISTINA ALEXOPOULOS
Solicitor, Retail Banking Service, Sydney



FOUR COHESIVE UNITS SERVE AS THE DRIVER OF EXCELLENT SERVICE DELIVERY / BANKING SERVICES / CORPORATE AND BUSINESS GROUP / LITIGATION AND DISPUTE RESOLUTION SERVICES / PROPERTY SERVICES / WE ARE ALL TOGETHER DIFFERENT



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Level 2, 200 Adelaide Street Brisbane Qld 4000
Phone 07 3221 4550 Facsimile 07 3221 8500

Level 7, 4 O'Connell Street Sydney NSW 2000
Phone 02 9239 9400 Facsimile 02 9239 9499

Level 9, 190 Queen Street Melbourne VIC 3000
Phone 03 8622 2700 Facsimile 03 8622 2722

Level 5, 50 Cavill Avenue Surfers Paradise Qld 4217
Phone 07 5630 9500 Facsimile 07 5630 9599

1 Ocean Street Maroochydore Qld 4558
Phone 07 5451 1455 Facsimile 07 5451 0744

E-mail us at macgill@macgillivrays.com.au
Phone us on 1300 369 581

ABOUT US

139 CLUB - RECIPES HELPED TO PROVIDE CHRISTMAS LUNCH

MacGillivrays staff developed a MacGillivrays Recipe book containing favourite staff recipes, the proceeds of which helped to provide Christmas lunch. An initiative of the senior PAs of the firm, the book was compiled and sold with the proceeds going to the 139 Club. As at Christmas over \$700 had been raised to help provide Christmas lunch and meals to 423 people over the four day Christmas break.

The cookbooks are still on sale! To place an order email Melinda O'Brien on melindal@macgillivrays.com.au. At 155 pages the books are selling for \$5.00 each or three for \$10.00.



LITTLE FISH IN A BIG POND

MEET OUR NEWLY ADMITTED SOLICITORS

On January 29, 2007 the final intake of MacGillivrays' Articled Clerks were admitted to the Roll of Legal Practitioners of the Supreme Court of Queensland. The admission ceremony was conducted by the Chief Justice of the Supreme Court, the Honourable Justice Paul de Jersey AC.

It signified the end of an era for MacGillivrays. As of January this year the firm is only offering 18 month Graduate Clerkships, rather than the two year Articled Clerk programme it has offered to law graduates since 1954. Five articled clerks were admitted and two have stayed with the firm as first year solicitors. See their profiles and responses (right) to our word association questionnaire.

MACGILLIVRAYS NEWLY ADMITTED SOLICITORS



MARIA CAPATI

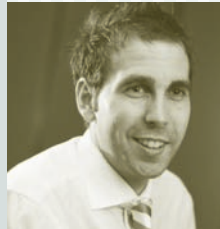
Maria Capati has joined Corporate and Business Services and is working with Peter Dwyer. During her articles Maria worked on government contracts, sale of businesses and share transactions where she developed her interest in corporate work.

Maria has both a Bachelor of Economics and Bachelor of Law (Honours) from the University of Queensland.

In her spare time, Maria enjoys shopping, reading and travelling.

Word Association Response

MacGillivrays	Traditional	Law	Complicated
Politics	Unpleasant	Movies	Fun
Alcohol	Avoid	Media	Murdoch
Breakfast	Yoghurt	Sport	Netball
Qld Reds	Over		



MARK ASKIN

Mark Askin holds a Bachelor of Laws (Honours) from the University of Queensland and is currently a solicitor in Property Services working with Peter McLeod. Mark says he is looking forward to making our clients' property transactions as effortless as possible for them, and to confronting the new challenges that will inevitably arise in the ever changing landscape of property law.

Mark's interests lie in a mix of property related transactions, including residential and commercial acquisitions, and commercial and retail leasing.

Outside of work, Mark plays for the MacGillivrays sponsored soccer team. He also dabbles in playing the drums and guitar and writing music.

Mark's long term aspirations include property investment and continuing his love of cars.

Word Association Response

MacGillivrays	Relaxed	Law	Challenging
Politics	Popularity	Movies	Too expensive
Alcohol	Scotch	Media	Eddie McGuire
Breakfast	Bacon & Eggs	Sport	Soccer
Qld Reds	You mean Broncos...		



RACHEL CONNORS

Rachel Connors recently joined the firm as our new Knowledge Manager. Rachel is a solicitor, holds a Bachelor of Arts and Laws (with Honours) from the University of Queensland and has a Master of Laws from the University of Melbourne.

Rachel's role incorporates various functions including developing and facilitating our practitioners' learning and development needs.

In her spare time, Rachel enjoys playing touch football, dining out, collecting champagne and going to movies with family and friends.

Word Association Response

MacGillivrays	Established	Law	University days...
Politics	Howard	Movies	Relaxation
Alcohol	Champagne	Media	Pathetic
Breakfast	Cereal	Sport	Gym
Qld Reds	No to Tuqiri!		

WORKCHOICES GOES TO THE MOVIES

Australian Industrial Relations Court decision denies employee access to unfair dismissal provisions in operational re-structures, regardless of circumstances.

In a recent case the Full Bench of the Industrial Relations Commission ruled that WorkChoices requires a strict interpretation of whether or not a genuine operational reason lead to the dismissal and that issues of redeployment were irrelevant to making that assessment.

In the case in question - *Village Cinemas Australia Pty Ltd v Carter* [2007] AIRCFB 35 (15 January 2007, PR975821), Mr Carter was the General Manager at a Village Cinema in Doncaster, Melbourne for 19 years.

Village Cinemas Australia Pty Ltd ('Village') decided to close the Doncaster cinema and consequently Mr Carter was made redundant.

It was claimed at a hearing of the Australian Industrial Relations Commission ('AIRC') that:

- Village had redeployed all other employees of the Doncaster cinema
- Village may have been able to find an alternative position for Mr Carter
- Whilst Mr Carter was happy to accept a position of lower status or otherwise accommodate redeployment, Village did not investigate the possibilities.

The WorkChoices legislation provides that unfair dismissal laws do not apply to an employee whose employment is terminated 'for genuine operational reasons or for reasons that include genuine operational reasons'. Operational reasons are defined as reasons of an economic, technological, structural or similar nature relating to the employer's business. The onus is on the employer to prove that the dismissal is for a genuine operational reason.

Initially Mr Carter won his case for unfair dismissal on the basis that Village was under an obligation to redeploy Mr Carter, if possible, and also to investigate whether Mr Carter would accept a lower position.

The decision raised concerns from employers as to the lengths to which they may be required to go to ensure that a dismissal was for a genuine operational reason and Village Cinemas lodged an appeal with the Full Bench of the AIRC.

The Full Bench of the AIRC overturned the initial finding, ruling that whilst WorkChoices requires a strict interpretation of whether or not a genuine operational reason lead to the dismissal and that issues of redeployment were irrelevant to making that assessment.

In the case in question, the employer proved that the demolition of the premises resulted in the position of General Manager of those premises becoming redundant and the Full Bench found that there was no doubt that this was an operational reason. Village was therefore exempt from an unfair dismissal action.



S U C C E S S F U L

On interpretation of the legislation, the application by the Full Bench at law is sound but the decision has caused outcry from the ACTU and concern from leading employee advocates, as it appears to provide an avenue for employers to avoid unfair dismissal laws when re-structuring the business by choice, rather than by necessity. While the WorkChoices legislation is focussed on encouraging business growth, there are concerns that this was an outcome that may not have been intended.

If wishing to rely on the 'operational reasons' exclusion from unfair dismissal laws, employers carry the onus of proof and thus, they must ensure that they are able to prove that the re-structure or other operational change was the reason or a reason for the dismissal.

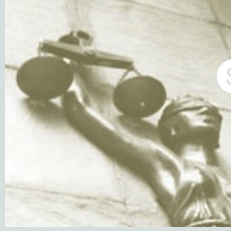
Given the climate of political opinion and an upcoming Federal election this year however, an employer may be prudent to also make some investigations into redeployment possibilities before dismissing an employee for operational reasons in case the political outcry sparks amendment to the legislation.

MacGillivrays' Litigation & Dispute Resolution Team are specialists in the new WorkChoices legislation and can provide advice to both employers and employees. If you have a query or would like to learn more about WorkChoices please contact our Employment Relations Partner, Gary Woodman.



BY ROWENA SPECHT-WHYTE
**Solicitor, Litigation & Dispute
Resolution, Brisbane**

COMMERCIAL LITIGATION WORKPLACE HEALTH & SAFETY MEDIATION
INTELLECTUAL PROPERTY LITIGATION DEBT RECOVERY PERSONAL INJURY
BANKING DEFAULT CORPORATIONS LAW CONTRACTUAL DISPUTES
SHAREHOLDERS ACTIONS PARTNERSHIP DISPUTES PRODUCT LIABILITY
INSOLVENCY ENVIRONMENTAL LAW JUDICIAL REVIEW TRADE PRACTICES



WHAT'S NEW?

CLIENT DOCUMENTS - DO THEY STAY OR DO THEY GO?

Businesses and individuals should be aware that it is now a criminal offence in Victoria to destroy or conceal documents which are likely to be required as evidence in legal proceedings.

Since the controversial and highly publicised 2002 Victorian Court of Appeal case of Mrs McCabe and British American Tobacco Australia ('BATAS') where there were allegations of deliberate document destruction by BATAS and its legal representatives, the Victorian government has moved to introduce a new legislative package ensuring criminal sanctions to individuals or companies who deliberately destroy documents relevant to current or future legal proceedings.

The legislation, which commenced on 1 September 2006, amends the Victorian Crimes Act 1958 and is burdensome in that it not only applies to traditional court proceedings but extends to any proceeding before any person acting judicially such as an Arbitration, Government Commissions / Inquiries and Administrative hearings. It is uncertain whether the Act would apply to court ordered mediations.

For companies, the new legislation makes it an offence if an employee deliberately destroys or conceals document(s) reasonably likely to be, or required in evidence in current or future legal proceedings.

The company will be found liable if there is a finding of a corporate culture within the company which directs, encourages, tolerates or leads to the offence being carried out.

A company can be fined up to \$322,290. A 'corporate culture' is defined as an 'attitude, policy, rule, course of conduct or practice' existing within the company generally or in a particular part of the company.

The new legislation permits a defence of 'due diligence' albeit the term 'due diligence' is not defined and as such it will be interesting to see how a court will assess whether a company was exercising due diligence.

However, the statutory 'due diligence' defence arguably provides a company with a very good reason as to why it should invest in developing and applying a bona fide **information management policy** which covers document destruction and retention. Such a policy would have to be regularly communicated to all staff, actively implemented and kept updated so that it complies with all State common law and legislative obligations.

A well-drafted and actively implemented information management policy can save a company much money, time and reputation as well as protect its clients' interests if the company was ever queried as to the destruction of documents.

In the event that a company is unable to produce documents which should be available (and no defence or explanation is accepted by or provided to the court), the court can order against the company the following:

- an adverse inference be drawn from the unavailability of the document;
- that certain evidence be prohibited from being adduced;
- that parts of a company's defence be struck out;
- allow presumed facts without evidence establishing the contrary; or
- order that the evidentiary burden of proof be reversed in respect of the fact in dispute.

Such orders can have very serious consequences for companies as they affect their ability to properly defend allegations and run the risk of precedents being set.

In light of the new legislation and the serious ramifications for companies, directors are urged to consider how they retain and destroy their client documents and whether the company's current document management policy or strategy adequately best serves the company and their clients.



BY RACHEL CONNORS
Knowledge Manager

PLEASE NOTE: This newsletter is not legal advice and our comments are of a general nature only. This document is not to be relied on as substitution for proper detailed advice. If you would like to be removed from, or added to our mailing or emailing list, contact Rachel Connors on (07) 3221 4550 or rachel@macgillivrays.com.au

MACGILLIVRAYS TRI-SERIES COMPULSORY CPD SUBJECTS

- RISK MANAGEMENT
- TRUST ACCOUNTING
- ETHICS

An exciting initiative: Providing the opportunity for in-house legal counsel to accumulate the six compulsory CPD units needed to meet the requirements of the Queensland Law Society.

MacGillivrays is hosting a Tri-Series of the Compulsory CLE subjects - Risk Management, Trust Accounting and Ethics.

Each of the three sessions will be presented by a Queensland Law Society quality assured presenter.

The first event, Risk Management, was held on Monday 28 March 2007 from 4 - 6pm. The presenters were Mr David Durham, Risk Manager, Lexon Insurance and Mr Giles Watson, the Queensland Law Society's Legal Practice Consultant.

Trust Accounting and Ethics are scheduled to be presented on 16 July and 16 October 2007 respectively. The lectures will be followed by light refreshments.

Solicitors holding a practising certificate since January 2005 are required by the QLS to obtain 2 CPD points in each topic by 31 March 2008.

If you are interested in attending these seminar, please contact Melinda O'Brien on 3228 5205 or email: events@macgillivrays.com.au

THE LIGHTER SIDE

Lawyers should never ask a question if they aren't prepared for the answer. In an American trial, a Southern state small-town prosecuting attorney called his first witness, a grandmotherly, elderly woman to the stand. He approached her and asked, "Mrs. Jones, do you know me?" She responded, "Why, yes, I do know you, Mr. Williams. I've known you since you were a young boy, and frankly, you've been a big disappointment to me. You lie, you cheat on your wife, and you manipulate people and talk about them behind their backs. You think you're a big shot when you haven't the brains to realize you never will amount to anything more than a two-bit paper pusher. Yes, I know you."

The lawyer was stunned! Not knowing what else to do, he pointed across the room and asked, "Mrs. Jones, do you know the defence attorney?" She again replied, "Why, yes, I do. I've known Mr. Bradley since he was a youngster, too. He's lazy, bigoted, and he has a drinking problem. He can't build a normal relationship with anyone and his law practice is one of the worst in the entire state. Not to mention he cheated on his wife with three different women. One of them was your wife. Yes, I know him."

The defence attorney almost died. The judge asked both counsellors to approach the bench and, in a very quiet voice, said, "If either of you idiots asks her if she knows me, I'll send you to the electric chair."