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Recent Changes to Bail Laws for Domestic Violence Offences



It's no secret that domestic violence has been a prominent topic in recent years. Likewise, grants of bail for alleged perpetrators are often controversial matters subject to scrutiny by the media.

In February this year, it was reported that a man in Pimpama who committed suicide after killing his wife was on bail for an earlier violent attack on his wife. Similar tragedies in recent times have resulted in calls for tighter bail laws.

On 30 March 2017, the *Bail (Domestic Violence) and Another Act Amendment Act 2017* (Qld) (**the Amendment Act**) came into force. This article will address how the amendments affect applications for bail in domestic violence matters.

Changes to 'Show Cause' Status

Section 16 of the *Bail Act 1980* outlines the factors that must be considered in an application for bail. Ordinarily, a person charged with an offence is entitled to bail unless the court is satisfied the person is an unacceptable risk of either, in summary:

- failing to appear in court;
- committing further offences; and
- endangering their own or someone else's welfare or safety.

However, in certain situations, the presumption of bail is essentially reversed,

requiring the defendant to show cause that their detention in custody is not justified. Perhaps the most notable of those situations is the alleged use or threatened use of a weapon in the course of an indictable offence and being charged with an indictable offence that occurred while on bail for another indictable offence.

Arguably, the most significant effect of the Amendment Act is to extend the 'show cause' position to any defendant charged with a *relevant offence*. Relevant offence is defined under section 16(7) as:

- an offence of choking under section 315A of the *Criminal Code 1899*;
- any offence punishable by a maximum penalty of at least 7 years imprisonment when also charged as a domestic violence offence;
- offences under the *Criminal Code 1899* of threatening violence, dangerous operation of a motor vehicle, deprivation of liberty and unlawful stalking when also charged as a domestic violence offence; and
- offences of contravening a domestic violence order where:
 - i. the offence involves the use, threatened use or attempted use of violence towards a person or property;

- ii. the defendant has been convicted, within the previous 5 years, of contravening a domestic violence order in the circumstances of (i), above;
- iii. the defendant has been convicted, within the previous 2 years, of any offence of contravening a domestic violence order.

Clearly, the scope of 'relevant offence' is very broad and would undoubtedly capture the majority of contravening domestic violence order charges that come before the courts.

The impact of the amendments is that a greater percentage of people charged with domestic violence related offences will fall into a 'show cause' category. This will inevitably result in more defendants being denied bail by police and having to make a 'show cause' bail application before a court.

Power for Prosecution to Seek Review of Bail Decision

Introduced in the Amendment Act, section 19CA of the *Bail Act 1980* empowers the prosecution to seek a review of a grant of bail regarding a domestic violence offence. Ordinarily, such a review would be heard by the Supreme Court.

When an application for review is made, the defendant is not entitled to be at liberty, and will remain so for three business days unless the application for review is heard or dismissed before then.

No doubt, the intention of this unusual and powerful provision is to ensure the

protection of victims of domestic violence. However, it clearly also carries the potential for defendants to be unjustly detained as there are no apparent restrictions in prosecution making an application for review.

It should be noted that the amendments to bail laws addressed in this article are relatively new, with courts and both sides of the bar table still adjusting to their implantation. What is clear is that the potential consequences for being charged with domestic violence offences or having a domestic violence order made against a person are very serious and far reaching. It is a rapidly evolving area of law.

We would encourage any person facing domestic violence charges or applications for domestic violence orders to seek advice from a criminal lawyer about the potential ramifications.

Trademark – It's Not Just a Symbol



Business & Property Team

We come across the ® and 'TM' symbol behind brand names almost every day and most people can identify that these are trademark symbols. Apart from that, how much more do people know about trademarks? How do you acquire a trademark, why do businesses use trademarks, what is the process involved?

What is a Trademark?

A trademark is a sign or a descriptive form used in a business to distinguish one business from another. A business uses trademarks to distinguish itself from other similar businesses and to inform its target audience that certain goods or services come from a particular trader or service provider.

A trademark can be a word, phrase, letter, number, distinct shape, logo, picture, or aspect of packaging or a combination of these.

Trademarks in Australia

In Australia, trademarks are governed under the *Trade Marks Act 1995* (Cth) and administered by Intellectual Property (IP) Australia. IP Australia is the body responsible for accessing, processing, approving and enforcing the laws on trademarks.

Registration of trademarks in Australia involves a number of stages.

Registered Trademark and the Advantages

Registration of a trademark is not compulsory but there are advantages and benefits of it. These include but are not limited to:

- **Effective marketing tool.** More than often the public identifies and associates a certain quality and image with goods and services bearing certain trademarks and your trademark can be one of them! Your trademark may be an integral part of your marketing strategy and you will want to protect it. Registration provides such protection from infringement from competing businesses.
- **Legal rights.** Registration gives the trademark holders the legal right to use, licence or even to sell the trademark within Australia for the classes of goods and services for which it is registered. Once a mark has been registered as a trademark, other businesses will be prevented from registering a similar trademark.
- **Notice to the world at large.** Registration also serves as a nationwide constructive notice of one's ownership of the trademark.
- **Court's jurisdiction.** Jurisdiction of the federal court may be invoked against trademark 'intruders'. If your trademark is registered and someone else uses the similar trademark for their business, you can demand and 'order' them to

cease using it because you are the trademark owner.

- **International trademarks.** Registration can be used as a basis for obtaining international registration in all countries that are members of the Madrid Protocol. When your business expands overseas, your trademarks can have similar protection.

So you have developed a great name for your business or product with your own

distinct logo and your business reputation counts on it?

Wouldn't you feel offended when some other businesses claims your efforts to be theirs and steal your profit? Registration is the shield.

Your trademark is more than a mere symbol. Protect it!

Personal Property Securities Act Changes



Changes under the personal property securities regime that came into effect on 20 May 2017 significantly amend the definition of a Personal Property Securities Lease (**PPS Lease**).

The *Personal Property Securities Act 2009* (Cth) (**PPSA**) provides that the security interests (including PPS Lease) not perfected by registration or otherwise may be exposed to adverse consequences if the lessor becomes insolvent and there are competing or other security interests in the goods in question.

What are the Reasons for the Changes?

The reasons for the changes were (as explained by the Minister for Justice), in summary:

- businesses sometimes lease goods for a short period of time and permit customers to then continue using those goods as long as the goods are needed (for example, chainsaws, cement mixers etc.);
- under the old regime, businesses had to insist on fixed terms for the lease of a chainsaw or cement mixer in order to protect their interest in the goods; and
- if the customer needs the goods for an extra day or a week, the lessor needs the flexibility to accommodate this without an onerous administrative burden.

What are the Changes?

The *Personal Properties Securities Amendment (PPS Leases) Act 2017* ("**amending Act**"), changes the definition of "PPS lease" in section 13(1) of the PPSA.

The new definition states that a PPS Lease means a lease or bailment of goods, if the

lessor is regularly engaged in the business of leasing goods:

- for a term of more than 2 years (rather than the previous 1 year) - will be a PPS lease from day one;
- for a term of up to 2 years (rather than the previous one year) that is automatically renewable, or renewable at the option of one of the parties, for one or more terms that might exceed two years - will be a PPS lease from day 1,
- for an indefinite term - will be a PPS lease if the lessee retains uninterrupted (or substantially uninterrupted) possession for more than 2 years (but not until the lessee's possession extends for more than 2 years) [previously, leases for an indefinite term were PPS leases from day 1], and
- a lease for a term of up to 2 years (rather than the previous 1 year) -

will be a PPS lease, if the lessor retains uninterrupted (or substantially uninterrupted) possession of the leased goods for a period of more than 2 years after the day the lessee first acquired possession (but not until the lessee's possession extends for more than 2 years).

Do the Changes Affect Existing Leases?

The amendments are not intended to apply to leases of goods which would have been PPS Leases prior to the commencement of the amending Act.

However, the changes to the definition of PPS Lease appear to apply to lease, rental and hire arrangements entered into after the commencement of the changes (May 2017), even if those arrangements incorporate the terms of a contract entered into before the commencement of these changes.

Elder Abuse & Superannuation



Superannuation is a major part of Australia's retirement income system. With the progressive tightening of income tests and reductions in Government benefits, superannuation is likely to overtake the age pension as the major source of support for the majority of working Australians in their retirement years.

There are currently over \$2 trillion in superannuation assets in Australia. Superannuation is currently the second-largest savings vehicle for Australian households (accounting for 17 per cent of household assets). This is likely to grow significantly in the next 25 years with over \$10 trillion in assets projected to be held in superannuation in Australia by 2040 (see Assorted forecasts, Treasury RIM Group and Cooper Review).

Given the importance of the superannuation sector to working Australians, and its importance in the

financial system and the economy more broadly, governments need to ensure that there is confidence in the system, and that it meets contemporary standards and is consistently delivering the best outcomes for members.

It is now a matter of law, subject to certain transitional arrangements, that the majority of Australians will only be able to access their superannuation entitlements when they reach 65 years of age or become permanently incapacitated or die. This exposes persons over 65 to the risk of abuse. Elder abuse can take the form of deception, threats, violence, coercion and other fraudulent pressures to make a person contribute, withdraw or transfer superannuation funds for the benefit of the abuser.

The Australian Law Reform Commission (**ALRC**) in its recent Report 131 issued May 2017 entitled 'Elder Abuse and National Legal Response-final report' identified a number of areas of concern that specifically related to elder abuse through the use and management of superannuation.

1. Binding Death Benefit Nominations (BDBNs)

People who have an interest in a superannuation fund may wish to authorise an attorney (appointed by an enduring power of attorney) to deal with their interests. Retail funds often will not recognise such an appointment or authority. There may also be uncertainty as to how a BDBN is filled in, what will be accepted by the fund, whether the BDBN complies with the very wide variety of

requirements of different funds and whether it is simply being incorrectly completed.

The increasingly complex legislation surrounding relationships and the rights and entitlements of former spouses and children can make the whole issue of estate planning and the preparation of BDBNs a very complex process. In the absence of any proper or direct regulations or guidelines for superannuation trustees nationally, it can often be the case that BDBNs are not properly prepared and are being found to be invalid at the date of death of a member.

In some cases the BDBN has lapsed because of some failure to observe a time-frame applicable to one fund but not another, which can cause unexpected windfalls or unexpected disputation after a member passes away.

2. Management of Self-Managed Super Funds (SMSFs)

The other area where problems arise is SMSFs. SMSFs may be a very good idea for persons with access to their superannuation who want to directly control it as trustees of their own funds, while they are fully capable, but once they are elderly or become subject to illness, or simply deteriorate due to advanced age, the procedural and technical aspects of managing such a fund can become overwhelming.

The ALRC identified a number of recommendations in its report regarding SMSFs, mainly being recommendations for changes in the law.

Some recommendations include:

- a) to better facilitate the process for appointing a person's attorney as trustee or director of a self-managed super fund in the event of disability;
- b) improved planning for a potential legal disability as part of the operating standards of a self-managed super fund, and
- c) provide for Australian Taxation Office notification where an enduring attorney has taken over as trustee/director of the SMSF following the principal suffering legal disability.

3. Tax on Superannuation Benefits

It is often considered that super funds are a tax-free environment, but this is not the case at all. If a member nominates a beneficiary who is not a dependant or in an interdependent relationship, there can be harsh tax consequences.

If a BDBN appoints a spouse (who is still the spouse at the date of death), no tax is payable. If the nomination appoints non-dependant children as beneficiaries of the fund death benefits, then tax may be payable at the rate of 15% on the benefit paid. If the funds are payable to a member's estate, the tax may increase substantially.

Another fact that is often forgotten is that relationships can change over the years. Applying a 'set and forget' mentality with non-lapsing BDBNs can cause very unfair consequences where relationships have soured or persons who were in a good relationship no longer enjoy that

relationship at the date of death of the member. As matters stand, if the BDBN form is adequately prepared, there may be no right to appeal to any court or tribunal, and the benefit must be paid to the person nominated as the beneficiary.

4. Poor Financial Advice

Another area of potential abuse arises through poor management advice as trustees of SMSFs become older and less able to monitor their decision-making, and the laws applicable to their decisions become more complicated.

Trustees of SMSFs can be exposed to risk in that unscrupulous intermediaries can take advantage of their diminished investment acumen and may possibly misappropriate or misuse the funds under administration in schemes such as churning investments, inappropriate investments, skimming and theft of funds.

These were identified as areas of concern by the ALRC which recommended that greater powers be given to the Australian Prudential Regulation Authority to limit or control misuse of members and trustees of funds by their advisers.

5. What Should Members of Superannuation Funds Watch Out For?

With elder abuse involving superannuation, all superannuation trustees, members and their advisers need to be aware that:

- a) the laws in respect of superannuation are changing rapidly, both by decisions of the courts and by the way that the

retail funds and self-managed super funds are regulated by different authorities;

- b) any estate planning process must address the issue of entitlement to superannuation proceeds, control of funds, transfer of control upon loss of capacity or death;
- c) the tax consequences of payment to non-dependant beneficiaries need to be considered before decisions which can trigger substantial tax liability;
- d) BDBNs need to be examined, the trustees of the fund need to confirm that they are validly prepared and members need to consider periodically whether or not their nomination is appropriate;
- e) in the case of lapsing BDBNs, when the benefit lapses, some mechanism needs to be maintained to ensure that a new nomination is made; and
- f) in the case of multiple interests in different superannuation funds all interests need to be pursued and benefits need to be examined at each stage of the superannuation cycle.

6. Role of Estate Planners When Dealing with Superannuation

Finally, a uniform approach to the regulation of this industry would be helpful.

The ALRC's inclusion of superannuation as an area which exposes Australians to potential elder abuse is very timely and most welcome.

It remains to be seen whether regulators and the wide variety of government, non-government and different state interest groups will accept and act on the ALRC recommendations.

In the meantime there has never been a greater need for members of superannuation funds to make sure they access good legal advice when they make plans to adequately deal with their superannuation entitlements on retirement and at the time of their death.

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