

# CLIENT NEWS

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## DRINK DRIVING – A PERSONAL RESPONSIBILITY

Hotel proprietors and licensees do have a duty of care to their patrons, but patrons still need to take personal responsibility for any decision to drink-drive.

The High Court has examined the issue of drink-driving and duties of hotel proprietors and licensees in its recent landmark case, *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board; C.A.L. No 14 Pty Ltd v Scott* [2009] HCA 47 (10 November 2009).

In this case, an intoxicated patron died in a road accident after driving his motorcycle home from the hotel where he had been drinking after work.

The patron arrived at the hotel about 5.15pm and on hearing of police breathalysers in the area made an arrangement that the hotel licensee would keep the motorcycle in the hotel storeroom and hold on to its keys. When the patron was ready to go home, the licensee would telephone the patron's wife to pick him up.

After drinking for about three hours, the patron was ready to leave about 8.30pm.

The licensee offered to call his wife but the patron refused, insisting the licensee hand over the keys so he could ride the motorcycle home.

The licensee claimed that the patron was agitated but did not appear drunk and he repeatedly sought assurances from the patron that he was "right to ride", with the patron responding that he was fine.

The licensee retrieved the motorcycle and the patron drove it away – with fatal consequences. There was conclusive evidence the patron's accident was directly related to his blood alcohol reading of 0.253g per 100mls of blood.

The patron's widow and the Motor Accidents Insurance Board (the Board) sued the hotel proprietor and its licensee for negligence, claiming they owed a duty of care to the patron which had been breached, resulting in his death.

The Supreme Court of Tasmania found that neither the proprietor nor the licensee owed a duty of care in these circumstances, but that if they did, it would have been breached by the failure of the licensee to prevent the patron from driving from the hotel.

On a successful appeal to the Full Court of the Supreme Court of Tasmania, the Court



found in favour of the patron's widow and the Board by holding that a duty of care did in fact exist and that it was breached.

A further appeal to the High Court found in favour of the proprietor and the licensee. The decision was based on three reasons.

First, the element of causation was not established. The patron's widow and the Board needed to show that, even if there was a duty of care that was breached, the breach had to have directly caused the patron's death. On these facts, there was no evidence that even if the licensee had tried to telephone the wife to take the patron home that the wife would have been successfully contacted, responded by attending and that the patron would have willingly left with her. There were several surrounding factors that made causation difficult to prove in this case.

Second, the High Court found that there was no breach of duty by the licensee. In complying with the agreement made, the licensee had asked the patron to let him telephone his wife but the patron refused. The licensee could not have been reasonably expected to physically restrain the patron or refuse him possession of his own property when he resisted.

Finally, the High Court observed that, while licensees do owe a general duty of care to patrons who use their premises, including duties such as maintaining safe premises and

monitoring equipment within the premises, the duty should not be extended in this case. The duty of care alleged in these circumstances was particularly narrow and required reliance on a sequence of events that could not reasonably be established. As a result, there was no specific duty of care established on which the patron's widow and the Board could rely in this case.

The case highlights the practical difficulties faced by hotel licensees when dealing with their patrons. •

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# A FAMILY FRIENDLY SOLUTION

In legal circles, alternative dispute resolution is the new black. The mantra “see you in court” is being replaced by the more cooperative and convivial “let’s meet and try and resolve it”.

Drawn out court cases that drain the resources and patience of the parties involved benefit no one, including the lawyers.

Even the traditionally more adversarial areas of law are seeing a shift towards conciliatory and facilitative models for resolving disputes that deliver quicker, more cost-effective outcomes and ultimately less stressed and more satisfied clients.

Family law, for example, which regularly involves highly conflictual disputes, also continues to be at the forefront of creative approaches to dispute resolution, now through a process called collaborative law.

Collaborative lawyers are specially trained negotiators who are able to provide a unique process for resolving family law disputes. Collaborative lawyers are trained to be “negotiation coaches” and work in a team with each other and their respective clients to reach a satisfactory and workable resolution of issues in dispute.

Collaborative law’s main feature is the collaboration contract that is signed by all parties and their lawyers and contains a promise to settle the dispute without litigation.

If the dispute cannot be settled, the parties must instruct new lawyers for any further



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litigation and the collaborative lawyer is prevented from acting further for them. Documentation and evidence from the collaboration are inadmissible in any later court proceedings.

All negotiations as part of the collaborative process are conducted in four-way meetings with the parties and their lawyers present. Lawyers act as co-counsel, not advocates or adversaries, working in a team to encourage the parties to speak for themselves and to each other. Other neutral experts, including accountants, psychologists, financial planners and valuers can attend meetings and give guidance or information on relevant issues.

Another important feature of the collaborative process is full disclosure. Both parties agree to make full disclosure of all relevant documents and financial records. This ensures an open and fair process where the parties can make informed decisions. Parties are also given legal advice about their rights early in the process which facilitates negotiations that are interest-based rather than position-based.

Parties are encouraged to work towards having their needs met, rather than needing to “win”.

Although in its early days in Australia, collaborative law has enjoyed success in other legal jurisdictions overseas and the signs here are just as promising.

In an area of law that can be too adversarial and often struggles to deliver high levels of client satisfaction because of its inherently sensitive subject matter, collaborative law is a positive and welcome development in family law dispute resolution. ●

# TIME TO WILLINGLY UNDERTAKE AN



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New Year resolutions may be a distant memory, but here is one resolution you can and should keep.

The beginning of a new year is a good time to do a personal legal inventory and review those standard legal documents such as wills, powers of attorney and insurance policies that you may not have looked at for a while.

As a rule, wills should be reviewed every five years or on the happening of a significant event such as marriage, divorce or death of a relative. However, it is useful to review them more frequently to make sure that your will reflects your up-to-date situation and expresses your current wishes.

The appointment of the executor/s and the

# ADVANCE AUSTRALIA FAIR



The human rights debate is firmly on the agenda as our nation considers whether to enact a national Human Rights Act.

On 9 October 2009, the National Human Rights Consultation (NHRC) Committee's report was released.

This report followed extensive and innovative consultation with thousands of Australians on human rights issues.

More than 35,000 submissions were received – the largest ever for a national consultation in Australia.

Sixty-six community roundtables were conducted in 52 locations nationwide and three days of public hearings were conducted.

Australians were asked key questions about which human rights should be protected and promoted in Australia, whether human rights are sufficiently protected and promoted

and how Australia could better protect and promote human rights in the future.

After 10 months of extensive consultation the NHRC Committee learned that the protection and promotion of human rights was an important national issue that affects all Australians.

The NHRC Committee recorded many stories and experiences from individuals whose rights have been threatened.

Disadvantaged Australians including the homeless, people with disabilities, people with mental illness, people living in rural and remote areas, the ageing and children highlighted concerns about the lack of protection of their human rights as well as issues relating to their access to justice.

The report contains a detailed discussion of which rights should be protected and promoted. While most people supported

the protection and promotion of civil and political rights in Australia, others argued that protection and promotion should extend to economic, social and political rights as they are equally important and are related and interdependent on the others.

New and emerging rights such as the right to a healthy and protected environment were also mentioned.

While the need to protect and promote human rights was generally agreed on by most Australians, how they should be protected was a more vexing question.

Whether a Human Rights Act should be introduced, and what form it should take, received detailed examination in the report. The NHRC Committee recommended the enactment of a Human Rights Act.

The Law Institute of Victoria also favours a Human Rights Act for Australia. The Victorian experience with the enactment of the *Charter of Human Rights and Responsibilities* in 2006 has shown the benefits of having important human rights enshrined in legislation.

The NHRC report contains 31 recommendations for greater human rights protection and promotion. The government is currently considering its response and it will be interesting to watch this important chapter in our national history unfold in the coming months. ●

## More information

From the LIV Bookshop: *Estate & Business: Succession planning* (edn 2), by B Evans, 2009, \$175

## IMPORTANT INVENTORY

status of beneficiaries can also be checked and your will should be updated if circumstances or relationships have changed.

Remember, you should destroy copies of earlier wills that have been superseded by a new one and advise your executor where your original current will is stored.

Wills should be stored in a safe and secure place such as your lawyer's or bank's document safe. It is unwise to keep your original will at home.

Similarly, the beginning of a new year can be a timely opportunity to review those insurance policies that cover you and your property. Again, circumstances may have changed and your insurance cover may require more detailed examination than just

signing the renewal and paying the premiums when due.

Your lawyer can assist you in taking your new year's legal inventory, advising on any updates required for your will or examining the contents of your insurance policies and advising on important terms and conditions.

Remember to protect your legal documents or preferably copy and store important documents in a place other than your home.

The devastating Black Saturday Victorian bushfires in February last year highlighted the need to have access to important legal documents, including proof of identity.

It is advisable to keep a "relocation kit" of important documents which can be accessed easily. Store copies of your important

documents in a plastic folder and/or scan them and store electronically.

The following checklist should help you to think about the kind of documents you need to copy and store: will, birth certificate, passport, marriage certificate, powers of attorney papers, land and/or house title or certificate, mortgage papers, rental/leasing documents for home or business rentals, current insurance policies and contact details, superannuation and investment details, employment contract (workers), important business papers (small business), tax file number, Medicare number, health insurance fund number and bank account and credit card numbers. ●

# THE WORKPLACE FLEX TEST



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If you've returned to work jaded after juggling child care and work over the long summer school holidays, take heart. Many workplaces are now embracing more flexible work practices for their employees.

Legislation now puts a positive legal duty on employers to consider their employees' requests for flexible working arrangements.

However, employees do not have an automatic right to flexible work arrangements. What they have is a right to have their requests seriously considered by their employers.

Flexibility in the workplace is a key concept of the new federal workplace relations framework and is a central theme of the *Fair Work Act 2009* (FW Act), the new National Employment Standards (NES) and the

modern awards that came into operation on 1 January 2010.

The modern awards contain flexibility provisions that allow an employer and an individual employee to agree in writing to vary the application of an applicable award in relation to arrangements for when work is performed, overtime and penalty rates, various allowances and leave loading.

Significantly, the employee must be better off overall under the flexibility agreement than they would have been under the award.

Similarly, the NES provides a new right for employees to request flexible working arrangements.

Obligations for flexible work practices have existed for Victorian employers under state legislation including the *Equal Opportunity Act 1995* (Vic), the *Equal Opportunity Amendments (Family Responsibilities) Act 2008* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) which specifically provides for the protection of families and children.

The NES brings this right to flexibility into the federal arena.

Under the NES, individuals who are a parent or who have the responsibility of caring for a child under school age or a disabled child under the age of 18 years are entitled to request

flexible working arrangements.

Flexible working arrangements are any arrangements that will assist an individual to balance their work and parental or carer responsibilities. They could include part-time hours, job sharing, working from home, starting and finishing work earlier or later, changing meeting times, limiting after work hours commitments etc.

An employee is entitled to make a request for flexibility after completing at least 12 months continuous service with the employer.

If the employee is a casual employee, he or she must be a long-term casual employee and have a reasonable expectation of continuing employment with the employer on a regular and systematic basis.

Requests must be in writing, setting out the details of the change sought and the reasons for the proposed change.

The employer must give the employee a written response within 21 days.

An employer can refuse a request on reasonable business grounds that must be included in the written response.

Does your workplace pass the flex test? Your lawyer can assist you in understanding flexible working arrangements under the new federal provisions, making a request for flexibility as an employee or responding to one as an employer. ●

## BUSHFIRE LEGAL HELP OFFERS ONGOING HELP

As summer rolls on, it's timely to reflect on the anniversary of 7 February 2009. Bushfire Legal Help was established to provide free legal support services to victims of the Black Saturday fires.

Now, in 2010 it still continues to provide an online free legal handbook and free phone line service (1800 113 432).

These services have proven to be valuable and

popular resources for dealing with thousands of legal queries from bushfire victims.

Recognising that ongoing support is needed for victims, the Bushfire Legal Help services will continue this year. "We understand that people will have a continuing need for legal advice ... so we are pleased that we can continue to provide it free of charge", Bushfire Legal Help spokesperson Kerry O'Shea said.

Since the bushfires in February 2009, more than 580 legal practitioners have volunteered their time and expertise free of charge. Bushfire Legal Help includes Victoria Legal Aid, the Federation of Community Legal Centres, the Law Institute of Victoria, Victoria Law Foundation, Public Interest Law Clearing House and the Victorian Bar.

If you need help, please call 1800 113 432, or visit [www.bushfirelegalhelp.org.au](http://www.bushfirelegalhelp.org.au) ●

*For more information, please contact:*

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