MERIDIAN LAWYERS

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Pharmacy insights

Dispensing sound legal insights

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In this edition of *Pharmacy Insights* we invite you to visit us on Trade Stand 13 at Pharmacy Connect 2018 at the Hilton Hotel, Sydney on 7 and 8 September 2018, to meet some of the lawyers who provide specialist legal services to the pharmacy industry and to enter our prize draw for a chance to win a luxury hamper.

Workplace Relations 2
Pharmacy Franchises – new warranties and indemnities in favour of franchisors 2
Company law – Oppression of minority shareholders in the conduct of a company 3

NEWS, EVENTS & PRESENTATIONS

Meet Meridian Lawyers at Pharmacy Connect

SYDNEY, 7-8 SEPTEMBER 2018

At Pharmacy Connect Meridian will be actively presenting the following:

FRIDAY, 7 SEPTEMBER 2018 | 4.00PM
Meridian Principal, Sharlene Wellard, will be taking part in **"The Great Debate – the future is female"**

SATURDAY, 8 SEPTEMBER 2018 | 11.50AM
Meridian Principal, Mark Fitzgerald, Special Counsel, Georgina Odell, and Senior Associate, Laura Dhana, will be taking part in the panel discussion **"Tips and pitfalls of buying and selling a pharmacy business"**

Our pharmacy lawyers at the trade stand will be offering hints and tips about buying or selling a pharmacy, employing and managing staff, taking a franchise, dispute resolution, obtaining finance, going into partnership, retail leasing and Pharmacy Location Rule issues. We will have a range of valuable pharmacy law information to take away.

We warmly invite clients past and future to visit our stand and say hello.

"Hello... *Let's talk*"

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HOT TOPICS

WORKPLACE RELATIONS

By Sharlene Wellard, Principal
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Double Dipping! In the case of WorkPac Pty Ltd v Skene [2018] FCAFC 131 the Full Federal Court determined that although an employee was called a casual and received a 25% casual loading, because his employment was regular and systematic he was also entitled to be paid out annual leave on the termination of his employment. This decision turns the law in this area on its head and will likely be the subject of an appeal to the High Court. Until then employers need to be conscious of the risk that regular casuals may be entitled to annual leave.

High Income Threshold / Guaranteed Earnings On 1 July the high income threshold increased to $145,000. Employees not covered by an industrial instrument (such as an award or enterprise agreement) cannot make an unfair dismissal claim if they are paid over the high income threshold. The terms of an award will not apply to employees who have a guaranteed annual earnings in excess of $145,000 however they remain covered by the award.

Domestic Violence Leave On and from 1 August 2018 award covered employees became entitled to 5 days unpaid leave per year to deal with domestic and family violence. This leave does not reduce other leave balances.

FOR INFORMATION ABOUT ANY WORKPLACE RELATIONS MATTER PLEASE CONTACT **SHARLENE WELLARD** AT SWELLARD@MERIDIANLAWYERS.COM.AU

Pharmacy Franchises – new warranties and indemnities in favour of franchisors

By Mark Fitzgerald, Principal
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The content of new pharmacy franchise agreements change and develop as the law and practices of the franchisor change.

It is essential that pharmacists thinking of entering into or renewing a franchise or buying group agreement fully understand the details of the arrangement so that they can seek to negotiate changes if necessary, and subsequently operate the pharmacy business in accordance with the franchise agreement.

Pharmacists should not assume that just because they have previously entered into a franchise with a particular group, any renewal of the franchise arrangement will be on the same terms. Typically, this will not be the case.

The arrangement may involve limits on a pharmacist's ability to transfer the business to a future purchaser, and may involve significant fees if a transfer of business takes place.

Recently, we have noted new obligations appearing in franchise agreements

that franchisees will comply with the Fair Work Act 2009 (as amended by the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017, and indemnities in favour of the franchisor in respect of any fine or penalty imposed on the franchisor as a result of a pharmacist's treatment of employees.

This new development follows a Fair Work Ombudsman prosecution of a 7-Eleven retail store operator for systemic underpayment of vulnerable migrant employees, and an investigation into the practices of the 7-Eleven network of stores.

It means that certain franchisors and holding companies can be held responsible if their franchisees or subsidiaries do not follow workplace laws (including contraventions of the National Employment Standards, modern awards, enterprise agreements and workplace determinations, as well as national minimum wage orders and misrepresenting employment as an independent contractor arrangement) if they knew or should have known and could have prevented it.

Franchisors may respond to this additional responsibility by taking steps to try to prevent breaches of workplace laws within the network, and by seeking warranties and indemnities from franchisees in respect of liability.

FOR ADVICE AND GUIDANCE IN RELATION TO WORKPLACE LAWS CONTACT PRINCIPAL, **SHARLENE WELLARD** (02) 9018 9939, AND FOR ADVICE IN RELATION TO FRANCHISE OR BUYING GROUP AGREEMENTS CONTACT PRINCIPAL, **MARK FITZGERALD** FOR VICTORIA ON (03) 9810 6767 OR FOR NEW SOUTH WALES AND QUEENSLAND, SPECIAL COUNSEL, **GEORGINA ODELL** ON (02) 9018 9975.

Company law – Oppression of minority shareholders in the conduct of a company

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The recent decision in *Dr L Shanahan and others v Jatese Pty Ltd and others [2018] NSWSC 1088* has demonstrated once again how intractable and long standing disputes between business partners can be.

The business in question in this case was a company called Canberra Eye Hospital Pty Ltd (**Company**) which operated an ophthalmic medical facility.

The plaintiffs in the case together held 43% of the shares in the Company (**Minority**).

The defendants together held 57% of the shares in the Company (**Majority**) and amongst both the Minority and the Majority were included doctors practising at the Company's medical facility.

The facts of the case span a business history of over 25 years with certain of the ophthalmologists originally building an unincorporated day surgery business together.

In 1999, the business partners decided to incorporate the day surgery and each of the then doctors involved became a director and equal shareholders in the new company.

In the years that followed, the business developed and new doctors, directors and shareholders joined.

As time went on, one of the original doctors ceased to practice and another decided to stop performing surgery and significantly reduced his consulting times. However, the legal entitlement of these two doctors to profits of the Company remained unchanged.

In September 2006, the subject of an exit strategy was broached with the doctors who had either ceased or reduced their practice.

The issue became clear, that those shareholders who continued to practice for the Company (the Majority) felt that they would be funding the retired Minority indefinitely and when they died would continue to fund their heirs who inherited the shares in the Company.

The Minority expressed a view that they were not obliged to sell their shares and were entitled to receive a dividend of profits for so long as the Company carried on.

A series of events and course of conduct followed including the Majority procuring the appointment of two additional directors who were put forward as 'independent' but whose actions were later found to have been seriously biased towards the Majority.

The doctors amongst the Majority decided to do their surgery elsewhere and established their own eye hospital, which put the Company under financial strain.

In an attempt to revive the Company, one of the Minority put forward the appointment of a new doctor but there was significant resistance over a period of nine months to the new doctor achieving accreditation with the Company.

Just before the new doctor started practice with the Company, the 'independent directors' used their power as directors to pass a resolution placing the Company into voluntary administration at a time when the Minority said the Company was not insolvent nor likely to become insolvent, and the sole purpose of the resolution was to bring about the sale of the Minority's shares to the Majority.

Finally, the Minority sold their shares to the Majority.

The Company subsequently ceased operations.

After selling their shares in the Company, the Minority applied to the Court for an order pursuant to section 232 of the Corporations Act 2001 (Act) on the basis that the conduct of the affairs of the Company had been contrary to the interests of the shareholders as a whole, or had been oppressive to, unfairly prejudicial to, or unfairly discriminatory against the Minority.

Under section 233 of the Act the Court can make any order that it considers appropriate in relation to a company including (but not limited to) orders:

- that a company be wound up;
- that a company's constitution be modified or repealed;
- regulating the conduct of a company's affairs in the future;
- restraining a person from engaging in specified conduct or from doing a specified act; or
- requiring a person to do a specified act.

In handing down his judgment in the case, Hammerschlag J found that:

- from the time of the appointment of the 'independent directors' the Company's affairs were conducted in a sustained and deliberate way both contrary to the affairs of the members of the Company as a whole and oppressive to, unfairly prejudicial to, and unfairly discriminatory against the Minority;
- the 'independent directors' had acted in concert with the Majority so as to prefer the interests of the Majority over those of the Minority;
- the underlying grievance of the Majority was the entitlement of the Minority to share in the profits of the Company. For so long as this was the case, the majority had no intention of furthering the interests of the Company. Their primary intention was to achieve a restructure of the shareholding arrangements and if this could not be achieved, they had no intention that the Company should be kept alive;
- once the shares in the Company had been sold to the Majority the Company closed down. The Company "was in fact worth more to them dead than alive";
- the appointment of the administrator was in bad faith and for improper purposes;
- the 'independent directors' conducted themselves as directors in a manner so unfair to the Minority that no reasonable director would have though it to be fair and a reasonable director would think it to be unfair;
- the 'independent directors' developed proposals in consultation with the Majority to the exclusion of the Minority; and
- one of the 'independent directors' took secret remuneration from the Majority in breach of a term of the shareholders' agreement for the Company and in breach of his duty not to use his position to gain an advantage for himself.

Despite the finding that oppressive conduct had taken place, the Court did not grant relief in favour of the Minority.

The Minority had been seeking compensation for the difference between what they said was the true value of their shares and the depressed value for which they said they sold them to the Majority, because of the oppressive conduct.

However, based on the Court's assessment of the methods of valuation put forward by the parties, the Court found that the Minority had failed to establish that had the oppressive conduct not occurred then they would have been in a better position than they were.

What we learn from this:

- the dispute between the parties might have been avoided had a comprehensive shareholders' agreement been signed between all shareholders setting out (amongst other things) how the Company was to be run, how decisions were to be made, the working time to be spent on the Company, the retirement and exit arrangements for all doctors, and whether the doctors were to be subject to restraints prohibiting them from working in an alternative business;
- it is important that any pharmacists who are going into business with another have a carefully considered and drafted ownership agreement which deals with the parties' exit strategy;
- new shareholders and directors or business partners should be required to sign up to the terms of the ownership agreement before admittance to the business;
- stressful and costly business disputes can be avoided if appropriate ownership agreements are in place.

FOR ASSISTANCE WITH PREPARATION OF SHAREHOLDER OR PARTNERSHIP AGREEMENTS PLEASE CONTACT **MICHAEL BRACKEN** (02) 9018 9977 (NEW SOUTH WALES AND QUEENSLAND) OR **MARK FITZGERALD** (03) 9810 6767 (VICTORIA). FOR ASSISTANCE WITH SHAREHOLDER, PARTNER OR OTHER DISPUTES PLEASE CONTACT **DOUGLAS RAFTESATH** ON (02) 9018 9978.

Find out more about Meridian Lawyers at www.meridianlawyers.com.au – our team's contact details are provided on the following page

Disclaimer: This information is current as of September 2018. These articles do not constitute legal advice and do not give rise to any solicitor/client relationship between Meridian Lawyers and the reader. Professional legal advice should be sought before acting or relying upon the content of these articles.

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