MARCH 2021

COMMERCIAL INSIGHTS

MERIDIAN LAWYERS

Commercial Insights

We are pleased to provide you with Meridian Lawyers' latest edition of Commercial Insights, which contains a number of recent updates, relevant to business owners.

From 1 January 2021, New South Wales Fair Trading is proposing to enforce new disclosure obligations (which were first introduced in July 2020) contained in the *Fair Trading Act 1987 (NSW)*. The new obligations relate to how businesses that supply goods and services in New South Wales to consumers, communicate with customers and how intermediaries such as agents and brokers, communicate with customers.

The obligations require businesses to disclose the substance and effect of any terms in their contracts which may *substantially prejudice* the interests of consumers and to disclose any referral arrangements with other suppliers or commissions payable when they recommend that a consumer buys goods or services from a third party supplier.

If you are an intermediary, you need to disclose that you are under a commission or referral arrangement. You are an intermediary if you, under an arrangement that provides for a financial incentive:

- arrange contracts for the supply of goods or services from another supplier on behalf of a customer as an agent, or
- refer a consumer to another supplier of goods or services.

These new provisions in the *Fair Trading Act* are designed to increase transparency and competition and provide consumers with information to enable them to make meaningful decisions.

Importantly, the unfair contract terms regime contained in the Australian Consumer Law applies to standard form contracts. However, the new provisions in the *Fair Trading Act* apply to both standard form contracts and bespoke contracts.

Organisations which fall foul of the new disclosure obligations detailed in the *Fair Trading Act,* face potential fines of up to $110,000 for companies and $22,000 for individuals.

When will a supply term substantially prejudice a consumer?

NSW Fair Trading has given examples of terms that may substantially prejudice consumers. These include:

1. Clauses that exclude the liability of the supplier
2. Clauses that exclude a suppliers liability or provide that a consumer is liable for damage to delivered goods
3. Clauses that allow a supplier to sell or share data about or are provided by the consumer to a third party in a form that allows the consumer to be identified
4. Clauses that require the consumer to pay exit fees or balloon payments or other similar payments.

A contract for supply or performance of services can contain these kinds of terms but they must be disclosed and must be disclosed before the good is supplied or service is performed.

It is always difficult to state with precision what a supplier needs to do in order to be deemed to have taken reasonable steps in order to make required disclosures. New South Wales Fair Trading has suggested that the best way to meet disclosure requirements is for the disclosure to be “clear upfront and automatic” taking into account the nature of the business, the likely impact of the terms and the supplier’s resources.

Disclosures should not be difficult to understand or hidden in the small print.

This article was written by Principal, Douglas Raftesath. If you have any questions about the new disclosure obligations, please contact Douglas.

Douglas Raftesath

Principal | Commercial Litigation & Dispute Resolution

T | +61 2 9018 9978

E | draftesath@meridianlawyers.com.au

The Federal Court of Australia decision in *Webster v Brewer [2020]* FCA622 is a timely reminder that people need to be cautious about what they post on Facebook about other people and entities. The warnings in this article are also relevant to organisations that have their own Facebook pages.

For reasons which are still unknown, in April and May 2020, Ms Brewer made various posts and uploaded various videos to a Facebook account operated and controlled by her. There were seven publications in total. Each of the publications was highly defamatory of Dr Anne Webster and Dr Philip Webster and of an organisation set up by Dr Anne Webster called Zoe Support. The publications were described by the Court as ‘vile’. The posts suggested that the Websters and Zoe Support were participants in a secretive criminal network involved in the sexual abuse of children.

The Websters were upstanding members of their local community and both had made significant contributions to their community, holding positions with institutions and community organisations. Dr Anne Webster was the founder of Zoe Support, a not for profit organisation established to provide benevolent relief from social isolation, poverty, ill health and destitution for pregnant women and new mothers who lack support and resources.

Interestingly, the Websters had never heard of Ms Brewer prior to the publications being made and it remains unclear what prompted Ms Brewer to make the publications.

The Court ordered Ms Brewer pay the Websters and Zoe Support a total amount of general damages and aggravated damages in the amount of $875,000 and to pay the costs of the proceedings. In making the award, the Court determined that Ms Brewer’s posts contained the most serious kind of defamatory imputations that could be levelled at an individual or a charity.

Considerable care should be taken when posting comments about another person or organisation, on social media. This is particularly the case for people or organisations who have a public profile or community reputation.

This article was written by Douglas Raftesath. If you have any questions about social media defamation, please contact Douglas.

Douglas Raftesath
Principal | Commercial Litigation & Dispute Resolution
T | +61 2 9018 9978
E | draftesath@meridianlawyers.com.au

Statutory Demands – back to being an effective means of collecting debt from a corporate debtor

What is a Statutory Demand?

A statutory demand is an efficient and inexpensive legislative tool enabling creditors to demand payment of a debt that is due and payable to it by a company debtor. Importantly, it is the first step in the process of having a liquidator appointed by the Court to wind-up the company debtor if the debt is not paid.

During the COVID-19 pandemic, the strict legislative regime in which statutory demands were issued was significantly amended in order to provide some assistance to debtor companies. A statutory demand could only be issued for a debt of at least $20,000 and a debtor company had six months to respond to the demand. However, from 31 December 2020 the statutory demand regime reverted back to its previous form: a statutory demand can now once again be issued for a debt of more than $2,000 and the debtor company has 21 days to respond.

Issuing a valid Statutory Demand

Issuing a statutory demand is time efficient and effective if done correctly. However, it is imperative that it is validly issued. Section 459E of *The Corporations Act 2001* specifies that a statutory demand is validly made if:

a) the debt is $2,000 or more
b) the debt is due and payable to the creditor who makes the statutory demand
c) the statutory demand is in the prescribed written form, namely it:
    a. specifies the total amount of the debt/s
    b. required the company debtor to pay the total debt within 21 days after the demand is served
    c. is signed on or behalf of the creditor, and
    d. specifies the address for service of the creditor.
d) it is accompanied by a verifying affidavit or judgment debt.

A statutory demand <u>cannot</u> be issued in circumstances where:

a) there is a genuine dispute about the existence of the amount of the debt in question, or
b) the company debtor has an off-setting claim, or
c) the purpose is solely to recover debt from an evidently solvent company debtor.

The consequences for inappropriately issuing a statutory demand may involve the Court ordering the creditor who served the statutory demand to pay the costs of the company debtor.

What to do if your company is served with a Statutory Demand

Upon receiving a statutory demand the company debtor must, within 21 days:

1. pay the debt, or
2. apply to have the statutory demand set aside.

It is important to be aware that the extended six month compliance period is no longer in effect.

The company debtor can apply to have the statutory demand set aside if:

a) there is a genuine dispute about the existence or amount of the debt in question, or
b) the company debtor has an off-setting claim, or
c) there is a defect in the demand.

What happens if you do not comply with the Statutory Demand?

If a company debtor does not comply with the statutory demand, the consequences of this failure can be severe and expensive. Non-compliance with the statutory demand leads to a presumption that the debtor company is insolvent. This then forms the basis of the creditor commencing court proceedings to wind up the company debtor.

At that point the onus is placed on the company debtor to prove its solvency to the court. The problem is that non-compliance with a statutory demand is often a default under a loan agreement. That default can trigger the obligation to repay the principal immediately.

If the company debtor cannot prove its solvency to the Court's satisfaction, then the company debtor can be placed into liquidation.

A statutory demand is an efficient and inexpensive tool to incentivise a company debtor to pay its debt owed to a creditor. The consequences of non-compliance are severe and the courts are correspondingly rigorous in their administration of the process.

This article was written by Senior Associate, Gabrielle Parra. If you have any questions or require further information about statutory demands, please contact Gabrielle.

Gabrielle Para
Senior Associate | Commercial Litigation & Dispute Resolution
T | +61 2 9018 9925
E | gparra@meridianlawyers.com.au

MERIDIAN LAWYERS

Retailers beware of advertising false promotions

The ACCC recently successfully prosecuted eyewear retailer, Oscar Wylee in the Federal Court of Australia which resulted in Oscar Wylee being ordered to pay $3.5m in penalties for misleading and deceptive conduct and making false and misleading representations about its charitable donations and affiliations in breach of the Australian Consumer Law.

Between January 2014 and December 2018, Oscar Wylee made statements in its social media posts, on its website and in promotional materials that for each pair of glasses a consumer purchased, it donated another pair of glasses to someone in need when in fact it did not do so.

The false marketing claims made by Oscar Wylee included claims that: "*For every pair purchased, a pair is donated to someone in need*" and: "O*ne for one*. A*ll the time*. *Forever. We donate a pair of glasses to those in need for every pair purchased*". They also had a slogan: *"Buy a pair, give a pair*".

The ACCC determined that during almost five years Oscar Wylee sold 328,010 pairs of glasses but donated only 3,181 frames to charity, without lenses, which is approximately one set of frames for every 100 pairs of glasses sold.

The ACCC alleged that Oscar Wylee promoted its charitable activities as a core reason why consumers should buy Oscar Wylee glasses. Its claims were false and were made in circumstances where consumers could not easily verify these claims for themselves.

Oscar Wylee also admitted to making false and misleading representations to consumers, that it was closely affiliated with the charitable organisation Rose Charities. Those claims were found to be misleading as Oscar Wylee only made one single donation of $2,000 and provided 100 frames to the charity. Those donations were made in 2014, yet Oscar Wylee continued to claim an affiliation with the charity until late 2018.

Justice Katzmann said: *"Oscar Wylee stood to profit from inducing consumers to purchase its products and still does. It built its reputation by engaging in the contravening conduct, appealing to socially conscience consumers who wanted to support charitable causes through their purchasing behaviour. Its conduct was a betrayal of that promise*."

Lessons to be learned

It goes without saying that advertising and promotional activities by retailers and service providers alike must be accurate. If you continue to promote an association with a charity or promote the undertaking of a charitable activity, it is important that those activities are current and not historical.

The ACCC is being increasingly proactive in pursuing and prosecuting retailers and service providers for misleading and deceptive practices. The penalties for breaching the Australian Consumer Law can be significant, as they were in this case.

This article was written by Principal, Douglas Raftesath and Lawyer, Alexander Hughes. If you have any questions about Australian Consumer Law, please contact Douglas Raftesath.

Douglas Raftesath

Principal | Commercial Litigation & Dispute Resolution

T | +61 2 9018 9978

E | draftesath@meridianlawyers.com.au

Alexander Hughes

Lawyer | Commercial Litigation & Dispute Resolution

T | +61 2 9018 9956

E | ahughes@meridianlawyers.com.au

How the changing definition of "consumer" under the Australian Law may affect you

From 1 July 2021, the monetary threshold for determining whether a person (or business) acquires goods or services as a "consumer" under the Australian Consumer Law (**ACL**) is set to increase from $40,000 to $100,000.

Currently, under the ACL, the definition of a "consumer" is a person (or business) who acquires goods or services if:

- the amount paid for those goods or services is $40,000 or less, or
- the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

A "consumer" has the protection of certain rights and guarantees in relation to those goods and services. Specifically, goods are to be of an acceptable quality, fit for purpose and match the description provided, and services will be provided with due care and skill, be fit for purpose and delivered within a reasonable timeframe (**consumer guarantees**).

As a business owner, a failure to meet these consumer guarantees will result in the consumer being entitled to an appropriate remedy under the ACL including repair, replacement, refund, cancellation and compensation.

What does this mean for businesses?

With an increase to the monetary threshold, consumers are now afforded more protection under the ACL than ever before. This means that a wider range of higher valued goods or services now fall within the consumer guarantee regime.

In preparation for this change, businesses may consider if they will need to:

a. update terms and conditions in any contracts or sales

b. update refund policies

c. account for potential refunds/replacement/compensation on a wider range of higher valued goods or services

d. ensure higher valued goods or services meet the consumer guarantees

e. train their staff to understand the new requirements.

Meridian Lawyers assists businesses in their obligations under the Australian Consumer Law. If you'd like further details about the assistance we can provide, please contact a member of our Commercial Disputes team.

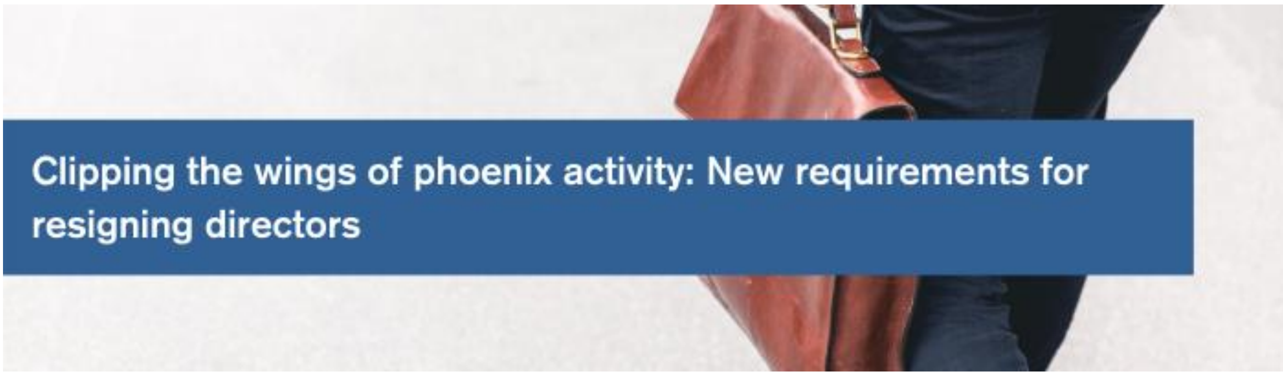
This article was written by Senior Associate, Gabrielle Parra.

Gabrielle Para

Senior Associate | Commercial Litigation & Dispute Resolution

T | +61 2 9018 9925

E | gparra@meridianlawyers.com.au



Clipping the wings of phoenix activity: New requirements for resigning directors

New laws came into effect on 18 February 2021, under the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* which provide that a company director will not be able to back date his or her resignation more than 28 days. A director will also not be able to resign as a director of a company if it means that the company will be left without a director.

Under the new regime, the resignation of a director takes effect:

1. if within 28 days after the day the person stops being a director of the company, ASIC is notified of that fact; or
2. the day that written notice is lodged with ASIC stating that the person has stopped being a director of the company, if this written notice is lodged with ASIC after 28 days of actual resignation.

This means if a written notice is lodged with ASIC after 28 days from the day that the person stopped being a director, his or her resignation will only take effect on the day that written notice is lodged with ASIC.

It is a common tactic of illegal phoenix activity for directors to reduce their exposure to a company's operations and activities by backdating to an earlier date their resignation as a director – this has the effect of obscuring the director's role in the company after the earlier date. Phoenix activity involves creating a new company to continue the business of an existing company that has been deliberately liquidated, to avoid paying outstanding debts including taxes, creditors and employee entitlements.

An important take away is that directors who resign from a company should not leave it to the company, or to others, to lodge the appropriate documentation with ASIC. They should ensure for themselves that the appropriate documentation is lodged within 28 days of the resignation date, or potentially be exposed to risks in relation to the company's trading activities when they were not in fact a director.

The new laws will also prevent a company being left without any director. If you are the last director remaining, you will be unable to resign as a director.

The amendments in their entirety can be accessed here.

This article was written by Principals, Georgina Odell and Mark Fitzgerald, and Solicitor, Yashila de Silva. If you have any questions about the impact of the new Treasury Laws Amendment Act, please contact Georgina.

Georgina Odell

Principal | Corporate & Commercial

T | +61 2 9018 9975

E | godell@meridianlawyers.com.au

Mark Fitzgerald

Principal | Corporate & Commercial

T | +61 3 9810 6767

E | mfitzgerald@merdianlawyers.com.au

Yashila de Silva

Solicitor | Corporate & Commercial

T | +61 3 9002 2149

E | ydesilva@meridianlawyers.com.au

Dangers in negotiating commercial agreements

Commercial agreements vary in complexity, the length of time parties are involved in negotiations, and importantly, in the level of formality the parties employ as they 'thrash out' the terms. For these reasons, it is sometimes difficult to work out when the negotiations have reached a point where the law would regard the parties as having reached a binding and enforceable agreement.

It is not uncommon for people to assume that they can enter into a negotiation and will not be bound to any agreement reached with the other party, unless and until the agreement is documented and signed. However, this is not the case, except in some cases where the law requires a written agreement. An agreement can be found by a combination of written evidence (email communications for example), oral discussions (including for example verbal representations), and the conduct of the parties (the actions that are taken).

In broad terms, the courts have categorised the effect of negotiations between the parties as falling into one of the following four categories:

1. The parties have negotiated the terms of their agreement, are in agreement and intend to be bound, but wish for the terms to be outlined as they are in a formal contract document. In this circumstance, the parties are bound by their agreement notwithstanding that it has not been fully documented and signed.
2. The parties have negotiated the terms of their agreement, are in agreement and intend to be bound, but wish for the performance of those terms to be conditional upon their execution and exchange of a formal contract document. In this circumstance, the parties have an obligation to ensure that the agreement that has been reached is documented and are bound by that agreement.
3. The parties do not intend to make an agreement at all until a formal contract document is executed. In this circumstance, the parties are not bound by what they have negotiated unless and until the agreement is documented and signed.
4. The parties have negotiated the terms of the agreement, are in agreement and intend to be bound, but expect to make a further contract in substitution for the first agreement which contains additional terms, yet to be agreed. In this circumstance, the parties may be bound by what they have agreed notwithstanding the fact that the agreement may not yet be documented. Whether or not the parties are bound will depend upon the importance of the additional terms not yet agreed to the operation of the agreement.

The above summary highlights that parties need to be careful about the language used when negotiating agreements. When negotiating an agreement it is important to make it clear to the other party, whether or not you intend to be bound by the negotiated terms, when those terms may not have yet been documented.

Confusion, ambiguity and uncertainty can arise when one or more parties have not clearly indicated whether they have reached a point in the negotiation where they intend the terms to be binding on them. It is also understandable for comments made during a contract negotiation to have an unintended consequence, especially when parties have not made it clear whether or not they intend to be bound to the negotiated terms.

Meridian Lawyers' Commercial and Corporate team frequently advises clients during contract negotiations and helps clients navigate the sometimes dangerous waters that exist between a robust contract negotiation and a concluded and enforceable agreement. Our Dispute Resolution team works with clients in resolving disputes that have resulted from misinterpretations of language in commercial agreements and misunderstanding parties intentions. This note serves as a timely reminder of the need to take care during contract negotiations so that there is no uncertainty about the status and legal effect of the negotiations at any given point in time.

This article was written by Lawyer, Alexander Hughes. If you have any questions about commercial agreements, please contact Meridian's Commercial Disputes team.

Alexander Hughes
Lawyer | Commercial Litigation & Dispute Resolution
T | +61 2 9018 9956
E | ahughes@meridianlawyers.com.au

Use of electronic signatures – a cautionary note

In recent times the use of electronic signatures has become common place. The use of electronic signatures during the COVID-19 pandemic has often been a necessity.

On 5 May 2020, the Treasurer made the Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 which provided that documents could be executed on behalf of a company under section 127 of the Corporations Act by electronic means and also that "split execution" was permitted. That Determination was repealed and replaced by the Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 which expired on 21 March 2021.

With the repeal of the Determinations, section 127 of the Act is to be read in the same way that it was before 5 May 2020 (that is, before Determination (No. 1) was made). Before the Determination, there was uncertainty as to whether electronic execution or split execution could be effective under section 127. This uncertainty meant that in practice, when companies executed under section 127, it was regarded as prudent practice to do so by wet ink signature only.

Section 127 does not limit the ways in which a company may execute a document. Section 126 provides that a company may execute a document pursuant to its constitution or by an agent or attorney given authority to do so. Depending on a company's constitution, a company may be able to validly execute documents electronically by other means – that is in accordance with laws other than section 127.

While the use of electronic signatures is now firmly part of the modern way for individuals to do business, there is a cautionary tale worth sharing. For those seeking to rely on an electronic signature to enforce a document, it is prudent to make enquiries to ensure that the person whose electronic signature is contained on the document did put the electronic signature on the document him or herself or authorised the electronic signature to be included on the document.

In circumstances where the signatory does not need to "put pen to paper" in the traditional sense, there have been disputes arising where the person whose electronic signature has been placed on a document has denied that they either placed the signature on the document themselves or authorised their signature to be placed on the document. These disputes can be disruptive and costly and most importantly, raise questions as to the enforceability of the document purportedly signed. A simple phone call to the person purporting to sign the document can ensure that they did intend to sign the document.

The issues which are starting to arise also highlight the importance of keeping your electronic signature safe.

This article was written by Principal, Mark Fitzgerald and Solicitor, Molly Cooke. If you have any questions about the use of electronic signatures, please contact Mark.

Mark Fitzgerald

Principal | Corporate & Commercial

T | +61 3 9810 6767

E | mfitzgerald@meridianlawyers.com.au

Molly Cooke

Solicitor | Corporate & Commercial

T | +61 3 9002 2105

E | mcooke@meridianlawyers.com.au

A shareholders' agreement is a contract between a company's shareholders (sometimes the company itself is also a party), setting out the rights and obligations of the shareholders in relation to the affairs of the company and how it is to be managed. If the company is the trustee of a unit trust the agreement relates not only to the shares in the trustee company but the units in the unit trust. In this article, the reference to shareholders' agreements refers to agreements that regulate both kinds of business structure.

We regularly assist shareholders who fall into dispute in circumstances where they did not enter into a shareholders' agreement, or the agreement they did enter into is ambiguous, and over time their views about the affairs of the company, or their involvement in it, have diverged. Company law is complex and disputes between shareholders and directors can cause substantial disruption and expense. That is why we always recommend to our clients that they enter into a shareholders' agreement <u>before</u> they start business together.

The importance of having a shareholders' agreement

A shareholders' agreement usually operates in conjunction with a company's constitution and, where there is conflict or inconsistency between the two, the shareholders' agreement should contain a term providing that it prevails over the constitution.

In closely-held proprietary companies we recommend that shareholders do not simply rely upon the company's constitution as their only contract regarding the affairs of the company. These documents are usually 'off the shelf' documents that adopt a 'one size fits all' approach, and do not deal with a range of matters that a well-drafted shareholders' agreement does. Furthermore, a shareholders' agreement will usually cover specific business and shareholder requirements.

Important parts of a shareholders' agreement at a minimum

Shareholders' agreements should include provisions relating to decision making. They should detail decisions that can be made by the directors of the company and those that must be approved by shareholders. For decisions that can only be made by shareholders, the shareholders' agreement may also contain provisions relating to whether a matter can be passed by ordinary resolution (more than 50% of votes) or by special resolution (75% or more of votes). Some shareholders' agreements also specify whether matters of significance require a special majority (including unanimity) of directors for the passage of the resolution.

A shareholders' agreement may also include provisions for resolving deadlocks. This is particularly important for small companies where there is an equal number of shareholders and directors. Deadlock provisions may not be appropriate where there are majority and minority shareholders. Well drafted exit mechanisms will sometimes be a better means of providing the parties with the incentive to resolve their disputes.

Whether a shareholder is entitled to be, or to appoint, a director should also be addressed in a shareholders' agreement. Some shareholders' agreements provide that a minority shareholder is not entitled to appoint a director to the board until the shareholder holds a minimum threshold of shares in the company (for example, 20%). Where the shareholding is equal you would typically expect that each shareholder is entitled to appoint a director, and the agreement should provide for this.

A shareholders' agreement should deal with issuing new shares and selling shares and also deal with how the company can raise finance and in particular, circumstances in which finance can be raised through equity. Whether a share issue can be approved by an ordinary resolution of the directors (which is the standard position under the Corporations Act and a standard constitution), or requires a special or unanimous resolution of the directors or shareholders, will depend on the dynamics of the company's share register and the nature of the relationship between the parties.

It is critical that a shareholders' agreement includes mechanisms for the disposal by a shareholder of their shares. Some agreements include pre-emption rights, while others provide that the continuing shareholder or shareholders have an option to purchase the outgoing shareholder's shares. The appropriate management of shareholder exit is important – whether caused by unexpected events (death or TPD), default or retirement.

A common area of dispute is, unsurprisingly, the value of the exiting shareholder's shares. A good shareholders' agreement will include a clear process for the valuation of the shares if the parties cannot agree.

In some start-up businesses, where the founding shareholders have a medium to long term plan to build goodwill and then sell by way of a trade sale or IPO, the shareholders' agreement will include what are known as 'drag along and tag along' provisions, designed to ensure that minority interests cannot veto the founders' exit plans.

The matters referred to above may sound straight forward, and in some respects they are. However, it is these types of matters which, if not dealt with in an appropriately and well drafted shareholders' agreement, can result in costly disputes.

Reviewing your existing shareholders' agreement

It is not uncommon for companies to develop over time in ways that were not originally expected. Circumstances change and expectations change. It is worthwhile regularly reviewing your existing shareholders' agreement in order to determine whether any new provisions need to be added or whether any changes should be made to reflect and appropriately address changed circumstances. It is usually easier to agree on changes to documents of this kind if there is a regular process of review rather than leaving the review during a dispute.

This article was written by Principals, Douglas Raftesath, Georgina Odell and Mark Fitzgerald. If you have any questions about shareholders' agreements, please contact Douglas, Georgina or Mark.

Douglas Raftesath

Principal | Commercial Litigation & Dispute Resolution
T | +61 2 9018 9978
E | draftesath@meridianlawyers.com.au

Georgina Odell

Principal | Corporate & Commercial
T | +61 2 9018 9975
E | godell@meridianlawyers.com.au

Mark Fitzgerald

Principal | Corporate & Commercial
T | +61 3 9810 6767
E | mfitzgerald@merdianlawyers.com.au

Small and medium businesses will have the ability to collectively bargain with their suppliers once the first ever class exemption granted by the ACCC commences this month.

Background and the ACCC's class exemption power

Since November 2017, the ACCC has had the power to make class exemptions for certain types of conduct which may otherwise have breached Part IV of the *Competition and Consumer Act 2010* (Cth) (**the CCA**). Such exemptions allow businesses to engage in the specified conduct without the need to apply for an authorisation or notification.

Class exemptions may be granted if the ACCC is satisfied that the conduct, in all circumstances:

- would not have the effect, or would not be likely to have the effect, of substantially lessening competition, or
- would result, or would be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or would be likely to result, from the conduct.

In granting a class exemption, the ACCC may also impose limitations on the persons, circumstances and conduct that the class exemption will apply to.

The ACCC also has the power to withdraw the benefit of a class exemption from particular businesses if it believes that the conduct in that case would be likely to substantially lessen competition or would be likely to result in a benefit to the public that does not outweigh the detriment to the public.

The collective bargaining class exemption

Following a consultation period, the ACCC announced in October 2020 that a class exemption would be granted to certain businesses to allow them to collectively negotiate with suppliers, wholesalers and franchisors.

The class exemption will apply to businesses and independent contractors who form, or are members of, a bargaining group, and who each had an aggregated turnover of less than $10 million in the financial year before the bargaining group was formed. This will apply to more than 98% of Australian businesses.

Further, all franchisees and fuel retailers governed by the Franchising or Oil Codes of Conduct, regardless of turnover, will be able to collectively negotiate with their franchisors.

Bargaining groups subject to the exemption will only need to fill out a one-page form in order to be granted protection from the CCA. Prior to this, small businesses wishing to engage in collective bargaining would have required authorisation in order to do so without breaching the CCA. The ACCC has recently stated that in its experience, collective bargaining by small businesses often does not harm competition and can actually, in some circumstances, produce public benefits.

The determination enacting the exemption is currently subject to the parliamentary disallowance process which will end in February, bringing the exemption into effect.

Further information

The ACCC's press release on the new class exemption can be found at https://www.accc.gov.au/media-release/class-exemption-will-enable-small-businesses-to-collectively-bargain.

General information on the class exemption power can be found at https://www.accc.gov.au/business/exemptions/class-exemptions.

Further information, including guidance for businesses seeking to form a collective bargaining group, will be made available by the ACCC once the exemption commences.

This article was written by Special Counsel, Hayley Bowman and Solicitor, Molly Cooke. If you have any questions about collective bargaining, please contact Hayley or Molly.

Hayley Bowman

Special Counsel | Corporate & Commercial

T | +61 3 9810 6723

E | hbowman@meridianlawyers.com.au

Molly Cooke

Solicitor | Corporate & Commercial

T | +61 3 9002 2105

E | mcooke@meridianlawyers.com.au

MERIDIAN LAWYERS

Contact Us

Penny Evans

Principal | Property

T | +61 2 9018 9965

E | pevans@meridianlawyers.com.au

Mark Fitzgerald

Principal | Corporate & Commercial

T | +61 3 9810 6767

E | mfitzgerald@meridianlawyers.com.au

Georgina Odell

Principal | Corporate & Commercial

T | +61 2 9018 9975

E | godell@meridianlawyers.com.au

Douglas Raftesath

Principal | Commercial Litigation & Dispute Resolution

T | +61 2 9018 9978

E | draftesath@meridianlawyers.com.au

Sharlene Wellard

Principal | Workplace Relations & Safety

T | +61 2 9018 9939

E | swellard@meridianlawyers.com.au

Hayley Bowman

Special Counsel | Corporate & Commercial

T | +61 3 9810 6723

E | hbowman@meridianlawyers.com.au

Laura Forsyth

Special Counsel | Property

T | +61 2 9018 9958

E | lforsyth@meridianlawyers.com.au

Gabrielle Parra

Senior Associate | Commercial Litigation & Dispute Resolution

T | +61 2 9018 9925

E | gparra@meridianlawyers.com.au

Mary Ibrahim

Associate | Workplace Relations & Safety

T | +61 2 9018 9979

E | mibrahim@meridianlawyers.com.au

Alexander Hughes

Lawyer | Commercial Litigation & Dispute Resolution

T | +61 2 9018 9956

E | ahughes@meridianlawyers.com.au

Molly Cooke

Solicitor | Corporate & Commercial

T | +61 3 9002 2105

E | mcooke@meridianlawyers.com.au

Yashila de Silva

Solicitor | Corporate & Commercial

T | +61 3 9002 2149

E | ydesilva@meridianlawyers.com.au

Annelise Morgan

Solicitor | Property

T | +61 2 9018 9961

E | amorgan@meridianlawyers.com.au