

# Moving forward ...

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The first of January 2007 seems like yesterday! We now can look back at 2007 and identify the changes that have occurred due to the uncertainty of the stock market, the fear of further interest rate rises, the fluctuations of the Australian dollar as well as the increase we have seen in the cost of housing in the Victorian property market, due to the short supply of property and the increasingly bandied term of mortgage stress. All these variables will impact over the next few months on both consumer spending and the economy as a whole. Furthermore, there is the uncertainty that is always created in the period before a Federal election, which is certain to be held prior to Christmas and the impact this will have on all aspects of the economy (especially the amendments to the WorkChoices Legislation) if there is a change of Government.

It is in view of these interesting challenges that we bring you a special note about current changes in the legal commercial landscape that we believe may be of interest to you. We start off with the decision of *Vines v ASIC* where a senior executive officer, who was not a director, was held accountable for failing to act with due care and diligence. We also comment on corporate insolvency reform, that was introduced following the decision of *Sons of Gwalia Ltd v Margaretic*. On the property front, we look at the rights and obligations of Owners Corporations and lot owners under the new *Owners Corporation Act* and the impact of E-conveyancing.

On the topical issue of estate-planning and asset-protection, we bring you five simple ways to protect you and your family from the unexpected.

Also in this issue, we present you with a special report on Australia and China and the ever-expanding landscape between these two countries.

We hope this issue of *Moving Forward* will be informative for you. Please feel free to contact us with any queries.

**Mark White**  
Partner



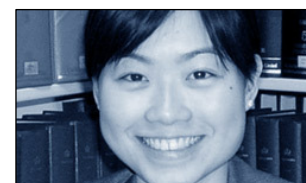
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### The decision of *Vines v ASIC* (2007) 25 ACLC 449

This decision is important because it tells us that senior executive officers who are not directors can be held accountable for failing to act with the requisite standard of care and diligence.

Mr Vines was the Chief Financial Officer of the GIO Group, but not a director. ASIC prosecuted Mr Vines for breaches of the *Corporations Act*. The NSW Court of Appeal found that the position of a Chief Financial Officer was such that there were identifiable specialist skills attaching to that office.

The practical implication of this case is that executive officers within the company are expected to exercise the degree of care and diligence that a reasonable person in a similar position in the entity would have exercised in the circumstances, failing which they will be held accountable.

### Corporate Insolvency Law Reform

On 31 January 2007, the High Court of Australia determined that shareholder claims brought against an insolvent company (or a company facing insolvency), are to stand on an equal footing with creditors' claims. The practical implication of this case means that creditors may now have an even shallower pool of company assets from which to satisfy their debts.

In the wake of the decision in *Sons of Gwalia v Luka Margaretic* (2007) HCA 1, corporate insolvency law underwent changes as proposed by Commissioner David Jackson

during the special inquiry into James Hardie.

As a result, the *Corporations Amendment (Insolvency) Bill 2007* was introduced into the House of Representatives on 31 May 2007. The legislation should be fully operational by the beginning of next year.

The first reforms to insolvency laws in 15 years comprised of improving outcomes for creditors and employees, implementing measures to deter corporate misconduct through the establishment of an assetless administration fund, improving regulation of insolvency practitioners and fine-tuning voluntary administration.

Companies dealing with environmental pollution, events causing cancer, product defects, manufacturing and mining will most likely be affected by the changes.

### The New Owners Corporations Act 2006 (Vic)

2007 heralds another change on the legal commercial landscape with the introduction of the *Owners Corporation Act 2006* (Vic) ("the Act"). With the high rise boom of the 90s, bigger bodies corporate were created. It is now estimated that there are about one million people in Melbourne that live or work in a building that is covered by a body corporate. The current legislation could not cope with the changing landscape and hence the Act was spawned.

The major changes brought about by the Act deal with dispute resolution

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mechanisms, internal workings of Owners Corporations, the obligations of the developer (i.e. initial owner), Vendor's Statements, insurance and two-lot subdivisions.

The most important element of the new regime is to take disputes away from the courts and the introduction of a multi-tier enforcement process (which also results in a multi-tier or staged dispute resolution process). However, the Achilles' heel of the Act may be the length of time involved in resolving what may be a simple matter between neighbours.

It is important to note that the Act does not stand alone – one also has to look to other pieces of legislation to ensure that these do not produce an inconsistent outcome. For instance, the Act amends the *Domestic Building Contracts Act*, *Sale of Land Act*, *VCAT Act*, as well as the *Limitation of Actions Act 1958* to ensure that there can be no adverse possession in relation to common property.

### E-conveyancing and the implications for conveyancing practices

Seven years ago (under the supervision of the Victorian Department of Sustainability and Environment), the Electronic Conveyancing Project ("ECP") was created with the aim of transferring real property via electronic means. The 'big four' lenders control about 76% of the \$600 billion in home loans. For the past 12 months, a limited pilot project involving the major banks has been underway.

Now, on the eve of the project going online (in November), major banks have withdrawn their support, with only the Bendigo Bank and Member's Equity still in the game. An immediate consequence of this is that any transaction that involves another bank as a mortgagee may not be able to be performed through ECP.

Nonetheless, it is too early at this stage to provide an informative discourse on whether the ECP has merits, or is a white elephant.

Until the system goes online in 2010, which is only another three years away, the 150 year old paper-based transactions will continue.

### Five ways towards Estate-Planning and Asset-Protection

1. The golden rule is to **coordinate** your asset-protection and your estate-planning/asset-protection strategies so that both husbands and wives (and domestic partners) are involved in asset-protection.
2. **Maintain business and personal assets apart** – Build up your assets, where possible, in protected entities. You don't want to lose everything.
3. **Minimising jurisdictions in which assets are held** – A Grant of Probate gives authority to the personal representative only within the jurisdiction that makes or reseals it. The fewer jurisdictions in which the authority must be established, the simpler the estate

arrangements.

4. **Wills in contemplation of marriage and mutual wills**

– A marriage will revoke a Will unless it contains an expression of contemplation of marriage. One matter that should be considered is whether the Will is to be conditional upon the solemnisation of the marriage, or whether the Will is to operate whether the marriage is solemnised or not.

5. **Trust and company arrangements**

– The power to appoint and dismiss trustees of a family trust is frequently vested in an individual (known as the Appointor) with provision that on his or her death, that power will vest in his or her personal representative. Importantly, such provisions can lead to the effective control of the trust being vested in the personal representative and the selection of the executor may require particular care.

**Special Report: Sino-Australia Relations**

*"How does Howard define the national interest with China? First, economic results – trade, investment, jobs. Second, a personal relationship with China's leadership. Third, a political relationship that minimises the disruption caused by different values. Fourth, formal but somewhat ritualistic support for China's engagement..." (Weekend Australian, 5 April 1997, page 21).*

The Asian economic crisis of 1997 brought into question the extent to which Australia's economic future lay within the region.

Ten years on, China is now Australia's largest trading partner and Australia is China's ninth-largest trading partner, accounting for almost \$24 billion in exports

(*Australian Financial Review*, 31 August 2007, page 80). There are currently over 3,800 Australian exporters who sell to China. China's phenomenal growth has propelled its demands for resources and China-Australia ties are bringing tangible benefits to both sides of the Asia-Pacific region.

China's new Corporate Income Tax Law comes into force in January 2008. This brings to an end arrangements that resulted in Chinese companies paying 33 per cent income tax, compared with an average of 15 per cent for foreign companies.

Importantly, from the foreign investors' point of view, this means that the new law reflects a more selective attitude towards foreign investment, as well as a levelling of the playing field.

To benefit from the Sino-Australia relationship, it is vital to consider what China means for Australian business. Specialised advice is important and we have developed a range of contacts that may be able to help you.

**Our areas of service include:**

- + Asset-protection
- + Business structures including new enterprises
- + Commercial leasing
- + Conveyancing
- + Corporate finance
- + Corporate governance
- + Corporate litigation
- + Corporate reconstruction and insolvency
- + Credit compliance
- + Estate-planning
- + General commercial and corporate advice
- + Health and Aged Law
- + Intellectual Property
- + Mediation
- + Mergers, acquisitions and dispositions
- + Property development and larger commercial property based transactions
- + Regulatory compliance including competition law and consumer protection
- + Revenue law
- + Trust Law