

# report

MULLINS

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## MUTUAL WILLS

MICHAEL KLATT



**M**utual Wills are Wills made by two persons who agree that neither party will change their Will during their lifetime

without the knowledge and approval of the other. If one party dies having honoured the agreement, the other is bound by the agreement and if they do subsequently make a new Will on different terms, the Court will generally enforce the terms of the agreement against the estate of the party who has breached the agreement.

It is not uncommon for a husband and wife to make Wills that are in identical terms or are "mirror image" Wills. This does not mean they are mutual Wills.

The agreement is normally in writing but in some cases can be enforced even if it is not in writing although establishing the terms of the agreement may be difficult.

Concern that a husband or wife may re-marry and leave the whole of their estate to the new spouse and not the children of the first marriage is the most common reason the parties

consider entering into an agreement for mutual Wills.

Another circumstance is where a person re-marries and one or both parties have children from previous relationships. They may each want, in the case of their death, to provide their spouse with full access to all of the assets during their lifetime but be concerned their spouse will, upon receiving the whole estate, change their Will and leave nothing to the surviving spouses step-children.

to have full use and the ability to dispose of assets during their lifetime with agreement as to how anything left will be dealt with.

Entering into an agreement to make mutual Wills will generally not be effective if the motive is to avoid a likely family provision application and careful planning is always required before entering into such an agreement. Generally the use of



The agreement may be drafted to restrict the disposal of assets by the survivor after the death of the other party but doing this is dangerous because it is hard to predict the needs of the survivor in the future. It is more common to allow the survivor

agreements for mutual Wills is discouraged because of the inflexible nature of the agreement which may have consequences which are not foreseen when the agreement is made.

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GREG SAWERS

In response to concerns regarding supervision in the building industry, the Queensland Government has introduced the Queensland Building Services Authority and other Legislation Amendment Bill 2007. This bill amongst other things seeks to introduce new licensing which will effect supervision of construction works, in particular if a licensed company conducts the work.

Under the proposed amendments the parties who may supervise building works will be expanded to include the company's nominee, an officer or employee of the company who holds a nominee supervisor license (new proposed license class), a site supervisor license (new proposed license class), a fire protection occupational license (new proposed class license) or an occupational license, together with any unrelated individual who holds a contractors license of the relevant class. These changes will reflect common industry practice of having construction managers and now independent third parties supervise the building works.

The obligations placed upon supervisors are proposed to increase significantly and will no longer be limited to factors such as the number of sites at which building work is being carried out or the geographical location of the sites. The proposed changes will require more subjective issues to be considered and taken account of including:

- (a) whether the licensed contractor has a system for the supervision of the work and, if so, how the system has been implemented;
- (b) whether the building work is in accordance with the plans and specifications set out in the contract for the work;
- (c) whether the work is of a standard expected of a competent holder of a contractor's licence of the relevant class;

(d) whether, having regard to the size and complexity of the building work, the following are sufficient:

- (i) the level of control, oversight and direction exercised by a person authorised to supervise the work;
- (ii) the number, timing and quality of inspections carried out by a person authorised to supervise the work.
- (e) whether the building work is checked on its completion and before final payment by a person authorised to supervise the work.

# LICENSE TO BUILD

The transitional provisions of the proposed act provides that any party holding a site supervisor license at the time of the commencement of the Act will be taken to hold a nominee supervisors license of the relevant class(es).

The proposed amendments to the Act would place increased administrative and monitoring costs upon licensed companies. Further, companies need to ensure that their employees or other parties engaged by them to supervise building works are aware of the changes and the higher standards of monitoring required and that they comply with the relevant licensing and reporting requirements. Examination will need to be conducted of the final legislation, if assented to, to determine the true impacts upon the building industry.

# MICROSCOPE

SCHOOL BULLYING UNDER THE

CARLEN LOWE



The Court of Appeal in New South Wales has recently handed down a decision of *Cox v State of New South Wales* where the Plaintiff received substantial damages for psychological injury resulting from bullying at school.

The Plaintiff, Benjamin Cox, claimed he suffered a psychological injury arising out of his enrolment in a NSW government primary school in 1994 and 1995. He alleged he suffered bullying, harassment and physical assaults by an older student and the school authority took no or inadequate steps to prevent the harassment and bullying, or provide him with protection from the older student.

During the course of the bullying in 1994 and 1995, the Plaintiff's mother raised concerns and requested intervention by the school principal and vice-principal. This factor was crucial to the outcome of the case in favour of the Plaintiff. The school's duty of care is to take such measures, as in all the circumstances, are reasonable to prevent injury. An isolated incident of bullying may not establish a breach of duty by the school. The State of New South Wales did not deny evidence of bullying or the failure by the school to intervene nor did it supply

evidence of reasonable conduct by the school.

The Plaintiff's mother withdrew her son from school in September 1995. He then attended various other schools from September 1995 with minimal symptoms, until 2001 when he developed increased psychological symptoms prior to attending high school.

He developed psychiatric conditions identified as Depression and Anxiety Disorder, Separation Anxiety Disorder, and Post Traumatic Stress Disorder. These conditions were unlikely to abate and he was unemployable.

The Court found the school breached its duty of care to Mr Cox.

Not all schoolyard bullying will automatically lead to a claim for damages against the school. The school in this matter of Cox failed to act on the pleas for help from the Plaintiff's mother and therefore breached its duty of care by failing to take appropriate action to prevent the bullying.

It is of significance that following this ruling by the New South Wales Supreme Court, the federal government moved to give teachers and principals more power to address schoolyard bullying.

# Land Tax - 101

CHRIS HARGREAVES



**L**and tax is an annual tax on the unimproved value of freehold land in Queensland as at midnight of 30 June

each year. The tax is calculated and levied in advance of each financial year. That is, land tax for the 2007/08 financial year is based on land owned at 30 June 2007.

The unimproved value for calculating land tax is determined by the Department of Natural Resources and Water, and is the same unimproved value used to determine your local government rates.

Land tax is payable by the owner of the property. If the land is sold during a financial year, the Commissioner of Land Tax does not make any pro-rata adjustment of the land tax. It is up to the parties to apportion the tax between themselves.

For the 2007/08 financial year, an individual may be liable for land tax if the total unimproved value of freehold land owned by that person is equal to or greater than \$600,000. A company (including a club, association or society), trustee (including a trustee of a deceased estate), or an absentee (an owner who does not ordinarily reside in Australia or an external territory), may be liable for land tax if the total unimproved value is equal to or greater than \$350,000.

There are a number of exemptions available for land tax. The most common is for land comprised of one parcel, used substantially as a principle place of residence by a person who owns no other land in Queensland. Exemptions are also available for residents of a retirement village, exempt charitable institutions and land owned by or in trust for a person or society and used as the sole site of a building owned and occupied by a non-profit society, club or association.

There are also a number of deductions available (that is, a reduction in the assessable value of the land). There is a deduction available for an individual resident landowner who uses land as his or her principle place of residence (if they are not eligible for the exemption). There is a deduction available for a trustee if all the trust beneficiaries use the land as their principle place of residence.

There are deductions available for land used solely for the business of primary production. However, land used as a hobby farm is not eligible for this deduction.

Land tax is calculated by applying the relevant tax rate to the taxable value of the land. The land tax rates are extracted in the tables below.

If you need any information or advice in relation to land tax for your specific circumstances, please contact us.

## INDIVIDUALS (other than trustees of absentees):

Taxable Value

\$0 - \$599,999	\$0
\$600,000 - \$749,999	\$1,200 plus 0.7 cents for each \$ more than \$600,000
\$750,000 - \$1,249,999	\$2,250 plus 1.45 cents for each \$ more than \$750,000
\$1,250,000 - \$1,999,999	\$9,500 plus 1.5 cents for each \$ more than \$1,250,000
\$2,000,000 - \$2,999,999	\$20,750 plus 1.675 cents for each \$ more than \$2,000,000
\$3,000,000 and over	Flat rate of 1.25 cents for each \$ of the taxable value

## COMPANIES, trustees and absentees:

Taxable Value

\$0 - \$349,999	\$0
\$350,000 - \$749,999	\$2,250 plus 1.5 cents for each \$ more than \$350,000
\$750,000 - \$1,249,999	\$8,250 plus 1.65 cents for each \$ more than \$750,000
\$1,250,000 - \$1,999,999	\$16,500 plus 1.8 cents for each \$ more than \$1,250,000
\$2,000,000 and over	Flat rate of 1.5 cents for each \$ of the taxable value



PAT MULLINS  
EDITORIAL

**I**n this issue, Carlen Lowe examines a recent decision concerning the civil liability of school authorities where they fail to tackle the problem of bullying. Bullying is an ugly reality of modern life. It is not confined to schools. Many of today's Workers' Compensation claims and industrial relations problems have some form of bullying as their root cause.

Because I act for a number of Queensland's largest independent schools I have been in the position to observe how various school Principals handle the very difficult issue of school bullying when it arises. I have been singularly impressed with the style of those Principals who tackle the problem themselves and don't simply delegate responsibility down the line. The only way to stamp out bullying when it occurs (whether at a school, sporting club or workplace) is to tackle it head on. It is necessary to deal with the bully separately from the victim.

The relevant institution must take a very public stance that any form of bullying will not be tolerated. When incidents occur, each one needs to be dealt with. Those in authority need to be in a position to properly investigate what has occurred. Following investigation, there needs to be a firm but fair disciplinary response. In this way the bully gets the message, and action meets rhetoric.

We live in a civil society. Australians have always recognised that everyone is entitled to a fair go. The insidious thing about bullying is that the bully selects a victim because of some perceived weakness. The victim is then denied the right to that fair go. Bullying is particularly un-Australian. It is important for the whole of our community to support school Principals, sports administrators and employers generally in the important work they do to tackle bullying head on.

# IP Protection – don't lose your rights

ANDREW NICHOLSON



**S**adly, people often lose the right to protect their intellectual property (IP) by publishing the idea before seeking to protect it. The sixty-four dollar question that any designer/author/inventor wants answered is "Can I

protect my idea and, if so, how do I go about it?"

There are 3 questions which need to be considered when any IP is developed:

## 1. What form of protection is available, if any, if I create or own any IP?

Often there is only one form of protection which is available to protect an idea, but that is not always the case. It may also be important to obtain more than one form of protection if a new business is starting or if a product and brand are being developed at the same time. The forms of protection which are available range from securing business/domain names and trade marks, to design or patent registration. If the correct choice is not made at the outset, then any rights which the owner of the IP had may be lost.

## 2. If I can protect my idea, what steps do I have to take?

That depends on the type of IP which you have developed. For instance, copyright protection is acquired automatically when a work is produced. Registration must be sought for trade marks, (which are relatively quick and inexpensive), designs and the more technical (as well as time consuming and costly) innovation patents and patents.

## 3. When do I have to take those steps to protect my idea?

The answer will depend on the type of IP which you have developed, but it is essential that you ask the question before you publish the idea or take the product to market. Otherwise, you run the risk of losing any rights which you have developed. In particular, for

design registration and patent registration, the invention must be new, distinctive and inventive or novel. Once an invention is published, exhibited or made available for sale in the marketplace then it is considered to be in the "prior art base" and no longer new and inventive or novel (and can't be registered).

A case in point is the recent decision of the High Court in *Burge v Swarbrick* [2007] HCA 17, in which the Court restricted the protection which was formerly available to designers who may also have relied on copyright protection. Mr Swarbrick had designed a "plug" or scale model of a sports boat which was subsequently produced for sale. Ordinarily, designers are required to obtain design registration for their product, before it is published to the world, otherwise they lose the monopoly rights to which they would otherwise have been entitled.

In some circumstances, designers may also be entitled to claim copyright protection, even though a design is not registered. Those rights may be lost if the product is industrially applied (that is more than 50 copies of the item are made. Mr Swarbrick did not register his design. Once the product was available in the market, it was no longer novel and not capable of design registration. However, he considered that his design had been copied and sought to claim that copyright in the model had been infringed.

The Court took the view that if protection (via design registration) is available, then it should be obtained and copyright protection will not be available to designers who either neglect to register their design or elect not to do so. It would be a bold move to ignore the warning of the Court and not to obtain registration if the design is worth protecting.

The moral is to ensure that careful thought is given to the protection of any IP as soon as it is created and certainly before it is published or taken to market.

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