

# report

MULLINS

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**JOHN MULLINS**  
**EDITORIAL**

**C**hristmas is here again. Like you, our staff are all looking forward to a break over Christmas to spend with their family and friends. The office will close from the 22nd of December and reopen on the 2nd of January. If you don't have a Partner's mobile number, they are available in the phone book. We are available to help you with any issue you may have at any time even when the office is closed.

With Australia leading 2 - 0 in the Ashes Series, the world seems to be back on its axis and everything is the way it should be leading into Christmas.

We thank you for your support and business over the last twelve months. It is the relationships that we have with our clients which makes the work we do rewarding and satisfying. Our goal is to assist you in running your business and private affairs with certainty and with success.

We are looking forward to 2007 with considerable optimism and purpose as South East Queensland continues to drive economic growth in the State and leads the way in Australia.

So whether it is at the beach, in the backyard, watching the cricket, tennis or golf, at the BBQ or around the Christmas tree, we hope that you are able to spend Christmas with those most important to you and renew your energy for an exciting 2007.

From all of the Partners and staff, we wish you a wonderful Christmas and a Happy New Year.

Best Wishes

## If you want to play **Santa** - look out for **Scrooge**

MIKE SWARTZ

**T**he Ghost of Christmas Past looms large again this year, as the spectre of Fringe Benefits Tax casts a shadow over the benevolent nature of many employers.

As the song goes, 'You better not shout' or at least you better not shout too many rounds for your employees at your Christmas bash for fear of awakening the real Grinch.

There are more rules and regulations on Christmas parties than Santa and his Elves can load onto the sleigh. The safest option according to the ATO is to have an in house, staff only party with finger food, no alcohol and no accompanying gifts. Now that's an Aussie style Christmas celebration to really remember. If you want to lash out little more than that, you can take your people to a restaurant or function venue, but you can't spend more than \$100 per head - otherwise the Grinch will be out to steal some more of your Christmas.

Oh, if you provide entertainment in the form of say, magicians (ATO suggestion), the limit increases to \$125 per head. Of course none of this is tax deductible.

Now the rules also state that if you provide a gift or hamper at the party itself, that must also be included in the \$100 per head, as the benefits are 'related' and therefore are no

longer minor or incidental. Here comes that Grinch again.

So, this Christmas, you better watch out because Santa really is coming to town, only he'll be taking, not giving. If you want to be really safe, just pay your staff's Christmas bonus to your accountant for some iron clad FBT advice, or better yet have Christmas in July, hand out a hamper in September, or maybe do like the Kranks - and skip it altogether.



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# MEMBERS BEHAVING BADLY

MATT BRADFORD



It is important for all clubs to ensure that they have appropriate procedures in place to discipline misbehaving members. Otherwise, it will be very difficult for a club to take action against a member and to deter such conduct

from occurring in the future. On the other hand, a clearly defined disciplinary model can assist in ensuring that any issues arising from misbehaving members are dealt with quickly and efficiently.

The authority and power for clubs to discipline members arises from the club's constitution. The constitution is basically a contract between members and the club. By becoming members, individuals agree to be contractually bound by the obligations contained within the constitution. This applies to unincorporated associations, incorporated associations and companies limited by guarantee.

Most constitutions contain a head of power allowing the management committee to make by-laws regarding the governance of the

club and under this power the management committee may implement a disciplinary by-law. The advantage of using a by-law is that the policy can be amended quite easily.

The problem for many clubs is that whilst there may be a head of power to make by-laws, either a specific disciplinary by-law does not exist, or the by-law is simply inadequate. A particular concern is that the disciplinary procedures of many clubs seem to overlook the concept of natural justice.

Natural justice is not a concept that was conjured up by Darryl Kerrigan in the movie *The Castle*. It is a series of well-established principles at common law that clubs are obliged to abide by when conducting disciplinary proceedings.

There are four main principles of natural justice:

1. The accused person should be correctly informed of the nature of the proceedings and the specific charge that they are facing;
2. The accused person has a right to be heard and make submissions before a decision is made;
3. The accused person will be given a fair hearing by an independent and unbiased tribunal, which will only consider relevant issues; and
4. The decision reached by the tribunal is not unreasonable.

Despite the fact that these principles of natural justice have been around for a long time, clubs often get themselves into trouble by failing to abide by these principles when conducting disciplinary proceedings, including a failure to advise of the charge, a failure to give an opportunity to defend before the decision is made



## GETTING YOUR PRIORITIES RIGHT

PAUL LUTVEY



If you have been unfortunate enough to be a creditor in an insolvency administration your first normal reaction is to be concerned as to how much of your debt, if any, will be paid by the time the assets are

realised and a dividend is paid.

However before any dividend is paid to the ordinary unsecured creditors there are certain payments that must be paid first according to the Corporations Act.

In the case of a voluntary administration the priority of payments is, in most cases, set out in the Deed of Company Arrangement. Under this form of administration it is the body of creditors that determine the terms of the Deed of Company Arrangement and therefore it is the creditors that can determine the order in which the payments to creditors are made.

In the case of a liquidation, where the process is more stringently

governed by the provisions of the Corporations Act, the order of payments is as prescribed by a section of the Act.

Put simply the order of payment is as follows:

- The legal and Court costs of the applicant, if the winding up occurred by Court order;
- Out-of-pocket expenses of the winding up incurred by the liquidator;
- The remuneration of the liquidator;
- All employee entitlements including wages, superannuation, holiday pay and retrenchment payments; and then
- All other unsecured debts.

So you can see that there are a number of priority payments to be met before any dividend is paid to the ordinary unsecured creditor.

Where creditors sometimes raise issue is with not just the priority given to the liquidator for his remuneration but also with the quantum. The quantum

of a liquidator's remuneration is governed by the creditors and can be reviewed by the Court.

Firstly the Corporations Act provides that a liquidator is not entitled to draw and be paid any remuneration unless approved by resolution of the creditors. Where there is a Committee of Inspection (comprised of representatives of the creditors) this committee can also approve the liquidator's remuneration.

If however the creditors (or in the case where there is a committee, the committee) are not prepared to pass a resolution approving the remuneration the liquidator is left with no option other than to apply to the Court for approval of the remuneration. Before this application can be made the liquidator must serve notice with full details of the remuneration sought on the five largest creditors and thereafter wait 21 days to allow objections to be received before proceeding with the application. Once the application

# LOSING LAND for the GREATER GOOD

SARAH LUDWIG



South-East Queensland is experiencing an infrastructure boom. Major developments include the North-South Bypass Tunnel, Gateway Bridge duplication, Northern Busway development, Ipswich Motorway upgrade and the North Bank redevelopment in the Brisbane CBD to name a few. These projects will have an impact on many land owners with compensation already underway for the Traveston Crossing Dam and other State Government projects.

The basic process of resuming Land is found in the Acquisition of Land Act 1967. The Crown or local government may take land for any purpose set out in the Act and includes such things as drainage, gas works, roads, railway, and public works in general. First a Notice of Intention to Resume is served on the registered proprietor of the land and any mortgagee. Objections may be made but in reality arguments against resumption are limited to:

- (a) The authority has taken the land ultra vires (outside their power); or
- (b) The authority has acted mala fides (motivated by wrong motives). This could happen where the land taken is excessive i.e. the purpose of the resumption does not support the land to be resumed.

Once the authority has declared the land taken by notification published in the gazette, a claim for compensation may be made. The amount of compensation may be agreed between the parties but this subject to the agreement of any mortgagee. The basis for assessment of the amount of compensation is as follows:-

- (1) the value of the land taken must be considered and the damage caused by:
  - (a) the severance of the land taken from other land owned by the claimant; and/or
  - (b) the exercise of statutory powers by the Authority otherwise injuriously affecting the other land;
    - (1) compensation will be assessed as to the value of the estate or interest of the claimant in the land at the date it was taken; and
    - (2) in the event the value of any adjoining land owned by the claimant is increased the compensation will be offset by this amount.

Several different heads of damage are used to assess the amount of compensation payable. The method used to determine market value is "what would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?" The land's "highest and best use" is taken into account.

A claimant is also entitled to "disturbance loss" which is damage caused by the exercise of statutory powers. This could include losses incurred in moving elsewhere.

Severance loss refers to damage sustained to the claimant's retained land which has been reduced in value.

Injurious affection applies where the land depreciates "or increases the cost of using the 'other land'. The exercise of the power limits... activities or the use of the land and interferes with the amenity or character of the land, deters purchasers from buying the land and makes it more expensive to use the land..."

With the infrastructure boom it is to be expected that the number of compensation claims will rise sharply in the next year or so. The amount of compensation will vary depending on the number of interests in a particular parcel of land, the best use of the land and whether a claimant's other land has been effected by the resumption.

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and worst of all a failure to provide an independent and unbiased tribunal. Often it is the case that members of the management committee simply do not have the necessary independence to hear disciplinary matters and we would generally recommend that the club have an independent tribunal made up of people that are not only independent, but have the appropriate skills, including a basic knowledge of the legal process, to adequately administer a disciplinary proceeding. It would generally not be appropriate for the club's lawyers to be on the tribunal, as they may not have the necessary level of independence from the club.

It is important that clubs have the ability to discipline their members to ensure that the club can continue to operate in an enjoyable manner consistent with the objects of the constitution. However, it is equally important for clubs to ensure that the disciplinary procedures in place are both adequate and lawful, otherwise, the matter could end up in the newspapers or in the courts.

is made it is up to the liquidator to satisfy the Court as to his or her entitlement to and the quantum of the remuneration sought.

Also if the creditors pass a resolution approving the remuneration and certain minority creditors or even a director feels aggrieved by such resolution it is available to such aggrieved party to apply to the Court for a review of the remuneration approved by the resolution.

So if you are in the unfortunate position of being a creditor of an insolvent company you should understand the procedure and priorities before a dividend will be payable to you and it is important for you to understand upon what basis the liquidator is entitled to his or her remuneration in priority to unsecured creditors.

# FAMILY SUCCESSION PLANNING

MICHAEL KLATT



The combination of family and business has led to many success stories, but also has the potential to end up in some of the most stressful litigation to come before the Courts. This is because it involves family relationships. This

being the case, it is imperative that the family business properly documents the agreement between the parties. The hard part is reaching an agreement and many family businesses avoid discussing the difficult issues at an early date, leading to bigger issues later.

Many family businesses prepare a Family Constitution. Its primary role is to set out the intentions that the parties have in relation to the business. This document could list the values of the family and business and would generally deal with a number of other issues including what shareholding in the business each of the family members may have, the succession of shareholding, ie will there be some structured decrease of one party's shareholding at specified times and an increase in the shareholding of other stakeholders interests and what consideration is paid for the acquisition of that shareholding.

The Constitution can also deal with the management structure of the business, the appointment of a Chairman, Chief Executive or other positions developed by the family. It is extremely important that family members have clearly defined roles as this can otherwise be a major source of dispute. The Constitution may also deal with bringing in non-family members as Directors, Managers or Consultants, which, in many cases where that person has specific expertise to compliment the business, can be invaluable to the increased success of the business.

Remuneration and frequency of meetings should also be addressed. Developing a corporate mentality and ensuring accurate minutes are taken is

extremely important. The Constitution can take the form of an agreement which is legally binding. However, some families have non-binding Constitutions which talk generally about these issues, but are supported by other legal documentation.

The type of other legal documentation prepared for family businesses depends largely on the structure set up for the ownership of the business and any associated assets. Sometimes businesses have been running for years

or trust or partnership is involved, it is important to have an agreement between the stakeholders. This could be a constitution, shareholders agreement or unit holders agreement.

One of the most important provisions in these agreements is the clause dealing with how a stakeholder's interest, can be dealt with. Generally, there are restrictions on who the interest can be sold or transferred to and consent of the other stakeholders is generally required.



using a particular structure which may not be the most appropriate structure and, in the course of a regular review of these matters and, faced with having had significant growth, the structure that was in place is no longer appropriate. Professional advice about whether a restructure is required should be regularly obtained. Restructures may have some tax and stamp duty implications which need to be weighed up against the benefits for the business into the future.

The usual structures used in family businesses include private companies, unit trusts, family trusts and partnerships of individuals. Whether a company

The agreement should deal with the transition and ownership of control during a stakeholder's lifetime, but should also deal with a stakeholder's exit from the business as a result of death or permanent disability. These events can be covered by insurance.

As part of the exercise all stakeholders need to review their wills to ensure they are consistent with the agreement reached. Succession Planning is vital for the long-term success of a Family Business and ensuring that arrangements are properly documented is essential.