mullins report

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SCHOOL VOLUNTEERS DO NEED A 'BLUE CARD'

By: Kylie Torlach

All volunteers who work with children or young people in the following areas - which are only some of the areas covered by the child safety legislation - must apply for a Blue Card:

- Schools;
- School boarding houses;
- Education programs outside of school;
- Sport and active recreation; and
- School crossing supervision.

A 'volunteer' is a person employed by another person or organisation who is not paid, other than being reimbursed for out-of-pocket expenses.

From 17 January 2005, all new volunteers (unless exempt) must hold a 'Blue Card' before they start volunteering, regardless of how often they come into contact with children and young people.

Volunteers who started before 17 January 2005 can continue to volunteer until whichever of the following events happens first:

- Their Blue Card is refused;
- They receive their Blue Card;
- Their application for a Blue Card is withdrawn; or
- The period of grace (until 16 January 2006) expires.

Some volunteers are exempt and do not need to apply for a Blue Card. They are:

- Children under 18 years of age who are volunteers (except students required to work in regulated employment as part of their studies);
- Parents who volunteer at the school their child is attending, as long as the child is under 18 years of age; and
- Parents who are involved in sport and active recreation, where their child is involved in the same or similar activity.

Importantly, it is not only the volunteer who is required to apply for a Blue Card. The organisation (in this case, the school) is also responsible for applying for a 'Working with Children Check' for each of its volunteers.

A 'Working with Children Check' is free for volunteers.

If the school allows a volunteer to work at the school without holding a Blue Card - unless (currently) that person is a pre-17 January 2005 volunteer, or exempt - the school is committing an offence.

The maximum penalty for the offence is $750 for each and every volunteer concerned. Further, it is possible that the school could be repeatedly fined if it continues to allow a volunteer or volunteers to work. That is, it is not simply a case of a 'once only' fine.

IMPORTANTLY, IT IS NOT ONLY THE VOLUNTEER WHO IS REQUIRED TO APPLY FOR A 'BLUE CARD', THE ORGANISATION IS ALSO RESPONSIBLE FOR APPLYING FOR A 'WORKING WITH CHILDREN CHECK' FOR EACH OF ITS VOLUNTEERS.

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EDITORIAL

By John Mullins

We live in interesting times. Last week the Courier Mail front page carried two stories, the closing of the Morris Inquiry and the reappointment of Di Fingleton as a Magistrate. I have no political comment to make in relation to either of these events. My only comment is that it would appear that mistakes have been made which have substantial and costly consequences.

How you look at these instances is very much a glass half full, glass half empty exercise. Some may say that the system is working well in that ultimately Ms Fingleton won her appeal. Individuals are entitled to due process and lack of bias. Others might say that the system was not working lower judicial levels with Ms Fingleton and that the enquiry which was making headway into addressing issues of Queensland Health was prevented from proceeding because of errors having been made. Which ever way you look at it, both of these matters impact on the confidence that we as citizens have in inquiries and judicial process. These matters also go to show the incredible complexity in such matters. There perhaps should be an inquiry into the criminal justice system, particularly Government funding of both prosecution and defence.

As always in our Mullins Report, we seek to deal with more grass root issues which hopefully are of information to you, your family and neighbours.

There are two articles which will be of interest to volunteers. Firstly, the need for the Blue Card and secondly, your liability as a Committee Member. There is a substantial amount of misinformation about both of these topics which hopefully we have clarified for you.

The article by Pat Mullins in relation to Access to Justice in Regional Areas highlights the difficulty for regional Australia as we become a more coastal nation. The assumption that Australians should have access to legal representation at a reasonable cost is being impacted upon by the fact that there are less and less lawyers in regional areas. People in regional areas are well aware of the problems associated with attracting professionals of all types, including lawyers, doctors, dentists and accountants to the regional areas. We are all aware that Australia is going through some demographical and sociological changes and this will be yet another fact which impacts upon this.

We hope that you find this edition interesting and informative.

I am finalising this editorial hours before the start of the final Ashes Test. By the time you read this we will know whether England have regained the Ashes for the first time in 18 years. Go the Aussies.

JJM

EXCLUSION FOR GAMBLING VENUES

By: Matthew Bradford

THE QUEENSLAND GOVERNMENT HAS RECENTLY TAKEN A POSITIVE STEP TOWARDS HELPING PROBLEM GAMBLERS FIGHT THEIR ADDICTION.

All venues that provide gambling services now have a duty to exclude a patron where that patron has requested to be excluded from the venue.

The patron and the venue can enter into a self-exclusion agreement, whereby the patron agrees not to enter the venue and authorises the venue to ban the patron from doing so. The agreement can be tailored to the patron's specific situation (e.g. apply to the entire venue or simply the gambling facilities). When a patron requests self-exclusion, the venue has an obligation to provide information to the patron about gambling support services that are available. There is also an option for the venue to initiate exclusion where it has identified concerns with a particular gambler, even where the gambler does not agree.

Once a self-exclusion or venue-initiated exclusion is in place, it has effect for a period of five years. The venue may agree to revoke the exclusion before the five years has expired, but not within the first 12 months of it commencing. A condition of revoking the exclusion may be that the venue will actively monitor the patron's problems against agreed risk indicators. Penalties can be imposed on both venues and patrons who breach an exclusion agreement.

Our firm has assisted in the drafting of many self-exclusion agreements for use by hoteliers throughout Queensland. We believe that the exclusion policy is a positive step in the battle against gambling problems in the community, not only because it provides an opportunity for patrons to legally prevent themselves from gambling at a venue, but because it gives some responsibility to the venues to ensure that they practice responsible gaming and consider the welfare of their patrons.

REGIONAL JUSTICE - AS IMPORTANT AS TELECOMMUNICATIONS

By: Pat Mullins

I serve as the Queensland Law Society's representative on the Access to Justice Committee of the Law Council of Australia. In that capacity I have recently prepared for the Law Council a business paper on Access to Justice in Regional, Rural and Remote Australia.

Senator Barnaby Joyce has been talking long and hard of late over problems with telecommunications in the bush. That is not the only problem which confronts people in regional, rural and remote communities of Australia. Their access to justice is problematic compared to those of us who reside in capital cities.

WE HOPE THE LAW COUNCIL WILL BE ABLE TO DEVELOP AND IMPLEMENT AN ACTION PLAN TO ENCOURAGE YOUNG AUSTRALIAN LAWYERS TO PRACTICE IN RURAL, REGIONAL OR REMOTE AUSTRALIA.

In February 2004, the Law Council of Australia Access to Justice Committee published its *Erosion of Legal Representation in the Australian Justice System Report*. In a number of its recommendations it recognised the increased costs associated with delivering legal services to remote communities.

It called for the creation of a national taskforce, including representatives of those bodies providing publicly funded legal services to develop national guidelines and priority for delivery of those services.

It recommended co-ordinated regional service delivery by Legal Aid Commissions, Aboriginal and Torres Strait Islander Legal Services and community legal centres, as well as the private legal profession. It also recommended the establishment of innovative scholarship and subsidy schemes to encourage young people from rural and remote regions to become lawyers, and for lawyers generally to be encouraged to practice in rural and remote regions. Few of these recommendations have been taken up seriously by the Government.

Legal Aid Queensland does have a scheme of placement of young lawyers in rural and regional practices.

Our Committee has recommended that the Law Council take a lead in the development of these programs in consultation with other interested persons and organisations. We hope the Law Council will be able to develop and implement an action plan to promote programs for enhancing access to justice in rural, regional and remote communities, and for encouraging young Australian lawyers to practice in rural, regional or remote Australia.

Access to justice in the bush is every bit as important as telephone reception.

WARNING!
DON'T SIGN RESIDENTIAL CONTRACTS BY FAX

By: Rebecca Castley

Whilst it might sound absurd in today's technologically advanced society, the requirement for a Warning Statement to be 'attached' to contracts for the sale of residential property means that it is no longer an option for a buyer to enter into a binding contract by receiving and signing the document by fax.

The *Property Agents and Motor Dealers Act 2000 (Qld)* requires a contract for residential property, except where entered into at auction, to have attached as its first or top sheet a Warning Statement which contains information about the five day cooling off period. A failure to attach this Warning Statement will give the buyer a right to terminate the contract at any time before settlement.

...THE PRUDENT APPROACH FOR SELLERS IS TO ENSURE THAT RESIDENTIAL CONTRACTS ARE ONLY ENTERED INTO BY THE PARTIES SIGNING ORIGINAL DOCUMENTS.

The recent decision of the Queensland Court of Appeal in *MNM Developments Pty Ltd v William Alan Gerrard* examined when a Warning Statement will be 'attached' for the purposes of the Act. The agent sent the contract for residential property at the Gold Coast to the buyer by fax. The buyer received from the agent a fax cover sheet, followed by the agent's disclosure to the buyer, then followed by the Warning Statement and the Contract of Sale. The buyer signed the documents and returned them to the agent by fax. Some time later, prior to settlement, the buyer terminated the contract on the grounds that the Warning Statement was not 'attached'.

On appeal, the Court found that the primary purpose of the Act is for the protection of buyers. The intention of the parliament was to ensure that when a buyer picks up the contract, he or she would first be confronted with the Warning Statement. For two documents to be 'attached' there must be some form of 'physical joinder'. A facsimile transmission was not capable of attaching documents due to its continuous nature (that is, it is not enough for the only physical relationship between the documents to be where the Warning Statement ends, the contract begins). The Court concluded that the Warning Statement was not attached and the buyer did have a right to terminate the contract.

As a result of this decision, the prudent approach for sellers is to ensure that residential contracts are only entered into by the parties signing original documents. This will no doubt cause some practical difficulties and delays where individuals are in other parts of Australia or overseas. However, until the legislation is amended to allow signing by fax, this is the only way that a seller can be confident that a buyer will be bound to complete the contract.

TO WHAT LENGTHS DO LANDLORDS NEED TO GO?

By: Tony Rosenthal

In the recent case of *Judith Gration -v- C. Gillan Investments Pty Ltd* (3 June 2005) the Queensland Court of Appeal considered a Landlord's liability to a tenant who was injured when steps of premises gave way because of wood rot.

The Primary Judge in the District Court at Townsville ruled that the Landlord was in breach of its obligation under the *Residential Tenancies Act 1994* (Qld) to ensure that the premises were in good repair.

In this case Mrs Gration was descending the front steps of the house in Townsville where she and her husband lived when two of the steps gave way due to wood rot. She fell about two metres to the ground and sustained injuries. The rental house was an old house in tropical North Queensland. The wooden steps were exposed to the weather and progressive deterioration from wood rot resulted from exposure to moisture - reasonably foreseeable by someone in the position of the Landlord. Foreseeability was heightened by the fact that at least one tread had been replaced on an earlier occasion. Expert evidence during the trial was presented, showing the presence of rot could have been detected by relatively simple probing with a screwdriver by someone with experience in home maintenance. The Plaintiff and her husband had moved into the rented accommodation some two weeks prior to the incident. Before Mrs Gration moved into the premises, the Landlord with the assistance of two other men, fully painted the house internally and had also completed minor repair work to some of the internal walls. According to the Landlord he did not observe any visible rotting or detect movement in any of the treads whilst undertaking this maintenance work.

The Tenancy Agreement incorporated the provisions of *section 103* of the *Residential Tenancies Act 1994* including the obligation that "at the start of the tenancy the lessor must ensure that the premises are fit for the tenant to live in and the premises and inclusions are in good repair".

At the appeal, the Landlord argued that it would be unreasonable to expect a Landlord of domestic premises to have the premises inspected by a qualified tradesman for defects unless it could be shown that some defect or defects were within the knowledge or ought reasonably to be within the knowledge of the Landlord at that stage.

The Landlord stressed that the stairs did not show any signs of rot in the treads or the stringers when the maintenance work was undertaken prior to the tenant taking possession. There are also no reports of any difficulties with the stairs at any stage prior to the Plaintiff's injury.

Notwithstanding this, the Court held that the Landlord's obligation was to 'ensure' the premises were in a state of good repair and this may necessitate some positive action on the part of the Landlord in order to meet the necessary standard.

The Court intimated that it would not be unreasonable for a Landlord to organise for the premises to be inspected by someone with home maintenance experience before a tenant moved in.

CLUB COMMITTEES – ARE YOU LIABLE?

By: Mark Madsen

It is often quite an honour to be elected to the position of a committee member in a club, an honour which often only comes after years of devotion to the club and its objectives. However, committee members who devote their time and efforts to a club should be aware that their efforts may actually put them in the firing line and make them liable for their conduct, the conduct of other committee members and even members of the club.

Whilst there are various structures by which clubs may be formed, when speaking in terms of 'clubs' as organisations offering liquor and gaming facilities, there are two organisational structures which may be involved:

1. Company limited by guarantee; or
2. Incorporated Association.

Unincorporated associations are not able to offer such facilities because they are not separate legal entities with their own identity; they are simply a conglomeration of their members. Either the unincorporated association's members as a whole, or a committee elected to represent them, will be the parties who enter into legal transactions or otherwise are liable for the conduct of the club.

In contrast, companies limited by guarantee under the *Corporations Act* are formed with a view to limiting the liability of the members to those amounts which the members have undertaken to contribute to the property of the company if it is wound up. In other respects, a company limited by guarantee is regulated by the *Corporations Act* in a manner similar to companies formed for the purposes of making profit. With many clubs, especially smaller clubs, the complexity of the *Corporations Act* and the costs to the club in complying with that legislation can often make it difficult for the club to benefit from this form of incorporation. This structure is usually adopted in situations where the activities of the club extend beyond a single State or Territory because the club will then be recognised throughout Australia under the *Corporations Act*.

When a club is incorporated as a company limited by guarantee, the members of the committee will be the directors of the company. They will be subject to all the duties and liabilities placed on directors by the *Corporations Act* and the law in general. The fact that a particular company may be a non profit organisation does not excuse the committee members as directors from the statutory and general obligations imposed upon them. These duties include the following:

- To act honestly in the best interests of the company;
- To avoid conflicts between the company's interests and personal interests;
- To exercise powers only for proper purposes;
- To exercise reasonable care and diligence; and
- Not to trade whilst insolvent.

Further, the mere fact that a committee member is not actually listed as a director may not prevent that person from being held liable. The *Corporations Act* in some instances extends the duties to other officers such as secretaries and also to mangers or shadow directors.

The constitution of the company limited by guarantee may create additional duties and obligations for directors and committee members of a particular club. It may also be extended or modified to the extent that the legislation allows through the use of replaceable rules.

In contrast, clubs which only operate within one regional area which does not extend beyond the borders of a particular State are quite often structured as non profit associations incorporated by registration under the relevant State legislation; for example, in Queensland, the *Associations Incorporations Act 1981* (Qld). Registration gives the association a separate legal status from its members and therefore affords its members limited liability. Incorporation under the State legislation is usually much less expensive and less stringent than that provided under the *Corporations Act*. The difficulty is that these State schemes are not uniform across the country. To maximise the benefit to members, any club seeking to incorporate should seek legal advice as to the best structure to adopt and in respect of the drafting of the club's constitution.

Similarly, the statutory duties imposed upon committee members by the individual State *Association Incorporation Acts* vary widely. In some States, the Acts are silent as to the duties of committee members. In other States (such as New South Wales), there are specific provisions applying duties to committee members, such as the insolvent trading provisions in the New South Wales legislation which are based on the *Corporations Act*.

In Queensland, the legislation includes some specific duties but is not as comprehensive as *Corporations Act*.

Subject to these specific provisions, the State Acts generally afford the members in general and the committee members some form of limited liability. For example, in Queensland, the Act provides that a secretary, member of a management committee or member of an incorporated association is not personally liable except as provided in the rules of the incorporated association to contribute towards the payment of the debts and liabilities of the association or costs involved in a winding up, beyond the property of the incorporated association in that person's hands.

It is at least arguable that duties similar to those mentioned above for corporate directors are placed upon committee members of incorporated associations by the general law. Additionally, duties will be placed upon the committee members by the rules of the incorporated association. It is important that such rules are carefully drafted.

Committee members of clubs should by no means feel that they are immune to being held personally liable for their conduct in managing a club. In this complex world of statutory duties, general law duties and obligations under insurance policies, committee members should immediately seek legal advice should they be concerned about any particular event, transaction or the management of their club in general.

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