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EDITORIAL

By: Michael Klatt

At our recent Partners' & Associates' Retreat, we discussed and identified areas where we can add greater value and enhance our relationship with our clients. The significant growth experienced by the firm in recent years has facilitated our ability to provide specialised legal services to clients in areas where we have not previously. Succession Planning is one of those areas.

The benefits of Testamentary Trusts are again highlighted in this newsletter. We have recently prepared a number of Business Succession Agreements for clients dealing with issues arising upon the involuntary exit of a partner from a business and the funding of that departure.

This edition highlights some extremely topical issues including the uncertainty for developers with changes to City Plan 2000 and the recent long awaited first sale of Operating Authorities for gaming machines.

The report released recently by David Jackson QC into the conduct of the James Hardie (JH) Board of Directors in managing the asbestos victims fund, has squarely placed the issue of corporate governance into the spotlight. Jackson's report found that JH, Australia's largest asbestos manufacturer, seriously misled the community when it set up a charitable foundation, knowing it did not provide enough to compensate all future victims of the deadly fibre. Although not found to be legally obliged to fund the liabilities of its former subsidiaries, JH's press release to the Stock Exchange in February 2001, which stated the new foundation had sufficient funds to meet all legitimate claims, was found to be "seriously misleading".

Jackson also found grounds for criminal charges and evidence of deception and misleading conduction against several JH executives, including the CEO, Peter Macdonald, who although retained by the Company, has been stood down from his position.

CBD - Can't Build District

By: Anthony O'Dwyer

DEVELOPMENT WITHIN THE BRISBANE CBD IS FACED WITH UNCERTAINTY FOLLOWING THE BRISBANE CITY COUNCIL'S ANNOUNCEMENT OF ITS INTENTION TO INTRODUCE A TEMPORARY CHANGE TO CITY PLAN 2000.

The Council announced that it had introduced a Temporary Local Planning Instrument that caused all assessable development on land within the City Centre Local Plan Area, the CBD of Brisbane, which would otherwise require code assessment to now require impact assessment. This did not apply to self assessable development. The Council subsequently amended the TLPI so that not every development will be subject to impact assessment.

As opposed to being able to assess a development against a series of applicable codes, the TLPI allows Council to assess the developments falling within the scope of the TLPI against criteria set out in the planning instrument that call for qualitative judgments. Some criteria allow Council an almost absolute discretion to approve or refuse an application based on opinions formed by the Council that the courts have usually shown a reluctance to upset.

The change has to be approved by the Local Government Minister and at the time of writing this article, the Minister had not announced approval for the change. There may be good reason to challenge the approval of the planning instrument by the Minister because it appears that the grounds to approve the TLPI have not been satisfied. The Minister must be satisfied that there is a significant risk of serious environmental harm or serious adverse cultural, economic or social conditions and that the delay in proceeding to amend the planning scheme under the usual process would increase the risk.

A relatively straightforward reading of the power to adopt a temporary local planning instrument would suggest that it is a power to be used in emergencies. Using the power in the way that the Council proposes, in the absence of a real emergency, ought to be a concern not only to inner city land owners but also to any person dealing with the Council. It means that the Council has expressed a willingness to temporarily bypass the consultative process of city planning for a quick fix to issues that arise from time to time.

The T in TLPI stands for Temporary. The change only lasts for a maximum of 12 months. During that time, the City Plan can be amended in the usual way. Any change that follows from the TLPI will allow property owners for a period of two years following the change to lodge applications under the superseded City Plan provisions and have their applications assessed under those provisions. If the Council chooses to assess an application under the new provisions, the property owner gains a potential entitlement to compensation arising from the changes made. Whilst the TLPI applies, developers can not lodge applications under the superseded provisions and are not entitled to compensation because of the temporary change. What this means in practice is that property owners who were not able to get their applications in before the change will wait out the one year before making applications.

For property owners in the CBD and for those looking to invest in the CBD, this is a time of uncertainty not only about the direct impact of the TLPI but also about indirect impacts including about the value of their properties. How is a valuer to assess the potential for an inner city site. How could a financier proceed with an advance on what until a few weeks ago was a site with clearly defined development potential.

The TLPI is not only an unwelcome intrusion upon the rights of property owners within the CBD it may represent a sign of the way that councils choose to make planning changes in the future.

contents

DEATH & TAXES – ONLY ONE CERTAINTY 2
JOGGERS RUN INTO TROUBLE 2
THERE'S MORE TO POKIES THAN A MACHINE 3
WILL YOU NEED PROBATE? 3
LIGHTS OUT 4
ANSWERING THE TOUCH QUESTION 4

DEATH & TAXES – only one certainty

By: Michael Klatt

More and more, clients are recognising the benefits of Testamentary Trusts. A Testamentary Trust is a trust created within your Will. The trust, does not commence until your death. Instead of leaving your assets absolutely to a beneficiary, they can be left on trust with that beneficiary controlling the trust and the distributions of income or capital made from the trust.

There are a number of benefits to be gained through testamentary trusts. The testamentary trust, like a family trust, gives the trustee flexibility in relation to the distributions of income and capital to be made to a wide class of beneficiaries, the principal benefit being the tax savings that can be made through splitting income. The advantage of testamentary trusts, however, over the family trust is the excepted trust income provisions in s.102AG2(d)(i) of the *Income Tax Assessment Act* 1936. Income from a testamentary trust can be allocated to children each year with children having the benefit of adult tax free thresholds and marginal rates. A trust with three children as discretionary beneficiaries will enable the trustee to distribute $18,000.00 in total between the three children tax free, unlike distributions to children under a family trust which attract a tax free threshold of $772.00 and the tax payable on the income is then at the highest marginal rate.

THERE ARE A NUMBER OF BENEFITS TO BE GAINED THROUGH TESTAMENTARY TRUSTS.

Another benefit of testamentary trusts is asset protection. Beneficiaries in high risk occupations and facing family law issues may be able to protect the assets if they are held in a testamentary trust. The Family Court does, however, consider the terms of a trust and how it has been operating. The Court will look at what distributions have been made and to who when considering whether, in reality, the trust can be regarded as property of a husband or wife. Even if the Family Court does not consider that the trust assets are property of the husband or wife, the Court can consider the potential distributions from the trust as a financial resource. Although the Court may not make orders requiring a transfer of any trust property, it may make an adjustment of other matrimonial property having regard to the financial resource which the other party retains. The Court effectively looks at who controls the trust and, in the case where a family dispute may arise, an independent trustee may be somewhat more protection or at least as much protection as can be given. The other benefit of testamentary trusts from a protection of assets point of view, is where a beneficiary or beneficiaries have disabilities or are spendthrift beneficiaries.

JOGGERS run into trouble

By: Sam Kendall-Marden

TWO RECENT CASES HAVE SHOWN HOW THE COURTS EXPECT PEDESTRIANS, ESPECIALLY JOGGERS, TO TAKE REASONABLE CARE FOR THEIR OWN SAFETY WHILST WALKING (OR RUNNING) ON COUNCIL FOOTPATHS.

In Boroondara *City Council -v- Cattanach* (20 August 2004), Ms Cattanach was a jogger who sued Boroondara City Council when she fell as a result of tripping on the cracked and uneven surface of a paving slab whilst running with two dogs.

The Court of Appeal in Victoria held that users of the pavement other than ordinary pedestrians, such as joggers or those running to catch public transport or to get out of the rain, must pay greater attention to the state of the pavement given that, ordinarily, it is more difficult to see faults when walking in haste or running.

The Court pointed to how a similar principle applied to elderly people who are obliged to exercise a higher degree of vigilance when walking on the pavement. It is suggested that the same could be argued to apply to other categories of pedestrian, for example disabled people or those who have exhibited a previous disposition to fall.

Additionally, the Court also held that the fact that the Plaintiff was jogging and that her view of the path was, at least in part, obscured by two dogs raised the level of her obligation to maintain a proper lookout for hazards. This principle could also be argued to extend to other categories of pedestrian, for example people carrying articles which could obscure their vision.

The Court of Appeal found for the council because the defect in the pavement was a hazard that would have been obvious to an ordinary, reasonable pedestrian exercising a proper lookout.

In *Lake Macquarie City Council -v- Holt* (3 September 2004), Mr Holt was a jogger who sued Lake Macquarie City Council when he fell as a result of placing his left foot on the edge of a pathway which was about three or four inches higher than the adjoining shoulder.

The Court of Appeal in New South Wales reiterated how "persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes".

The Court found that the council was not in breach of its duty of care to Mr Holt because he failed to take reasonable care for his own safety in running close to the edge of a path in poor lighting conditions.

Whether cases such as Cattanach and Holt mark a change in pathway tripping cases remains to be seen but what is clear is that pedestrian Plaintiffs who fail to exercise sufficient care for their own safety will run into trouble in pursuing damages claims for injuries they suffer.

There's more to Pokies than a Machine!

By: Joe Carey

The hotel industry in Queensland has finally received an indication of the value of gaming activities contained within the hotels. On 1 July 2003 a scheme was created by the government establishing Operating Authorities which allowed hotels to operate gaming machines at their venue.

Essentially if a gaming machine licensee had one Operating Authority it could operate one gaming machine at its hotel. By introducing this scheme, the Queensland Government also effectively lifted the cap which had been in place since May 2001 and prevented hoteliers from increasing the number of gaming machines operating at the hotel. This cap was removed whereby hoteliers could purchase Operating Authorities from a government tender. For the purposes of this tender, Queensland was divided into three regions, being the South East Queensland region, the Coastal region and the Western region. Given the high demand for gaming machines by hoteliers it has therefore been of considerable interest how much these individual Operating Authorities are worth. As the first auction recently took place in July this year, an indication as to the market value has finally been realised.

BY INTRODUCING THIS SCHEME, THE QUEENSLAND GOVERNMENT ALSO EFFECTIVELY LIFTED THE CAP

In the South East region, encapsulating Gold Coast, Brisbane and areas of the Sunshine Coast, the Authorities sold at an average of $99,453.00. The Coastal region which incorporates all coastal areas north of Noosa, Authorities changed hands for an average of $70,801.00. In the Western region the Authorities were sold for an average of $15,260.00. It must be noted that not all Authorities in the Western region were sold.

The publishing of this data has provided two immediate benefits to the hoteliers in that:

1 It assists in now placing a valuation of gaming enterprises to their hotel business; and

2 It offers some guidance on how to bid and what the market value is for the future tenders.

In this regard, the QOGR has indicated they intend to have such auctions two times a year with the next auction being set down for October 2004.

Interestingly, you don't need an Operating Authority to run gaming Machines in Clubs.

Will you need PROBATE?

By: Michael Klatt

PROBATE IS THE SANCTION OF THE SUPREME COURT OF QUEENSLAND OF THE RIGHT OF EXECUTORS NAMED IN A WILL TO ADMINISTER THE ESTATE IN ACCORDANCE WITH THE TERMS OF THE ESTATE. WHEN COLLECTING THE ASSETS OF THE ESTATE, THE EXECUTOR NEEDS TO CONSIDER WHAT ASSETS FORM PART OF THE ESTATE AND WHETHER THE INSTITUTION WHICH HOLDS THE FUNDS, WILL RELEASE FUNDS TO THE EXECUTOR WITHOUT SEEKING PROBATE.

Applying for Probate requires the advertising of the executor's Intention to Apply for Probate in a local newspaper, the Queensland Law Reporter and service of that Notice on the Public Trustee of Queensland. The executor may file the Application together with a Supporting Affidavit (14 days after such advertising) and Probate is generally issued by the Supreme Court within a week of the Application being filed. This process would generally take approximately 6 weeks in total.

Whether Probate needs to be obtained depends on the policy of the financial institutions. If the estate assets include shares worth $15,000 or more, Probate will be required. All financial institutions have different policies and monetary limits in respect of the requirement for Probate, sometimes even though the amount held by the financial institution may be in excess of the amount normally released. Without Probate, they may waive the requirement if the circumstances of the estate are straight forward. For example: if a husband leaves his whole estate to his wife. The Commonwealth Bank usually releases funds of up to $20,000 without requiring Probate, but that may be dispensed with and may release a sum of up to $100,000 without requiring Probate depending on the circumstances.

WHETHER PROBATE NEEDS TO BE OBTAINED DEPENDS ON THE POLICY OF THE FINANCIAL INSTITUTIONS

If an executor elects not to apply for Probate, they leave themselves exposed to a claim by disappointed beneficiaries if it is established that the Will which they are relying upon is in fact not the last Will of the deceased. Commonly, however, executors take this risk, given the extra cost involved in applying for Probate. The risks should be fully explored before a decision is made.

Even when Probate is obtained, there is some risk in distributing the estate to beneficiaries within 6 months of the date of death. The executor will have no protection from a person who within that 6 month period notifies the executor of their intention to make a Family Provision Application and subsequently, within 9 months of the date of death, does in fact make an Application for Family Provision and is ultimately successful with that Application, but no assets remain in the estate to meet the amount.

Lights OUT

By: Ruth Marshall

The Queensland government recently announced that it would enact what has been described by Premier Peter Beattie as the toughest anti-smoking proposals anywhere in Australia, following a review of *The Tobacco and Other Smoking Products Act 1998 ("the Tobacco Act")*. The review examined the evidence concerning the health effects of inhaling environmental tobacco smoke (ETS), the economic implications of smoke-free policies on the hospitality industry and examples of court cases and out of court settlements involving the issue of passive smoking. The conclusion was reached that the increase in publicity regarding the dangers of ETS makes it likely that there will be an increase in the number of successful ETS cases run in the future, an issue clearly of concern to employers and occupiers of public venues such as sports stadiums.

...INCREASE IN PUBLICITY REGARDING THE DANGERS OF ETS MAKES IT LIKELY THAT THERE WILL BE AN INCREASE IN THE NUMBER OF SUCCESSFUL ETS CASES RUN IN THE FUTURE...

The Queensland Government believes it has a responsibility to do everything it can to limit the effects of smoking on people's health and that it has strong public support for increasing bans on tobacco smoking. Accordingly, it proposes to amended the *Tobacco Act* so that:

- From 1 July 2005, smoking will be banned on all patrolled beaches, within 10 metres of children's playgrounds, within four metres of all building entrances and at all sporting venues administered by the Major Sports Facility Authority including Suncorp Stadium and the Gabba;
- From 1 July 2006, smoking will be banned in 100% of indoor areas of liquor licensed premises and in all outdoor areas where food or beverages are served and are contiguous to the operations within a business.

A range of organisations have issued statements in response to the Government's accouncement. The Retail Association is worried about the impact on small businesses, where cigarette sales represent a large proportion of their income. The Queensland Hotels Association, Clubs Queensland and Queensland's casinos have expressed their concern regarding the implementation period, with the hospitality industry hoping that there would be a longer phase-in period and that the bans would be delayed until 2008 or 2009 to enable hoteliers to educate patrons regarding the changes. Surf Life Saving Queensland believe that the legislation could mean that smokers feel isolated from patrolled beaches and put themselves at greater risk by swimming at unpatrolled beaches.

Only time will tell whether the bans are successful but, with other Australian states also following the international trend of strengthening legislative restrictions on smoking in enclosed public places and workplaces, it is clear that the choice smokers have as to where and when they light up is increasingly limited.

Answering the touch question

By: Pat Mullins

One ramification of the prevalence of child sex abuse cases has been that schools and educational authorities have imposed on teachers a "no touch" requirement in their daily interaction with students.

Such arrangements in primary schools, kindergartens and pre-schools have been particularly difficult.

WE ALL WANT OUR CHILDREN TO BE EDUCATED IN SAFE ENVIRONMENTS

Recently there has been talk of some schools introducing a "safe touching" policy. I have severe doubts that such arrangements are workable.

We all want our children to be educated in safe environments. We are more aware of the issues and concerns than we were in the 60's and 70's.

Education Queensland, as well as the independent schools, are to be congratulated on the great work they have done in the area of child protection policies and procedures. The over-riding concern in implementing these procedures is to ensure the safety of children. However another concern is to ensure that teachers do not place themselves unnecessarily in situations where their conduct toward children might be ambiguous.

This secondary concern is one that ought not be lost sight of. It seems to me that there is the danger under a "safe touching" regime.

In the area of sexual harassment we all know that some conduct may be interpreted one way by a person who is on the receiving end of the conduct and in another way by the person who is the initiator of the conduct. The same principle can apply in relation to interpersonal contact between an adult teacher and child student.

For that reason I think it is appropriate that teachers impose upon themselves a no touching regime. Certainly teachers should ensure that they are not alone with an individual child or a small group of children. What I am talking about is simple risk management.

Teachers should not be meeting with individual students behind closed doors. Teachers should apply their common sense to their dealings with students to ensure that those dealings are totally transparent. The more those interactions are on view and carried out in the open, the less possible it is for there to be problems.

Although the imposition of a no touch regime is essentially negative, the more that interpersonal contact between teacher and student is conducted in the open in a transparent and open way, the more our children and young people are protected.

In developing healthy relationships between students and teachers a "no touch" policy should not be an obstacle. There are many other ways for students and teachers to appropriately interact and develop relationships that are appropriate.

In the area of child protection there are no shortcuts and in the interests of protecting both children and teachers, the boundaries should be clear. All concerned should operate within the boundaries that are set. There is no room for the boundaries to be relaxed.

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