# mullins report

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# ARE YOU **CUTTING** YOURSELF SHORT?

*By John Mullins and Stephanie Smith*

According to the Brisbane City Council's recent *Natural Assets Local Law 2003 (NALL)*, interfering with protected vegetation without permission will result in a fine of up to $37,500.00 for an individual and $63,750.00 for a company. The scope of protected vegetation that now exists within Brisbane has been broadened. Landowners should be aware that vegetation that they have interfered with in the past, may now be protected. Under the *NALL*, landowners who have protected vegetation on their property will need to apply to the Council for a permit before interfering with any protected vegetation.

## CAN YOU CUT DOWN THAT TREE?

So what can you as a landowner interfere with on your property? Landowners can interfere with any vegetation on their property so long as it is not protected. Generally landowners who have protected vegetation on their property would have received notice from the Council. However, if you are uncertain about the status of any vegetation on your property, you can contact the Council to obtain this information.

## WHAT IS PROTECTED VEGETATION?

The *NALL* lists seven categories of protected vegetation. They are:-

- vegetation on land owned and controlled by the Council,
- vegetation subject to a vegetation protection order,
- vegetation in a waterway corridor,
- vegetation in a wetland,
- significant landscape trees,
- significant native vegetation and
- valued urban vegetation.

A landowner cannot interfere with any vegetation on their property that falls into any of the above categories, unless they have first obtained a permit from the Council to do so.

## WHAT IS MEANT BY INTERFERE WITH?

It is important for landowners to understand what is meant by "interfere with". The definition is extensive and includes activities, such as lopping, poisoning, cutting, tearing, scarring, excavating and uprooting, to name a few.

## HOW DO YOU OBTAIN A PERMIT TO INTERFERE WITH PROTECTED VEGETATION?

A person may apply for a permit by lodging an application with the Council. Application forms are readily available from the Council or their website.

Once an application has been lodged the Council will then do one of the following;

(a) approve the application;
(b) approve the application subject to conditions; or
(c) refuse the application completely.

Unsatisfied applicants can apply to the Council for a review of a decision on the condition that they do so within 14 days of their resolution. If an applicant is still unsuccessful, legal action may need to be pursued.

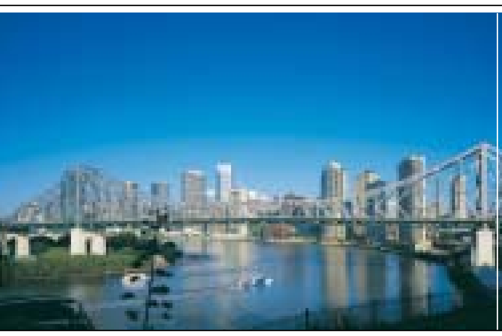
## EXEMPTIONS TO THE LOCAL LAW:

In certain circumstances, landowners can lawfully interfere with protected vegetation without obtaining a permit from the Council. The Council recognises, for example, that a landowner may need to carry out basic maintenance work on protected vegetation. Pruning, mowing and the removal of weeds, (subject to certain conditions), are considered to be activities which will not result in a fine under the *NALL*.

The removal of protected vegetation in an emergency situation may also, subject to certain guidelines, be lawful under the *NALL*. A landowner can interfere with protected vegetation where it creates an immediate risk or hazard to a person or property, as demonstrated by photographic evidence and, if requested, an arborist's report. Landowners should be aware of these conditions as they require the supply of evidence for the work to be considered lawful under the Act.

## CONCLUSION:

With the power to impose hefty fines by the Brisbane City Council under the *Natural Assets Local Law 2003*, landowners should check the status of the vegetation on their property before attempting any work, as it may now be protected. Landowners should contact the Brisbane City Council to ascertain whether their land contains protected vegetation, otherwise they could find themselves out on a limb.



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## EDITORIAL

By John Mullins

This edition coincides with the launch of our Business Services Group within the Firm.

Traditionally lawyers have tended to look at clients by the work they do for them. Lawyers tend to categorise clients as Property clients, Employment Law clients, Franchising clients, etc.

In keeping with our desire to help clients achieve the results they want we have created what we call a Business Services group which aims to provide a range of services to clients with a view to building stronger, broader relationships with these clients.

The Business Services Group will deal more holistically with all of the requirements of clients, for example purchase and sale of businesses, corporate governance, due diligence, employment law advice, distribution advice, advice on intellectual property, property leases and acquisitions, risk management and compliance, trade practices, competition law to name but a few.

Our particular focus will be in relation to growing businesses. As a growing business ourself, we recognise the importance of obtaining advice to help and support that growth. That advice needs to be relevant, timely and cost effective. We are looking at ways to package our services to provide cost effective, reliable advice with access to partners to get fast answers to questions, not to create legal projects.

Our goal is to create relationships where clients can seek proactive legal advice and assistance to get things done right from the outset rather than spending time and money sorting out these problems later and being distracted from the main focus of getting on with growing their business.

Importantly, we will include an employment lawyer in our Business Services sector as any growing business will recognise that employment law issues are one of their greatest challenges. To support our Business Services group, from next month we will be producing a Business Services newsletter. David Williams and I will be the partners responsible for delivery of Business Services and I would welcome the opportunity to discuss with you the provision of this type of advice to your growing business.

This edition of Mullins Report continues to provide a broad spectrum of general advice to clients and this edition is a great example of the diversity of articles which we hope you find interesting.

# DON'T LOSE YOUR SMART ASSETS: **PROTECTING YOUR IP**

By Andrew Nicholson & Kate Williams

Australian businesses have historically been quick to develop and implement new ideas. However, the rights to those assets are all too often lost through lack of recognition or carelessness.

Intellectual Property (or IP) rights are increasingly being viewed as imperative tools used to gain strategic advantage over competitors. If properly protected, managed and enforced, those IP rights can provide a commercial edge.

One aspect that is often overlooked is the work produced by someone engaged by a business to perform a certain task. Businesses often incorrectly assume that any work produced by someone who is acting within the scope of his /her ordinary duties automatically becomes the property of the business.

## WORK PRODUCED IN EMPLOYMENT

A number of factors may influence who acquires ownership of any IP produced in the course of employment.

In general, an employer acquires ownership of any IP produced by a worker in the course of his or her employment. However, the changing nature of the relationship between businesses and their staff means that the general proposition is increasingly less likely to apply. Some examples of cases where workers have been entitled to retain inventions for their own benefit include:

> IT IS ESSENTIAL TO PROPERLY DOCUMENT THE RELATIONSHIP BETWEEN THE BUSINESS AND THOSE WHO UNDERTAKE WORK FOR IT.

*1. Independent Contractors*

Businesses are increasingly engaging labour through independent contractors as opposed to hiring employees. Generally, an independent contractor or consultant acquires the exclusive right to their work, even where developed for an employer. Those rights may then be assigned to another party, usually for a fee.

In *Oceanroutes (Australia) Pty Ltd v MC Lamond*, the court held that a consultant and not the employer owned copyright in a report produced in compliance with a contract of employment.

*2. Directors*

Whilst Directors are considered to be an employee of a company in many respects, businesses should not assume that any IP produced by a member of the management team will become the property of the company.

In *Antocks Lairn Limited v Bloohn Limited*, a Managing Director prepared some drawings of a chair, beyond the parameters of his contract of employment. Accordingly, copyright in the drawings remained the property of the managing director, although the court decided they should be held in trust for the company.

*3. Partners*

In certain circumstances, partners may retain the IP they develop. The High Court held in *O'Brien v Komesaroff* (applying the *Partnership Act (Vic)*), that where the deed of partnership did not contain any clause relating to copyright, then there was no assignment of copyright from one of the partners to the partnership. Accordingly, the work produced by one of the partners became his own.

*4. Work produced out of hours*

When an employee produces an invention out of hours or when engaged in work which is beyond the normal course of his or her duties, he or she may obtain the right to exploit it. For example, in *Selz Ltd's Application*, the manager of a factory making lampshades invented a coating method. It was found that, even though he was using the employer's equipment and resources, it was not part of his normal duties to conduct that research. Accordingly he was entitled to apply for a patent in his own name.

## MODIFYING THE EMPLOYER/EMPLOYEE RELATIONSHIP

It is possible to modify the entitlement of a party to any Intellectual Property which they develop during the course of their work. Generally those rights are modified by the execution of an appropriate contract of employment or other document which evidences the relationship between the parties.

Those agreements commonly require the employee to assign their rights in all work produced during their employment. However, there is a risk that the agreement, if not properly drafted, may be held void as being wider than required to protect the employer's rights or, alternatively, an unreasonable restraint of trade.

## AVOIDING THE PITFALLS

It is essential to properly document the relationship between the business and those who undertake work for it. If that relationship changes in any way, then fresh consideration must be given to the scope of the work likely to be produced by the employee and the role which they undertake in the organisation.

It is clear that one size does not fit all in relation to protecting the work produced on behalf of the business.

# Bad kids, big bucks?

## CAN PARENTS BE SUED FOR THE ACTS OF THEIR CHILDREN?

*By Dean Frost*

Whether parents can be liable for the actions of their children is a question which has often been raised since the High Court of Australia considered the issue in *Smith v Leurs* in 1945. That case involved a 13 year old boy firing a stone from a catapult which hit another boy in the eye. The High Court held a parent was not responsible for the acts of a child unless the child was acting with the parent's authority. However, a parent who has the control of the child is responsible for negligence in the exercise of that control if injury results. Whether there is negligence will depend upon all the circumstances.

> THE HIGH COURT HELD A PARENT WAS NOT RESPONSIBLE FOR THE ACTS OF A CHILD UNLESS THE CHILD WAS ACTING WITH THE PARENT'S AUTHORITY.

In *Allen v Kerr & ANOR* [1995], a claim was made by a property owner against the parents of children aged 5 and 3. The parents failed to adequately supervise their children who left their home and entered a nearby property. The children found some matches, started a fire and caused severe fire damage to the property.

The parents of the children were initially held not liable. However, on appeal to the Supreme Court the decision was reversed. The Supreme Court found a duty of care was owed to act reasonably in the supervision, care and control of the children to avoid damage to property. The risk of children playing with matches is generally well known in the community and given the period of time the children were left unattended, there was significant evidence of failure to supervise.

That decision was later reversed on a technicality by the New South Wales Court of Appeal although there was no criticism of the rationale applied by the Supreme Court.

In *Cameron v Commissioner Railways* [1964] and *Rogers v Rawlings* [1969] the Queensland Supreme Court held the parents of young children owed no general duty to exercise control and supervision of their children at all times, but a duty does arise out of specific situations where parents had direct and immediate charge of a child.

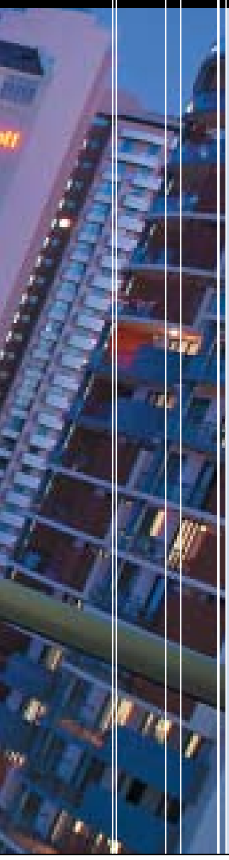
The South Australian Supreme Court (*Robertson v Swincer* [1989]) held that for public policy reasons, a duty of care owed by parents to their children is not absolute. The Court held "It must be recognised that a departure at some time from the standard of reasonable care even by the most prudent of parent is almost inevitable ... The prospect of a parent's assets being at risk, in an action by a child, in consequence of a momentary failure of supervision, judged by a Court against an objective standard of reasonable care, has alarming personal implications for parents and disturbing implications for society generally".

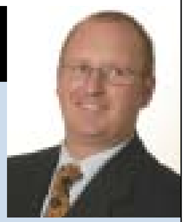
### CONCLUSION

Generally parents are not personally liable for the negligent acts of their children unless their child acts with the parent's express authority. However, each case is judged on its own facts and will often take into account the age and experience of the child involved. The younger the child, the less likely the child and the parents will be found to have acted negligently.

To be safe, in the absence of a perfectly behaved child, parents should ensure they have public liability insurance.

# PROPERTY MARKET SCHEMES - **BEWARE!**





*By: Richard Stone*

A recent case highlights the importance of real estate marketers and vendors providing factual, objectively assessed information to prospective purchasers. *Australian Competition & Consumer Commission v Oceana Commercial Property Pty Ltd* [2003] FCA 1516 concerned a scheme to market and sell residential units at the Gold Coast during 1997 and 1998 using "two tier marketing".

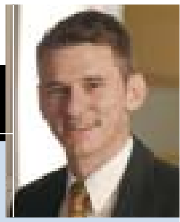
"Two-tier marketing" was not defined by the Court, so in that respect it is difficult to determine exactly what it is. But the inference is that "two-tier marketing" involved the marketing of property at one price to people who were familiar with a particular location, and marketing the same property to other people who were not. The more important aspects of this judgement concern misleading and deceptive conduct, and the ACCC's willingness to test the boundaries of what may amount to unconscionable conduct.

In terms of misleading and deceptive conduct, "qualified financial advisers" made representations to potential purchasers about rates of capital growth during a "property investment analysis". The ACCC claimed that there was no reasonable basis for the belief by the "qualified financial advisers" that those rates were a reliable property value guide. Instead, the "qualified financial advisers" were simply trained to present their "analysis" and apply pressure. On that basis, the Court found those representations were misleading to potential purchasers.

The ACCC also alleged that two solicitors knew details of the scheme - namely the relationship between the particular companies involved in it - and that they failed to disclose those details to their clients (who in fact were referred to them to sign the appropriate documentation, by the operators of the scheme). The Court found, that the solicitors did not know all the details of the scheme, and a failure by them to alert their clients to the relationship between companies involved in the scheme was not misleading or deceptive. The ACCC has expressed its disappointment with this aspect of the judgement and has indicated the possibility of an appeal.

In this case, the ACCC claimed that a bank behaved unconscionably by failing to provide two of the potential purchasers with a valuation obtained for lending purposes that it knew to be inaccurate as the valuation figure was too high. As a consequence, it was claimed that the bank put the potential purchasers in a position where they were unable to make a judgement about their best interests, namely whether or not to purchase a property. However, the Court found that the banks' conduct had not seriously affected the potential purchasers' ability in that respect, so in effect it had not behaved unconscionably.

Although the notion of "two-tier marketing" was not thoroughly addressed by the Court, this case illustrates the importance of having a reasonable basis for making representations. Furthermore, this is another case where the ACCC has sought to test the scope and boundaries of "unconscionable conduct" in circumstances where it is perceived that a bank has acted without any commercial or reasonable basis.



# SUBCONTRACTORS CHARGE ON

*By Leslie Venville*

Traditionally, a subcontractor's charge could only be claimed if the money to be charged was payable now or in the future under the subcontract's payment clause. If, for example, part of a progress claim was excluded from a progress payment certificate, the subcontractor could not charge the excluded amount. This was because until the excluded amount was certified, it wasn't "payable" under the subcontract. Since 1 July 2002, amendments to the *Subcontractors' Charges Act 1974* (the "Act") now make it possible to lodge a subcontractor's charge in respect of such excluded amounts. In fact, a charge may be lodged in respect of money that will become payable, despite the provision governing payment is still to be complied with.

THE NEW PROVISIONS TO THE ACT REPRESENT A SIGNIFICANT ENLARGEMENT OF THE AMBIT OF CHARGEABLE CLAIMS.

In *Abigroup Contractors Pty Limited v. Multiplex Constructions Pty Ltd* [2003] QCA 501 the Queensland Court of Appeal considered the validity of a charge lodged by Abigroup in respect of money excluded from progress claims totalling the value of $3.2 million. The Court of Appeal unanimously upheld the changes to the Act and decided that the potential to charge money under the Act was "*now very wide*". Had Abigroup attempted to charge the money prior to the amendments, the charge would have failed.

So what has changed? The amendments make it possible to charge money that the payment of which is "prospective" or yet to fall due on the happening of an event (such as certification or the making of an award in an arbitration) which may (not will) occur in the future [*Abigroup decision* paragraph 10].

However, the newly widened scope is subject to limitation. Essentially, subcontractors are not able to lodge charges in respect of compensatory rights that accrue outside of the basic payment of work provisions contemplated by the subcontract. For example, a charge cannot be lodged in respect of damages for breach of contract, an extra-contractual remedy such as reasonable work for compensation done or remedies under the *Trade Practices Act 1974.*

The new provisions to the Act represent a significant enlargement of the ambit of chargeable claims. However, subcontractors must remain vigilant in preparing their contracts. For example, contracts that do not contain a progress payment clause, it may be the case that money for partially completed work will not be chargeable. This is rarely an issue where the parties are using a relatively sophisticated standard condition contract such as AS 2545-1993 that contains a progress payment clause. However, where work is performed following the exchange of a quotation and work order that contain minimal trade terms, money for partially performed work may not be chargeable until all work is completed. The good news is that inclusion of a relatively simple clause dealing with payment for partially completed work should fix the problem.

# WHEN NEAR ENOUGH IS NOT GOOD ENOUGH

*By Ruth Marshall*

Purchasers, under land contracts, frequently have to pay deposits and be in a position to settle at designated times. It is important that purchasers comply with these time stipulations, particularly where time is of the essence. The High Court recently considered when a purchaser should be relieved of liability when the purchaser misses a deadline for settlement or payment of the deposit, with disastrous results for the purchasers.

In the first case (*Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57), the Purchaser entered into three contracts to purchase properties. The Purchaser was unable to obtain finance and settlement did not take place. The parties then signed a deed to reschedule settlement, with "time of the essence". The Purchaser also acknowledged that if it did not settle the sale in accordance with the deed, all monies paid under the Contract would be forfeited to the Vendor. On the day of settlement, the Purchaser's second mortgagee's funds were held up and completion did not take place. The funds needed for settlement were received the next day by the solicitors acting for the 2nd mortgagee. The Vendor's solicitors were advised that settlement could take place but the Vendor had already given instructions to terminate the contract and a notice to that effect was issued that afternoon.

The Purchaser sought relief against forfeiture and specific performance of the contracts, claiming that the Vendors unconscientiously exercised their rights to terminate the contracts. The Purchaser's appeal to the High Court was dismissed. The Court agreed that in certain circumstances it would be inequitable for a vendor to rely on its contractual rights to terminate a contract even where the purchaser has failed to complete and time was of the essence. However, in the circumstances of this particular case, the Court found that the vendors had not acted inequitably. There was no fraud, mistake, accident or surprise sufficient to warrant relief.

In the second case (*Romanos v Pentagold Investments Pty Ltd* [2003} HCA 58), Purchaser entered into three contracts to buy land. The contracts provided that part of the deposit was to be paid upon approval of a development application and that time was of the essence. The Purchaser had to inform the Vendor immediately that the approval was received. On 24 November 2000, the development application was approved by the Council but the Purchaser was not notified of this until 1 December 2000. On 19 December 2000, the Vendor gave notice to the Purchaser terminating the Contracts. The next day, the Purchaser paid the balance of the deposit. The Purchaser sought relief against forfeiture and specific performance of the contracts.

The Vendor's appeal to the High Court was allowed and the Court made a declaration for forfeiture of the deposit to the Vendors. The majority of the Court held that the possible "windfall" to the Vendor should not be taken into account. The relevant question is whether the conduct of the Vendor caused or contributed to the circumstances "rendering it unconscientious for them to insist upon on their legal rights to terminate the contracts".

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