mullins report

Newsletter of **Mullins Lawyers** | Issue Number 43 | October 2003

The **new** Mullins Lawyers

By John Mullins

We didn't set out to change our name. Our goal was to ensure that after a period of considerable growth we understood our position in the market. We wanted a clear statement and understanding of who we are and what we are trying to achieve.

Some of our clients were good enough to tell us what they thought of us and we compared their comments to what we thought of ourselves. We were delighted, but not surprised that our clients thought we were decent and ethical and that we valued the relationship we had with them.

What is clear is that we are a contemporary commercial law firm that enjoys good relationships with our clients. We have identified that maintaining long term relationships with clients who share the same high ethical standards as ourselves is a cornerstone for the firm.

WE WERE PROUD OF THE NAME MULLINS & MULLINS, WHAT IT STOOD FOR AND WHAT WE HAVE ACHIEVED OVER THE LAST 23 YEARS.

To reflect the change and growth in the firm, we set about to redesign our corporate identity to reflect the fast growing, capable, committed law firm that we are.

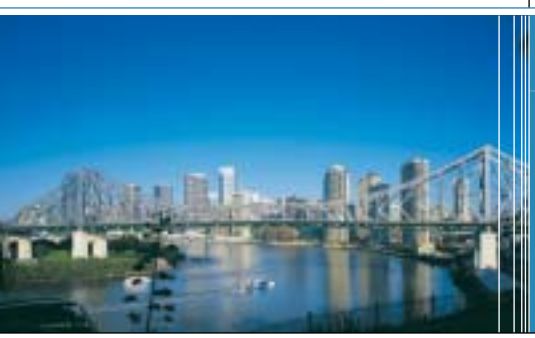
We were proud of the name Mullins & Mullins, what it stood for and what we have achieved over the last 23 years. The firm is successful today because it has been able to retain all the values which were given to us by our founder, Mr Pat Mullins Senior. We continue to uphold his values of decency and honourable behaviour and at the same time delivering first rate commercial legal advice.

We believe our new contemporary corporate identity reflects the growing nature of our firm. We recently held our Partners and Associates Retreat where we discussed the future business plan for the firm. We currently have 85 staff and our goal is to achieve 100 staff over the coming 18 months. This will be achieved through our ability to provide innovative service delivery practices to our clients. We aim to be market leaders.

Despite being a commercial law practice, we remain strongly committed to acting for individuals. Personal Legal Services is, and will be, an important part of our firm. That is the way Mr Mullins would have wanted it.

We are proud to launch this new edition of Mullins Report. Through this publication our aim is to provide our valued clients with up to date and topical legal issues which will be of benefit to you.

For your benefit we have provided a copy of our last Sports Law newsletter under the old design. Over the coming months we will be updating all our publications with the new corporate design and we look forward to distributing these to our clients.



contents

THE COST OF LIVING 2
BUILDING CONTRACTORS - Rapid Dispute Resolution is on the Horizon 3
COMPLY OR RESIST? 3
TAXES - What's New and How can you Save? 4
IMMIGRATION LAW: The Family Court decides 4

THE COST OF LIVING

By Cameron Seymour / Roland Davies

THE HIGH COURT OF AUSTRALIA WAS RECENTLY ASKED TO DETERMINE WHETHER THE PARENTS OF A HEALTHY CHILD WHO WAS CONCEIVED AFTER A FAILED STERILIZATION PROCEDURE COULD RECOVER THE COST OF THE CHILD'S UPBRINGING FROM A NEGLIGENT DOCTOR.

THE FACTS

The Plaintiff underwent a sterilization procedure in 1992. The sterilization procedure was unsuccessful as the doctor mistakenly believed the Plaintiff had her right fallopian tube removed in an earlier operation and only performed the procedure on the Plaintiff's left fallopian tube.

In November 1996 the Plaintiff discovered she was pregnant and in May 1997 she gave birth to a healthy son. The Trial Judge found the Doctor was negligent in failing to adequately inform the Plaintiff of the possibility the sterilization procedure would be ineffective and to give her the option of undergoing further procedures that would increase the probability of a successful sterilization.

The Trial Judge's award of damages included an amount for the mother's pain and suffering in respect of the pregnancy and birth, her loss of earning capacity and the cost of her maternity wear. The Trial Judge also awarded the father of the child an amount for loss of consortium. However, the controversial aspect of the Trial Judge's decision was awarding the costs associated with raising the child.

...THE CONTROVERSIAL ASPECT OF THE TRIAL JUDGE'S DECISION WAS AWARDING THE COSTS ASSOCIATED WITH RAISING THE CHILD.

The Defendants appealed to the High Court after the Trial Judge's decision was affirmed by the Queensland Court of Appeal. The Defendants contended the Court could not award damages for the cost of raising a healthy child and if damages were to be awarded then they should be reduced to take into account the joy parents receive from raising their children.

THE DECISION

The High Court in a narrow 4:3 majority upheld the lower Courts' decision to award damages for the cost of raising the healthy child. The majority held the cost of raising the child was a reasonably foreseeable consequence of the Doctor's negligence. The majority also refused to discount the award of damages for the joy the Plaintiffs derive from raising the child.

The minority Judges argued that policy reasons precluded the Court from awarding damages for raising the healthy child. The minority Judges were concerned that an award of damages would distress the child when he was subsequently informed of the legal proceedings. The minority Judges expressed concern about the "commodification" of children and believed an award of damages for raising a healthy child offended the fundamental premise that children were a "blessing" and should not be assigned a dollar value.

...CHILDREN WERE A "BLESSING" AND SHOULD NOT BE ASSIGNED A DOLLAR VALUE.

THE RAMIFICATIONS

The award for damages included the cost of items such as clothing, medical expenses, child care expenses, birthday presents and entertainment. Callinan J indicated that it may be possible to recover damages for the cost of tertiary education and weddings. The Compensatory Principle requires the Court to award the amount of damages to the Plaintiff that will put him/her in the same position as if they had not suffered the injury. Therefore it is plausible a wealthy Plaintiff pursuing a similar claim may be able to recover the cost of expensive holidays and tuition fees to exclusive schools.

The Queensland Government has expressed discontent at the High Court's decision and has introduced the *Justice and Other Legislation Amendment Bill 2003* to negate the effect of the decision. The proposed legislation precludes the awarding of damages for raising a child where the birth results from the failure of a sterilization procedure or the failure to provide competent advice in relation to a sterilization procedure. The proposed legislation continues the trend of governments to implement restrictive measures in the area of negligence.

BUILDING CONTRACTORS - rapid dispute resolution is on the horizon

By Leslie Venville

Speedy resolution of disputes is something that has plagued subcontractors since time immemorial. Often, the reason a contractor or builder wishes to delay payment of subcontractors is to assist an already poor cash flow or avoid insolvency. Litigation is fraught with danger, takes a perilously long time and is often subject to an arbitration agreement. Some subcontractors take comfort by lodging a subcontractors' charge which, if validly claimed, will even safeguard progress claims or retention money against a liquidator.

SPEEDY RESOLUTION OF DISPUTES IS SOMETHING THAT HAS PLAGUED SUBCONTRACTORS SINCE TIME IMMEMORIAL.

However, the law relating to subcontractor's charges is technical and still requires the subcontractor to commence legal proceedings within 4 months where retention money is charged, otherwise one month. To add a further negative dimension, lodging a subcontractors' charge is not available to subcontractors working on domestic building jobs.

The Queensland Building Tribunal provides a forum for hearing building disputes which is less technical and more user friendly, but it still takes a long time to hear a dispute in cash flow terms. Simple matters may be heard in as little as 90 days compared to a target time of 180 days under the Court system.

However, with recent Cabinet approval of the Queensland Building Services Authority's *Building and Construction Industry Payments Bill 2003*, good news is on the horizon. The Bill has a simple primary objective - rapid resolution of payment disputes. Forget 180 days, or even 90 days - a result is promised (with some exceptions) within 20 working days of lodging an application.

The basic mechanics and timing are as follows:

- The builder and subcontractor have an initial 20 working days to discuss and resolve the dispute. If this cannot be achieved, the subcontractor should lodge an application within that time.
- The Adjudication Registrar must appoint an Adjudicator within 3 working days of the application.
- The Respondent (ie contractor), must lodge a response within 10 working days of the application.
- The Adjudicator then has 10 working days to decide the dispute and give a decision.

All decisions have the force of Court and may be enforced as such (eg by execution or statutory demand). There are two primary safeguards to protect the parties. Firstly, any payments ordered under by an Adjudicator are "on account" and subject to a final determination of entitlements under the contract. Secondly, an Adjudicator may "opt out" of making a determination where a matter is legally complex and requires judicial consideration. There is no direct right of appeal from an Adjudicator's determination. However, a dissatisfied party may continue with dispute resolution procedures under the contract or litigate the matter.

The rapid adjudication process will be available not only to contractors carrying out building work, but also architects, landscape architects, engineers, surveyors, construction planners and project managers.

The Bill is expected to be introduced into Parliament in the next sittings and passed early next year.

COMPLY OR RESIST?

By Richard Stone

The Australian Competition and Consumer Commission ("the ACCC") can formally compel the provision of information and/or documents to it by issuing a Notice in terms of section 155 "a section 155 Notice" of the Trade Practices Act 1974 "the TPA".

In order for a section 155 Notice (which abrogates the privilege against self-incrimination) to be issued, the ACCC Commissioners must form the view that there is already information and/or documents in existence that evidence a contravention or possible contravention of one or more of the TPA's provisions.

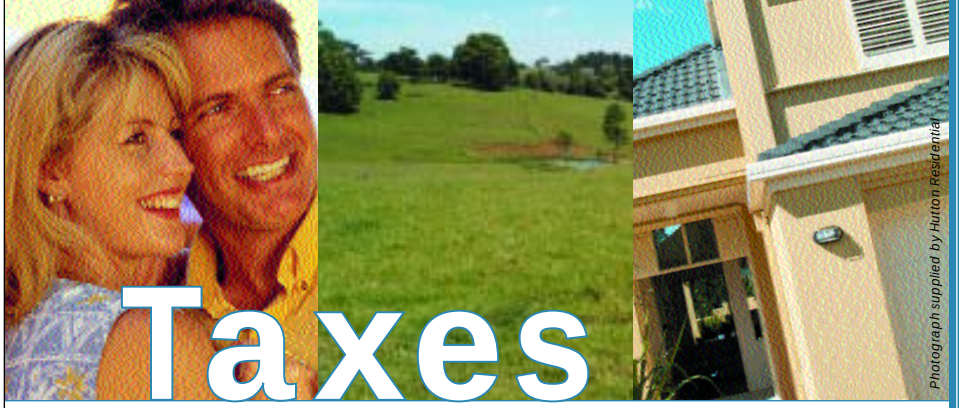
In other circumstances, the ACCC embarks on informal fishing expeditions which by their nature can involve vague or confusing assertions of possible contraventions of the TPA. Advisers' must minimise the extent that targets of the ACCC's concerns operate in the dark as to the issues upon which a response is sought, by seeking clarification of the ACCC's views as soon as practicable.

When pressed, however, the ACCC will often (but not always) refuse to articulate the basis of its view. Complainant confidentiality is the over-arching reason for this - when confidentiality has been sought. Even when confidentiality has not been expressly sought, the ACCC is not in the business of hindering its investigations by disclosing a complainants' identity, information or the fact of the complaint.

Often the ACCC simply does not have enough information upon which to articulate its view (and by implication insufficient information to warrant a section 155 Notice). This is unhelpful - if the ACCC cannot clearly articulate a possible contravention of the TPA then the matter should go no further. The law reports are littered with instances of trade practices anomalies because of the inability of anyone to articulate the precise evil that has been committed.

There is no legal obligation to comply with an ACCC request for information (and the ACCC recognises this - it has section 155 at its disposal). Yet, to minimise damage to its bottom line, a business may wish to get the ACCC off their back. It is important to resist the temptation of knee-jerk responses, and risking making matters worse. But, in some circumstances it will be in a business' best interests to promptly voluntarily provide information and/or documents.

In other circumstances it will be in a business' best interests that it resists providing information and/or documents until compelled to do so. A range of legal issues flow from such compulsion which cannot be addressed here. In any event, the ACCC will consider requests from businesses that they be compelled to provide information and/or documents as opposed to voluntarily providing it. The complexity of trade practices issues means that every matter is different, as are the ways in which the ACCC chooses to obtain information. The best response to any request, whether formal or informal, deals with the matter in a cost efficient and expedient fashion. The worst response could involve inadvertently slotting conduct within a TPA prohibition.



Photograph supplied by Hutton Residential

Taxes

What's **NEW** and how can you **SAVE?**

By Sam McNeice

WITH THE PROPERTY MARKET **BOOMING** AT PRESENT, IT IS IMPORTANT FOR HOME OWNERS TO KNOW THEIR RIGHTS WHEN BUYING, SELLING AND REFINANCING.

Below are some examples of how property owners can save.

FIRST HOME OWNER'S GRANT

A Practice Direction was recently issued by the Commissioner of State Revenue regarding changes to the First Home Owner's Grant.

The definition of "new home" has been extended to include non-residential premises which are subsequently converted into a residential dwelling, such as churches. The conversion will be treated by the Commissioner as the building of a new home by an owner builder and the grant may be claimed.

In addition, where construction is undertaken to complete a partially finished home, for example in circumstances where the original building company enters into liquidation, then the grant may now be claimed on a subsequent contract with a different builder to complete the home. The renovation or expansion of an existing home remains an ineligible transaction for the purposes of the grant.

LAND TAX

The provisions of the Land Tax Amendment Act 2003, will be effective from the 2003-04 financial year. Land tax is levied by the state government on freehold land as at 30 June each year and is payable by the owners of land where the aggregate unimproved value of land held by that owner exceeds certain thresholds. The new act makes some significant changes to land tax thresholds and subsequently to the liability of Queensland landowners. Notably, the statutory deduction for taxpayers who are residents has increased from $200,000 to $220,000 whilst the company and trustee threshold has also risen by $20,000 to $170,000. Further concessions are available for natural persons, so that for individuals who reside in Australia, the taxable threshold will now be $275,997. Land tax assessments for the 2003-04 financial year will be issued from 1 September 2003.

SAVE ON STAMP DUTY

With interest rates so low many property owners are refinancing their existing loans to take advantage of the competitive packages on offer by financial institutions. If you are refinancing your existing loan you may be entitled to a "Transfer of Mortgage". Essentially, transferring your mortgage from you existing bank to your refinancing bank has the effect of preserving the stamp duty previously paid on your existing mortgage. For example, if you paid stamp duty on a $200,000 loan with your existing bank and you obtain a refinance from your new bank for $210,000, you will only need to pay stamp duty on the difference of $10,000 rather than the entire loan amount. This can mean substantial savings for borrowers. With limited exceptions, section 94 of the *Property Law Act* 1974 compels mortgagees to transfer a mortgage to any third person when requested by a mortgagor. If you're thinking of refinancing, talk to your refinancing institution and your solicitor to ascertain whether your existing mortgage can be transferred.

mullins LAWYERS

Level 22, Central Plaza One,
345 Queen Street,
Brisbane, Q 4000

GPO Box 2026,
Brisbane Q 4001 DX 306

Telephone 07 3224 0222
Facsimile 07 3224 0333
www.mullinslaw.com.au

IMMIGRATION LAW: THE FAMILY COURT DECIDES

By Michael Klatt/Jason Walsh

What happens when immigration policy clashes head on with family welfare issues? The Family Court embarks on a journey into the world of immigration law. A world, which sees the jurisdiction of the Family Court being placed under the microscope.

In *B and B v The Minister for Immigration & Multicultural & Indigenous Affairs* the Full Bench of the Family Court ruled that it had the capacity to order the release of five children who were being detained in a detention centre. The Full Court determined that the *Migration Act 1958* did not operate to oust the welfare jurisdiction of the Family Court. This welfare jurisdiction, it was decided, allowed the Family Court to order the release of the children who were detained under the auspices of the *Migration Act 1958*.

The Court, in making its ruling, applied the principles it would use when making a parenting order pursuant to the *Family Law Act 1975*. When making a parenting order, the Court has as its paramount consideration, the best interests of the child. This interest, in the Court's view, is best served by ensuring stability in the child's life. When assessing the best interests of the child, the Court considers the environment in which the child resides. If the child is well settled, stability is thought to be promoted by leaving the child in that environment. However, if the child is in an environment where he/she is not well settled, the Court will consider a number of factors in determining what is in the child's best interest. If, in the Court's opinion the child's best interests are served by removing them, the Court will rule accordingly.

In *B and B v The Minister for Immigration & Multicultural & Indigenous Affairs*, the Court could not be satisfied that the children were well settled in their Detention Centre home. The Court rejected submissions made on behalf of the Minister that the children were progressing well at the Detention Centre and that to release the children would be to forcibly remove them from their parents. Further, removal, it was argued, would provide the children with a false sense of hope that they may be able to stay in Australia for the longer term. However, the Court took the opposite view and decided that whilst ever the children remained at the Detention Centre, their emotional and psychological well being was being impaired. The Court, which favoured the removal of the children from the detention, believed that the children were being subjected to violent and inappropriate behaviour at the detention facility, which was not in the children's best interests.

By entering the world of immigration law the Family Court has subjected itself to both criticism and praise, as debate continues as to whether or not the Family Court has the jurisdiction to order the release of children from detention facilities. The debate centres around whether the Family Court's welfare jurisdiction can be relied upon to effectively by-pass the operation of the *Migration Act 1958*, which allows the detention of unlawful non-citizens. With an appeal to the High Court pending, this debate is set to continue.