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Newsletter of
Mullins & Mullins
Lawyers and Notary

M&M Report

Editorial

By John Mullins

We have recently finalised negotiations with the owners of Central Plaza One to renew our lease. In doing so, we are taking over approximately half of the 21st floor. The advantage of this arrangement is obviously that we do not have to relocate, yet we have sufficient additional space for our immediate needs as well as the opportunity over the next few years to take the balance of the 21st floor, which would enable us to have the whole of adjoining 21st and 22nd floors.

As well as giving us additional offices, our move onto the 21st floor will enable us to have more meeting rooms and importantly be able to hold mediations in our office. The process of mediation is regarded by us as a very important tool in dispute resolution and to be able to hold the mediations on site enables us to facilitate mediation conferences virtually immediately the opportunity arises.

Our staff numbers have grown to 76 and our ability to recruit and retain good people is enhanced by our evolving HR policies, which seek to deal with the changing nature of people and their expectations of employment. A challenge that all businesses face today. With this edition of M&M Report is our specialist "At Work" Newsletter. Almost everyone in employment these days is touched by employment law issues in some respect.

The firm has joined a National group called Australian Law Network, a network of independent firms with offices in Perth, Adelaide, Melbourne and Sydney. Carroll & O'Dea, a significant firm in Sydney with whom we have had a close relationship over many years, invited us to join this group. We considered the ability to service our clients nationally would be enhanced by us joining this group which has been in existence since 1991. This group is a group of independent firms and we have no intention to change our independent status. Carroll & O'Dea are a long established, highly regarded 11 partner Sydney firm with whom we share a number of substantial clients.

We have been working on regularly updating our website with up to the minute articles on developing law. Have a look! www.mullins-mullins.com.au

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Misuse of Market Power Redefined

By Helenah Mac

On 7 February 2003, the High Court handed down its decision in *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v Australia Competition and Consumer Commission (ACCC).* This case represents an important milestone in the history of competition law in Australia.

The ACCC issued proceedings against Boral alleging that Boral had contravened s.46 of the *Trade Practices Act.* The ACCC alleged that Boral engaged in predatory pricing and misuse of market power as a result of price wars between a few manufacturers in the early to mid 1990's.

The key issues dealt with by the High Court were:

- Did Boral have a substantial degree of market power; and
- Was Boral's aggressive pricing during the early to mid 1990's taking advantage of market power for one of the proscribed purposes alleged under section 46?

On the issue of market power, the majority Judges by 6 to 1 found that Boral's market power was, in fact, very limited. Boral did not have a substantial degree of power in this market (Boral, in fact, had only accounted for 19% of the market). The Court confirmed that financial straints (or deep pockets) is not of itself market power, although financial resources may be part of an explanation for market power. Boral did not have the substantial market power in any market in the sense intended by s.46. This finding on market power was the decisive and most prominent issue in the majority decision.

With regard to the issue of taking advantage, the majority found that Boral set prices no lower than was necessary for it to win business and to survive in a highly competitive market. The majority emphasised that s.46 is designed not to protect particular competitors but to promote the long-term welfare of consumers by fostering competition.

On the issue of purpose, the majority held that Boral did have an anti-competitive purpose prohibited by s.46. The existence of an anti-competitive purpose was not however, of itself, enough.

Although the majority did not reach a conclusion of whether pricing below cost could ever be a misuse of market power, the majority noted that there was little prospect that Boral would ever recoup the losses incurred by pricing below avoidable cost.

Boral's case has clarified a number of important issues concerning the application of s.46:

1. All constraints on the company should be assessed in order to determine its market power. In this regard, the influence of consumers on the demand and supply of the product in question should be considered.
2. Size, financial strength and membership in a vertically integrated corporate group does not necessarily equate to market power for the purpose of s.46.
3. Aggressive price-cutting does not necessarily mean misuse of market power, it may be a response to competitive conditions.
4. The ability to eliminate competitors by price-cutting is unlikely to indicate market power. Price-cutting itself is usually evidence of healthy competition and is not of itself unlawful.

This decision follows the Melway case in reversing the trend in Federal Court decisions in which judges have jumped from finding a 'purpose of eliminating or damaging a competitor' to readily inferring that the firm involved must have 'taken advantage' of its market power.

The decisions of *Boral, Melway and The Daniels Corporation International Pty Ltd v ACCC* have been the only three cases considered by the High Court for the past 18 months concerning the Trade Practices Act. In each decision the High Court have ruled against the ACCC.

Boral's case has not been welcomed by small business and pressure is now mounting on the Government to provide leadership and seek to amend Section 46 or other provisions of the *Trade Practices Act.* The concern small business has is that big business can by competitive strategies damage small business.

Planning Ahead for Personal Injury Victims

By Michael Klatt

The Federal Parliament has recently introduced new legislation to encourage personal injury victims to seek damages in the form of annual payments as opposed to lump sums. The *Taxation Laws (Structured Settlements and Structured Orders) Act* received royal assent on 19 December 2002 and makes annuity payments received as a result of a personal injury settlement tax free.

Disadvantages of Lump Sums

A 'lump sum' settlement is one where a personal injury victim receives all damages in the form of a single payment. Many victims find they are unable to properly administer the amount of damages they receive, particularly in the cases of serious injuries, so that it is sufficient to cover them for the term of their lifetime.

When lump sums are generally assessed, Courts will often assume the victim will be able to invest some of the damages and gain further income. The reality though, is that not all plaintiffs are particularly investment 'savvy'.

Lump sum settlements may also create difficulties in cases where the nature of the injury renders the victim unable to care for themselves. In such situations, there is a risk that the persons entrusted to care for the victim may use the damages unconscionably.

Structured Settlements (annual payments) provide an alternative to 'lump sum' payments and would avoid some of the above disadvantages.

The New Legislation

The *Taxation Laws Amendment (Structured Settlements and Structured Orders) Act* has been passed by the Federal Parliament to address these above mentioned concerns. According to the Act, a structured settlement is a settlement of a claim for personal injuries not made against an employer where damages are paid to the victim by way of annuities or a mixture of annuities and a lump sum. While such annuities would previously attract income tax, the new legislation has designed such payments to be exempt from tax.

Ramifications

This legislation has been designed to encourage personal injury victims, especially those who are severely injured and will recover large damages, to consider applying for a structured settlement due to their tax free status. Such structured settlements would ensure that damages received by injured persons would not dissipate too quickly, but would rather be spread evenly over the course of their lives. By reducing the amounts of lumps sum settlements paid out by insurance companies, the legislation may also provide a partial solution to rising insurance premiums.

Warning Sounded for Chairman

By Pat Rogers

In *Australian Securities and Investments Commission v John David Rich and others* (handed down on 24 February 2003), Justice Austin reviewed an application by Mr Greaves, the Non-Executive Chairman of OneTel Ltd, to have certain allegations levelled against him by the Australia Securities and Investments Commission (ASIC) dismissed. Specifically, the ASIC contended that due to his position as a non-executive chairman and due to his prior extensive business experience/qualifications, he had special responsibilities beyond those of other non-executive directors and that these duties were subsequently breached. Mr Greaves submitted that there was no reasonable cause of action against him as the duties alleged did not exist.

In considering the application, Justice Austin noted that the case against Mr Greaves is:

"not a case about the duties of a Company Chairman at large, but about the duties of a Company Chairman who is also Chairman of the Audit Committee, having regard to the particular circumstances of the Company and his special personal qualifications."

Justice Austin then considered the duties imposed on directors under section 108(1) of the Corporations Act 2001 which require exercise of powers and duties with a degree of care and diligence.

In concluding that Mr Greaves' application should be dismissed, Justice Austin considered in conjunction with section 108(1) a large volume of case law dealing with the evolution of the duty of directors put forward by both parties. In particular, a number of foreign decisions that extend the scope of what is relevant in determining a director's duties, were reviewed. Justice Austin found that:

"It is in my opinion incorrect to say that the word "responsibility" refers only to specific tasks delegated to the relevant Director, through the Articles or by Resolutions or otherwise. It is a wider concept referring to the acquisition of responsibilities not only through specific delegation but also through the way in which work is distributed within the Corporation in fact, and the expectations placed by those arrangements on the shoulders of the individual Director."

Justice Austin also considered whether the office of chairman of directors is capable of carrying additional responsibilities. Whilst only reviewed in the context of pleadings and evidentiary issues, Justice Austin acknowledged some significant possibilities, in particular, that the case law indicated:-

"What emerges from the cases is that the Chairman has specific authority of a procedural kind when chairing meetings of Directors or members. The cases do not attribute to the Chairman any wider non procedural functions or responsibilities. But they do not deny the possibility that wider responsibilities might exist."

Justice Austin's findings are significant and are a further reminder to directors that they need to be fully aware of their duties and then discharge them. In ascertaining their duties not only the duties they must adopt a more focussed approach, considering the "standard corporate expectation" of directors, but must also consider how their own experience, qualifications and role on the board may extend these duties.

Dependancy Claims – Prospects of Remarriage

By Mark Rowbotham

In November 2002 the High Court changed its approach on how a widow's prospects of remarriage should be considered in the assessment of damages for a loss of dependancy claim.

An action was brought in the District Court of Western Australia under *the Fatal Accident's Act 1959*. Mrs De Sales claimed damages for loss of dependancy. The trial Judge made no deduction in the damages for the general vicissitudes of life but applied a discount of 5% to reflect the chance of her obtaining financial benefit from remarriage.

On appeal to the Full Court it was argued that the trial Judge should have applied a significantly higher discount. The Full Court allowed the appeal com-menting that "the appellant was relatively young and very capable with two children who would not take long to reach their adulthood". The overall deduction was 20% for the possibility of remarriage and 5% for general contingencies.

On appeal to the High Court, Mrs De Sales argued there should not have been any discount by the trial Judge for the prospect of remarriage.

The High Court concluded there was difficulty in assessing the contingency of remarriage as a pecuniary advantage. There was no formula for arriving at the deduction to be made for the contingency of remarriage or for the formation of a new relationship. It is impossible to accurately predict remarriage or the forming of a new continuing relationship. It is wrong to single out prospects of remarriage as a special and separate consideration.

However, where a plaintiff has actually remarried, to his or her pecuniary advantage before trial, a defendant may be able to show the plaintiff's loss is reduced by the financial benefit of the marriage.

Unless there is evidence at trial that a new relationship was formed, no separate discount should be applied for the prospects of remarriage.

Overhaul of the Law for Community Living

By Rebecca Castley

The development of strata title units has continued to grow in the Queensland property market over recent years as more and more people turn to community living. The news for around 250,000 unit holders in Queensland is that Parliament passed the *Body Corporate and Community Management and Other Legislation Amendment Act* on 4 March 2003 which overhauls the existing community title legislation for the State. The changes are substantial so this article will seek to briefly examine some of the major changes:-

Management Rights

"Management rights" is a term used to describe the rights held by an on-site resident manager to carry out the role of caretaker and letting agent. Typically, this role is carried out from a lot within the scheme which is owned by the manager. The nature of this role is such that a non-performing or unscrupulous manager can adversely affect an investor's return, charge excessively or otherwise take financial advantage of its position. Significant protection was put in place in the last review of the legislation in 1997. However, this Amendment Act adds further consumer protection:-

- A manager (and any other service contractor appointed by the body corporate) must now comply with a code of conduct.
- If a manager breaches the code of conduct and fails to comply with a code contravention notice, the body corporate may by majority resolution force the manager to transfer the management rights.
- The manager will have 9 months to transfer the management rights to a person chosen by the manager and approved by the body corporate. If the manager fails to do so, the manager must transfer the management rights to a person and for a price notified by the body corporate (although the price must be determined by reference to the market). If the manager still fails to transfer the management rights, the body corporate may terminate the authorisation. Given the high value of goodwill that usually attaches to these management rights, this is a substantial power.
- There is a procedure to allow the review of existing authorisations, but only where it is entered into while the original owner (ie the developer) controls the body corporate (which is usually during the first 12 months of the scheme). Such a review can only take place once.

Adjustment of Lot Entitlements

For all new schemes, the contribution lot entitlements must be equal, unless it is just and equitable in the circumstances for them not to be equal. For existing schemes, a lot owner may make an application either to the specialist adjudicator or the District Court for the lot entitlements to be adjusted and the principle of equality will be applied. In making the determination, a District Court or adjudicator may have regard to how the scheme is structured, the nature, features and characteristics of a lot and the purposes for which a lot is used. For example, in a basic residential scheme comprising 10 units, there is an expectation that the lot entitlements will be the same. However, if there is a penthouse which has additional facilities maintained by the body corporate (eg a pool or a private lift), then it is fair and equitable for that unit owner to contribute more towards the costs of the body corporate.

Statutory Easements

Community management statements are required to be registered at the Department of Natural Resources for every scheme and set out basic information including the lot entitlements and by-laws. These statements will now be required to include a services location diagram showing the location of all easements for services such as telephones, electricity and sewerage. A prudent seller should disclose the existence of the easements to a buyer prior to entry into a contract of sale for any lot.

Significant Community Impact

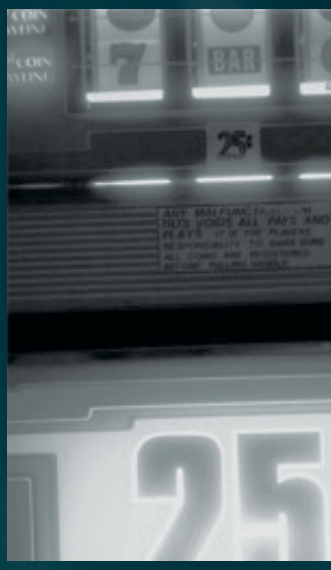
By Louise Wallace

The Queensland Office of Gaming Regulation the (QOGR) has recently changed the requirements for an Application for a Gaming Machine Licence for an existing approved site. This will affect all future applications made on the purchase of hotels.

Sections 55B and 55C of the Act require that an Application of "significant community impact" must be accompanied by a Community Impact Statement and advertise for community comment. A Community Impact Statement is a detailed and comprehensive document which can cost in the region of $15,000.00 to $20,000.00 for a specialist consultant to prepare.

An "application of significant community impact" includes an Application for a Gaming Machine Licence whether it be for an existing approved site or a new site. Previously, as a matter of practice the QOCR had only enforced section 55B in respect of applications to approve a new site.

The QOGR have advised that these requirements will now be applied to all Applications whether for a existing site or a new site. This has the potential to greatly lengthen the application process on the purchase of a hotel and increase hotel costs significantly.



The Chief Executive of the QOGR has a discretion in section 55G of the Act to waive the requirements.

From now on, upon every application in a "transfer" situation a request for the waiver must be submitted. There is no guarantee that the waiver will be given, however the discretionary grounds in section 55G are arguably met by submitting that in relation to the current application no variation to the existing conditions of issue of the Gaming Machine Licence is being sought. If it is imperative to change the gaming conditions as a prerequisite to commencing trade then the contract and settlement date need to be drawn to cater for the time needed to prepare the Community Impact Statement and the increased approval time period which will follow.

Superannuation Splitting

By Catherine Abercrombie

If there is one thing that can be said with certainty about Family Law, it is that there is a constant stream of change to the law and it's application. Some changes are more significant than others, and the amendments to the Family Law Act which came into effect on 28 December 2002 can certainly be classified as significant.

Prior to the amendments, the Family Court was limited in the way in which it could deal with the superannuation interests of parties to a marriage upon the breakdown of the marriage. Unvested superannuation was considered by the Family Court, not as an asset to be added to the pool of assets available for distribution between parties on marriage breakdown, but rather as a financial resource which would be available to the member spouse at some time in the future, causing the Court to order the member spouse to receive a smaller share of the matrimonial property than they would have otherwise received, had it not been for the existence of the superannuation.

The result of the amendments is that in essence superannuation interests will now be treated as property, the value of which is to be ascribed in accordance with formulas for valuation set out in the Family Court Regulations. The Court is now empowered to make orders referred to as "payment splits" which specify how a superannuation interest is to be divided between spouses, and "payment flags" which place obligations on the trustees of superannuation funds to notify non-member spouses when a superannuation benefit becomes payable.

Other amendments to the legislation place obligations on trustees to provide specified information regarding members accounts to members and their spouses whether current or estranged, and intended spouses of a member.

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Sexual Misconduct by Teachers. Are Schools Liable?

By Cameron Seymour

Two victims of a paedophile teacher commenced proceedings against the State of Queensland and the Minister for Education of Queensland alleging the school authorities breached their non-delegable duty of care to ensure that reasonable care is taken of them. The proceedings raise as their central issue, whether a state and school authority is liable to a person who, while a pupil at a state school was sexually assaulted by a teacher during school hours and on the school premises.

The Facts

The plaintiffs, aged between seven and ten at the time, were victims of sexual misconduct by their teacher. The acts of sexual misconduct occurred, at school, during school hours, and in a classroom or adjoining rooms.

The Issues

The High Court was asked to consider whether education authorities owe a non-delegable duty of care to children attending schools that they conduct, and, if they do, the extent of that duty. The court was also asked to consider whether those authorities may be held vicariously liable for deliberate acts of sexual misconduct on the part of their teachers.

Non-Delegable Duty of Care

School authorities owe their students a non-delegable duty of care to provide suitable and safe schools and to ensure that no child is exposed to any unnecessary risk of injury. School authorities must be careful to ensure that the school is free from any foreseeable risk of harm. The school authorities cannot discharge their obligation to ensure the safety of the students by delegating the responsibility to teachers.

The High Court found that the school authorities did not breach their non-delegable duty of care. The injury suffered by the plaintiffs was not a result of negligence on the part of the teacher or the school but was caused by the deliberate criminal conduct of the teacher. It was not suggested that the school authorities were negligent in the selection or supervision of the teacher. The teacher had no previous criminal convictions for sexual misconduct.

Vicarious Liability

The High Court considered whether the school authority should be held vicariously liable for the sexual misconduct of the teacher. Vicarious liability refers to the liability imposed on one party for the wrongful act of another on the basis of the legal relationship between them, in this instance the employment relationship.

Traditionally an employer has only been vicariously liable for a wrong committed by an employee in the course of his or her employment. Three members of the High Court decided to follow previous decisions of the Court and state that the school authorities were not vicariously liable for the acts of sexual misconduct on the basis that the acts of sexual misconduct were not in the course of the teacher's employment.

Three members of the High Court left the door ajar for the plaintiffs to claim damages on the basis the school authorities were vicariously liable for the teacher's sexual misconduct. These judges believed that liability could be established if the school authorities placed the teacher in such a position that his/her conduct could fairly be regarded as so closely connected with the teacher's responsibilities as to be in the course of the teacher's employment.