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M&M Report

Editorial

By John Mullins

The performance of the Australian economy generally, and in particular, compared against the American economy over recent times, has been quite amazing. It used to be said that when America sneezes the rest of the world gets a cold. This is certainly not currently the case and as of this week there are more interest rate cuts and supposedly more on the way. Anyone who is trying to do any building work in South East Queensland will be well aware of the building boom that has now been going on for quite some time. This is driving a very strong and buoyant economy in South East Queensland, perhaps the strongest in Australia.

Events such as the opening of the new Suncorp Stadium are contributing to this considerable sense of confidence in the market place. The fast looming Rugby World Cup and the excitement and tourism that it will generate, I believe, will continue to fuel the fire of optimism and confidence. It will be interesting to see whether the significant improvement in the Australian dollar, some 38% over the last 18 months, will negatively impact upon the economy as imports become cheaper and exports more expensive.

For business, all of this provides an environment for improvement. Business has the opportunity to refine its goods and services and the service delivery of these goods and services to become better and more competitive. Those that fail to recognise this will simply follow the cycle of economic ups and downs.

As a firm, we are working hard on internal processes, systems and methods to improve our service delivery. We are employing the most qualified people to capitalise on the strong elements of the firm and minimise and improve the weaker elements.

We are very focussed on the people aspects of our business and the need for us to recruit and retain top quality staff. We have many strategies in place for identifying what is important to our people and delivering this. As a result we have reduced staff turnover to far below the industry standard.

To coincide with this, we are reviewing our profile in the market and our livery. This will in fact be the last edition of the M&M Report in this format.

Business is enjoying good times and history tells us that good conditions are followed by less favourable times. The challenge for all businesses, including our own, is to seize the opportunity of positive economic conditions to equip our businesses to be strong performers in all market conditions.

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New Gaming Legislation

By Curt Schatz

We have developed a very strong Hospitality practice over the last four or five years which has culminated in us providing advice to the Queensland Hotels Association.

The hotel industry has gone through an amazing phase in the last few years. One of the major reasons for the interest in hotels is the fact that hotels can have up to 40 Electronic Gaming Machines as part of the operation.

Another reason for the interest in Queensland hotels is that each hotel can have three detached bottleshops within a 10 km radius of the hotel. This provides an opportunity for the sale of packaged liquor from those premises.

However, the main interest of late in the hotel industry has been the long awaited revision of the gaming legislation.

Reasons for the Legislation

On 8 May 2001, the Queensland Government announced a state-wide cap on the number of gaming machines in hotels and undertook to develop a scheme for the re-allocation of machines within that state-wide cap. The state-wide cap was subsequently given effect via the *Gaming Machine Amendment Act 2001*.

The cap was a response to community concerns that the proliferation of gaming machines had led to an increase in the level of harm caused by gambling. The calls for slowing the growth of the gaming machine industry prompted the Government to cap the expansion of any further gaming machines into hotels. As the most significant recent growth in gaming machine numbers had occurred in hotels, the state-wide cap was only imposed on hotels.

In introducing the cap, the Government announced that a scheme would be developed to allow for the re-allocation of gaming machines that became available within the cap as a result of hotel closures or reductions in the number of machines in hotels.

The re-allocation of gaming machines via trading in authorities will complement the current licensing requirements for gaming machines, but the current licensing processes will not change. Potential licensees will still be required to make an application for a gaming machine licence. Similarly, existing licensees will still be required to make an application for an increase in the number of approved machines. Both types of applications will continue to require the approval of the Queensland Gaming Commission. Additionally, potential applicants will also be required to continue to meet probity and integrity requirements as well as undertake community impact assessments.

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Re-allocation will occur via a tender sale process overseen by the Government. The Government has developed the scheme to discourage the drift of machines from country areas to the South-East through the creation of regions in which trading of authorities will be confined. In addition, the Government is determined to prevent speculative trading in authorities by placing limits on the sales process.

Consultation

Government consultation has taken place with the Department of the Premier and Cabinet; the Department of Tourism, Racing and Fair Trading; the Department of Local Government and Planning; the Department of State Development; the Department of Employment and Training; the Department of Primary Industries; the Department of Public Works; the Department of Families and the Department of Justice and Attorney-General. The Office of the Queensland Parliamentary Counsel has prepared the Bill.

During October and November 2001, the Queensland Office of Gaming Regulation (QOGR) held discussions with the Queensland Hotels Association and conducted discussion sessions with hoteliers in Cairns, Townsville, Rockhampton, Toowoomba, the Sunshine Coast, the Gold Coast and Brisbane. As a result of those sessions, a Discussion Paper titled "A Scheme for Re-allocating Gaming Machines in Hotels" was publicly released in December 2001.

The Discussion Paper was provided to all Members of Parliament, Local Councils, Directors-General and industry and community stakeholders.

The Discussion Paper was also published on the QOGR web-site and QOGR received 50 submissions in response to the Paper.

Following the release of the Discussion Paper, QOGR conducted further discussion sessions with hoteliers from 31 January to 5 February 2002 in Cairns, Townsville, Rockhampton, Ipswich, Mackay, Toowoomba, the Sunshine Coast, Gold Coast and Brisbane.

In 2002, an Industry Consultative Committee was formed comprising representatives from the hotel industry, to discuss in detail the main issues pertaining to the re-allocation scheme.

During 2003, a Public Benefit Test (PBT) was undertaken in relation to the restrictions potentially placed on competition as a result of the scheme. As a result, a Draft PBT Report was released for comment on 5 April 2003 and comments closed on 28 April 2003. Five responses were received and a summary of the responses were included in the Report which was finalised on 6 May.

You Can BEAT City Hall

By Anthony O'Dwyer

In a recent decision of the Supreme Court *(Hollis v Atherton Shire Council)* a developer succeeded in recovering money paid to a local council for headworks contributions although the condition imposing the contributions was not challenged at the time it was imposed.

The council had imposed the headworks contributions condition in a development approval based on costs incurred in setting up a water supply and sewerage system. This was subsequently found not to be a valid basis for the contribution but not until after the developer paid the contributions. The developer did not appeal against the condition and accepted it at the time, making the payments without complaint. The developer completed the subdivision and sold the lots.

Upon discovering that the contributions paid were excessive, the developer brought a claim to recover the payments on the basis that they were paid under a mistake. The developer had to show that the council was enriched by the payment at the developer's expense and that it would be unjust for the council to retain the payment.

The council argued that the payments were made voluntarily and for good consideration. The court concluded that the payments were not voluntary because the developer had relied upon the council to comply with its own by-laws and the legislation to calculate the correct charges. The developer was not aware that the charges were incorrect nor did the developer have access to the information relied upon by council to calculate the charges.

The court rejected the council's argument that the developer had received good consideration for the payment so that he should be denied the excess payments. The court found that the decision of council to approve the application and the subsequent actions of council were not of the nature of consideration for the payment of the contributions. Additionally, the unjust nature of the retention of the payments dictated that the repayment should be made even if the council had delivered part of the consideration.

The council argued that the repayment should not be made because the developer had passed on the contributions to the buyers of the lots in the subdivisions. The court found that the lots were simply sold at market value and it was not valid to reduce the right to repayment based on a profit made from the sales.

Threatened Defamation: Ca

By Ralph Mann

If, prior to a defamatory article, television story, or public statement being made about you, you became aware that it was about to be published, can you prevent it?

The High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* re-affirmed that courts have the power to grant injunctions preventing publication or re-publication, however injunctions may only be granted if certain criteria are met.

To secure an immediate interlocutory injunction you must show:

1 that there is a serious legal question to be tried;
2 that you will suffer irreparable injury for which monetary damages will not provide adequate compensation; and,
3 that the balance of convenience favours granting an injunction preventing publication. (That is if the injunction is not granted more harm will occur than the "harm" caused by preventing publication).

Australian courts have granted injunctions to restrain publication in circumstances such as where allegations of criminal activity in the family of the late Gianni Versace were made by a private investigator in a book promoting the investigator's business and where footage of a man in his underwear taken illegally by police was provided to a television broadcaster for inclusion in a current affairs programme.

Mutual Wills do not prevent Family Provision Applicants

By Michael Klatt

The recent High Court decision of *Barns v Barns* puts to rest the issue of whether mutual wills are immune from Family Provision Applications. Mutual wills are usually made between two persons who enter into an agreement relating to how their assets are going to be distributed upon the death of the surviving party. Once the first party to the agreement dies, having left a will in accordance with the terms of the agreement, the surviving party is bound to ensure they dispose of their estate in the manner agreed. If the surviving party does not dispose of their estate in the manner agreed, equity will oblige the surviving party's personal representatives to hold the estate, which devolves to them on the death of the surviving party, on trust for the beneficiaries prescribed in the agreement.

Essentially what attaches to the assets of the estate is a constructive trust, which allows the surviving party to enjoy the assets for the remainder of their lifetime, subject to a fiduciary duty to bequeath what is left in the manner agreed upon. It is the constructive trust, which attaches to the assets of the estate, not the agreement itself, which is able to be enforced by the beneficiaries set out in the agreement.

In *Barns v Barns* a husband and wife entered into a deed for a mutual will, with the assets of the estate to devolve to the surviving party, who agreed, upon their death, to bequeath all assets to their only son. The aim of the agreement was to exclude the only daughter of the marriage from making a claim against the estate, as it was submitted that the estate was bound by the agreement.

The court had to determine whether or not mutual wills were subject to the making of a Family Provision Application. A Family Provision Application allows a dependant of the deceased to apply to the court for provision to be made out of the estate to cater for the proper maintenance and support of the dependant where insufficient provision has been made in the will.

The court in determining whether the deed for a mutual will precluded a Family Provision Application being made, held that there was no justification to deprive the daughter of an estate out of which provision could be made. The court held the legislature had conferred on the court a discretionary jurisdiction to make provision out of a deceased person's estate in a manner that overrides the testamentary intention of the deceased. Thus, the court could entertain the daughter's application and the matter was referred back to the Supreme Court of South Australia for determination.

The lesson from this case? An agreement for a mutual will does not protect a deceased's estate from a Family Provision Application. The only way to ensure an estate is not subject to a Family Provision Application, is to have no estate. This means, the deceased, prior to their death, must divest themselves of all of their assets so that no assets remain at the time of their death. A practice, which in itself, is not without risk.

n You Prevent Publication?

In cases where the court considers that monetary compensation is an adequate remedy or where the test of the balance of convenience is not met, then the courts will refuse to grant an injunction preventing publication and the alleged defamatory story can be aired.

Plaintiffs have not been successful in the following cases:-

- illegally obtained film footage of possums being killed and processed for export;
- footage obtained through intrusive harassment of a company and its employees in circumstances designed to reflect the company in a misleading and negative light.

Failure to obtain an injunction to prevent publication does not mean that the aggrieved person does not have a defamation case, nor does it prevent a defamation action being taken after publication occurs. The test however for prevention of publication is high as one of the principles of our democratic society is freedom of speech which the granting of an interlocutory injunction can inhibit.

The individual circumstances of each case will dictate the likelihood of success in obtaining an injunction preventing publication but when balanced against the public interest of freedom of speech only the strongest cases may expect protection from the court.

Report Shorts...

Misleading and Deceptive Expert Reports

By Paul Lutvey

Justice Gyles of the Federal Court in the case of *Reiffel v ACN 075 839 226 Pty Ltd*, has found an independent report was misleading and deceptive despite assurances made in the report to the effect that nothing had come to the expert's attention which caused the expert to have any doubt about the matters it was asked to report on. This adverse finding was due to:

1. the impact of the report in the prospectus provided to investors for promotion of the scheme;
2. the failure to utilise sound and reasonably based methodologies;
3. the failure to include all important information as to how the task was completed. In particular, if the scope of the report was limited, or if there were any disagreements with other methodologies;
4. the impression created that the authors were qualified in other areas, and most importantly;
5. the lack of a reasonable basis for the inclusion of a statement that "nothing has come to our attention which causes us to believe that (the statements of the promoters) do not have" a reasonable basis.

The independent expert was ordered to pay damages to the claimant.

Case Note – Maurici v Chief Commissioner of State Revenue – 13 February 2003

By Samantha McNeice

In the recent case of *Maurici v Chief Commissioner of Taxation*, the High Court ruled that the land tax valuation method used by the Chief Commissioner in New South Wales was flawed, resulting in an over-inflated valuation. The case centred on the valuation of a vacant parcel of waterfront land on Sydney Harbour. The landowner appealed on the grounds that the valuation was based on the direct comparison of vacant land sales in an area where such blocks are extremely scarce.

On appeal the High Court rejected the Commissioner's method of assessment and held that a valuation must also have regard to a representative group of comparable sales and that all facts, not merely the scarcity of vacant sites, should be taken into consideration. The court held that a group of comparable sales could not be representative if they only included sales of scarce vacant land.

This decision opens the door to further challenges to municipal and possibly industrial land valuations by taxpayers where the scarcity of available land has been a factor in determining the unimproved value of property, and has potential to apply nationwide.

Dawson Report

By Andrew Nicholson

Former High Court judge Sir Daryl Dawson released a report last month, which recommends a number of reforms to competition provisions of the Trade Practices Act, including:

Exclusionary Provisions

Agreements between competitors to restrict supply to a person or group are prohibited under the Act regardless of whether they have an adverse effect competition. The committee recommended that the current prohibition on exclusionary provisions be watered down so that it applies only where the conduct has the effect of substantially lessening competition.

Third Line Forcing

Where a supply is made conditional upon the recipient acquiring goods or services from a third party, that is regarded as third line forcing and prohibited under the Act. The committee recommended that third line forcing should only be prohibited where it has the purpose or effect of substantially lessening competition.

Misuse of Market Power

The ACCC want to stamp out all conduct under s.46 of the Act, which prohibits big businesses from flexing its corporate muscle for an anti-competitive purpose when it has substantial market power.

The committee opted not to adopt the changes sought by the ACCC, as there are a number of cases before the courts on that issue.

Search Powers

The committee adopted a submission that the ACCC be required to obtain a search warrant before entering into premises when searching for documents.

Conclusion

The proposed reforms are generally positive and have been welcomed as providing greater clarity for business. It will be interesting to see which (if any) of the reforms are adopted by the government.

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Sleeping Directors Awake!

By Mark Madsen

In March and May 2002, Santow J of the NSW Supreme Court handed down decisions in *ASIC v Adler & Ors*. In the first of those decisions, the Court found that three directors of HIH Insurance Ltd, Adler, Williams and Fodera, had all breached duties owed by them as directors and officers. In the second of those decisions, the Court imposed not only various monetary and other penalties against the directors, but also made compensation orders, requiring substantial payments to be made to HIH to compensate it for the losses suffered as a result of the action of the directors.

One of the directors, Fodera, claimed that he did not have knowledge of the details of a particular transaction and, therefore, should not be held liable in respect of that transaction. The Court disagreed, finding that Fodera "did not want to know". The Court affirmed what had already become apparent through a string of decisions in Australian Courts; directors cannot rely upon ignorance of their company's affairs to avoid the responsibilities associated with the role of director. Whether a director or officer of a large public company or of a small shelf company, an individual (even one fulfilling the role of director or officer without a formal appointment) must be aware of his or her common law duties, and of the statutory duties under the *Corporations Act 2001*.

The duties are to:

1 act with care, skill and diligence (section 180 of the Act) and to prevent insolvent trading (section 588G);
2 act bona fide in the interests of the company (section 181(1)(a));
3 exercise powers for proper purposes (section 181(1)(b));
4 retain his or her discretion (sections 190, 198A, C, D and E of the Act); and
5 avoid conflicts of interest (sections 191 - 196).

In light of recent high profile corporate collapses, the regulatory authorities must be seen to be enforcing the statutory safeguards which were intended to protect the rights of creditors and shareholders. Sleeping directors and officers who ignore their duties do so at their own peril, including the possibility in some circumstances of facing terms of imprisonment.

Swain v Waverley Municipal City Council

By Cameron Seymour

On the Mullins and Mullins website in 2002, we reported on the jury's decision in the NSW case of *Swain v Municipal City Council* to award Mr Swain $3.25 million. Mr Swain became a quadriplegic after diving into a sandbar at Bondi Beach. On the 23 April 2003 the NSW Court of Appeal overturned that decision.

The decision by the NSW Court of Appeal clearly indicates the courts are changing the focus of personal injuries law with greater weight now been given to the proposition that people should take responsibility for their own safety.

The Court of Appeal held the Council was not liable in negligence for failing to warn of a sandbar, the risk of diving in the surf, or the placement of the swimming flags adjacent the sandbar.

Springham CJ stated in his judgment; *"no person attending an Australian beach could fail to know that there are sudden variations in the sand level under water".* It was argued that a sign would not have told Swain anything he did not already know. The court repeatedly emphasised that there was no proactive duty to warn adults of the obvious risks of a dangerous activity.

Whilst the decision was made in NSW and has reference to their legislation, many of the considerations contained in the judgement can be identified as part of the Civil Liability Act recently introduced in Queensland. The notion that adults need not be warned of obvious risks is something which is specially addressed in ss 14 and 15 of the Qld Civil Liability Act. The Act also provides it is not practical or realistic for public authorities to provide warnings of the risks of certain activities.

Courts seem now to be more willing to find that persons who fail to take reasonable care for their own safety are the authors of their own misfortune.