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Lawyers and Notary

M&M Report

Editorial

By John Mullins

There has been a lot of publicity of late in relation to the behaviour of solicitors, and the role the Queensland Law Society and the Solicitors Complaints Tribunal play in protecting the interests of clients and disciplining lawyers. Pat Mullins has, for about the last 12 months, sat on the Solicitors Complaints Tribunal which has struck off and suspended numerous solicitors. All of the time, spent by senior solicitors who sit on this Tribunal, is provided free. This is difficult and complex work, which typically involves hearing from Senior Counsel representing various parties.

The cost of running these Tribunals is borne by the Law Society. It is open to people to allege that this Tribunal is Caesar judging Caesar. This is far from the truth. The Tribunal publishes bi-annually its report as to the hearings giving all details of its decisions and reasons and this publication is readily available. This process is stringent and transparent. The standards which are imposed are extremely high and we believe that the Tribunal operates very effectively.

What operates less effectively is how the Law Society processes matters to the Tribunal and the resultant delays. We believe that improvement can be made in this process. From our point of view, if the responsibility for this aspect was moved to a third party it would mean the cost of this process to the Society and to its members would reduce massively. As a firm, our interest is in the maintenance of the highest standards of the profession.

We do everything that we can as a firm to ensure that the profession maintains the integrity that the public expects. We are committed to high standards and to resolving any issues which can arise from time to time with clients as quickly as possible.

Michael Klatt, one of our senior lawyers, recently became one of only nine lawyers in Queensland to gain Specialist Accreditation in the area of Succession Law which encompasses will drafting and estate planning, estate administration and estate litigation. Michael is in charge of our Personal Legal Services section and is to be congratulated on this outstanding achievement.

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Common Law – Common Sense

Enright v. Coolum Resort Pty Ltd & Ors.

By Anthony Freese

The Queensland Supreme Court has ruled against the Plaintiff in what could have otherwise been the highest damages award in Queensland in a case for personal injury or death.

The Plaintiff was the widow of Robert Enright, a Vice-President with Pepsico Inc. Enright was attending the Hyatt Coolum Resort for a conference.

Briefly, the facts are:-

- Enright had flown overnight from the Philippines and expressed an intention to the driver of his limousine to go surfing;
- The driver stated Yaroomba Beach was unsafe;
- After the conference, Enright and a colleague (Hickey), decided to go surfing;
- Surf Information was available at the Resort including transport to the Resort's fully patrolled 'Beach Club';
- Enright did not make any enquiries about the beach conditions. It was likely a warning would have been given about swimming outside lifeguard hours;
- The men became lost on the way to the beach and flagged down a bus. They asked to be taken to the closest beach which was Yaroomba Beach;
- It was after 5pm and the beach flags had been removed and patrols had ceased. Despite this, the pair entered the surf;
- After a period of body-surfing, they found themselves a significant distance off shore;
- Enright, who had experience with water based recreational activities and similar surf conditions in the US, drowned.

The Plaintiff sued the Resort and the local Council for loss of dependency and also as Executor of Enright's Estate alleging:-

- The Council failed to provide a warning sign at the point where Enright had accessed the beach;
- The Resort failed to warn of the hazards of entering surf at an unpatrolled beach.

Justice Moynihan found:-

- Enright knew of the risks of swimming in surf at an unpatrolled beach;
- He made no attempt to acquire any information;
- He entered the water without locating the Beach Club and without any prospect of assistance if he got into trouble;
- He ought to have been put on enquiry by the limousine driver that Yaroomba beach was unsafe;
- He had not been paying attention to the depth of water, the distance from shore or his state of fatigue (from his overnight flight and attendance at the conference) and fitness.

Justice Moynihan commented, "In… determining whether or not a duty had been breached the common law recognises individual autonomy and responsibility" and "The Defendants did not create the risk of Enright drowning in the surf or have any control over or responsibility for the conditions, which created it. The choices Enright made… were his alone."

Even if Enright had been warned, his Honour found Enright would still have entered the surf. In dismissing the case it was noted "…there is a point at which those who indulge in…risky pastimes must take personal responsibility for what they do. That point is reached when the risks are so well known and obvious, it can reasonably be assumed that the individuals concerned will take reasonable care for their own safety."

This case demonstrates Courts are prepared to "draw a line in the sand" and find that even in tragic cases, it is not always required that someone else must pay for another's misadventure. At the time of printing it is unknown if the case will be appealed.

Expect the Unexpected

By Anthony O'Dwyer

Force majeure clauses are found in many trade agreements and commercial contracts. The clauses cater for the possibility that a party to the contract may be prevented from carrying out its obligations because of an unforeseen event that is outside its control. Generally, the clauses allow a party to the contract to be excused from what would otherwise be a default and allow for a period of grace to ensure that the disruption can be overcome and the contract put back on an even keel. Failing the situation returning to normal, the parties are usually asked to terminate the contract without penalty.

The World Trade Centre attack of September 11 last year brought about a significant shift in American lawyers' attitudes to force majeure clauses. At the time, Mullins & Mullins was in the midst of negotiating a significant contract with an American based organisation for a function to occur in Brisbane. The Americans were understandably nervous about committing to an event without the safety of a force majeure clause to allow them to immediately pull out of the event if something similar occurred rather than to wait out the impact of the unforseen situation. That concern translated into intense negotiations to achieve the appropriate balance with our client's desire to allow for a period of time in which to assess the situation to determine if the contract could be continued.

Until October 12 and the Bali bombings, Australians generally may not have been as concerned to ensure that force majeure clauses provided for immediate termination for matters wholly within Australia. That mind set is most likely changed with the threat of disruption from unforeseen events more likely then ever. Decisions to proceed with contracts or terminate may need to be made quickly rather than preferring to wait out the event and make a decision after the lapse of time. With insurers writing more exclusions into their policies these considerations are likely to be paramount when negotiating contracts, however as the events of this and last year have shown the immediate commercial impact of an event often dissipates over time.

Body Corporate Laws Revisited

By Rebecca Castley

Yet another key piece of legislation affecting the property industry is set to be overhauled. Since March 2002, the Body Corporate and Community Management Act has been the subject of review and community consultation. The amendment Bill was introduced to the Queensland Parliament on 3 December 2002 with an anticipated date of assent in March/ April 2003.

Many of the proposed amendments deal with procedural issues to improve the operations of body corporates. Some of the more substantial changes are summarised below:-

Forced Sale of Management Rights:

A new division is proposed which will allow the body corporate to request the letting agent to sell its management rights if supported by a majority vote of the body corporate. The letting agent will have 9 months in which to sell to a person approved by the body corporate. If not sold in this time, the letting agent will be required to transfer the rights to a person nominated by the body corporate committee at a price determined by valuation. If the letting agent fails to do so, the body corporate may terminate the letting authority. Not surprisingly, this has been a particularly controversial part of the Bill within the management rights industry.

Body Corporate Ownership of Lots:

This is currently prohibited but the change would allow a body corporate to acquire lots at fair market value in limited circumstances (for the purpose of letting to a letting agent or caretaker). The lot must be converted to common property and at the end of the letting arrangement, reconverted into a lot and sold.

Changes to Lot Entitlements:

The new regime will require lot entitlements to be equal unless it is just and equitable for them to not to be. The procedures for a lot owner to apply to the District Court or specialist adjudicator for a lot entitlement adjustment has been expanded and clarified. In some circumstances, an existing scheme will be given a 'once only' ability to adjust the lot entitlements more equitably.

Sale of Letting Rights by Body Corporate:

It is proposed the Act will be amended so that the body corporate may sell letting rights and receive payment upon such sale where no letting arrangement has been previously granted for the scheme.

We will report to you more fully in a future M&M Report about the impact of the Bill once it has been passed.

Getaway

By Catherine Abercrombie

Travel Insurance

In light of the September 11 terrorist attacks and the Bali bombing, travellers are becoming more discerning when it comes to buying travel insurance policies. So they should. The definition of terrorism can vary considerably from policy to policy and so to can the degree of coverage. Many travel insurance policies exclude coverage for any losses arising from acts of war, natural disaster or terrorism. Others provide partial coverage such that medical expenses can be claimed but other losses, for example, costs resulting in the cancellation of a holiday can not be. Other policies cover travellers for terrorism but only on conditions such as, the traveller having not visited a country against Commonwealth Government advice. Unfortunately, as in the case of the Bali bombing, travellers usually only discover these exclusions exist after the event. In a frequently uncertain world, travellers should make extensive inquiries with prospective insurers to ensure their policy covers acts of terrorism and other such events. Too often, the fine print of these policies are either not read or are misunderstood. It really is a case of buyer beware.

Visa Requirements

All Australians intending to travel overseas should check whether any visa requirements exist for their destination before they leave Australia. Visa requirements differ from country to country and can change over time. Officials at borders have the legal right to refuse you entry to the country if you do not possess a visa (where one is required) or if you possess the wrong visa. In these circumstances, you have no right to appeal their decision. The Schengen Convention allows visa-free movement for Australian tourists within Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Sweden, the Netherlands, Norway, Portugal and Spain for a cumulative total of ninety (90) days in any six (6) month period. There are other countries listed in the Schengen Convention which do require visas to be obtained and travellers should contact the relevant diplomatic representative of those countries for confirmation of entry requirements. Failure to do so could result in a very short holiday.

Travel Advices

The Federal Department of Foreign Affairs and Trade issues country specific travel advice notices which focus on risks to Australian travellers. These travel advices are constantly updated and made available free of charge. The advices can be viewed on the Departments website **www.dfat.gov.au** where there is an alphabetical country listing. If a travel advice has been issued in relation to the country, the date it was updated will be shown, and a full textof the advice is available for perusal. Alternatively, travel advices can be obtained from a fax back service operated by the Department on **02 6261 1299**.

It is prudent for people intending to travel overseas to seek out this information, particularly in light of the attitude taken by some insurance companies to refuse claims where the travellers have disregarded government travel advices.

Eye on Auditors

By Pat Rogers

The recent spate of corporate collapses has again drawn the auditing profession into the spotlight. A combination of dubious management policies and an apparent lack of diligence on the part of auditors, has seen the demise of the likes of HIH, Enron, Worldcom and Harris Skaff. The collapses have been the cause of shake ups and call for increased scrutiny for a number of groups, but in particular auditors.

The collapse of companies of this magnitude has increased the pressure on boards across the country to strengthen their internal reporting controls and ensure audits are accurately confirming the true financial position of the company. In particular audit committees of companies will be expected by both their boards and shareholders to ensure the accuracy of audits. As a result, auditors will be required to provide a higher level of assurance and more comprehensive sign offs on any materials that they review and any opinions that they provide to companies.

However, the burden will not be borne purely by the auditors. Audit committees, financial controllers and other financial management team members will be requested to provide more detailed information during the conduct of an audit. The new audit environment will dictate that auditors, to discharge their duty properly, will need to pursue and investigate matters in far more depth than previously and adjust their materiality limits accordingly. This will in turn increase the pressure and demands on finance divisions.

policies. The opposition has introduced to parliament Corporations Amendment (Improving Corporate Governance) Bill 2002 which proposes a number of measures including:

- increasing current penalties for breaches of the Corporations Act;
- tightening rules concerning executive remuneration; and
- setting new standards for auditor independence, particularly a prohibition on non audit services.

Another concern for auditors are the looming legal ramifications from the recent collapses. The liquidators for HIH have already commenced proceedings against Arthur Anderson for numerous offences pertaining to their audits on HIH and subsequent unqualified audit opinions. This follows a number of scathing comments from the HIH Royal Commission in respect of Arthur Anderson's role as auditor of the company. Clearly for the audit profession and boards of companies, we are entering a new era where expectations on auditors will be scrutinised far more closely.

The increased exposure auditors will face (as a result of the higher expectations in relation to their services), will undoubtedly cause a flow on effect to professional indemnity premiums required of them from insurers. This poses not only issues for accountancy firms in respect of increased costs but also adds a new dimension to the relationship between auditors and audit committees of companies in terms of how and if those costs may be passed on.

In addition to the market forces that will be changing the landscape for boards and auditors, both the government and opposition have also brought measures before parliament seeking to ensure greater accountability, auditor independence and shareholder protection. The government has recently released its CLERP 9 which in particular focuses on auditor independence, provision of audit and non audit services and audit committees. Whilst there are no immediate plans to require non audit services not to be provided to clients by an audit firm, many audit firms are of their own initiative adopting audit partner rotation

With the new challenges now presented to the profession and their clients, it is more important than ever before that auditors and audit committees seek to work together to identify and address shareholder concerns and deficiencies in existing audit and control processes. Whilst auditors undoubtedly must bear the lion's share of the burden by holding themselves out as verifiers of the financial well-being of the clients, these issues and problems have equal significance to the boards of all Australian companies.

Private Matters - The Privacy Act and Small Business

By Sam Kane

In previous M&M Reports and our related publication M&M at Work we have provided an overview of the new privacy laws introduced in 2001 governing the way in which organisations collect and deal with personal information relating to individuals. These laws essentially require certain organisations to take reasonable steps to make individuals aware that they are collecting personal information about them, the purposes for which it is collecting the information and who it might pass the information on to. It also gives individuals the right to know what personal information an organisation holds in relation to them and to correct that information if it is wrong.

The legislation has applied to organisations (including not for profit organisations) with an annual turnover of more than $3 million and to health service providers since 21 December 2001.

Small Businesses with an annual turnover of **$3 million or less** are exempt from the new laws **unless** one of the following apply:

- it is related to another business (for example a holding or subsidiary company) that has an annual turnover of greater than $3 million;
- it provides a health service and holds health records;
- it discloses personal information for a benefit service or advantage (for example, if a small business sells its customer lists for an advantage or benefit, or marketing companies which sell personal information for a benefit);
- it provides someone else with a benefit, service or advantage to collect personal information; or
- it is a contracted service provider for a Commonwealth contract (for example, job search agencies).

If any of these circumstances apply to a business with an annual turnover of $3 million or less, the new legislation will apply from **21 December 2002** (unless it provides a health service, in which case it has been required to comply from 21 December 2001).

Those small businesses who may be affected by the changes are encouraged to review their policies and practices immediately to ensure they are compliant before 21 December 2002.

Governance Grab Back

By Mark Madsen

In recent years, Australia has witnessed a series of spectacular corporate crashes which have significantly undermined confidence in the corporate world. A particular area of concern for the Australian public has been the continued payment of directors' bonuses by companies faced with financial turmoil.

However, the Federal Government has recently moved the Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002 which aims to promote greater corporate responsibility within non performing companies. If the Bill is enacted, section 588 FDA of the Corporations Act will provide that certain transactions will be voidable if:

(a) the transaction is made to, on behalf of, or for the benefit of;

(b) a director or close associate of a director;

(c) in circumstances where the transaction is unreasonable; and

(d) the transaction is entered into in the four (4) years ending on the relation-back day (or an act is done during that period to give effect to the transaction).

The concept of a 'transaction' is defined broadly to include payments, transfers, issues of securities, and does not need to involve a creditor of the company. 'Close associate' is also given a wide meaning, and will include a relative or de facto spouse of a director as well as a relative of the director's spouse or de facto spouse.

In order to be a voidable transaction, it is imperative to prove to a Court that the transaction was unreasonable. The standard of proof required is objective, and will be satisfied if a reasonable person in the company's circumstances would not have entered the transaction having regard to:

- the benefit or detriment to the company;
- the respective benefits to other parties to the transaction of entering into it; and
- any other relevant matter.

Put simply, this Bill will permit Courts to prevent companies making unreasonable payments to its directors in situations where the companies' attention should be clearly directed towards its future viability. Such a power shall surely encourage a greater degree of directorial responsibility within the Australian corporate landscape.

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Dominos Pizza

By John Mullins

On 5 December 2002 Fel Bevacqua will stand down as Managing Director of Domino's Pizza Australia after more than 20 years in the Chair.

Our firm is very proud of the relationship which we have had with Fel and Domino's over this 20 years. We started acting for Silvio's Dial a Pizza back in 1982 when our firm and its partners were very young, as were Fel Bevacqua and his then partner, brother Silvio.

They came to us to obtain legal advice on how to protect their concept of home delivery of pizzas and the intellectual property rights to their very first delivery vans with large red telephones on top.

Over the many years and thousands of files, we have developed a strong relationship with the company and its people. This is borne out of shared values between our firm and Domino's - commitment to clients/customers, looking after staff, being honest and loyal and acting decently in transactions. Many of these values come out of family based businesses as Silvio's Pizza and Mullins & Mullins, and have translated to the corporate cultures that exist now.

Fel is leaving the business because he wants some different challenges in his life having felt that he has achieved everything that he wants to achieve with the Domino's. He leaves Domino's in great shape. Its growth rate in recent years has been phenomenal. This is a direct result of the leadership he has provided to the company.

Another major factor in Fel's decision is his ability to hand over to a person who shares his passion and commitment for the business, Don Meij. Don started with the business as a pizza delivery driver and has run some of Domino's most successful stores in the world, after becoming a franchisee and winning awards such as World Franchisee of the Year. Don will no doubt carry on the great tradition of leadership which has existed at Domino's.

We do not usually write about our clients for reasons of privacy and confidentiality. We regard the success of the relationship between our firm, the Bevacqua's and Domino's as significant in our firm's history. We wish Fel, wife Juleen and children the best of luck with the next phase of his business life.

Fixing Family Trusts

By Michael Klatt

The Australian Taxation Office released Interpretative Decision 2002/921 on 2 August 2002. This decision may affect many family discretionary trusts. Most family trust deeds provide for a number of classes of discretionary beneficiaries, including benevolent beneficiaries, for instance churches and charities. The clause in the trust deed is generally very wide and includes any association, society, authority, institution, church, religious order, etc which, at the time of distribution of income or capital, is exempted from income tax or the gift to such a body would be tax deductable. The entitlement, however, of these benevolent beneficiaries is discretionary and, accordingly, they would have no right to call on the trustee of the Trust to distribute income or capital to them.

The CGT small business concessions are available to discretionary trusts, but these concessions are only available where the net value of the CGT assets owned by a entity or any entity connected with that entity do not exceed $5,000,000. The ATO decision looks at the effect of s.152 - 30 of the *Income Tax Assessment Act 1997* which describes how entities are connected with each other. Sub-section (1) of that section provides that an entity will be connected with another entity if either the entity controls the other entity or both entities are controlled by the same third entity. To determine whether a beneficiary controls a discretionary trust, a beneficiary is taken, pursuant to s.152 - 30(5) of the Act, to have an interest in any distribution of income or capital of the trust equal to the maximum percentage of the income or capital that the Trustee could distribute to that beneficiary under the trust deed regardless of the actual distribution. If that interest is at least 40%, the beneficiary is taken to control the discretionary trust under ss.155- 30(2) of the Act.

The decision says that where a gift deductable body is a beneficiary of the trust and, according to the trust deed is capable of receiving all the income or capital of the trust to the exclusion of all other beneficiaries, it is taken to have 100% interest in the trust to control the trust and therefore to be connected with the trust regardless of whether such distributions are made to that body or not. Accordingly, the net value of the CGT assets of the gift deductable body must be taken into account when applying the maximum net asset value test to the trust.

The result of the decision is that trust deeds with the usual wide range of benevolent beneficiaries will require all of the assets of all of those conceivable benevolent beneficiaries to be taken into account in calculating the assets of the Trust. Therefore, such trusts would never be within the maximum net asset value test and would not be eligible for concessions.

It may therefore be prudent to amend existing family trust deeds to limit the income and capital which any benevolent beneficiary may take to 39%. It is our view that amending the trust deed in this way will have no stamp duty nor capital gains tax implications for the Trust.