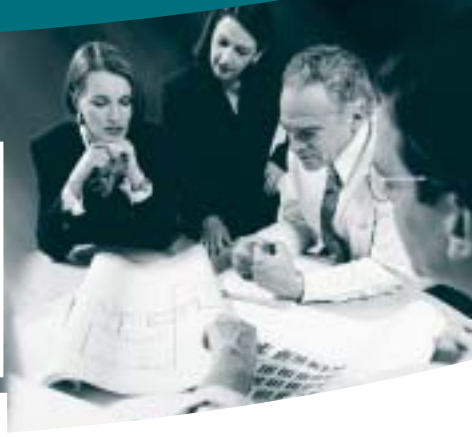
ISSUE 39
SEPTEMBER 2002

Newsletter of
Mullins & Mullins
Lawyers and Notary



M&M Report

Editorial

by John Mullins

The founder of our firm, Mr Patrick Mullins Senior died peacefully at home aged 79, on Saturday 7 September. His requiem Mass was held at St James's Church at Coorparoo on Thursday 12 September celebrated by 15 priests and attended by around 1,400 people. The celebration of his life which took place that day was a fine tribute to a great man.

As a lawyer, Dad held a practising certificate to practice law in Queensland for more than 55 years. He founded this firm in 1980 and was a consultant to the time of his death. During his life, Dad was involved in or acted for the Queensland Rugby League, Queensland Cricket, Queensland Baseball League, Queensland Cricketers Club as well as assembling Australia's greatest cricket library, now housed at the MCG. He was a life member of Queensland Cricket and Queensland Cricketers Club.

As a family man, Dad is survived by his wife of 47 years, Betty, and eight children, four of whom are currently at Mullins & Mullins. He had 19 grandchildren. Dad was always strongly involved in the Church and was extremely proud of the fact that he had been made an affiliate of both the Marist Brothers and the Augustinians.

For our firm he left us with a great legacy of values borne out of his own simple philosophy that what mattered was faith, family and friends. He was extremely proud of the firm that he created and our growth in recent years. He always regarded his decision to establish the firm as one of the best decisions he ever made.

We would like to thank so many of our clients, colleagues, members of the profession, family and friends for the extraordinary level of support and messages of condolences that we have received over the last few weeks. This has meant a great deal to our family.

Print Post Approved PP 454 022/00073

Restraint of Trade... the High Court's Extended View

By Ralph Mann

A confidentiality agreement seeks to protect information secret in nature shared between parties to the agreement, but not publically accessible. A confidentiality agreement may be in restraint of trade. An agreement in restraint of trade is one which restricts a person from freely exercising her or his trade, business or profession. Agreements in restraint of trade are traditionally limited to two groups:

1. Agreements made when a business is sold to protect a purchaser's goodwill against undue competition by the vendor; and
2. Agreements made with an employee to restrain the employee from exercising her or his occupation in a certain area or for a certain time.

Is there any longer a limit to the doctrine of restraint of trade? The High Court, in the decision of *Peters (WA) Ltd v Petersville Ltd*, was unwilling to extend the doctrine of restraint of trade to purchases of land, or leases. However, the majority did apply the doctrine to a licensing agreement, determining restrictions on use of brand name, manufacture, distribution, sale and/or supply will amount to restraint of trade.

The doctrine has now been extended by the High Court in the decision of *Maggbury Pty Ltd v Hafele Australia Pty Ltd*, by a 3 to 2 majority, to confidentiality agreements. In this case, an inventor created a new design for a foldaway ironing board and sought patent protection for, and commercial exploitation of, his new design. The inventor entered into negotiations with a company to develop the invention. The parties entered into a confidentiality agreement prior to divulging any information.

Subsequently, negotiations between the parties broke down and the inventor sought the return of the divulged information. A short time later, the company began distributing a wall-mounted foldaway ironing board. The Judge at first instance ordered injunctive relief in favour of the inventor stopping the company from manufacturing or distributing its product or any similar product using wholly or part information derived directly or indirectly from information supplied by the inventor. The inventor was awarded damages of $25,000.

The Queensland Court of Appeal reduced the damages awarded by the primary Judge. The invention was shown at trade fairs to gauge market potential and the inventor lodged several patent applications. In light of these facts, the Court of Appeal argued that third parties, including competitors, could have gained public access to the information contained in the confidentiality agreement. Because the information had been made public, the court held the injunction should not have been granted.

Similarly, on appeal to the High Court, the majority held the company had recourse to the public domain and to its own previously acquired skills and experience. Therefore, despite any agreed terms and intentions of the parties, once the subject of the confidentiality agreement became public knowledge, trade was held not to be subject to restraint. The company was free to continue manufacturing its product.

The public's perception of the High Court's decision may be that it is unfortunate. The parties entered into an agreement that did not prevent the company from using the information, but rather, constrained the use of information agreed by the parties to be confidential. The High Court's decision may have wider ramifications for any business or industry operating in trade or commerce, particularly in the area of intellectual property. Your confidentiality agreement may be unreasonable or contrary to public policy if it does not define, or limit the use of the confidential information:

- to a defined market;
- within a geographical boundary; and
- over a specified period of time.

The doctrine of restraint of trade may now be applied to your confidentiality agreement. To better protect your rights, if you are entering into a confidentiality agreement, discuss with your solicitor whether the provisions of the agreement are likely to restrain commerce.

No development for Stradbroke Island Hotel

By Anthony O'Dwyer

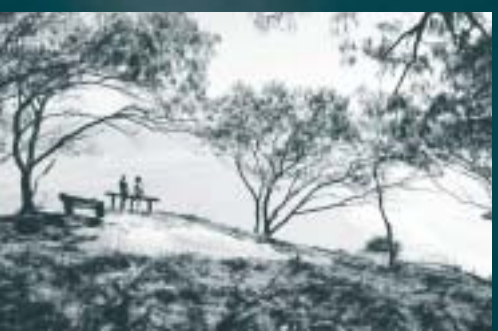
The proposed redevelopment of the Stradbroke Island Hotel at Point Lookout has been curtailed following the success of an appeal by a number of individuals and associations against the decision of the Redland Shire Council to approve the redevelopment.

The developers had obtained a development permit to allow them to redevelop the hotel into an integrated tourist resort with a new hotel including a bistro, bar, terraces, decks, drive through bottle shop and manager's residence, together with 16 serviced hotel rooms, 27 accommodation units and a basement level car park for 63 cars.

The development was outside the Development Control Plan for the island. Specific issues arose in relation to the conflict with the development standards for vegetation retention, height limit, site coverage, boundary clearance and linear dimensions of buildings. The proposed development was described by the Court as a gross over-development of the site compared to that allowed by the development standards.

The Court of Appeal found that the Planning and Environment Court had failed to apply the Development Control Plan, which required that the question be asked whether the proposed development is a more sensitive and desirable solution, than if it met each relevant development solution. This was a necessary step to take before the Planning and Environment Court could go on to exercise a general discretion to allow the development despite the conflict.

The development was found by the Court of Appeal not to be an exceptional case that would justify approval despite the conflict with the Development Control Plan. Rather than send the matter back for determination by the Planning and Environment Court on the legal principles established, the Court of Appeal decided to refuse the application for the development effectively bringing it to an end.



Personal Injuries Proceedings Act 2002

By Michael Klatt

As a response to the medical insurance crisis, the State Government passed the *Personal Injuries Proceedings Act 2002*. The Act applies to all personal injuries claims except motor vehicle personal injuries claims and WorkCover claims which are regulated by separate legislation. The Act commenced on 18 June 2002 and did not generally apply to injuries occurring prior to 18 June 2002, but recent amendments to this Act commencing on 29 August 2002 provided that the provisions of the Act now apply to all personal injury claims except those started in a Court before 18 June 2002.

Pre-Court Procedures

The pre-Court procedures are very similar to those provided for in motor vehicle personal injuries claims. A Notice of Claim is to be given to the person who the Claimant believes is responsible for the injury. The Notice must be given to the Respondent on a date which is the earlier of the day nine months after the day of the incident giving rise to the personal injury or when the first appearance of the symptoms of the injury occurred or the day one month after the day the Claimant first consults a lawyer about the possibility of seeking damages for personal injury. The amendments to the Act provide that the day of the incident for the purposes of calculating the nine month period is taken to be 1 August 2002 in relation to those incidents occurring before 18 June 2002. If the claimant has already consulted a lawyer, the Notice of Claim needs to be served by 29 November 2002.

If the Notice of Claim is not given within the time specified, a reasonable excuse for the delay must be given in writing to the person against whom the proceedings are proposed.

The person who is served with the Notice of Claim must then respond within the prescribed time limits. Within six months after receiving a complying Notice of Claim, the Respondent must give the Claimant written notice stating whether liability is admitted or denied. If contributory negligence is claimed, the degree of contributory negligence must be expressed as a percentage. If the Claimant has made an offer of settlement, the Respondent must accept or reject the offer and make a written counter-offer to the Claimant, if liability is accepted. The Act

provides that a Claimant must give a Respondent copies of all relevant documents, including reports about the incident and the Claimant's medical condition and, in relation to the quantum of the claim, the Respondent must also give the Claimant copies of documents in its possession in relation to the matter.

Before commencing proceedings, there must be a conference between the parties within six months after the Claimant gave the Respondent a complying Notice of Claim for the purpose of attempting to settle the matter and the conference may be held with a mediator if the parties agree. If the matter does not settle, then the claim should be started within 60 days after the conclusion of the compulsory conference. No proceedings can be commenced without compliance with these pre-Court proceedings unless leave of the Court is obtained.

Other Provisions

The Act allows for an individual to express regret about an incident without that being construed as an admission of liability. Such expressions are inadmissible in Court. The Act also provides certain limits on amounts that can be claimed as economic loss and gratuitous services, as the Act also puts restrictions on the amount of legal costs that can be recovered. The Act excludes Jury Trials in personal injuries proceedings and restricts lawyers from advertising the fact that they are prepared to accept instructions on a 'no win, no fee' basis.

Duty of Care and Binge Drinking

By Michael Simpson

The parameters of the duty of care publicans owe to their patrons have been a source of much concern in the hotel industry. Previous decisions such as the 'Chevron Case' have indicated hoteliers owe a duty to their patrons even after they have left the pub. In that case, an intoxicated man left the Chevron Hotel and was struck by a car as he walked onto the road. The Court ruled the hotel was negligent in allowing the patron to become intoxicated to a level whereby it was reasonably foreseeable he could endanger himself. As the man had lost the capacity for self-preservation due to alcohol, the hotel was deemed to owe a duty of care for his safety. The hotel breached this duty and was found partly liable for the patron's injuries. This decision was overturned on appeal when evidence emerged the patron had offered to pay witnesses from the compensation proceeds. However, the principles concerning the duty of care still apply.

Given the accident occurred off the Chevron Hotel's premises, the implications of this decision were a source of much concern to Queensland hoteliers. The duty of care to patrons now appeared to extend beyond their actions within the pub, to their behaviour outside as well.

However, a recent New South Wales decision has suggested pub patrons must now take responsibility for their actions as a result of intoxication. In *South Tweed Heads Rugby League Football Club v Cole*, Miss Cole sued the Leagues Club for injuries she sustained when hit by a car after being ejected from the club. Miss Cole had been drinking for most of the day, and on her ejection, the Club had offered to call her a taxi and use of the Club's bus. The Court ruled the Club did not owe a duty of care to protect intoxicated persons from harm, if the intoxication was a result of a conscious decision to drink to excess. As Miss Cole had voluntarily drank excessively, she carried a personal liability in law. This meant the Club's duty to Miss Cole was similar to the duty owed by an occupier to a lawful entrant, and did not extend to her actions outside the Club.

The Court did suggest this duty may be altered if a patron became intoxicated to the point where they were not capable of looking after themselves. In such a scenario, it may be that a hotel would have to take steps, such as arranging transport, to ensure the safety of the intoxicated person.

While this case does not give hoteliers a 'carte blanche' to negate duties to intoxicated persons, it does suggest such patrons are responsible for their own actions. As a New South Wales case, the decision does not directly bind on Queensland's Courts, but would still be persuasive if the Chevron duty is tested in the future.

Protecting Brisbane's Natural Environment

By Rebecca Castley

The Brisbane City Council is set to further protect the environment with the introduction of the Natural Assets Local Law, which came into effect on 9 August 2002.

The new local Law empowers the Council to place a Vegetation Protection Order (VPO) on any vegetation on private land that it deems valuable and worthy of protection. Vegetation that may be affected includes wetland habitats, rainforest remnants and wildlife corridors and vegetation links between natural habitat areas (eg. along creek beds). Accordingly, landowners with land located near a river or waterway, in a bushland area or in an emerging community with large trees will be have to be particularly vigilant.

A VPO may only be issued once the Council has consulted the landowner and advertised its intention to order a VPO in the local press. The community has one month to support or reject the proposal before Council ultimately decides whether to make, modify or not make the order.

The effect of the VPO is that it prevents the landowner from clearing, trimming, pruning and/or lopping the subject vegetation without prior Council approval.

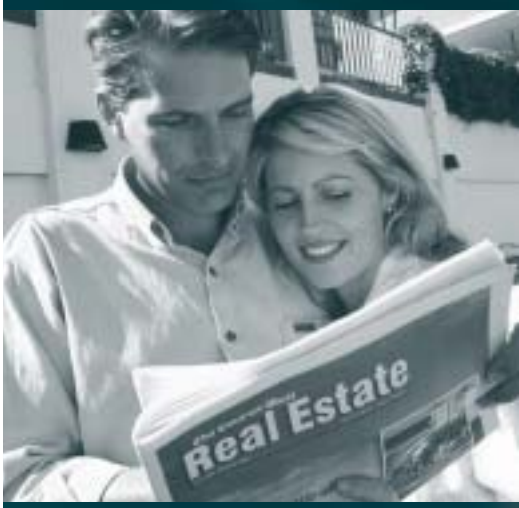
The penalties for breaching a VPO include a maximum fine of $5,000 with a provision for a $500 fine for every day the offence continues.

Council ultimately hopes the introduction of this local law will reduce indiscriminate removal of vegetation, improve weed management and preserve the city's natural character.

Switch on to new Safety Law

By Bob Lette

After 1 September 2002, all homes sold in Queensland must have a safety switch installed on the property within three months of settlement. This requirement comes as the State Government aims to curtail the number of accidents from electrocution, which has seen more than forty people die in the sunshine state in the past decade from residential electrical shocks.



Recent amendments to the *Electricity Regulation 1994* will require any transfer of domestic premises including estate, family law and mortgagee transfers, to have a safety switch installed within three months of the transfer if the house is not already fitted with a safety switch. It is the obligation of the Purchaser to ensure that a safety switch is installed within the requisite time, with a maximum penalty exceeding $1,000 being imposed for breaching the Regulations.

For all residential land transferred in Queensland where the Agreement has been signed on or after 1 September 2002, a new Form 24 - Property Transfer Information must be used. The new, redesigned Form 24 requires the Vendor to answer whether a safety switch has been installed and whether the Purchaser has been informed in writing as to the existence of a safety switch on the property.

The new legislation also means increased audits of electrical work in homes and businesses, tougher restrictions on live electrical work, higher standards for electrical suppliers and greater enforcement of safety laws.

Tennis Anyone?

By Jason Walsh

The days of asking all of the neighbours for permission to erect tennis court lighting are gone.

Those seeking to erect outdoor lighting on residential tennis courts must comply with the Brisbane City Council's City Plan 2000. The City Plan 2000 is the Council's blueprint for the City of Brisbane in managing the city's growth by providing a framework for sustainable development. It is necessary for those wanting to erect lighting in residential areas to ensure they consult the City Plan 2000 and take the steps necessary to adhere to the Light Nuisance Code under the Plan.

The Light Nuisance Code aims to control outdoor lighting in residential areas so as to maintain the amenity and environmental integrity of the city. Under the code, outdoor lighting is defined as any form of permanently installed exterior lighting and interior lighting systems, which emit light that impacts on the outdoor environment.

For the purpose of lighting a tennis court in a residential area, it is necessary for an applicant to lodge a compliance statement with Council within 1 month of erecting the lighting. This statement must be given by a suitably qualified person, confirming that the lighting complies with the 'acceptable solutions' contained in the Light Nuisance Code.

In determining whether the outdoor lighting of the tennis court is of the type permitted under the code, considerations such as the location, utilisation and direction of the outdoor lighting will be taken into account. Ideally, the lighting must efficiently light the desired area while minimising light spillage into the adjoining and adjacent environment. A fact and check sheet detailing the necessary procedures under the City Plan can be accessed from the Brisbane City Council's website at www.brisbane.qld.gov.au

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Divison of Superannuation

By Catherine Abercrombie

So all you want for Christmas is a fair and equitable division of superannuation on marriage breakdown – well Santa can't deliver that for Christmas 2002. However, if you put it on your list for next year, you are in with a chance.

The Family Law Legislation Amendment (Superannuation) Act 2001 will commence operation on 28 December 2002. This legislation, working together with Superannuation Industry (Supervision) Amendment Regulations 2001, brings major change to the way the Family Court can deal with the superannuation of a party to the marriage following the breakdown of the marriage.

Until now, the Court has been required to distinguish non-vested superannuation held by a party to the marriage as a 'financial resource' keeping it separate from the 'property of the marriage'. As a result, there has been a tendency to give the spouse without the superannuation a greater share of the other assets, usually the matrimonial home, and the superannuated spouse retained their superannuation. This method of dividing property and financial resources has been perceived by parties on both sides of the equation as producing an unsatisfactory result.

Upon the commencement of the new legislation on 28 December 2002, the Court will have the power to make orders which split a spouse's interest in a superannuation fund in percentages determined by the Court on a case by case basis. These orders will be binding on the trustees of the superannuation funds once served on them. The Court will also have the power to 'flag' a superannuation interest. The effect of a flag is to place the trustee on notice that no payment should be made to the member spouse until agreement between the parties or order of the Court, and may further require the superannuation trustee to notify the Court when the interest becomes payable to a member.

The operation of the SIS Regulations will then enable the non-member spouse to consider a number of alternatives in dealing with that part of the interest which has been split in their favour. The options include leaving the interest where it is, creating a new interest in the non-member spouses name, rolling that portion of the interest allocated to the non-member spouse into an existing superannuation fund held by the non-member spouse, or rolling the interest into a new interest in another fund established in the name of the non-member spouse. The options available to the non-member spouse will depend on the type of interest held by the member spouse, and the best option for a non-member spouse in any particular matter will need to be assessed on a case-by-case basis.

While the changes are not perfect and, in some situations will still create perceived injustices, it is a step in the right direction.