ISSUE 38
JUNE 2002

Newsletter of
Mullins & Mullins
Lawyers and Notary

M&M Report

Editorial

by John Mullins

There has been a significant amount of discussion in the press of late criticising lawyers. The Courier Mail seems to have a particular agenda in this regard and almost daily we can read articles which are 'Lawyer Bashing'.

Lawyers are easy targets and to the extent that these articles are in fact lawyer bashing, they can be dismissed. There is little doubt, however, that in a number of cases this criticism is justified and the behaviour of the lawyers is inappropriate and/or unethical.

Like you, we deplore this behaviour. We feel so strongly about maintaining a high level of ethical behaviour that our values are set out on both our Internet and Intranet sites. These are constantly reinforced by the partners with all of the people at Mullins & Mullins. These values are expressed under the headings:

- Commitment to our Clients
- Duty to the Law
- Honesty and Integrity
- Expertise
- Loyalty to our People
- Vision

Somewhere along the line, Solicitors involved in inappropriate trust account lending, trust account misdealing, deliberate over charging, dubious advice in two-tier marketing and failure to make full disclosure in litigation matters, have lost sight of the high ethical obligations of lawyers.

Our Senior Partner, Mr Pat Mullins, has recently been appointed to the Solicitors' Complaints Tribunal which deals with complaints against Solicitors, and ultimately this body is responsible for the striking off or suspension of Solicitors.

The firm continues to grow and over the last few weekends we have undertaken certain refitting of our office to accommodate our growing staff. We now have a total staff of around 70. We launched a range of new HR policies in the last few weeks including some paid maternity and study leave. We are committed to employment policies which enable us to recruit and retain the best people.

As part of our ongoing development, we have a new website and we invite you to visit us at

www.mullins-mullins.com.au

When smoke gets in your eyes – Smoke Free Enclosed Places

by Sam Kane

Friday 31 May 2002 saw the introduction of amendments to the *Tobacco and Other Smoking Products (Prevention of Supply to Children) Act 1998 (Qld)* which introduces restrictions on smoking in licensed premises, including restaurants and hotels. The Act will now be known as the *Tobacco and Other Smoking Products Act 1998 (Qld)*. The amendments are of particular relevance to licensed restaurants and to hotels and clubs, which contain dining areas or restaurants.

The objects of the Act are 'to improve the health of members of the public by reducing their exposure to tobacco and other smoking products'.

The Act prohibits a person from smoking in an 'enclosed place'. 'Enclosed place' is defined to mean a place (other than a vehicle) having a ceiling or roof and, except for doors and passageways, completely or substantially enclosed, whether permanently or temporarily.

The prohibition on smoking in an enclosed place does not apply to licensed premises, other than in the following areas of the premises:

1. Dining areas while meals are available for consumption or being consumed; and
2. Gaming table areas of casinos.

'Smoke' means 'to smoke, hold or otherwise have control over an ignited smoking product'.

'Meal' is defined as food that 'is eaten by a person sitting at a table, or fixed structure used as a table, with cutlery provided for the purpose of eating the food and is of adequate substance as to be ordinarily accepted as a meal'.

'Dining area' is defined as an area where meals may be consumed.

'Gaming Table area' for a casino is defined as an area within 2.4 metres of a gaming table at the casino.

'Licensed Premises' are defined to mean licensed premises under the Liquor Act 1992 or the Wine Industry Act 1994 or a place which holds a permit under those Acts.

A person found smoking in an enclosed place prohibited under the Act may be fined up to $1,500.

A person who is found smoking in a prohibited area as defined under the Act is required to comply with a direction to stop smoking by the occupier of the licensed premises or an employee or agent of the occupier. If a person in such circumstances fails to comply with a direction to stop smoking, they may be fined up to a maximum of $1,500.

'Occupier' is defined broadly as a person having the management or control, or otherwise being in charge, of the place or part of the place.

If a person is found to be smoking on premises in contravention of the Act, the occupier of the hotel or premises is also deemed to have committed an offence and may be fined up to $1,500. It is a defence, however, for the occupier of the premises to prove:

1. That the occupier was not aware, and could not reasonably be expected to have been aware, that the contravention was happening; or
2. The occupier, or an employee or agent of the occupier:
   a) directed the person to stop smoking; and
   b) told the person it was an offence not to comply with the direction to stop smoking.

It is important to note that failure of an employee to request that a patron stop smoking within prescribed places will result in fines to occupiers of premises rather than the individual employee.

A Licensee of licensed premises containing a dining area or gaming table area is also required under the Act to display a no smoking sign for the area in accordance with the prescribed regulations. Failure to comply with this may result in a fine of up to $750.

It is essential for occupiers of licensed premises and their staff to be fully aware of the requirements of the Act, and to ensure that all employees have been trained in relation to the legal requirement to prevent patrons from smoking in regulated areas.

The requirements of the Act are of particular concern to occupiers of licensed premises operating restaurants incorporating a bar area within or in the vicinity of the restaurant. Given that smoking is to be prohibited in 'dining areas' and that 'area' is not specifically defined, it would appear that in reality, premises serving meals will be prohibited from allowing patrons drinking at bars within restaurants to smoke.

Cooling Off Period Clarified

By Rebecca Gray

The Property Agents and Motor Dealers Act 2001 has been changed yet again by the Queensland legislators with the enactment of a second substantive amending bill since the Act commenced on 1 July 2001.

Most changes took effect from 24 April 2002 and seek to address some further operational difficulties identified by the property industry since the new regime has been in place.

The Act now makes it clear that parties to a residential contract will be "bound for all purposes" when the buyer receives a copy of the contract signed by the buyer and the seller. By doing so, the Act ousts the general law of contract as to when parties become bound (ie. upon acceptance of an offer with consideration and communication of that acceptance).

The 5 day cooling off period will begin from when the copy of the fully signed contract is received by the buyer. There will no longer be any need for the parties to sign the Form 31a Declaration to prove when the contract was signed. While this change will make the procedure less cumbersome, there still remains the potential for disputes as to the date when the buyer receives the copy of the contract. If there is a dispute as to when the parties are "bound", the seller has the onus of proof.

The recent changes also clarify that it is sufficient for the fully signed contract to be sent to the buyer by fax. A buyer may withdraw its offer at any time before the contract is signed by the seller rather than waiting until the contract is signed and then terminating within the cooling off period.

The new forms will be required to be used from 31 May 2002.

Principles of Sentencing

By Michael Klatt

The maximum penalties prescribed for various offences are contained in a number of different statutes, including the Criminal Code. The principles, however, that a Judge or Magistrate must have regard to in determining what sentence should be imposed are set out in the *Penalties and Sentences Act 1992* (as amended). Section 9 of that Act provides that the only purposes for which sentences may be imposed on an offender are:

(a) To punish the offender to the extent or in a way that is just in all the circumstances; or

(b) To provide conditions in any Court order that the Court considers will help the offender to be rehabilitated; or

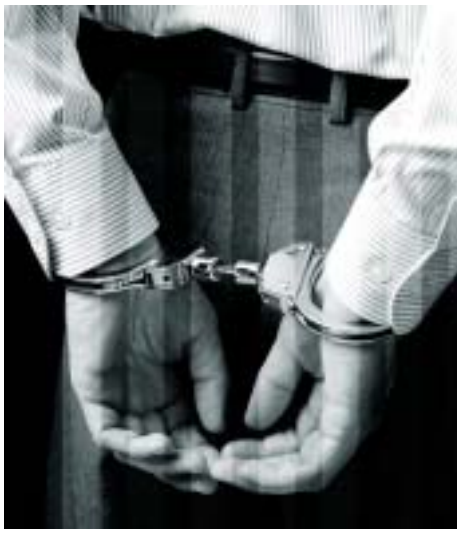
(c) To deter the offender or other persons from committing the same or a similar offence; or

(d) To make it clear that the community, acting through the Court, denounces the sort of conduct with which the offender was involved; or

(e) To protect the Queensland community from the offender; or

(f) A combination of two or more of the purposes mentioned in paragraphs (a) to (e).

Section 9(2) provides that a sentence of imprisonment should only be imposed as a last resort. This section also provides that the Court must have regard to a number of matters including the maximum and minimum penalty prescribed for the offence; the nature of the offence and how serious the offence was including any physical or emotional harm done to the victim and the extent to which the offender is to blame for the offence; any damage, injury or loss caused by the offender; the offender's character, age and intellectual capacity; the presence of any aggravating or mitigating factor concerning the offender; the prevalence of the offence; how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences; the time spent in custody by the offender for the offence before being sentenced.



Section 12 of the Act provides that a Court may exercise discretion to record or not record a conviction. In considering whether or not to record a conviction, a Court must have regard to all the circumstances of the case, including the nature of the offence, the offender's character and age, the impact that recording a conviction will have on the offender's economic or social well-being and chances of finding employment.

Section 13 of the Act provides that, when imposing a sentence on an offender who has pleaded guilty to an offence, a Court must take the guilty plea into account and may reduce the sentence that it would have imposed had the offender not pleaded guilty.

The Court has regard to sentences imposed on other offenders for similar offences. It is also common for first offenders not to have a conviction recorded against them provided the offence is not too serious. The Court has a range of penalties which may be imposed in lieu of imprisonment. It is common for offenders to be sentenced for a period of community service of up to 240 hours in lieu of a prison sentence. A Court is also able to impose a suspended sentence so that a term of imprisonment may be suspended for a period and if the offender does not re-offend within that period, the offender will spend no actual time in prison.

Changes to the Mental Health Act

by Kate Williams

The Queensland Government's inability to extradite mentally insane patients from interstate has been fixed with the enactment of the new *Mental Health Act 2000* in February this year. The Act empowers the Government to enter into agreement with another State or Territory to admit, transfer or return a patient to and from Queensland.

Under the old *Mental Health Act 1974*, the Government was powerless to apprehend and return to Queensland mentally insane killer, Claude Gabriel, who absconded from the John Oxley Centre to Victoria. Whilst there was provision for Police Officers and other authorised bodies in Queensland to return patients who had absconded from the hospital, there was no legislation conferring that same power on an interstate body. The new Act, ensures that where a patient fails to return to the hospital at the expiration of his/her grant of leave, and is found interstate, an authorised person in that state may return that patient.

So how does the 'insanity plea' work? Under the new Act, where the Mental Health Court (MHC) decides that a person was of unsound mind or of diminished responsibility when a criminal offence was committed, the person is detained indefinitely as a forensic patient. Despite being involuntarily detained, the patient may be granted a leave of absence if the MHC is satisfied the patient does not represent an unacceptable risk to the safety of the patient or others.

Protecting your domain name

By Ralph Mann

Internet addresses are becoming an important intellectual property asset for commercial entities, associations and clubs. Internet domain names need to be registered in order to protect intellectual property rights.

Mullins & Mullins recently received a favourable decision from the World Intellectual Property Organisation (WIPO Arbitration and Mediation Centre) in respect to a complaint made on behalf of one of our clients. The WIPO/ICANN Arbitration Procedures fill a void where traditional legal remedies may not be available.

The WIPO Panel accepted that our client, the Complainant, had held the registered business name in question since 1990 and an unregistered trade mark in the same name for many years.

FACTS:

The Respondent registered a domain name identical to our client's registered business name. Despite requesting he cease use of the domain name and transfer the domain name to our client, he refused to do so. Through his use of the domain name in question, the Respondent engaged in conduct in trade or commerce. However, often domain names similar to business names are registered and there is no trade activity from the site. This practice is known as (cyber squatting).

The Respondent argued he was within his rights to acquire and hold in his possession the domain name and asserted:

1 The name was available to anyone in the world without risk of retribution;
2 He was fortunate to have been the one to have found the name;
3 His interest was in all respects in what our client did in Queensland; and
4 Whilst declining the request to transfer the name, indicated he was open to a substantial compensation payment to cover all work he had done and suggested discussions start at $25,000.

The Complaint was filed with WIPO in Geneva in February 2002 and the Respondent declined to file a submission in response.

In the decision made on 1 May 2002, a single member Administrative Panel, Mr Argy made the following findings:

1 The disputed domain name is confusingly similar if not identical to the trade marks in which the Complainant has rights;
2 If the Respondent could not lawfully trade as the Complainant's business and could not lawfully use the Complainant's business as a trade mark, the fact his website has content relating to what the Complainant does in Queensland is too weak to be regarded as a "legitimate interest";
3 The Respondent registered the disputed domain name for the purpose of selling the registration to the Complainant. It was not necessary for the Panel to determine this was the only purpose for which the domain name was registered; and
4 The Respondent registered and first used the disputed domain name and despite any other intentions he may have had, intentionally attempted to attract, for commercial gain, internet users to his web site by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or the endorsement of its website or of a product or service on its website. The Respondent has since included an expressed disclaimer on its website of any connection with the Complainant and an expressed statement the site is owned by the Complainant. Accordingly, the Panel found the disputed domain name was registered and being used in bad faith.

THE DECISION:

The Panel determined our client had proven all of the requirements of paragraph 4(a) of the WIPO Policy and ordered the domain name in question be transferred to them.

An alternative procedure available to our client would have been to institute proceedings in the Federal Court or Supreme Court of Queensland alleging a breach of s.52 of the Trade Practices Act, that the Respondent had indulged in misleading or deceptive conduct or, alternatively, to claim for damages for "passing off". To establish a trademark infringement, the domain name has to be used as a trademark to show a connection in the course of trade with a particular trader.

Although the Administrative proceeding through WIPO was expensive, it would not compare to the cost of a contested action in an Australian Court of competent jurisdiction. Additionally, provided our client keeps the registration of the domain name in place, the procedure has determined the dispute between the parties with finality.

Doing Business with the ACCC

By David Williams

The Australian Competition and Consumer Commission (ACCC) is the regulator of the Trade Practices Act (TPA) within Australia. In the past few years the ACCC has extended its investigations and prosecutions into all facets of business and professional life. The most spectacular prosecutions undertaken by the ACCC have related to arrangements entered into between competitors in regard to issues of price and anti-competitive conduct.
Examples have included Cement Cartels, Fire Protection Companies, Pharmaceutical Companies, Car Rental Companies and, more recently, Obstetricians. Lawyers who have documented these arrangements have, in some cases, also been prosecuted by the ACCC.

Prosecutions under the TPA render corporations involved in the conduct liable to pecuniary fines of up to $10 million for each offence. Similarly, individuals involved in the commission of the same offences are also liable to fines of up to $500,000 for each offence. Anti-competitive behaviour is usually not a one-off event; rather it is usually evidenced by a series of events. Therefore, potential liability for pecuniary fines could be in excess of the maximum amount.

The Federal Government in May this year announced the appointment of Sir Daryl Dawson AC KBE CB who will be chairing a committee that is conducting a review as to the competition provisions

of the TPA. This report is to be completed by November of this year. The committee will be hearing public submissions in relation to the operation of the TPA and, no doubt, all sections of the community, including the business community, will be actively involved in making submissions in regards to the TPA. Issues that will be of concern include dealing with third line forcing, misuse of market power and conduct dealing with the lessening of competition within the market place.

In granting this leave now called, 'limited community treatment', the MHC must have regard to the patient's mental state and psychiatric history, the offence leading to the making of the forensic order, the patient's social circumstances and the patient's response to treatment and the willingness to continue treatment.

A person must not induce or knowingly help a patient detained in an authorised mental health facility to unlawfully absent themself from the health service. The maximum gaol term for this offence is two (2) years.

Claude Gabriel was a restricted patient who was granted a leave of absence when he absconded to Victoria. Clause 185 of the Act provides where the Law fails is that Queensland legislation is not recognised law in Victoria.

Whilst the *Victorian Mental Health (Interstate Provision) Act 1996* provides for the apprehension of restricted patients who have absconded from interstate Mental Health facilities, neither the Victorian Police or any other authorised body possessed the legal power, which needed to be conferred by the Queensland Act, to effect an extradition. Accordingly, the Queensland Government found itself powerless to apprehend and transfer Gabriel back to the John Oxley Centre.

Interestingly, had Gabriel been held to be criminally responsible for his offence ie. sane, legislation in the Criminal Code would have enabled his extradition.

Defence up in Smoke

By Matthew Hunter

In a recent Victorian Supreme Court case *McCabe v British American Tobacco Australia Limited*, Rolah McCabe, a fifty-one year old mother, became the first person in Australia to successfully sue a tobacco company for smoking related personal injuries, being awarded in excess of $600,000.

McCabe alleged she started smoking at age twelve as a result of television advertisements in the 1950s and 1960s and as a result developed lung cancer.

McCabe succeeded because the tobacco company admitted to illegally destroying in excess of 30,000 documents. The Defence was struck out because the absence of these documents which prevented the hearing of a fair trial. Documents cannot be destroyed if litigation is underway or pending. Justice Eames also held disclosure was inadequate in the circumstances as it was the tobacco company's duty to inform McCabe the documents had been destroyed.

Evidence of the destroyed documents arose in 1994 after documents had been leaked or stolen from Brown & Williamson Tobacco Company. The documents allegedly pointed to forty years of knowledge by the tobacco company of the harm tobacco smoking causes and included reports on the effects of cigarette smoking on children.

In Queensland, this case is not binding law in relation to the facts alleged by the Plaintiff. This case was not decided on its merits, but on a technical point associated with the proper disclosure of documents. However, a similar outcome would be likely in Queensland given similar circumstances. The case acts as a reminder to the legal community of the requirement to act ethically and diligently in litigation. If this requirement is not strictly adhered to, tough penalties and undesirable outcomes for clients are likely to follow.

The tobacco company have stated they will appeal the decision.

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Postscript: The information contained herein, whilst accurate, is of a general nature. If you have any queries in relation to the information contained herein, we ask that you consult the partners or solicitors of Mullins & Mullins with whom you usually deal. If you have any comments regarding our newsletter, we would like to hear from you.

Should you not wish to receive this newsletter or any other marketing material from Mullins & Mullins, please advise us immediately.

Family Provision Applications

By Catherine Abercrombie

Our property is ours to do with as we would wish upon death - or is it?

While Queensland law recognizes the concept of testamentary freedom, there is enshrined in law a capacity for such freedom to be restricted where there has been a failure on the part of a testator to make proper provision for the maintenance and support of a dependant. This is provided for by the Testator Family Maintenance Act.

Applications, known as Family Provision Applications, can be made to the Supreme Court in Queensland where a person who was dependant on a deceased claims no adequate provision has been made for them in the will of the deceased.

Initially, this remedy existed only for spouses and children of the deceased. However, the ever-changing nature of our society and the relationships people form within it has seen a broadening of the class of persons to whom the remedy is available. In Queensland it has been expanded to include de facto partners, former spouses, parents, step children, adopted children, grandchildren, a person under the age of eighteen years, and the parent of a surviving child of the deceased under the age of eighteen.

In determining whether the Court should make provision from the estate of the deceased to the applicant, a two-step approach is adopted. Firstly, the Court must determine whether the applicant has been left without adequate provision for their proper maintenance or support. In making this assessment, the Court assesses all the circumstances of the case and makes a finding of fact regarding provision made for the applicant. A sum of money deemed proper maintenance or support for one applicant will not necessarily be deemed proper maintenance and support for another applicant.

These circumstances which the Court is required to take into account may include the relationship which existed between the deceased and the applicant, the contribution the deceased was making to the applicant at the time of the deceaseds' death, or the contribution an applicant made to the acquisition and accumulation of assets by the deceased during their lifetime.

Once the Court has determined that adequate provision has not been made for the applicant, the Court determines what if any provision ought to be made for the applicant. In doing so, the Court is required to consider what provision the deceased would have made had they been 'just and wise' at the time of making their will.

It is because of the existence of this legislation and the wide class of possible applicants that every person's mind should turn, at the time of making or reviewing their will, to the possibility of an application being made against their estate.

For this reason, it is important to communicate openly with your solicitor when your will is prepared and provide instructions as to whether there is anyone in your life who falls into one of the categories of persons listed above who is dependent upon you and for whom you are making no or no substantial provision in your will.