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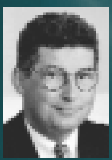
Editorial



by John Mullins

Recently Minister Welford announced that the way in which we practise law in Australia, on a state by state basis, will be changed so that from the 1st July we will be operating on the same system across Australia.

There are a number of significant issues here which impact both upon legal practices and our clients. They include the issue of limitation of liability for lawyers, compulsory professional indemnity schemes and the level of this insurance, and thirdly the right to incorporate and have as shareholders such persons other than legal practitioners.

Over the last few months there has been significant public discussion about the increase in personal injuries litigation in Australia and the extent to which the behaviours of certain law firms have contributed to this. Current Affairs shows have run sensational headlining stories denigrating lawyers.

Whilst we do not in any way support the behaviours of ambulance chasing lawyers, our society has changed to one which seeks to attribute blame and obtain compensation. To say that lawyers cause this problem is obviously untrue. The question is whether aggressive advertising by lawyers acts to perpetuate or increase the problem.

The converse position is that in days gone by when a no win no fee environment did not exist, a lot of disadvantaged members of our society who had genuine claims would have been unable to pursue these claims. Clearly the proposition that no win no fee gives access to justice to a disadvantaged sector of our society is correct.

We are all affected by increasing insurance premiums but if you or your children were seriously injured tonight on your way home by a drink driver, would you want to be told that you are entitled to some statutory compensation but you had no right to sue for damages.

This is an incredibly complex issue. As a firm, we do not believe in ambulance chasing behaviours but as a firm we believe in the right of Australians to seek compensation when they have been injured by the wrongful behaviour of other parties.

The New Duties Act – "It's Time"

by Rebecca Gray

After a staggering 108 years on the statute books, the *Stamp Act 1894* has finally been replaced by the new *Duties Act 2001* (supported by administrative provisions in the Taxation Administration Act 2001), effective from 1 March 2002. There is no doubt that this reform has been long overdue and all those who have previously waded through the cumbersome drafting of the old Stamp Act will be pleased to hear that the new Duties Act 2001 adopts plain language and a straight-forward structure and incorporates some common sense reforms.

The new Duties Act 2001 follows the reform of the old stamp duty legislation in New South Wales and Victoria. In many ways, the Duties Act 2001 is a "re-write" of the old Act but there have been some substantive changes. Commonly encountered duties are examined below:-

Transfer Duty

Transfer duty is payable when a person enters into a "dutiable transaction" relating to "dutiable property". The liability arises whether or not the dutiable transaction is evidenced by a written document and is imposed when an agreement is entered into or when the transfer is made, whichever is the earlier. As was the case under the Stamps Act, the parties must lodge the transaction for assessment within 30 days.

There is a list in the Act of those transactions which are "dutiable transactions". The term includes a transfer, an agreement for transfer or a surrender of dutiable property. "Dutiable property" includes land in Queensland, a Queensland marketable security and a Queensland business asset.

The dutiable value of a dutiable transaction continues to be calculated as the greater of the purchase price or the unencumbered value of the property acquired. The ad-valorem rate of duty remains unchanged.

Transfer Duty – Concessions for Homes

The concession for acquisitions where the property will be used as the buyer's principal place of residence will continue. However, the buyer will no longer need to prove an intention at the time of purchase to use the residence as his or her principal place of residence. It will be sufficient if the buyer actually does occupy the residence as his or her principal place of residence within 12 months (previously 6 months) from the date of becoming entitled to possession of the residential land (ie from the settlement date).

If the buyer does not remain in occupation for 12 months after he or she starts occupying the residential land (eg if the residential land is transferred or leased), the buyer will receive the concession only for the period of occupation. Previously, under the Stamp Act, the buyer was required to repay the entire concession if he or she did not remain in occupation for the whole of the prescribed period.

The additional concession for a first home acquisition continues where the value of the residential land (including the home) does not exceed $160,000. The value of any other property acquired as part of the acquisition (eg for gaining income) will be disregarded for the purposes of this concession.

The Duties Act 2001 has also removed the requirement that the land around the residence (ie the curtilage) must not exceed 5000m² in area. Now, provided that the curtilage is used for residential purposes (and not, for example, for gaining income), the concession will apply to the house and curtilage, regardless of the area.

Businesses

The main change is that the transfer of "business assets" in Queensland will be dutiable (regardless of whether or not a business has been acquired). Business assets include:-

- goodwill
- a statutory business licence
- a business name
- a right under a franchise arrangement used to carry on business
- a debt of the business
- a supply right of a business (eg work in progress)

The New Duties Act Cont.

- intellectual property used for carrying on a business
- personal property of a business

The last 4 items are not dutiable by themselves. They must each be acquired together with other dutiable property or aggregated with another dutiable transaction before they will become dutiable.

Duty is payable on business assets even if the business ceased operations (provided that the business was carried on in the year prior to the transaction). There are rules of apportionment to deal with the sale of a business or business assets which relate to Queensland and other states in Australia or overseas.

Leases

Generally, the new Duties Act 2001 imposes duty on transactions rather than instruments (or documents). Leases and other "occupancy rights" are the exception to this rule and will remain assessable on the instrument only. Duty will now arise from when the tenant takes up possession of the premises instead of the date on which the lease is signed. Where there is a right to renew the lease, duty will only be payable for the option term once it has been exercised.

Often, part of the rent payable under a lease will not be known when the liability to pay duty arises (eg where rent reviews are by CPI or market review during the term). In this case, this "unascertainable amount" will be dutiable and liability will arise within 30 days of the earliest of end of possession or the term or when the final rent review is carried out.

Mortgages

As is the case with leases, mortgages will remain instrument-based (rather than imposed on transactions). Duty will no longer be payable on loan agreements but rather will be imposed on the mortgage itself. The liability will arise when the mortgage is signed or, in the case of further advances, when an advance is made which exceeds the amount originally secured by the mortgage. There are new rules to help apportion the value of the security where mortgages secure property in Queensland and in other states in Australia and overseas. Rates are unchanged.

Administration and Penalties

The aim of the Taxation Administration Act 2001 is to make compliance with the Duties Act 2001 easier and cheaper. It regulates practical matters relating to assessments, returns and reassessments, payments, refunds and penalty tax. It also deals with enforcement, record keeping and confidentiality.

The Commissioner may in certain circumstances extend the time period for payment of duty and may for example agree to allow a liability to be paid by instalments. If a person fails to pay duty by the due date, unpaid tax interest is payable at the rate of 12.89% calculated at a daily rate. There is also the right for the Commissioner to impose the harsher penalty tax at a rate of 75% in certain circumstances (eg if a person fails to lodge a self-assessment or fails to provide information or documents). Offences also apply if a person knowingly provides false or misleading documents.

Damages in Personal Injuries Claims

By Michael Klatt

The court's fundamental objective in awarding damages for personal injury is to place the injured party in that position he or she would have been in, had the injury not occurred. In our increasingly complex and litigious society, the principles of assessment and quantum of damages are continually developing as new case law emerges.

Personal injury compensation falls under two main heads; general damages which need to be assessed and specific damages which are capable of precise monetary calculation.

To assess general damages which include a persons' pain and suffering, the court must determine the actual suffering and mental distress the person has suffered or is likely to suffer as a result of the injury caused. To assess damages for a person's loss of amenities of life, the court must assess the person's "deprivation of the ability to participate in normal activities and thus to enjoy life to the full." For example, an injury which may result in the loss of ability to play sport. Obviously it is not possible to calculate these losses in terms of precise sums of money. In a practical sense, usually the court will assess its compensatory figure having regard to an independent doctor's assessment of the plaintiffs' percentage of disability. The courts must determine a 'reasonable sum', having regard also to the general standards prevailing in the community. This 'tariff-like' approach, whereby like-cases must be treated similarly, has been heavily criticised by the High Court of Australia on the basis that no two cases are ever comparable. What remains certain however, is that whilst judges maintain a large degree of discretion, the court will always have consideration to previous decisions. Accordingly a consideration of previous cases in which similar injuries are sustained is important in calculating general damages.

Although 'perfect compensation' is unattainable, given that no-one can ever be certain what life held in store for a plaintiff had he or she not been injured, various scientific methods are used by the courts to come as close as possible to reimbursing the plaintiffs for their true loss. A plaintiff who has lost the capacity to earn income is entitled to be compensated for the loss suffered. Past economic loss to the date of the trial will be recoverable and calculated on the basis of gross wage less any amount that would be payable as income tax earning. Loss of superannuation is also recovered. Loss of future earning capacity will be calculated on the net loss of earnings at the date of the trial having regard to the whole of the plaintiff's expected working life. Where a plaintiff can provide evidence to suggest that his or her future earning capacity could have been increased, for example by promotion, the amount will be adjusted. Once the total has been calculated, contingencies of life such as ill health and unemployment will be discounted depending on the individual plaintiff.

Any damages awarded for future economic loss are discounted also to reflect the benefit obtained by receiving the damages in some cases 20-30 years prior to actually suffering that loss.

A person is also required to mitigate their loss so that the economic loss is calculated having regard to income which could be earned by the person (having regard to their disability), not always what they are actually earning.

The plaintiff will also be compensated for the expenses of meeting any needs created by the plaintiff's injury provided they are reasonable. These generally include the cost of past and future medical attention, prescriptions, physiotherapy, travelling and accommodation expenses and since the case of *Griffiths v Kerkemeyer*, gratuitous nursing care. In that case, the plaintiff suffered a permanent disability as a consequence of the defendant's negligence. He claimed damages in respect of voluntary services rendered by his fiancee and his family. The High Court accepted the principle of "needs created" and awarded him an amount quantified by reference to the value of providing those services. Interest is also claimable on all past losses claimed.

This decision is demonstrative of the courts current approach to increasing the categories of costs now recoverable on a "needs created" basis, and indicative of the compensatory principle that underlies all awards of damages for personal injury.

Warner & Universal Music misuses Market Power

by Gavin Bartlett

In a landmark decision handed down on 14 December 2001 Justice Hill of the Federal Court found that major record companies Warner Music and Universal Music had breached sections 46 and 47 of the Trade Practices Act 1974, dealing with misuse of market power and exclusive dealing.

It was accepted by the Court that it was almost inevitable that each of the major record companies in Australia would have some of its catalogue music on the various "Top 40" style charts at any one time, making it a practical necessity for most, if not all retailers to obtain supplies of CD music, particularly "popular" or "chart" music from Warner, Universal and the other major record companies.

The conduct complained of arose following amendments in 1998 to the Copyright Act 1968 which legalised importation into Australia of copied music CDs from other countries, provided they did not infringe the copyright laws of the country of manufacture (commonly known as "parallel importing"). Prior to the amendments, importing CDs manufactured outside Australia without a licence was an infringement of copyright, and the five major record companies in Australia (of which Warner and Universal, formerly Polygram, were two) enjoyed a "statutory monopoly" on the manufacture and wholesale to retail outlets of "popular" music. Subsequent to 30 July 1998, that monopoly all but disappeared, as the Australian market was opened up and small independent wholesalers began to import and sell overseas copies at lower prices.

In response to this very real threat to their market domination, the Australian Competition and Consumer Commission ("ACCC") alleged that Warner and Universal, holding approximately 17-18% and 15-17% of wholesale market share in Australia respectively, used their market power to discourage retailers from stocking competitively-priced parallel imports and to deter smaller wholesalers from importing the copies. The conduct engaged in included:

- implying in communications to smaller wholesalers that trading relations might be reviewed if they engaged in parallel importing;
- threatening to cut off supply to or withdraw significant trading benefits, including promotions and advertising from retailers who stocked parallel imports;
- closing the accounts and ceasing to supply a number of retailers who had acquired imported copies from competitors.

It was also alleged that Universal and Warner colluded with related Indonesian companies in an attempt to curtail parallel imports from Indonesia of music on their catalogues. These arrangements were alleged to breach section 45 of the Act as having the purpose or likely effect of substantially lessening competition.

The court found that Warner and Universal did engage in the misuse of market power in contravention of section 46. Importantly, Justice Hill found that a market share of between 15-18% could constitute "substantial" market power in circumstances such as these, where the lion's share of the market was controlled by five multi-national companies, the financial barrier to others entering the marketplace was high and by the nature of the product there was a high degree of differentiation between the CDs offered on each of the major company's catalogues.

The case under s.47 "Exclusive Dealing" was also made out, the Court finding that Universal and Warner had supplied or offered to supply CDs on the condition that the buyer would not source parallel imports from a competitor. The Court was of the opinion that a specific competitor did not need to be identified.

In relation to the alleged collusion with Indonesian record companies Justice Hill refused to find that either Warner or Universal had breached section 45 of the Act, holding that the evidence presented by the ACCC was insufficient to prove that an arrangement or understanding was formed, between unrelated parties, that had the purpose or was likely to have the effect of substantially lessening competition.

Does a mother owe a duty of care to her unborn child?

by Michael Highfield

On 30 November 2001, the decision of *Bowditch v McEwan & Ors [2001]*, was handed down by the Supreme Court of Queensland.

In this case, Judge White found that a mother who was the driver of a motor vehicle owed a duty of care to her unborn child, who suffered injury in a motor vehicle accident.

In Queensland, we have a compulsory third party insurance scheme which covers drivers of motor vehicles for injuries caused by their negligence.

Judge White considered that comprehensive liability insurance schemes and public policy are proper factors to consider, but the presence of such schemes should not dictate whether a duty of care should be imposed.

Judge White also considered comments from a similar case in Canada. Judge Cory, from the Supreme Court of Canada, suggested there are significant reasons against the imposition of liability for prenatal negligence.

Judge Cory stated "everything the pregnant woman eats or drinks, and every physical action she takes, may affect the foetus. If a mother were to be held liable for prenatal negligence, this could render the most mundane decision taken in the course of her daily life as a pregnant woman subject to the scrutiny of the courts".

Judge White commented that although a wide range of actions may affect a foetus, the occurrence of many of these actions would not necessarily result from the mother's negligence.

Judge White also gave examples where unusual situations would arise if no duty of care was held to be owed where a pregnant woman negligently drives her car and injuries her unborn child.

"A pregnant woman whose careless driving causes injury to two of her children who are passengers in the motor vehicle as well as injury to her unborn child would be liable to the passenger children but not to the injured baby when born", she stated.

"Equally unsatisfactory would be the situation where a pregnant woman driving her pregnant friend negligently causes a motor vehicle accident in which injuries are sustained by both unborn children. The child born to the passenger would have standing to sue, but the child born to the careless driver would not", she stated.

Judge White concluded that the existence of a reasonably comprehensive liability insurance scheme is a clear social policy decision by the Parliament that those injured by careless driving should be compensated. No class of persons is expressly excluded from the ambit of the Act (see s.5) and there is nothing to imply that an unborn child is to be excluded.

Therefore, Judge White found that compulsory third party insurance was introduced to fund judgments obtained by injured parties, and it would be inequitable to deny access to that fund to a Plaintiff injured in utero.

To intervene or not to intervene?

By Mark Madsen

Section 447D(1) of the Corporations Act 2001 provides 'that an administrator of a company under administration or of a deed of company arrangement may apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers.' Similarly, section 479(3) of the Act provides that a liquidator 'may apply to the Court for directions in relation to any particular matter arising under the winding up' of a company.

With the calibre of recent and much publicised administrations, it is not surprising that administrators look to the Courts for comfort prior to committing to a proposed course of action. That said, the Courts do not always consider it appropriate to provide that comfort.

On 12 February, 2002, the Federal Court heard an application by the administrators of the Ansett Group in which a direction was sought from the Court that the administrators could properly and justifiably continue to operate the Ansett mainline airline business for a period ending no later than 28 February, 2002, notwithstanding estimated losses during February, 2002 of approximately $6 million per week. The reason for the extension to 28 February 2002 from an earlier, agreed settlement date of 31 January 2002 for completion of the sale to Tesna, was to allow the administrators time to overcome difficulties and reach agreement with a number of third parties.

The administrators voiced their concerns that in allowing the Ansett Group to continue trading at a loss, they would be moving outside the ordinary parameters of administration under Part 5.3A of the Act. The administrators had estimated that the benefits to creditors achieved as a result of the continued operation would outweigh the disadvantages of doing so.

Goldberg J. cited numerous authorities for the well-established principle that a Court 'will not give directions approving of a commercial or business decision made by a liquidator or administrator where the decision is within the power of the liquidator or administrator, and there is no challenge to it or other issue arising in relation to it such as propriety or reasonableness, or calling for the exercise of legal judgment.' The Court went on to say that to give the direction sought would be for it to approve of the commercial judgment and decision made by the Ansett administrators, and that was not an appropriate direction for the Court to make.

The rationale for the Court not doing so was explained in part as being based on two principles; firstly, such decisions are particularly committed to administrators and withdrawn from the officers of the company (sections 437A and sections 437C) and, secondly, the Court is not qualified nor equipped to make or approve of such business decisions, particularly as it has not been privy to the negotiations and all of the circumstances involved in the making of the business decision.

The Court likened the current decision of the Ansett administrators to decisions which they had already made, without the sanction of the Court. 'The commercial decision is more acute, but it has been made by the administrators and it is no different in kind or character than the earlier decisions they made. All that can be said is that, perhaps, the stakes are greater.'

It is not difficult to conclude that the decision would not have provided the administrators with any comfort; comfort which now may be sorely missed in light of the failure of the Tesna Holdings bid.

Global Rewards – Still Grounded

By Mark Madsen

In our December 2001 edition, we commented on the doubtful future of the Ansett Global Rewards Scheme. That doubt was borne out even before the failure of the Tesna Holdings bid.

Almost 70 billion points credited to nearly 2.7 million Global Rewards members were frozen when the Scheme was suspended in September, 2001. The administrators have valued those points at approximately $140 million, a valuation which has not pleased many of the members who see it as being significantly undervalued. The administrators were hopeful that such discord would dissipate once Tesna Holdings released the details of its proposed frequent flyer program. It was not to be.

On 19 February, 2002, Tesna Holdings released the details of the new scheme. The new scheme's incentives were necessarily targeted at attracting frequent flyers and business travellers. Whilst bonuses were offered to members from the previous scheme (if they chose to join the new program, at a cost), Tesna made it clear that the points themselves accrued under the old scheme would not be honoured.

The proposed scheme received a mixed response from those affected. Diners Club (which represented more than 300,000 Global Rewards members) indicated that it did not believe the scheme went far enough to recognise points accrued through card schemes. Another group, the Global Rewards Action Group, was considering an application to the Federal Court in an attempt to obtain some better return for the points held by its members.

In circumstances where the new airline would had to have drawn the business of frequent travellers away from its competitors, and do so quickly if it was to survive, a backlash against the new airline would certainly not have been surprising.

The point is now moot. As ordinary unsecured creditors, the Global Rewards members cannot expect to see any dividend when it is evident that former employees of the airline will not receive full returns for their years of service.

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