ISSUE 36
DECEMBER 2001

Newsletter of
Mullins & Mullins
Lawyers and Notary

M&M Report

Editorial

by John Mullins

Firstly, I would like to wish all of our clients and friends a very happy Christmas. With the happenings of September 11 I am sure that people more than ever will appreciate a safe and happy Christmas with their family and friends.

This edition of the M&M Report deals with a number of topical issues. We explain exactly what is Redundancy and in what circumstances is one entitled to redundancy payments. There seems to be a general misunderstanding of this notion in the marketplace.

We also look at the issue of the refugee legislation which was much talked about particularly leading up to the recent Federal Election.

Loyalty programmes particularly with airlines are a major part of travel and credit card usage these days. It will be extremely interesting to see what happens with Ansett's Global Rewards scheme and this is covered in this edition.

Inspired by the recent Billy Connolly movie and September 11, we have looked at exclusions to typical householders policies in Australia, such as Acts of God and terrorism. Child Support (maintenance) has changed significantly over the years and our article outlines the formula based methodology which now applies.

Cooling off periods have been introduced in Queensland sale contracts for real property. It is extremely important you understand how these apply if you are involved in those transactions. Cooling off periods can be avoided in certain circumstances.

Recent amendments have increased Workers Compensation payments to injured workers. Our article sets out some of these changes.

To enable all of our staff to enjoy Christmas with their family and friends, we will again be closing the office between Christmas and New Year. The office will be open on Monday 24 December and will re-open on Wednesday 2 January. Phone numbers for all of the partners are available in the White Pages and if you have any issues during this time you should feel free to telephone any of the partners.

Severing Ties

An Overview of Redundancy

by Samantha Kane

The question of when a redundancy in fact occurs and what redundancy monies, if any, are payable, is one which is asked often by both employers and employees. This article hopes to dispel some of those misnomers which have arisen in this area, and to provide a basic overview of what an employee's entitlements are in the event of redundancy.

What is a redundancy?

Perhaps the greatest misnomer in this area is that a redundancy occurs when a person is no longer required in an organisation. In fact, it is a position which becomes redundant, when an employer no longer wishes a job which an employee has been doing to be done by anyone. The dismissal is not therefore on account of any personal act or default on the part of the employee dismissed or any considerations peculiar to that employee. Redundancy generally occurs because of economic or industry down turns or restructures of organisations.

A redundancy will still occur where the duties that go to make up a position are split up and spread out amongst other employees. Even if the work is still being done, the position filled by that worker no longer exists.

Whilst much has been done to regulate the manner in which a redundancy is carried out, it is still accepted that an employer has a right to make economic decisions about the structure of its business and the number and distribution of staff. An employee will not therefore be entitled to challenge a genuine redundancy imposed by an employer solely on the basis that it does not agree with the economic or business decision of the employer. Provided an employer has acted in good faith, an employee cannot challenge its judgment as to the needs of the business.

What is an employee entitled to on redundancy?

Contrary to general assumption, there is no common law right of an employee to be paid redundancy monies (otherwise known as severance pay). The entitlement to redundancy pay must therefore arise either under an award or industrial instrument covering the employee, or from an employee's written contract of employment. Alternatively, if an employer has a clear policy on payment of redundancy monies which is communicated to staff and applied on a regular basis, it may be argued that an entitlement to redundancy monies is an implied term of each employee's contract of employment (whether that contract is formalised in writing or not). Many non-award employees are shocked to learn that they have been made redundant and that they have no technical right to redundancy monies.

Most employees covered by Federal or State Awards will have an entitlement to redundancy monies as a result of the Termination, Change and Redundancy Case. As a result of that case, what are commonly known as 'TCR' provisions are included into awards setting out when award employees become entitled to redundancy monies. The provisions do not extend to casual employees or to businesses with less than 15 employees. The TCR provisions provide for severance pay on a sliding scale according to length of service, up to a maximum of 8 weeks pay for employees with four years service or over. This is well below what many employees expect to receive in the event of redundancy.

Provisions also exist in Awards and industrial legislation in relation to

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Severing Ties - an overview of redundancy cont.

consultation with employees and unions by employers and applications to industrial relations commissions for orders in relation to redundancies. The Industrial Relations Act 1999 (Qld) for example contains provisions which apply to dismissals of 15 or more employees for redundancy. Provision is made for an application to the Commission by an employee or union for orders regarding severance payments. Requirements exist for notices to be given to Centrelink and unions in relation to the redundancies and for unions to be consulted by the employer throughout the process.

In addition to redundancy monies, an employer is required to provide an employee with notice of the termination or payment in lieu thereof. The period of notice is designed to allow an employee to adjust to the change in circumstances and to seek alternative employment. A severance payment on the other hand is to compensate the employee for their loss of employment through no fault of their own.

In recent years it has become apparent that employees made redundant may have a right to commence proceedings for unfair dismissal if for example they were not properly consulted by the employer in relation to the proposed redundancies before decisions were made, that fair or objective selection criteria was not developed to determine who to be made redundant, that they were unfairly selected over another worker, or that in deciding who to retrench the employer took into account performance issues without giving the employee the opportunity of responding to those concerns. Unfair dismissal claims have also attacked the adequacy of severance payments. It may be for example that an employer pays an employee what he or she is entitled under the TCR provisions, but that given that employees length of service that payment is inadequate. An employer should therefore always consider the adequacy of severance payments made in order to avoid potential exposure to unfair dismissal applications.

Conclusion

Whilst the circumstances and manner of redundancy differ in every case, it is essential that before any decision to impose redundancies is made, the decision makers are aware of their various obligations in terms of both the process to be followed and the appropriate payments to be made to employees. Only then can a true cost benefit analysis of imposing redundancies be made.

Insuring against God

By Elizabeth Sheehan

We live in a litigious society. This point was taken to the extreme by Billy Connolly in his recent movie about the man who sued God when struck by lightning. A more reliable solution is to insure against such acts of God and extraordinary events.

The World Trade Centre was insured against acts of terrorism, which given its previous history, was appropriate. Whilst it is not necessary to insure our homes against terrorism, it does raise the question, what acts of God and other extraordinary acts are our homes in fact insured against?

Insurance cover for homes and their contents are contracts for which the Insurance Contracts Regulations 1985 provide minimum standards for cover pursuant to the Insurance Contracts Act 1984.

The Act provides an insurer is liable to provide cover against at least the 'prescribed events' (risks) specified in the Regulations, unless before the contract was entered into, the insurer clearly informed the insured in writing, or the insured knew, or a reasonable person in the circumstances could be expected to have known the contract did not cover the particular risk.

In addition to the normal risks of theft and the like, the following acts of God or extraordinary events are risks which standard home and contents insurance contracts must cover:-

- Fire or explosion;
- lightning or thunderbolt;
- earthquake;
- riot or civil commotion
- impact by or arising out of the use of a vehicle, including an aircraft or water-borne craft;
- impact by space debris or debris from an aircraft, rocket or satellite;
- storm, tempest, flood, the actions of the sea, high water, tsunami, erosion or land slide or subsidence.

The following extraordinary risks are excluded:

- war or warlike activities;
- the use, existence or escape of nuclear weapons material, or ionizing radiation from, or contamination by radioactivity from, any nuclear fuel or nuclear waste from the combustion of nuclear fuel.

According to a policy reviewed by us, it is clear insurance companies take a very strict, narrow approach to the interpretation of the Regulations. For example, we found a standard policy from a major bank only covers flash flooding which it defines as the flooding caused by storm which occurs where the flooding occurs within 24 consecutive hours of the storm having commenced. It does not cover flood which falls outside this definition of flash flooding. Most importantly, people should be aware that some insurance companies specifically exclude some of the risks provided for in the minimum standards in their written policy documents.

As with all insurance contracts, it is vital to read the policy, however the Act does provide some minimum standards to save us from the prospect of suing God.

Border Protection

By Michael Highfield

In September this year the Federal Government passed new legislation to deter people smugglers and to protect Australia's borders.

The new Acts are the Border Protection *(Validation and Enforcement Powers) Act 2001*, the *Migration Amendment (Excision from Migration Zone) Act 2001* and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*.

The occurrence of people smuggling is one of the reasons for increased levels of unauthorised arrivals into Australia and the Government wants to send a clear message that it will not be tolerated.

The new laws can be summarised as follows.

New jail terms

People smugglers and crews of boats who bring people to Australia illegally will face a minimum five years for a first conviction, and at least eight years for a second conviction.

Stopping boats

- Australian authorities' existing powers to board boats carrying illegal travellers, search boats, detain passengers and remove them from boats have been increased.
- Court challenges like the Tampa Case are no longer allowed. The new laws are an attempt by the Government to put beyond doubt the legality of the actions of the Government in relation to the MV Tampa and the Aceng, and to provide additional statutory authority for future action.
- Changes affecting Australia's migration zone

People who travel illegally to excised offshore places, e.g., Ashmore, Cartier, Christmas and Cocos Islands, can no longer apply for any visa to Australia.

People may be detained at or removed from the excised territories and reception facilities are currently under construction.

New visa system

People who arrive illegally in Australia only qualify for a temporary protection visa, which is valid for three years. They will never get permanent residence and their families will never be able to join them. If they leave Australia they will not be allowed to return.

Child Support

The Child Support (Assessment) Act 1989 in most cases dramatically reduced the legal costs which parents may have had to spend to obtain a child maintenance order under the Family Law Act 1975.

Applications for child support may be made to the Child Support Agency ('CSA') by eligible carers in respect of children where the parents separated on or after 1 October 1989 or where the child or children were born on or after that date.

Who Collects Child Support

The CSA is part of the Australian Taxation Office and is responsible for assessing and collecting child support. The CSA may also collect child maintenance assessed under the Family Law Act where the Court Order is registered with the CSA.

How is Child Support Calculated

To calculate child support, the CSA calculates the liable parents child support income amount by adding that parent's most current taxable income, with any exempt foreign income rental property loss and fringe benefit of that parent, deducts from that income an amount for the living expenses of the liable parent and any dependent children living with that parent. The entitled carers taxable income is then considered and if it exceeds average weekly earnings, the excess reduces the liable parent's income for the purpose of calculating child support by 50% of the excess. A percentage of the liable parent's remaining income is paid as child support as follows:

1 child	**18%**
2 children	**27%**
3 children	**32%**
4 children	**34%**
5 or more children	**36%**

Arrangements Without an Assessment

Parents may elect to enter into a private agreement concerning child support known as a child support agreement which may be registered with the CSA. These agreements have the effect of consent orders. However, parents who receive social security benefits are required by the Social Security Act 1947 to take reasonable action to obtain an appropriate level of child support.

Shared Care

Where at least one of the children resides with each parent or one or more of the children resides with one of the parents for more than 40% of the nights in a year or one of the parents has substantial contact, ie. more than 30% of the nights; the CSA calculates the amount of child support each parent would be liable to pay to the other and then offsets the two amounts.

Termination of Child Support

Child support generally continues until the child attains 18 years or until the child completes their secondary schooling in the year they turn 18.

Child support also ceases if the child dies, is adopted, becomes a member of a couple and in a number of other circumstances.

In some circumstances, a person who has attained the age of 18 may apply to the Family Court for maintenance whilst they are undertaking tertiary studies, but this is not child support.

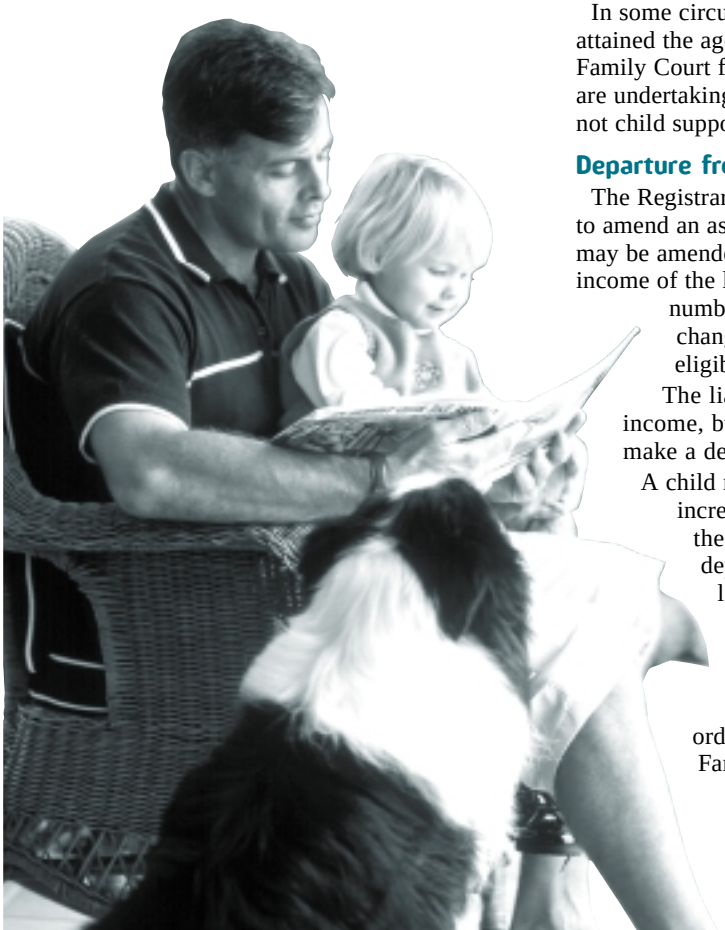
Departure from Formula Assessments

The Registrar of the CSA has broad power to amend an assessment. The assessment may be amended because of a change in income of the liable parent, a change in the number of dependent children, a change in care arrangements for eligible children

The liable parent may have a low income, but substantial assets which make a departure 'just and equitable'.

A child may have special needs which increase the costs of maintaining the child and necessitating a departure. The high costs of the liable parent having contact because of distance may also justify a departure.

In some circumstances, an application for a departure order may also be made to the Family Court.



Early Christmas present for injured workers

Workers injured in Queensland since 1 July 2001 who are entitled to claim compensation, could receive an early Christmas present.

The WorkCover Queensland Amendment Act 2001, passed a few weeks ago, has significantly increased compensation benefits payable to injured workers.

Several changes have been made to the workers' compensation system in Queensland since the fund was found to be 'in the red' in the mid 1990's. Since then, a restriction of access to common law damages and a more responsible approach to rehabilitation has strengthened the fund.

The recent amendments to the legislation have increased maximum compensation payments as follows:

- the maximum amount of lump sum compensation for an injured worker has increased from around $130,000.00 to $150,000.00;
- the maximum lump sum payable to dependants of workers who are fatally injured has increased from around $200,000.00 to $250,000.00;

It will also be easier for injured workers to access additional compensation of up to $150,000.00 to compensate for dependency on day to day care caused by the work injury. The amendments have reduced the threshold level of impairment from 50% to 15% which will enable a greater number of injured workers access to additional entitlements to compensate for expenses incurred in day to day activities.

For injured workers who choose to sue their employer in addition to receiving compensation, some new procedures have been enacted although the procedures to be adopted remain relatively complex.

Will Ansett Global Reward Members Fly Again?

By Mark Madsen

Australia has witnessed the downfall of one of its two principal domestic airlines. Ansett commenced flight operations in 1936 with only one aircraft but, in the decades that followed, developed into a corporate group which recently employed approximately 16,000 individuals, served both Australian and international destinations through the use of about 130 aircraft, made approximately 900 domestic flights per day, and carried over 14.04 million passengers in the 2000 financial year.

On 17 September 2001, the Federal Court appointed Mark Mentha and Mark Korda of Andersen as administrators of the "Ansett Group", which consists of some 40 companies. One of the tasks of an administrator is to explain to the creditors of the company under administration the administrator's opinion as to what course of action for the company's future would be in the creditors' best interests.

Individual Global Rewards members do not yet appear to have been contacted directly by the administrators as if those members were creditors. In a recent application before the Federal Court, the administrators informed the Court that they had identified approximately 17,000 creditors of the Ansett Group, the clear majority of which are employees. The Court noted in its judgment that this number did not include, inter alia, Global Rewards members because the administrators had not, at that time, determined whether such persons were creditors.

Whether these members are in fact creditors of Ansett and to what extent is a complex question. There were numerous methods by which points could be accrued and rewards claimed; not all of them limited to Ansett products. The question remains as to what dollar value could be attributed to each point accrued. Further, the program rested on often changing terms and conditions. Similarly, Ansett's Participating Program Partners (for example, institutions operating credit card facilities by which points could be accumulated for the scheme) each had its own set of terms and conditions. These will all, no doubt, become the subject of close, public scrutiny once the future of the program and the airline is decided.

Details of the agreement entered into between the administrators and the Fox - Lew - Tesna Holdings consortium which have been made public do not appear to account for the Global Rewards program, as one would expect. Similarly, one would not expect that the bid announced by Virgin Blue on 19 November 2001 would include a rescue package for the program.

If Global Rewards members are not satisfied with the outcome, actions based on several different causes may be brought against Ansett (and, possibly, its directors). The nature of such claims and the parties involved will mean that it is unlikely that these actions will be anything other than representative actions.

For the moment, the administrators have suspended the Global Rewards program. At best, Global Rewards holders (which, according to a help line established by the administrators' firm, number at approximately two million) will only rank with thousands of other unsecured creditors in any dividends paid, behind a queue of secured creditors and major or priority, unsecured creditors. In circumstances where thousands of employees (who rank before Global Rewards members) may not receive their full entitlements, the question as to whether Global Rewards holders will receive any benefit from accrued points appears extremely doubtful.

Cooling Off

by Anthony O'Dwyer

Amendments to the Property Agents and Motor Dealers Act now ensure that all buyers of residential properties in Queensland have the benefit of a cooling off period. The only exception is for persons buying at an auction.

The cooling off period is for five days after the buyer becomes bound by the contract. This does not mean five days from the date of the contract. The buyer becomes bound by the contract when the buyer having signed the contract, returned it to the seller and then having received it signed from the seller returns a copy of the contract to the seller. It is hoped that this complicated mechanism will be changed in the next round of amendments to the Act.

Buyers can waive or shorten the cooling off period but before they can do so they must obtain a certificate from their lawyer. The purpose of the certificate is to ensure that the buyer is properly advised before they lose the benefit of the cooling off period.

Another safeguard for buyers is the lawyer's independence certificate to be given to the buyer by their lawyer. This follows from concerns that some lawyers may not have been acting independently of the seller or marketer. A buyer can assess whether its lawyer is independent of the seller or marketer of the property when it receives the certificate. A lack of independence does not necessarily disqualify the lawyer but the buyer can then decide whether it should seek other advice.

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