



M & M

Report



Editorial



by John Mullins

Queensland is a truly wonderful place to live, particularly in Spring. The recent spate of beautiful blue sky weather coinciding with the River Festival and the Goodwill Games has made Brisbane a very exciting place in September.

The amendment to the Privacy Act will impact upon many businesses. You should read this article as it is possible that there are issues which will affect your business which may surprise you. I strongly recommend that you have a look at this article to ensure that you are covered.

There is a very interesting article on your rights on zoning issues. The Liquor Act has also been amended recently in relation to noise which is a sign of attempting to balance the interests of higher density living with licenced premises. There are a couple of short articles on an important change to compensation cases and the Consumer Credit Code.

There is also a lot going on at Mullins & Mullins. On 10th September Ralph Mann and Mark Madsen joined us from RWT Mann & Partners. There is an article on the back page in relation to this. Rebecca Gray who recently returned from the UK has been made an associate. Rebecca, who practices in the areas of property and business law, has had some excellent exposure to some significant developments in and around London over the last few years.

Later this month we will be spending a day reviewing the progress of the firm and planning for the future, particularly focussing on delivery of client services. We do this as an annual event and believe that this type of planning offers great value to our firm and our clients.

PS. Since writing this editorial, the tragedy in America has occurred. We pray for those affected and that we can one day enjoy peace on this planet.

Privacy Act Amendments

- Are you 'NPP compliant'?



By Michelle Lember

The Privacy Amendment (Private Sector) Act 2000 (Cth) was enacted in

December 2000 and introduces

a number of amendments to the Privacy Act 1988 (Cth) which are relevant to how individuals and organisations keep records and exchange information in the conduct of their businesses.

Individuals and organisations must meet the obligations imposed under the amended legislation or face investigation by the Privacy Commissioner. Private sector organisations have until 21 December 2001 to introduce systems and methods to comply.

The Privacy Act previously governed the use of tax file numbers, consumer credit reporting and the collection and release of material involving health and medical information. Whilst these areas will continue to be governed by the Act, the amending legislation has now introduced ten National Privacy Principles (NPPs) which organisations are required to comply with. Alternatively, they must introduce their own compliance system which is approved by the Privacy Commissioner.

What are the NPPs?

The NPPs are briefly summarised as follows:

1. NPP1 relates to the collection of personal information by an organisation. An organisation must only collect personal information where it is relevant to one or more of

its functions or activities and the way it is collected must be fair. In addition, at the time of the collection the organisation should tell the individual to whom it usually discloses the information.

2. NPP2 governs how an organisation may use and disclose personal information in its possession. There are restrictions on the way in which an organisation may use or disclose personal information if it is for a purpose other than the primary purpose for which it was collected.
3. NPP3 relates to the quality of the data held by an organisation.
4. NPP4 requires an organisation to take reasonable steps to ensure that the personal information it holds is secure and to destroy personal information which is no longer required.
5. NPP5 requires an organisation to be open about what personal information it holds and its policy on its management of personal information.
6. NPP6 relates to access to and correction of personal information held by an organisation by the individual to whom the personal information relates.
7. NPP7 regulates the use of identifiers assigned by a commonwealth agency.
8. NPP8 states that individuals must have the option of not identifying themselves when entering into transactions with organisations, if it is lawful and practicable to remain anonymous.

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Privacy Act Amendments cont.

9. NPP9 regulates the transfer of personal information held by an organisation in Australia about an individual to someone in a foreign country.
10. NPP10 limits the ability of an organisation to collect sensitive information, such as information about an individual's racial or ethnic origin, political opinions, religious beliefs and so on.

What does the Act apply to?

Presently, the Act only applies to information concerning individuals and not information held with respect to corporations. However, where information is held about a corporate entity in respect of which personal guarantees or covenants have been given, the Act will apply in so far as information is held about the individuals who have given the guarantees or covenants.

The types of organisations which typically hold personal information include banks and other financial service providers, real estate agents, franchisors, health and sporting clubs, 'frequent flyer' or 'preferred buyer' schemes, magazine publishers in relation to subscribers, and insurers.

It is important for organisations to recognise that their obligations under the Privacy Act will override any contractual obligation. In order to ensure that organisations are ready for the 21 December 2001 deadline, a review of their policies and procedures should be undertaken as a matter of priority with a view to determining the extent to which the organisation complies with the NPPs.

Recent Developments

On 16 August, the Internet Industry Association (IIA) launched Australia's first privacy code for the Internet industry. The draft is open for comment until 5 October, before it is submitted for registration by the Federal Privacy Commissioner.

In developing the code, the IIA has taken up the opportunity to develop their own code in response to the new legislation, an opportunity for other organisations to also take up. Once the code is approved, IIA's members will have the opportunity to sign up to it, ensuring they are in line with the new laws.

Noise - is it all it



By Curt Schatz

Recent amendments to the Liquor Act concerning noise require Liquor Licensing Division inspectors to now consider the order of occupancy between a complainant and the hotelier. However, there is another change to the legislation which has not been so extensively publicised.

Nuisance v Unreasonable Noise

Section 187 of the Liquor Act used to refer to the words "that is no longer a nuisance". The words now read "that the noise is not an unreasonable noise".

The section also states that an investigator must have regard to the following:

- (a) the order of occupancy between the licensee and any complainant;
- (b) any changes in the licensed premises and the premises occupied by the complainant, such as structural changes;

- (c) any changes in the activities conducted on the licensed premises over a period of time.

In relation to the change from the word "nuisance" to "unreasonable noise" it provides greater scope for inspectors to more freely exercise discretion to issue requisitions to licensees to reduce or cease noise from their premises.

The common law definition of nuisance is contained in the case of *Holland v The Chief Executive*. In that circumstance it was held that it is not sufficient for an investigator to conduct noise measurements and then issue a requisition, simply because the noise exceeds the noise levels suggested by the Department of Heritage and Environment.

Rather, the investigator must have grounds to form an honest and reasonable belief that the noise emanating from the licensed premises constitutes a nuisance. This was held to be a pre-condition to the power of the investigator to issue a noise requisition

Planning Compen



by Anthony O'Dwyer

The Brisbane City Plan 2000 commenced in October 2000 with the aim of ensuring the city is well positioned to manage expected growth and development in coming years. It replaces the 1987 Town Plan and looks to provide a framework for sustainable and responsible development, as well as being in line with new state government legislation, specifically the *Integrated Planning Act (1997) (IPA)*.

As we approach the first anniversary of City Plan 2000, it is timely to remember that time is running out for property owners in Brisbane to apply for compensation if they feel City Plan 2000 has had a negative impact on them. These rights are available under the IPA, but once the time allowed for making an application expires, owners' opportunity to take action will be lost altogether.

The compensation scheme under the IPA is different from previous schemes and owners who wish to make a claim are faced with a number of steps.

The Hurdle

Where an owner believes their property has been negatively affected by changes

brought about by City Plan 2000, their first step towards compensation is to make a development application to Council and request that it be assessed under the previous town plan.

This is aimed at providing an avenue for owners to demonstrate they have been disadvantaged by the new plan, and asks Council to consider the application as if the changes had not been made. The application must be made within two years of the new plan - for City Plan 2000, this means October 2002.

Council can then choose to either consider the application under the prior town plan or under City Plan 2000. This decision is entirely at Council's discretion, and would involve Council weighing up the impact of approving an application that isn't in line with the new City Plan, but is in line with the old one, as opposed to the cost involved in paying compensation.

If an application is approved under the old town plan, the owner can go ahead with their development. If rejected, the owner retains the right to appeal, but either way, they are not entitled to compensation. Put simply, if their application has been passed or rejected under the old town plan, it means they have not been disadvantaged in any way by the new City Plan.

seems?

in the case of Holland. That case also stated that a noise nuisance is one where unusual or excessive noise materially interferes with the ordinary comfort of persons living in the neighbourhood of the source of the noise.

In my view the amendment to Section 187 by omitting the concept of “nuisance” and inserting the concept of “unreasonable noise” makes it easier for investigators to issue requisitions.

It is intended that the regulations prescribe limits developed in consultation with the Environmental Protection Authority as a guide for the inspectors in their assessment. It seems to me that it will be easier for an investigator to substantiate the view that noise is unreasonable, than to substantiate that the noise is a nuisance.

A Balanced approach

However, the introduction of the principle of order of occupancy does provide a requirement for an investigator to take a

balanced approach to the interests of all parties. In particular, the investigator must give due weight to the rights of the party who was there first, and whose activity was conducted first.

Time will tell whether or not the convenience of all parties in these disputes are being properly considered.

Taking Action

We did have a matter where a “stop the noise” requisition was delivered to an hotelier client of ours to take immediate effect. In essence, the requisition provided that, until further notice, the licensee was not permitted to allow any amplified sound (words or music) to emanate from his premises.

In that instance, we sought a stay from the Liquor Appeals Tribunal under an urgent application which was heard into the night. We were successful in obtaining that stay which enabled our client to continue with the

planned event which involved bands that had already been booked until the matter was heard again before the Tribunal. This is one avenue that can be taken.

It is prudent that licensees become aware of the noise limits which are prescribed in the regulations and if your noise levels consistently exceed those levels that action is taken to curb or reduce such noise. One method is to hire a noise limiter which is set in terms of its calibrations to the maximum allowable limits.

If licensees employ this method, and document the use of the machine as well as other approaches and efforts to keep noise levels to an acceptable level, they will have a strong argument should a complaint from local residents be received. It demonstrates to Liquor Licensing Division inspectors that the licensee is adopting a responsible and proactive approach to activities run on their premises.

sation: the clock is ticking

If the Council considers the development application under City Plan 2000 then the owner may be entitled to compensation if their application would have succeeded under the old town plan.

Use it or Lose it

IPA has introduced a use it or lose it concept into the compensation issue. Owners can not sit back and rely on theoretical developments of their property to support a claim for compensation.

Money must be outlaid to make the application to the Council and owners must be prepared for the possibility that if the Council considers and rejects their application under the old town plan, while they still have the right to appeal the decision, they do not have any rights to compensation.

An approval obtained in these circumstances that an owner does not have the will or capability to act on could be worthless unless the property is sold to a person willing to pay for the benefit conferred by the approval.

The situation is different if the change has the effect of limiting the use of the property

to a public purpose. However, a two year time limit (ie October 2002 for Brisbane) for making the claim for compensation still applies.

How much?

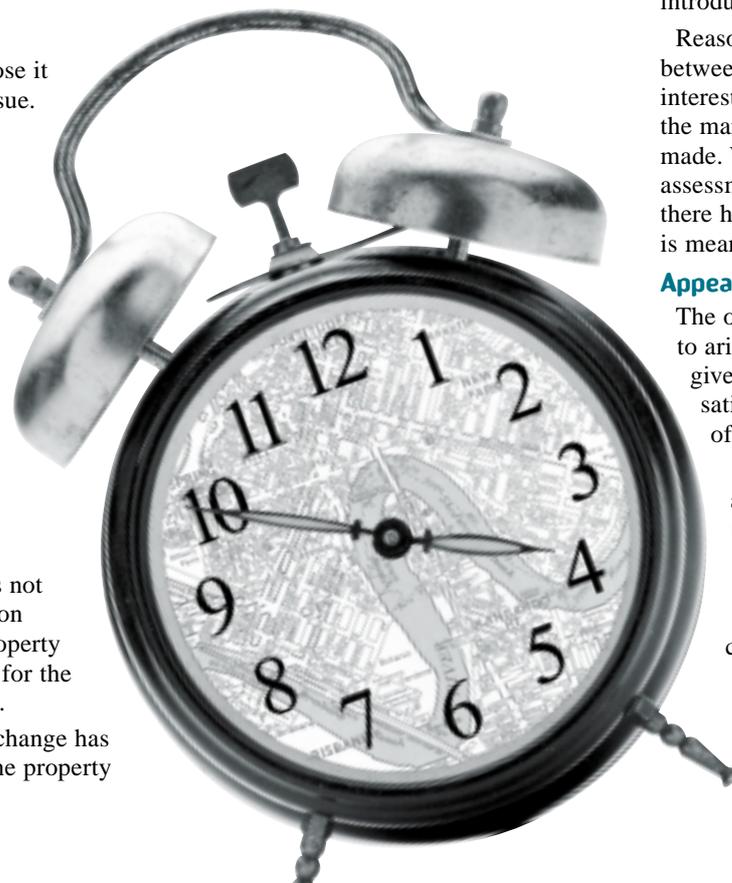
If entitled, owners will be paid reasonable compensation for the loss suffered as a result of the change brought about by the introduction of City Plan 2000.

Reasonable compensation is the difference between the market value of the owner’s interest in the property after the change and the market value if the change had not been made. Various limitations apply in the assessment of reasonable compensation and there has not been an attempt to define what is meant by market value.

Appeal rights

The opportunity for differences in opinion to arise remains prominent and owners are given appeal rights if they are not satisfied with the Council’s assessment of their claim.

The time consuming process of arguing compensation appeals before the Planning and Environment Court will remain, however it is an appropriate safeguard to ensure that disadvantaged owners are properly compensated for the loss suffered.



M&M News

By John Mullins

We are pleased to announce that earlier this month RWT Mann and Partners merged with our firm, with Ralph Mann having joined us as a Partner and Mark Madsen as an Associate.

The joining of RWT Mann and Partners takes our total number of staff to over 60, including eight partners, seven associates, five solicitors and four graduate article clerks, and this number is set to increase before the end of 2001.

In going ahead with this alliance, we believe the values and culture of RWT

Mann and Partners are closely aligned to ours, in that we are committed to developing strong relationships with our clients and providing a personal service. Ralph and Mark bring with them wide ranging experience and expertise, and this of course can only enhance our service to clients.

Having been admitted as a Solicitor in New

South Wales in 1973, Ralph came to Brisbane two years later. He was a founder of RWT Mann and Partners in 1988, following the restructuring of a previous



Ralph Mann

partnership which had been in operation since 1975.

His commercial litigation experience extends to over 25 years, having practised extensively in the Supreme, District, Federal and High Courts. He has also overseen many large scale property transactions for large corporations and institutional clients, including:

- the sale of many prominent Brisbane sites, including Her Majesty's Theatre in Queen St, the Brisbane Administration Centre, the Queen Adelaide Building, the Jetset Centre in Edward St and the Dalgety Wool store;
- the purchase and sale of numerous shopping centres throughout Queensland;
- the sale of 52 AMP Regional Centres throughout Queensland; and
- the sale of hotels.

As a Partner at Mullins & Mullins, Ralph will put his vast experience and expertise into practice across our commercial litigation, property and insolvency areas. We look forward to working with him and sharing in his knowledge in these areas and to the positive outcomes this will have for all clients.

Mark Madsen has also joined us and will continue to work with Ralph, primarily within our commercial litigation area. He joined RWT Mann in 1997 and became an Associate in 2000. Mark's experience and expertise extends to several areas, including commercial litigation, injuries litigation, property and small business.

New laws for compensation cases

by Suzanne Wishart



New laws will be passed in Queensland to bring fairness to decisions in relation to compensation claims.

Under the Law Reform (Contributory Negligence) Amendment Bill, plaintiffs who make a compensation claim for breach of contract may see their damages reduced if they are found to have been partly responsible for their own injuries.

The bill is in response to the 1999

High Court decision of *Astley v Austrust*, that meant if the defendant was found to be in breach of contract, the court could not reduce damages even if it was established that the plaintiff's negligence had also contributed to their injury.

For example, a person who refused to wear protective equipment on to a building site and was injured as a result, faced no reduction in the damages awarded to them.

The new bill is aimed at bringing balance to these situations, to allow damages in such cases to be reduced by the plaintiff's share of responsibility. For example, if a plaintiff is found to be responsible for 40% of the loss, then they will only be able to claim for the remaining 60%.

Queensland is one of the last states to introduce such legislation. It will be welcomed by defendants subject to these types of compensation claims.



Netting the sharks

By Louise Conlan

In the interests of consumer protection, the State Government has recently passed legislation to amend the Consumer Credit Code, which regulates personal lending in Queensland. The effect of the amendments is to broaden the Code's application to the practice of payday lending and other short term loans.

Payday lending is a form of finance where consumers borrow small amounts of cash to tide them over until their next pay.

As well as pay-day lenders, the other type of credit provider targeted by the amendments are the so called "loan sharks" whose terms generally include that the amount borrowed is required to be paid back along with interest calculated at extremely inflated rates in comparison to the general finance market.

Credit Providers who propose to charge fees and charges which exceed 5% of the loan amount, or an interest rate which exceeds 24% per year must now comply

with the various requirements of the Code which include:

- To disclose the fees and charges that are payable, whether security is required, and the terms of the loan;
- To put loan contracts in writing, and provide a copy to the borrower for their reference; and
- To show that an assessment of the borrower's ability to repay the loan has been undertaken.

The Court has the power to reopen a transaction upon the application of the borrower and has wide ranging powers to reduce the amount payable, or set aside the credit contract, where the circumstances in which the contract was entered into, or later changes to the contract terms, are considered unjust. If, for example, it is proven that the borrower did not have the capacity to repay the loan at the time the credit contract was entered into, the contract may be set aside.



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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.