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M&M Report

Editorial

by John Mullins

The upcoming referendum is starting to loom large on the Australian political and constitutional horizon. We are seeing the form of the questions to be put to the Australian people to determine whether Australia should become a republic.

This is an issue of significance in that it will change the head of government in Australia. The issue of the preamble has less practical significance and is far more philosophical. A change to the preamble of the constitution will not in fact effect any change to government in Australia or the way we are governed.

Both sides of the debate have received significant funding from the Commonwealth to mount advertising campaigns to attempt to persuade the voters to their argument. Each side of the debate has a committee appointed to authorise this advertising.

The history of Australian referenda as we all know is that most fail and where multiple questions are asked the likelihood of failure increases. The ensuing debate and outcome of this referendum will be fascinating to observe.

However, the CGT legislation and the change in FBT legislation to widen the parameters to include relationships outside employment (to involve companies and trusts), has greater practical signficance. We will talk more of these in ensuing months as at the moment there is no legislation to deal with, and accordingly, any discussion is based on speculation. The speculation however, is that the effect of the proposed legislation will be to widen the net further than the original expectations.

This edition focuses on a wide range of topical issues. If you are involved in any sort of business many of these articles will have relevance to you.

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Corporate Insolvency Which Road?

By Paul Lutvey

An insolvent company that goes into liquidation generally does not provide much of a return to its creditors. Readers may recall in earlier editions we have written about voluntary administration, which is another option for an insolvent company which does not necessarily end up with the company going into liquidation. When creditors are faced with the dilemma of administration as opposed to liquidation they should consider the differences between the two and seek expert advice.

Since the voluntary administration legislation was added to the Corporations Law in 1993 a number of companies have been able to "survive" liquidity problems and through the use of the voluntary administration legislation have been able to continue to trade and pay their creditors 100 cents in the dollar. Whereas if such companies were placed into liquidation at the same time it is almost certain that the creditors would not have fared so well and the companies would not exist today.

Once the appointment of a liquidator has been made it is the liquidator's duty and function to realise the assets of the company and distribute the proceeds of same in strict priority as set out in the Corporations Law.

The role and functions of the liquidator are rigid. In some cases the liquidator may trade on a business for a short time if it is his or her opinion that continuing to trade will ultimately realise a better return on the asset in the short term.

It is common for a liquidator upon appointment to terminate staff, close the business and sell off each asset.

However certain cases may dictate that liquidation is the best course as a liquidator has powers that an administrator does not have.

For instance, a liquidator is able to investigate any preference payments and if appropriate recover same from any creditors who had been paid same within the relation back period.

Also the liquidator can conduct public examinations of company officers and other persons if it will assist his or her investigations. This is a useful tool in determining whether or not the company was trading whilst insolvent. Also if the liquidator determines that the company has traded whilst insolvent, proceedings can be taken against the company officers to recover the amount of the debts incurred whilst insolvent.

On the other hand the appointment of an administrator

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Employers it's your turn

by Sam McNeice and Ann White

Employers have long occupied an unenviable status before the law with respect to the onerous duty of care they owe to employees. It must often appear to employers that the simple rule is that if an employee is injured at work, then the employer is considered negligent. The Courts have even gone so far as to say that where there is a potential hazard in the workplace and an employee is injured then, even if it is not the direct cause, the accident can be attributable to the employer's negligence. However, recent decisions indicate that the pendulum may have finally embarked on a swing back towards employers.

The case of *Queensland Corrective Services Commission (QCSC) v Gallagher* addresses the issue of whether employers are responsible for employees who allegedly develop psychiatric injuries due to work related events.

Mr Gallagher was employed in management at a correctional centre from 1991 until 1994. In the course of that work he developed a major depressive illness and sued the institution for negligence.

The Court found difficulty in accepting that the employer, knowing of the availability of support services offering psychiatric care, should reasonably foresee a risk of injury to its managerial staff.

It noted that while QCSC should bear a reasonable amount of responsibility for the injury in the circumstances, Gallagher refused all offers of on site counselling services. For Gallagher to succeed, he had to prove the correctional facility failed to take reasonable measures which would have protected him from such an illness.

There was no evidence from psychiatrists linking any failure to establish systems of counselling with the development of Gallagher's depressive disorder. Further, while work events led to the onset of the psychiatric condition, the critical issue remained, whether QCSC's failure to implement the suggested preventative measures was the probable cause of that condition. There is no precedent which obviates the need to demonstrate a causal link between a person's condition and the deficiency in the workplace, and that evidence was lacking in this case.

While it is difficult to ascribe a precise cause to a complaint of stress, acceptance of the view that work problems are the sole cause of an employees psychiatric condition is now being questioned.

In *Hill-Douglas v Beverley*, an appeal arose from a judgment whereby the employers were found liable for nearly $500,000 for an employee's injuries.

The employers, who were away, owned a sheep property and left the jackaroo to oversee the operations. In the course of his work he noticed fly- blown sheep which required treatment. He set out to separate those fly-blown from the rest of the flock. He intended to block the sheep by utilising a nearby fence and turn them towards a set of yards, but in doing this, he collided with the fence and a wire struck him across the neck.

He sued his employers for negligence arguing, they failed to provide a safe system of work in expecting him to work sheep on a motorbike without assistance from a suitably trained sheepdog or another person. He argued, the task was made more difficult by the necessary increase in concentration on the task, with the consequence of a reduced ability to watch for hazards. The trial judge found the employers were negligent only in that they failed to warn the jackaroo to be careful of fences while riding a motorbike.

The implications of this for employers was overly onerous and in reality, a managerial nightmare.

On appeal, the Court noted that employers are expected to take reasonable care for employees safety, which may encompass an obligation to warn staff of "unusual or unexpected risks, and by

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is not the death knell for the business. Once an administrator is appointed the company is within his or her control for the period of the administration. There is a moratorium in relation to the company's creditors.

For the voluntary administration period the administrator is personally liable for all debts incurred by the company.

Generally, the administrator attempts to continue to trade the business with as little interruption as possible. Following the appointment of the administrator a meeting of creditors is held within five (5) business days to confirm or replace the administrator. Once this meeting has taken place, for the remainder of the period of administration the administrator assesses the company's financial position and determines whether or not the company can continue to trade out of its problems and give an acceptable result to its creditors.

Ultimately the decision rests with the creditors who vote at a second meeting of creditors called by the administrator. This meeting must take place within five (5) business days from the 21st day following the appointment. This meeting can be either adjourned for no more than 60 days by the creditors to a future date or the period for the calling of the meeting can be extended by an order of the Court.

At the time of calling the meeting the administrator provides to the creditors his or her report in as much detail as the short time period allows. The administrator will also have investigated and provide reports on preference payments and insolvent trading. However, these two issues cannot be followed through unless the company ends up in liquidation. The administrator must recommend an option in his or her report to the creditors that:

- the administration end;
- the company be wound up (ie liquidation); or
- the company enter into a Deed of Company Arrangement.

If the creditors vote for the administration to end, the control of the company is returned to the directors. This rarely happens as the company will then be in the position it was in prior to the appointment of the administrator.

If the creditors vote for the company to be wound up the administrators role changes and he or she becomes the liquidator and thereafter conducts the winding up of the company.

If the creditors are prepared to accept the proposal put forward by the directors of the company, the company and the administrator enter into a written Deed of Company Arrangement.

This Deed sets out the basis upon which the company can continue to trade and it

instructing him in the performance of his work where instructions might reasonably be thought to be required to secure him from danger of injury."

In particular, this obligation was to warn of "unusual or unexpected risks" and the Court considered that the "risk posed by the existence of the fence was, by contradistinction, obvious and known to the (jackaroo)."

The task was a relatively simple one and his employers left the determination about the mode of performance to the jackaroo. The employers did not fail to take reasonable care because they conferred that discretion on their employee. It was concluded that the accident happened due to the employee's inadvertence, not because the employer did not tell him to look out for fences. There was no evidence that should he have been warned, he would have performed the task any differently.

These decisions signal a change in the Courts attitude in that now it considers that an employee must take some responsibility for his or her own safety at work. However, employers should not become complacent in the knowledge of this change as the ramifications of a finding of negligence are always unpalatable. These recent decisions by no means alleviate the responsibility of employers to provide a safe system of work. It is advisable that employers regularly review their work system and if concerned, seek legal advice about their exposure to an action in negligence. The standard of care the Courts now expect is an obtainable one and provides an opportunity for employers - a timely opportunity that should be embraced.

Which road?

also sets out what return to the pre-administration creditors of the company the company will make during the period of the Deed in relation to the pre-administration debts of the company in full satisfaction of same.

The Deed has the effect of binding all creditors unless stated otherwise in the Deed and whilst the Deed is in force any action against the company is governed by the provisions of the Deed.

Generally the running of the company is in the hands of the directors and the administrators role is more of a supervisory role.

The voluntary administration period ends when the Deed is signed or at the time when any one of the other options is resolved by the creditors at the second meeting.

If the terms of the Deed are carried out, the company's pre-administration debts are completely discharged and the company then continues with no restrictions.

Liquidation and administration are two entirely different forms of insolvency appointment and if used in the manner in which they were each designed will achieve different results. Liquidation will mean the end of the company where all assets are sold and the proceeds divided in accordance with priorities as set out in the Corporations Law, whereas administration is designed for the company to restructure, continue trading and pay off creditors over an agreed amount of time.

The issues associated with corporate insolvency are complex and if such issues arise you should contact Paul Lutvey of this office for expert advice.

Corporations Law

Execution of Documents by Companies

by Matthew Stapleton

Changes to the Corporations law have removed the requirement for a company to have a common seal. The effect of these changes on the manner in which companies execute documents has consequences for both company directors and anyone dealing with companies.

The amendments provide that a company may execute a document without using a common seal if the document is signed by:

- 2 directors of the company; or
- a director and the secretary of the company; or
- the sole director of the company.

The ability to execute a document without a seal applies even if the company has elected to have a common seal. The effect of this is to make the use of the seal optional. The law still provides for the execution under seal, where the affixing of the seal is witnessed by any of the above three parties.

A person can assume that the document has been properly executed by a company if it has been executed in accordance with the above requirements.

A person may also assume that anyone who appears on the information available to the public via an ASIC company search, to be a director or secretary has been properly appointed and has the power to exercise the duties usually exercised by a director or secretary.

However, these assumptions cannot be made if the person making the assumption knew or suspected at the time that the assumption was incorrect.

The effect of these amendments is that a document signed without a seal is valid. In the past, the existence of the seal gave some assurance to outsiders that the seal had been properly applied, as it was usually maintained by the company secretary. However, that safeguard is no longer there. Before accepting any documents, you should ensure by way of a company search that the person who has signed the document is a director. This will then give the outsider the benefit of the above assumptions.

The Titles Office have already indicated that they will register documents, provided it is executed in the above manner.

Family Law

by Catherine Abercrombie

I am pleased to be part of the team of professionals at Mullins & Mullins to service clients needs in the area of family law.

Within the newly formed Personal Legal Services section, which is more fully explained in the brochure accompanying this newsletter, I practice exclusively in the area of family law, dealing with childrens' issues such as residency and contact, and financial issues such as property settlement, spousal maintenance, and child maintenance.

Family law is in many respects a unique area of law in which to practice, as it requires an ability to appreciate that the client's issues must be addressed swiftly to minimise not only financial cost, but also emotional impact.

My experience in acting for parties in family law has demonstrated that the most effective way to ensure matters are resolved with the minimum financial and emotional detriment is the provision of legal advice at a very early stage.

It is not the case that once you consult with a solicitor all chances of resolving the matters without a court battle are abandoned, but rather that where you are fully informed of your rights and the possible outcomes, the chances of a resolution are increased.

To facilitate this and address our client's needs, we have developed our fixed fee consultation program.

The consultations vary in time and cost, and are developed with the aim of ensuring there is an outcome to suit every client.

So if you, or a friend or family member is contemplating or experiencing separation from their partner, I invite you to call me to discuss our consultation program with the hope that we can be of assistance.

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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.

The Future of Unionism

by Rob Stevenson

Introduction

Industrial relations in Australia have, for most of this century, been characterised by centralised dispute resolution. Compulsory conciliation and arbitration and industry based awards have been the main features. This centralisation facilitated the growth of large industry based employee associations. Recent years have seen the breakdown of centralised conciliation and arbitration and an emphasis on agreements suited to the needs of individual work places. Traditional representative associations have faced significant pressures as they struggle to meet the varying demands of individuals and small groups of employees. What is their future?

A Little History Lesson

The Australian system of industrial relations has largely been shaped by historical and political forces. The great strikes of the late 1800s led to the emergence of interventionist policies as a means of minimising and resolving industrial conflict in preference to the minimalist approach which had previously prevailed. These interventionist policies resulted in a system being adopted at Federation characterised by compulsory conciliation and arbitration. This forced the parties to an industrial dispute before a specialist tribunal able to make rulings binding on the parties. One of the effects of this key feature was the creation of "paper disputes" involving ambit logs of claims thus evoking the central tribunal's jurisdiction. Such "disputes" were commonly settled by a tribunal ruling known as an award which set out in great detail the rights and obligations of the parties, normally on an industry wide level. Another effect of this centralisation was to facilitate the position of supremacy held in the system by employer and employee organisations.

The Shift to Enterprise Based Bargaining

The impetus for change in the comfortable duopoly held by employer and employee associations was driven by the practical need for the economy to improve its international competitiveness in the face of the severe economic downturn of the late 1980s and early 1990s. For almost the first time since Federation, the ways in which our system of industrial relations operated and the results it achieved were openly questioned.

It is now a matter of record that the centralised nature of our system has been subsequently broken down. This process was started by the then Labor government's reforms of 1990 and 1993 and expanded by the current Federal government, resulting in the enactment of the Workplace Relations Act 1996 (Cth) and corresponding State legislation. Further reform is currently under consideration by the Federal government.

Workplace agreements have become the dominant form of industrial agreement. Traditional industry based awards are being stripped back to provide a safety net of minimum provisions with the emphasis on detailed rights and obligations being contained in workplace agreements.

The Future for Unionism

As the emphasis has swung towards enterprise based bargaining, the traditionally industry based representative associations have struggled to meet demands on their resources. The most likely result of the decentralisation in bargaining practices is that for at least the foreseeable future, industry based employee associations will retain an umbrella role in ensuring that industry wide concerns are addressed and safety net awards updated. However, there will be a greater need for employees to form their own associations at a workplace level to protect their common interests and assist individuals in the bargaining process.

It is with a view facilitating such associations that provision has been made in the Federal and State legislation for the registration of such enterprise associations with the Industrial Relations Commissions. The key criteria laid down in the legislation for such associations are that they:

- Are a genuine association formed with the intention of furthering and protecting the interests of their members.
- Are free from control or improper influence.
- Have at least 50 members who are employees.
- Are supported in an application for registration by a majority of employees.

One enterprise association has already been registered at a Federal level and a number are currently in the process of seeking registration.

Summary

In summary, as we approach the new millennium Australians are experimenting with a new system of industrial relations where the emphasis lies on individual and workplace bargaining. Our traditional industrial structures are ill suited to handling the many and varied demands of the decentralised system. It is likely that whilst traditional industry based unions will retain an umbrella role, the emphasis in collective bargaining will shift towards enterprise based associations.