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M&M Report

Editorial

by Patrick Mullins

The Chief Justice of the Federal Court, Justice Michael Black, has made some recent public comments about the difficulty experienced by persons presenting their own cases without proper legal representation before the Federal Court. That has prompted the Victorian Bar to arrange a scheme by which Barristers offer their services free of charge to persons who cannot otherwise afford legal representation and who cannot secure legal aid.

Justice Black's comments are backed up by the Griffith Legal Aid Report which was released this year. That report concludes that the legal aid system in Queensland is moving from *'crisis to calamity'*.

What has happened with the legal aid system is that fewer dollars are being spent on funding actual cases and more monies are being channelled into phone-in advice services and computer networks which allow people in isolated areas to access legal information, over the Internet.

As Christmas approaches and our thoughts turn quite rightly to the less fortunate in our community, it is appropriate that we consider the plight of people, and they are now in increasing numbers, who have legitimate cases but cannot afford proper representation before the Courts. Our society is the poorer when governments of all persuasions are not prepared to properly fund a decent legal aid system, so that we can truly say that we have a society, where there is justice for all.

Our offices will be closed from Christmas Eve to the 4th of January 1999. On behalf of the Partners and Staff of Mullins & Mullins, I wish you a very happy and peaceful Christmas and a very prosperous 1999.

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The changing face of Hospitality and Gaming

by Curt Schatz

Wherever an industry is producing large profits or has the potential to do so, more and more players want to participate in the market. So it is in the hospitality industry at present. This has led to a massive rationalisation of the liquor industry, resulting in changes to the legislative framework governing it. There will be further amendments to the Liquor Act next year.

In relation to gaming we have seen emotive speeches in State Parliament over the last few weeks concerning activities of Licensed Operators which has led to proposed changes to the Gaming Act, which are currently before State Parliament. These proposed changes deal with the sharing of gaming revenue and seek to ensure that commercial practice reflects the spirit of the gaming legislation in that the majority of profits derived go back to the sporting club's facilities.

The Hotel Scene

We work very closely with many hotel and motel brokers. A leading broking firm is Power Jeffrey & Co. In discussions with Peter Power this week, he said *"there are now very few hotels genuinely for sale and the major assault has been on hotels in the South East corner of the State. There is a huge demand for hotels in this area and much of the demand has emanated from South Australia"*. Peter went on to say *"People are now holding on to their hotels as they are finally making good money. This economic turnaround for hotels has been principally driven by favourable legislative changes for hotels including lower taxation regimes and the introduction of poker machines in increased numbers into hotels"*.

I asked Peter whether or not this increase in gross income as a result of the poker machines had other ramifications. He advised *"as a result of the increased revenue to hoteliers through gaming machines, they have been able to spend money refurbishing other incoming producing areas of their hotels, for example bistros, bars and other general renovations, and as a result they have increased their income from other parts of their business as well."*

Gaming

One of the major reasons for the turnaround has been the capacity for hoteliers to acquire and operate more poker machines in their premises. This has been a staged process. A hotelier can have up to 30 machines in their premises currently, and can increase the number of machines by five per year until the year 2001, when the maximum number of machines is 45.

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New legislative regime for coll

by Rebecca Gray

A major change to regulation of collective investments occurred on 1 July 1998 by the enactment of the *Managed Investment Act 1998 ('The Act')*. A significant change is that ASIC will now be regulating certain investments which previously were not considered to be within the scope of the Corporations Law. Specifically, property investments in strata title arrangements (eg resorts and hotels), time sharing schemes and solicitor's mortgage funds will be subject to greater regulation by ASIC.

The Act amends the *Corporations Law (Part 5C)* and replaces the old provisions dealing with "prescribed interests". It aims to improve protection for investors who are not entitled to take part in managing their investment and where there is no government or prudential supervision.

It provides that if something is a *'managed investment scheme'*, then the operator must issue a prospectus to offer interests to potential investors and the scheme must be registered. A scheme will be a *'managed investment scheme'* if:-

1. People contribute money or money's worth to acquire rights to benefits produced by the scheme;
2. The contributions are pooled or used in a common enterprise to produce benefits to members; and
3. The members do not have day-to-day control.

A time sharing scheme is expressly included. Schemes specifically excluded include

partnerships with 20 or more members, body corporates, franchises and certain superannuation and approved deposit funds.

Even if a scheme is a *'managed investment scheme'*, registration may not be required where:-

- The scheme has 20 members or less; or
- The purchase price of each interest is at least $500,000.00.

If the Act does apply, to be registered with ASIC, the scheme must have:-

a. A licenced responsible entity who must meet certain financial and educational requirements and statutory duties.
b. A constitution dealing with matters such as the powers of the responsible entity, how interests may be acquired and disposed of and what happens when the scheme is wound up.
c. A compliance plan setting out how the responsible entity will comply with the constitution and the Act.
d. Custodial arrangements for the scheme assets. If the responsible entity does not meet certain financial requirements, a third party custodian must be appointed.

The prospectus and registration requirements are substantial and costly. However, failure to comply may result in consequences such as:-

- Prosecution against the operator and any unlicensed salespeople;
- Injunctions restraining the operation of the scheme; and/or
- Contracts for interests in the scheme being avoided.

The Act has a particularly significant impact in the property sector, especially for developers of strata title schemes which involve a lease-back and the appointment of a letting agent and manager. Under the old

The changing face of Hospitality

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There have been several new hotels recently opening where the gaming room is obviously a feature. However, associated with that capacity for gaming are the other public need services of take away liquor, meals, responsible service of liquor, function rooms, music and so forth.

De-Regulation of the Liquor Industry - Will it Happen?

The National Competition Council (NCC), through the National Competition Policy (NCP) and related reforms, is setting up a Committee to review the Liquor Act. This review seeks to address all anti-competitive provisions that regulate the sale of liquor in Queensland. The review stems from an independent committee of inquiry established to look at generating more competition within the Australian economy.

Recommendations of the inquiry are found in the NCP report, presented to the Federal Government in 1993 by Professor Fred Hilmer. As a result of that report, certain agreements were struck with Government to systematically examine all legislation to identify anti-competitive provisions and the Liquor Act must comply by June 1999. Therefore, if there are any parts of the Liquor Act which, on the face of them appear to be anti-competitive, they will only be retained where it can be justified in the public interest.

The types of issues affecting the consideration of legislative change would include:

1. Whether the objectives of the legislation can only be achieved by restricting competition; and

2. Whether the benefits of the restriction to the community as a whole outweigh the cost.

Clearly, if any current restrictions in relation to the sale of liquor are removed from the Liquor Act then the hotel industry will be open to much greater competition, especially from the merchandising giants, who already have a majority share of all food sales in Queensland.

In looking at the contrary points of view in relation to this issue, it is clear that on one hand the liquor industry should remain exempt from this

ective investments

regime of 'prescribed interests', judicial decisions suggested non-regulation by the *Corporations Law*. However, on 6 October 1998, ASIC released Interim Policy Statement 140 ('IPS 140') as a temporary guide setting out ASIC's position in relation to strata title schemes. It states that a service strata arrangement is likely to be a *'managed investment scheme'* if the investor's return depends on:-

- An interdependency between the use of the unit and the use of other investors' units (for example, where the return depends on allocation of rent between investors); or
- A pooling of income earned from investors' units; or
- The use of the unit as part of a serviced strata arrangement (even if the return is fixed).

So, if the unit is only suitable for use as part of a hotel or resort and is promoted as such (rather than as an individual unit), there is a letting agreement or a booking allocation system in place, expenses are pooled (eg a marketing fund) or any shared arrangement is in place, then the scheme may well be a *'managed investment scheme'* and should be registered.

The application of the Act has been unclear for some time and until the final Policy Statement is released (anticipated mid-December 1998), uncertainty will continue. Fortunately, temporary relief from at least immediate compliance may be available in some circumstances:-

- Existing strata schemes with an approved deed under the old 'prescribed interest' provisions must be registered under the Act by 30 June 2000;
- Existing strata schemes that do not comply but where no primary offers are being made will not be subject to action by ASIC unless conduct has been misleading or improper. However, ASIC will not grant relief from civil consequences (such as the investor's right to avoid contracts) and may require registration within a reasonable period after the final Policy Statement;
- Non-complying schemes still offering primary interests must cease offers until they comply with the Act. Existing investors must be given the opportunity to withdraw from the scheme. ASIC will grant temporary relief on a case by case basis for operators of well advanced non-complying schemes. The relief is valid for 12 months.

Mullins & Mullins has recently made a successful application on behalf of a client on the basis that its development is well advanced.

We will keep you updated of any further developments once the final Policy Statement has been released.

nd Gaming

process so that the benefits of responsible service of liquor to the community can be maintained. On the other hand strict economic rationalists would say that the de-regulation of the liquor industry should lead to cheaper prices through greater competition, and increased employment.

It seems to me that in the event that total de-regulation occurs, then the possibility of irresponsible service of liquor would increase. Also, the viability of many country hotels would be threatened. As a result, this would create less competition, not more.

Also, the detached bottle shops linked to various hotels have done a tremendous job in responsibly marketing and selling liquor and once again, if supermarkets sold alcohol the viability of the detached bottle shops would be threatened. This could result in a decrease in employment and at the same time may not necessarily result in a decrease in pricing.

Currently the healthy competition in relation to the detached bottle shop chains has produced very low prices and a good range of products.

The way in which the review will be effected is that the Liquor Licensing Division and Treasury's National Competition Unit will work closely together to develop the review guidelines and time frames.

Various aspects for consideration include:

a. The calling for submissions from the various industries affected;
b. Formal consultation with key stakeholders including surveying of public opinion;
c. Release to government of various option papers;
d. Further consultations; and
e. Final reports.

This obviously means a fair bit to both the liquor industry and you as members of the public. Hotel keepers have an obvious stake in these developments and therefore the Queensland Hotels Association (QHA) and other people in the hotel industry are currently preparing submissions for consideration. You, as a member of the public, should consider your position in relation to all of this and involve yourselves in the process.

If you have any further enquiries regarding the NCP Review you can contact the Liquor Licensing Division on 07 3224 8076.

Family Law

Family issues at Christmas

by Catherine Abercrombie

With the Christmas holiday season almost upon us, the inevitable stress resulting from the combination of end of year work pressure, school holidays and the constant commercial reminders of Christmas can become too much.

Whilst Christmas is the 'festive season' and the 'family holiday', for those whose families are separated or separating, the added stress of Christmas can often result in a sense of disappointment or frustration for separated parents and children when issues such as contact between parents and children are discussed.

Changes to the *Family Law Act* in 1996 were prompted by a desire to encourage separated parents to work together to create an agreed plan for their childrens' development.

As part of this encouragement, services in the form of mediation and counselling services, which are provided by the Court free of charge, were enhanced and promoted.

These services are intended to operate in conjunction with the parties obtaining independent legal advice in relation to their rights and responsibilities as parents.

At Mullins & Mullins, our Family Law Section forms part of our comprehensive Personal Legal Services division.

Our focus in Family Law matters is to listen to our client's needs and provide them with the advice and legal assistance relevant to their particular situation, with an emphasis on equitable resolution of disputes in the shortest possible time.

The importance of a workable arrangement between parents concerning their children cannot be understated. We therefore encourage mediation and other methods of alternative dispute resolution for separating parents.

These methods of resolution work most effectively when the parties to the dispute are fully informed of their legal rights and obligations.

To sue or not to sue, that is the question

by Susan Brunton

The American habit of suing anyone and everyone when something goes wrong is generally regarded as a society gone 'litigation mad'. Australian society certainly hasn't reached those same litigious heights, although we're arguably heading in that direction.

Certainly it's regarded as quite acceptable to sue if one is injured in a motor vehicle accident, or sustains an injury in the workplace, but what about good old fashioned 'accidents'? Can accidents still occur with the idea that "no-one was to blame, it was just an accident", or are we always on the lookout to sue someone, whether to make money or to simply feel avenged?

What if while staying in a five star hotel, you slip in the shower and cut yourself on a sharp shower fitting? What if your child falls in the playground at school and breaks an arm causing you no end of inconvenience and expense in terms of treatment, not to mention the general disruption to your family? Can you sue? Should you sue? Who do you sue? Inevitably you need legal advice to answer these questions. The answers lie in the facts of each set of circumstances.

The law requires that there must have been a duty of care owed to the injured person. This duty must be breached by an act of negligence resulting in damage to the injured person.

It is worth remembering that litigation has a price, not just in terms of legal and medical (or other expert) fees, but the emotional cost must be borne in mind. There's not always a pot of gold at the end of the rainbow and people can sometimes be drawn into litigation, only to discover its pitfalls too late. Being a litigant is not easy and can become a consuming passion with little to show for it at the end of the day and sometimes to the detriment of family and friends. There is also the community cost in terms of increased insurance premiums and the like.

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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.

Wives are different

by Rachel Wolfe

The High Court of Australia in *Garcia v. National Australia Bank Ltd* recently confirmed the 60 year old doctrine of the 'wives special equity' which allows a wife to resist a Mortgagee enforcing a guarantee which she has provided for the debts of her husband or his business. The facts of the case are as follows:-

In 1979 Mr and Mrs Garcia gave a Mortgage of their matrimonial home as security for a number of loans to Mr & Mrs Garcia. The Mortgage contained an all moneys clause, that is, the Mortgage secured all moneys which Mr & Mrs Garcia owed and may owe the Bank in the future. The loan was repaid, but the Mortgage was not discharged.

Between 1985 - 1987, Mrs Garcia signed four Guarantees in favour of Mr Garcia's business. In 1989 the businesses were ordered to be wound up. In 1990, Mr and Mrs Garcia were divorced and Mrs Garcia sought to have the Guarantees set aside. The Bank made a demand for $327,189.69 under the latest Guarantee and sought to enforce the Mortgage.

The High Court held that although Mrs Garcia presented to the Bank as an intelligent and articulate professional, she was relieved from her obligations under the Guarantee based on the wives special equity doctrine because:

1. She gained no financial benefit from the transactions secured by the Guarantees;
2. She understood that she was guaranteeing an overdraft given to Mr Garcia's business. However, she did not understand that the all moneys clause in the Mortgage meant that her obligations under the Guarantee were secured by the Mortgage over the matrimonial home given to the Bank many years earlier;
3. The Bank knew that Mr & Mrs Garcia were husband and wife; and
4. The Bank did not explain the nature and effect of the Guarantee to Mrs Garcia, nor did she receive any independent legal advice.

The High Court justified the continued existence of the wives special equity doctrine because "the marriage relationship is such that one, often the woman, may well leave many, perhaps all, business judgments to the other spouse. In that kind of relationship, business decisions may be made with little consultation between the parties and with only the most abbreviated explanation of their purport or effect. Sometimes, with not the slightest hint of bad faith, the explanation given by one party to the other will be imperfect and incomplete, if not simply wrong... (The doctrine) conforms to the fundamental principle according to which equity acts, namely that a party (the Bank) having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct."

The court recognised that Australian society and in particular the role of women in that society has changed since the doctrine was established in 1939. However, the court noted that some things are unchanged and that there is still a significant number of women in Australia in relationships which are for many varied reasons marked by disparities of economic and other power between the parties. The Court stated that the doctrine is not to be found in notions of the subservience or inferior economic position of women.

Mortgagees must explain to prospective guarantors the nature and effect of the security they are giving and that securities given years ago for different purposes and in different circumstances can, due to provisions such as an all moneys clause, lie dormant but secure future incurred obligations. The Mortgagee should also ensure that any prospective guarantor receives independent legal advice. If the financier takes these safeguards, then a guarantor's failure to grasp a material part of the documents or the significance of what he or she is doing will not raise the doctrine to set aside the security.

Although the wives special equity doctrine only applies to a wife acting as surety for her husband, the High Court adverted to the possibility that the principle would extend to the situation where a husband acts as surety for his wife and relationships which fall short of marriage between members of the opposite or same sex, provided the relationship is long term and publicly declared.