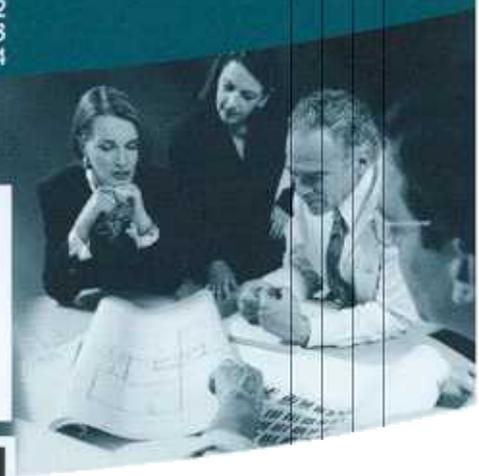


M & M

Report



Editorial



by John Mullins
In a time where the focus of business is to streamline service, utilise technology, be quality assured and manage the delivery of the service so that it is as quick as possible and at the best price, it is often easy to forget one very important element and that is, that despite the fact that we are doing business, we are ultimately all individual people and dealing personally on the basis of society as we know it.

The best example of this change is those infernal automated receptions, which give us a range of options on pushing various keys and inevitably the options are not what we want; we simply want to speak to somebody.

Recognising this, and that the strong foundations of our firm are our personal relationships with our clients, we have formalised our Personal Legal Services section. We recognise that as individuals, our clients have a range of legal problems and issues in their life and when these occur, what is needed is to be able to depend upon a firm such as ours, which while delivering quality legal services, does so in a personal way.

Many of our clients have dealt with the same lawyers in our firm for years, some for decades. It is through this development of communication and trust that we can best deliver legal services in times of stress in your lives.

This section will be focusing on Wills and Enduring Powers of Attorney, Estates and importantly in these days, Estate Planning, Family Law, Personal Injuries, Police Matters and any other matter which effects the personal and financial aspects of one's life. We look forward to introducing you to these services and to our staff who will be responsible for this. If you require any further information in relation to this, please contact me.

Personal Legal Services



By Julian Nathan
Jim is born with an intellectual disability. He is the youngest in the family. He has a brother and sister, 15

or so years older than him. His father and mother are hard working parents. Some 10 years after his birth, Jim's father suddenly passes away. Pursuant to his will, he left his whole estate to his wife. At the time, Jim's brother was becoming a successful identity in the advertising industry. Jim's sister had started her own fashion business and was progressing well.

Two years later, Jim's mother remarries. Her new husband has a son from his first marriage and that child is 7 years old at the time of the remarriage. Some three years later, they file for divorce. In the midst of this, Jim still requires constant care. His step father has placed most of his assets in a Superannuation Fund. His step father suddenly dies of a heart attack.

Prior to this, he had changed his will and provided everything for the care of his child from his first marriage. Jim's mother suffers a stroke and is in a coma for months before finally passing away. Jim's brother (whilst driving Jim with him to visit his mother at the hospital) is involved in a motor vehicle accident resulting in serious injury to Jim. The police discover that Jim's brother was driving under the influence of alcohol.

The story could be regarded as a rather far fetched account of events. However, people do face situations like these at times in their lives and require legal advice



to ensure that their interests are protected.

Mullins & Mullins has always provided a personal legal service to its clients. Our firm is celebrating 18 years in the legal profession. Mr Patrick Mullins Senior has been providing committed legal advice for over 50 years. From its inception, people have been the firm's focus. The firm has since grown and we have become lawyers to a whole range of clients including business and corporations. We have, though, continued to look after our "people" clients.

In today's society, people's needs are often attended to through increasingly impersonal methods. This is due, in part, to increased technology and also to our generally busy pace of life.

I am Julian Nathan and am proud to lead a team of experienced and dedicated lawyers practising in the areas of law that are of concern to the individual. Mullins & Mullins have not lost sight of serving
Continued page 2.

Trade Practice

Watch your conduct!



by David Williams

The Trade Practices Act was amended on the 1st July 1998, to include a new "unconscionable conduct" provision. This amendment provides to "small business" a new weapon in matters of a contractual nature. If conduct falls within the unconscionable conduct provision then you will have access to a variety of remedies under the Trade Practices Act.

What amounts to unconscionable conduct?

Here the Courts will look at the following indicia to see if the conduct under investigation could be termed "unconscionable". The indicia that a Court would look at are by no means exhaustive, but some of the matters it will take into consideration are as follows:-



- (i) relative strengths of the bargaining parties;
- (ii) are the conditions imposed, reasonably necessary for the protection of legitimate interest;
- (iii) whether or not any party to the contract is able to understand the contract that is required to be signed;
- (iv) whether any undue influence or pressure has been exerted or unfair tactics used;
- (v) what is the cost of identical or equivalent goods or services;
- (vi) extent of any similar conduct based on similar facts;
- (vii) requirements of any Code in that industry;
- (viii) is there any reasonable basis to assume an Industry Code would be followed;
- (ix) unreasonably failing to disclose any intended conduct and any risks that may arise;
- (x) were the parties willing to negotiate;
- (xi) whether the parties have acted in good faith.

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Will my computer die

Extracts From Article Published by LPM Magazine. By Bruce L. Dornier & Daniel S. Coolidge

There is rampant concern that on January 1, 2000, mainframe and personal computers will die, errors will abound, databases will be corrupted and molten lava will spew forth from disk drives as they try to contend with a simple problem - changing four digits to represent the new millennium.

What is going on, you might well ask, and what does it mean to me?

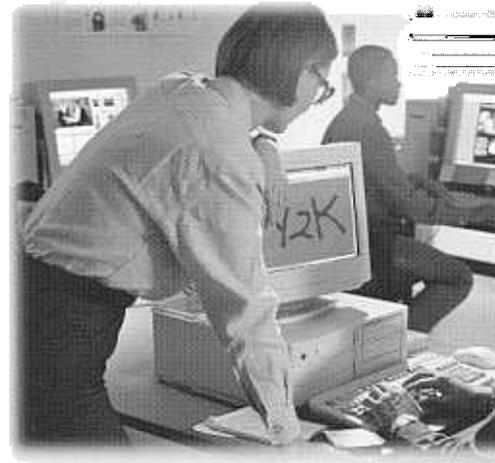
Birth of a monster

The millennium bug originated during the dark ages of computers (the '60s). Banks, insurance companies, stock exchanges, the government - lots of big hitters - depended on huge programs with tens of millions of lines of code. Space-saving shortcuts to get more information onto a single punch card or in as little core memory as possible were the norm. Few people ever thought, given the pace of the change, that any of these programs would still be in use 30 years later.

The shortcut that brought us the millennium bug was the technique of representing a year by the last two digits only. People do this all the time without thinking. We write "24/12/98" and know the "98" means "1998". Computer programs were written to recognise it the same way. This shortcut saved space on punch cards, space in core memory and labour for the card punchers.

A two-part problem

First, for all their seeming intelligence, computers really do things by blindly following a set of detailed instructions in a program. Computers don't "think" contextually and can't figure out the two-



digit representation without someone writing a set of rules to follow. If the rules work, all is fine. If there is a problem with the rules - a "bug" - the program output can't be trusted.

Second, lots of the old programs are still around. Vendors don't start over from scratch every few years - it's too expensive. Those huge programs with their millions of lines of code have not been replaced. Instead, they have been modified and added to over the course of decades. More to the point, the parts that seemed to work - like the date calculations - weren't touched during modifications. This particular shortcut didn't become a problem until we approached the millennium.

Worst of all, for you as an average user, most PC programmers and manufacturers were shortsighted and continued to use two-digit years in their programs and hardware

Personal Legal Services

Continued from page 1.

the client's individual needs. It is for this reason we have established the "Personal Legal Services" division. I am an Associate, and joined the firm as an Articled Clerk in 1992.

Apart from being a qualified Accountant with substantial exposure in the area of taxation with the Australian Taxation Office and Arthur Andersen Chartered Accountants, as a solicitor I have been involved with numerous property developments, both acting for vendors and purchasers, involving conveyancing of residential and commercial property, leasing and subdivisions.

In addition, I have been involved with commercial disputes between partners of businesses as well as providing advice on the appropriate structures to conduct business, including taxation planning. I have gained experience in Property Syndications and Public Property Trusts and the prospectus work in relation to them.

Some of the issues that impact on people are demonstrated in the above story.

1. Estate - From our story, questions arise as to whether the Wills made by Jim's father or mother or his stepfather are adequate with respect to the needs of Jim and his brothers and sister. At Mullins & Mullins, we will investigate and advise as to whether there are grounds to challenge a Will, and the probability of success and costs associated.

2. Estate Planning - Planning for our future is becoming one of the biggest challenges today. Issues such as income, capital gains tax, business assets, partnership assets, superannuation, insurance policies as well as the disposal or protection of one's own assets at death, needs planning and advice from us as legal advisors and your accountants and financial planners.

3. Family Law - How does the impact of the family law proceedings and marriage property, impact on the distribution of the Estate? The care of the children as a result

January 1, 2000?



until just a few years ago if they were savvy, or just a year or two ago if not. As a result, many recent programs and desktop computers are afflicted by the bug and won't work properly either, come the millennium.

Problems beyond your control

Assume for the moment you have taken care of all your in-house systems, and they are fabulously Y2K-compliant. What about people with whom you deal? Vendors who sell you products or services? Clients who use computers to cut cheques? Are their systems all in order?

Then there are the so-called embedded systems: computer chips buried in the brains of all sorts of equipment like cars, electrical power grids, elevators or anything that uses a date to function. Trust us: You will be affected by this problem. Indeed, one estimate claims the problem is sufficiently large and intractable that as many as 5-10

percent of small to medium-size businesses will go bankrupt as a result of the millennium bug. (Small businesses are better off, in a way, because they can upgrade their hardware and over-the-counter software more readily and inexpensively).

Warranties? What warranties?

What economic recourse do you have if your hardware or software is noncompliant? What about breach of warranty? Read the software licence. It includes, almost certainly, a disclaimer of liability and a statement that the vendor doesn't really warrant that the software does anything.

What about your hardware? Read the warranties. Probably the same thing. What about an insurance claim for all the work to get things right and maybe to replace systems? Remember how this bug got started. There is a significant question whether its repercussions are accidental or simply the consequence of a business choice not covered by warranties and insurance policies.

A real problem - and a real opportunity

So is the millennium bug real? You bet! Do you need to be concerned? Absolutely. Can you protect yourself completely? Probably not. You can probably deal with the problems of your own computer systems, but you're still likely to be affected in some way by external computer systems that haven't adequately dealt with the issue.

A host of issues will arise from losses caused by errors and attempts to sort out who is responsible.

Now is the time to plan. Make New Years Day 2000 a day for fun, not a day for panic.

entitled to? We will advise you of your entitlements and chances of success as a result of these proceedings.

5. Police Matters - What laws has Jim's brother broken as a result of "being over the limit"? Are there any defences? With respect to criminal matters and in particular, preparing and defending our clients' rights, we will ensure the best possible representation.

6. Wills and Enduring Power of Attorney - Were the Wills drafted properly to ensure that the outcome is the one that was intended? We will draw your Wills to ensure that they carry out your purpose, advise of any potential challenges to your Wills and draw those Wills to withstand such challenges. Was there an Enduring Power of Attorney in place to look after Jim's mother's financial affairs and health needs? We will advise you on all you need to know about Enduring Powers of Attorneys and their function.

The Mullins & Mullins Personal Legal Services team will listen and advise our clients on their rights and the most cost effective way of protecting their rights in relation to their individual circumstances.

Taxation

G.S.T. - What are the effects on legal fees?

by Murray Hooper, Senior Taxation Accountant Greenwood Kendalls Chartered Accountants and Business Advisors

A key element of the Federal Government's Tax Reform Package is the proposed implementation of a Goods and Services Tax from July 1, 2000. This will be levied at 10% and will replace a number of indirect taxes including wholesale sales tax.

A goods and services tax is a tax on consumption. It is collected at each stage of the process of supply of goods and services with the tax burden falling on the ultimate consumer.

A broad base of goods and services have been selected for the G.S.T. It will apply to all supplies made by persons registered for G.S.T. who are carrying on a "taxable activity". A taxable activity is broadly defined as the supply of goods and services for a payment, whether in cash or in kind. Therefore, it will apply to legal services.

As a result, G.S.T. at 10% will be charged on legal fees. The effect of this will depend upon the nature of the client incurring the expense.

A person or business who is registered under the G.S.T. system will account for the G.S.T. on their sales and offset this amount by the G.S.T. they have paid on their business inputs and expenses (referred to as "input tax credits"). In effect, sales from one business to another are effectively free of G.S.T. as the purchasing business is able to claim any G.S.T. paid as a credit.

Thus, G.S.T. paid on legal fees by registered persons will be available to offset the G.S.T. they collect on their own sales and receipts. This will apply to most business and corporate clients.

However, individuals who are not registered, and who are in fact the "ultimate consumer" will be required to pay the G.S.T. on the legal services, and will not receive a credit.



Watch your conduct!

Continued from page 2.

Whilst the unconscionable conduct provisions do not apply to agreements entered into prior to the 1st July 1998, it would certainly apply to conduct that occurs after the 1st July 1998, even though the contract predated this amendment.

This provision does have some limitations in that it can not be used by a publicly listed company or where claims are in excess of \$1 million. Strangely, subsidiaries of multinational companies would still have access to this provision. In addition, concern has been raised as to how the \$1 million is determined. Is it one invoice for \$1 million or 10 invoices each amounting to \$1 million dollars? Clearly these and other matters will need to be determined by the Courts.

The Federal Government has at the same time provided to the Australian Competition and Consumer Commission (ACCC) funding of \$480,000.00 for each of the next four years. The purpose of this funding is to assist the ACCC to undertake test cases as to what amounts to unconscionability. Will you be one of the test cases?

It should also be remembered that the ACCC has recently commenced an action against a landlord based upon the common law doctrine of unconscionable conduct. If the ACCC is successful in this action it will widen this area of the law which will no doubt have a flow through effect upon the small business provisions.

The important factor to remember in regards to this provision is that it may well be that no one indicia listed on its own would amount to unconscionable conduct, but a series of indicia may well lead a court to find that a party has engaged in unconscionable conduct. It is essential that small business people be aware of this provision as it can be used against you by other small business operators.



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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 new franchisors



by David Williams

On the 1st October, 1998 the Franchising Code of Conduct ("Code") commenced in full which regulates all participants involved in franchising.

The Code sets up a detailed process of how franchisors may deal with prospective franchisees and franchisees when entering into franchise agreements. It also establishes a regime of disclosure for franchisors in their dealings with franchisees not only prior to entering into a franchise relationship but also during that relationship.

Failure to comply with the terms of the Code will amount to a breach of the Trade Practices Act. The Code will be administered by the Australian Competition and Consumer Commission ("ACCC").

Whilst the traditional franchisor is identifiable and most are aware of the Code, the real impact will be upon those parties whose arrangements would now fall within the definition of a "franchise agreement" and they are not aware of it. These new entrants to the franchising industry are in for a rude awakening.

The Code is modelled on Californian legislation. Recent cases in the United States have taken a very liberal interpretation as to the definition of "franchise agreement". The view of the courts has been that if parties seek by the "fine letter of the law" to create contractual arrangements outside the definition, but the substance of those arrangements are within the definition of a franchise agreement, then liability will attach.

What then, is a franchise agreement?

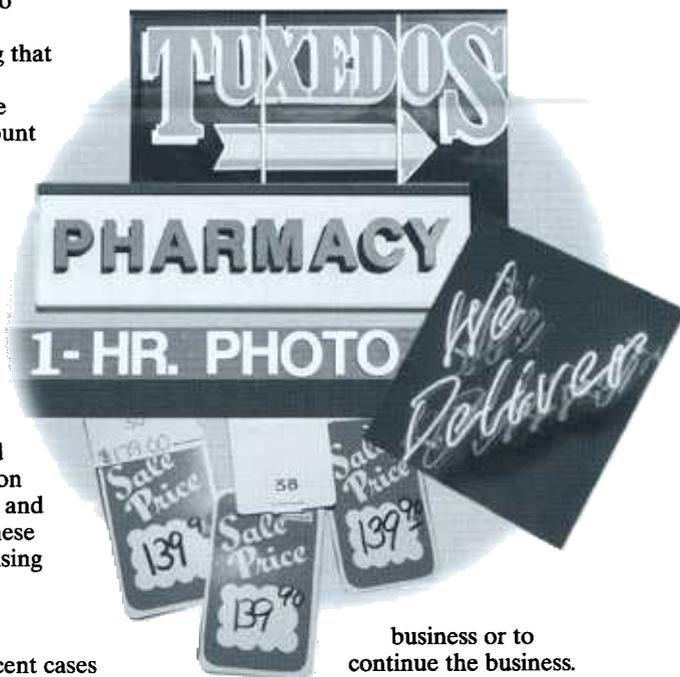
Under the Code four elements must be shown to exist;

1. Some sort of agreement i.e. written, oral or implied.
2. Rights are given by one party to another to carry on a business of "offering, supplying or distributing goods or services" under a "system or marketing plan" which is "substantially determined, controlled or suggested" by the granting party.
3. The operation of the business is "substantially or materially associated" with a trade mark, advertising or a commercial symbol which is owned, used, licensed or specified by the person granting the rights.
4. There is an obligation "to pay or agree to pay" such as:-
 - (a) initial capital investment fee; or

- (b) goods or services; or
- (c) a percentage of gross or net income; or
- (d) a training fee.

But it would not include any payment which is for:-

- (i) goods or services at or below "wholesale price";
- (ii) repayment of a loan;
- (iii) wholesale price of goods on consignment; or
- (iv) market value to purchase or lease property, fixtures, equipment or supplies which may be needed to start the



business or to continue the business.

The exception provided in element (iv) provides for certain transactions that may form part of the franchise agreement to be taken out of the transaction for the purposes of the Code. A classic example is where a franchisor loans to a franchisee funds in order to open a franchise. Under the exception that transaction is taken out of the franchise agreement. Of course, it would still form part of the disclosure requirements of that franchisor.

What are the ramifications of being a franchisee?

If your business fails within the definition of a franchise then you will be obligated to:

- (a) have a disclosure document;
- (b) review your contractual arrangements to ensure that the contract complies with the Code;
- (c) follow certain recruitment procedures for existing and new franchisees;
- (d) make financial disclosure and/or undertake an audit of your business; and
- (e) provide access to a dispute resolution process.

Do you operate your business in such a way that you may well be operating under a franchise agreement?