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Newsletter of Mullins & Mullins Solicitors & Notary

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M&M Report

Editorial

by John Mullins

March 31st, 1998 represents the firm's 18th Birthday. An 18th Birthday in modern days is regarded as a time of reaching maturity and, in many respects, this reflects the current position in our firm. The firm continues to grow, focusing on improvement in technology, service, cost effectiveness, satisfying the needs of our clients, assisting them with their legal problems and in developing their business.

From the 20th April, 1998, the firm will relocate to the 22nd Level of Central Plaza One. We have outgrown our current offices and we require new space to facilitate our growth and to enable us to provide the high level of service that is our goal.

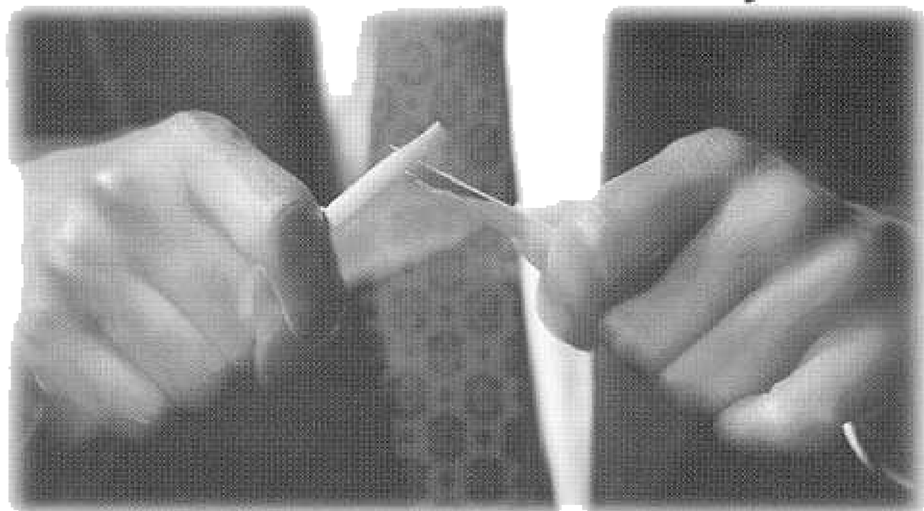
The decision to relocate in Central Plaza One has been a decision arrived at after an extended period of researching all the alternatives. The new premises were already fitted out by a previous tenant and after some refurbishment will be available for occupation by us.

In choosing these premises we took into account many factors including, accessibility for clients, facilities for our staff and an effective working environment integrating our technology and library facilities.

We have been successful in negotiating an excellent leasing deal. Despite the better accommodation and some 400 metres of additional space, the rental is not greater than our current commitment to 200 Mary Street. Accordingly, our firm and our clients will enjoy improved facilities at no additional cost. The relocation however gives us the opportunity to review our quality assurance system, file management issues, our current use of technology and many internal procedures which will lead to greater efficiency and service.

We look forward to welcoming you to our new offices as we look forward to our next 18 years.

Stress in the Workplace



by Susan Brunton

While no doubt everyone at one time or another has complained of being "stressed out" in their work environment, in the Nineties suing one's employer for a stress condition caused by the conditions of the workplace has become endemic. People in occupations as diverse as cleaners, bank tellers, health care workers, prison officers and plumbers have all sued their employers for a stress condition. Rarely are two claims alike.

An employer has a general duty of care towards its employees to provide for their safety. When an employee suffers a physical injury as a result of an unsafe work environment, it is easier to identify whether or not the work environment was safe and whether or not the employee injured himself / herself as a result of any workplace danger and thereby determine whether or not the employee is entitled to compensation for that injury. Claims for non-physical injury, particularly psychiatric injury which occur in the absence of physical injury and obvious cause are less clear cut and therefore more difficult to resolve.

If an employee discloses to his / her employer that he / she is having difficulties in the workplace, for example coping with workload or work expectations, or have concerns for their physical safety which have led to a condition of anxiety, (or other diagnosable psychiatric condition) then it would be prudent for the employer to investigate the work environment and take any steps deemed appropriate to assist the employee. Full documentation of any such approach by an employee and subsequent investigations should be made. If an employer ignores such an approach by an employee, then depending on other circumstances, they may be breaching their duty of care towards their employee.

Circumstances do exist though where employees go home from work or fail to turn up at work, later producing a medical certificate stating that the employee suffers from work-related stress or anxiety or some other psychiatric condition in the absence of any identifiable cause. Later claims may be made that the employee was unfairly treated, harassed or victimised. On reviewing the work environment, the

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A way through the Regulato

by Robert Stevenson

The Integrated Planning Act 1997 (Qld)

The Integrated Planning Act 1997 (Qld) which is to come into force on 30 March 1998 is the first attempt in Queensland to create a unified approach to the planning and development of our community. Planning and development has always involved balancing the needs of the community with the rights of individuals to use their land as they see fit. These processes have become increasingly complex over recent years particularly with increased awareness of social and environmental factors. For example, a government review in 1989 found that more than 400 separate approval processes in 60 different Acts of parliament related to development alone. The new Act seeks to address these issues of ecological sustainability and the simplification of the processes of planning and development. The single object of the IPA is to "seek to achieve ecological sustainability". This is to be achieved by the co-ordination and integration of planning processes and the management of the development process and its effects on the environment.

The Integrated Development Assessment System

The centrepiece of the new Act is the provision of an integrated development assessment system, or IDAS. The aim is to bring together the many different assessment and approval processes into a single system for the making of applications, requests for more information, public notification, the making of decisions and dispute resolution. Examples of development approvals which will be immediately subject to IDAS are building, planning, plumbing, subdivision, environmental discharge, coastal development and heritage approvals. In the longer term, other types of approvals will be incorporated into IDAS. The aim in introducing this new system is to:

- Provide for all social, environmental and economic matters relevant to a development application to be addressed at the one time; and
- Incorporate a referral process enabling all relevant state agencies to have input into the assessment process.

This does not mean that only one application will be necessary for a development, rather that different applications can be made utilising the one system.

Planning Schemes

The function of planning schemes is to be expanded. Currently, planning schemes provide a system of zones within a community within which certain activities can be undertaken. Under the new regime, the aim is for planning schemes to provide a coordinated local expression of integrated State, regional and local planning issues and development assessment criteria. In particular, schemes will have to identify desired environmental outcomes including particular localities within the area and measures and performance indicators for the achievement of those outcomes. They will also have to set guidelines to determine which development applications can be the subject of self-assessment and those which

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employer's perception of events may be that it was simply trying to extract an acceptable level of work performance from that particular employee.

How do the courts view these types of claims? As yet, comparatively few have been litigated fully in the courts. Last year in the District Court at Brisbane, His Honour Judge McGill SC found for the Defendant employer in a case where an employee had sued his employer for a psychiatric injury arising during the course of his employment with the Defendant. The employee claimed that there was unfair criticism of his work and that he had been unfairly treated under the employer's disciplinary system.

A number of incidents were complained of by the employee which he felt proved his claims. In order to establish that the particular employer had a duty to take reasonable care to avoid causing psychiatric injury to him, Judge McGill SC said that the employee had to show that in the circumstances complained of a person of normal personality,(that is, no abnormal predisposition to psychiatric reaction from stressors) could suffer psychiatric injury OR that the defendant employer knew of the employee's susceptibility to psychiatric injury and knew that he could have suffered psychiatric injury in the circumstances complained of.

The evidence of one of the psychiatrists who had examined the employee was that he had suffered depression in the past and may have had an exacerbation of those symptoms associated with his work difficulties. Nevertheless the Psychiatrist pointed out that the employee had an obsessional personality and was constantly preoccupied with the idea of his being wronged. The Psychiatrist thought that as a result of this personality type, the particular employee may suffer from depression if required to change his work habits. He stated that if one has an obsessional personality, one could decompensate into depression with trivial

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will require assessment by the planning authorities. The intention is to promote flexibility for planning schemes to accommodate the needs of particular communities. Current planning schemes will remain in force on an interim basis, but will require review to comply with the Act within 5 years.

Other changes

Other changes introduced by the new Act

- Increased scope for the public to comment on the approach a local government intends to take in a planning scheme;
- The centralisation of environmental impact of development as a factor in the assessment process;
- An easier system of designation of land for public infrastructure including schools, hospitals and recreational facilities; and
- A less formal system for the merits review of applications outside the Planning & Environment Court by a Building and Development Tribunal.

Benefits and criticisms

Some of the benefits which have been ascribed to the new system are:

- A simpler planning and decision making process;
- More emphasis on the environmental elements that must be addressed in preparing a new planning scheme;
- Greater levels of protection to those with existing use rights;
- Greater emphasis on non-court based dispute resolution;
- Opportunities for third party review of planning scheme provisions; and
- Improved co-ordination to ensure efficient delivery of infrastructure and services to the community.

Some criticisms of the new system have been that:

- It does nothing to counter the increasing remoteness of town planning from the community;
- The Act only relates to planning administration and does nothing to address practical planning issues;
- The Act does nothing to reduce the number of applications necessary for the purposes of development and will do little to reduce the delays in having applications approved; and
- For an Act designed to make the planning and development process easier, it is considerably more complex than the legislation it supercedes and increases the scope for technical and procedural litigation (the current Act is 171 pages long, the new Act is 311 pages).

Conclusions

The Integrated Planning Act 1997 (Qld) represents a brave new world for the planning and development of our communities. For the first time, planning legislation in Queensland introduces the concept of ecological sustainability as a paramount consideration. It remains to be seen whether this will be given more than lip service by the relevant authorities. The real matters of progress in the legislation are the expansion of the role of planning schemes and the provision of an integrated system for the assessment of development applications. These changes represent a significant conceptual improvement over existing processes. However, the real test as to the Act's success will be whether significant practical cultural change in this area can be achieved. That will be considerably more difficult.

stresses and therefore start to view the surrounding environment as stressful, even if the environment has not altered.

Judge McGill SC said that the question was whether the employer in this case was aware that the employee had the sort of personality which made him susceptible to relatively trivial stresses. He found that no-one, on behalf of the Defendant employer, in any position of authority, seemed to be aware of this particular man's obsessive personality, which predisposed him to suffering from a psychiatric reaction in the particular circumstances. Therefore, as there was no reasonably foreseeable risk of psychiatric injury to the employee, the employer had no duty of care to take reasonable care to avoid such injury. The employee's action failed.

Indeed the general test is whether it is reasonably foreseeable that as a consequence of certain events in the workplace psychiatric injury will result for a person of normal susceptibility. The Judge in this case went on to say, " An employer has to be able to change the way in which an employee is doing his work, even if the employee prefers not to make the change, and any active resistance to such change provides a reasonable justification for close and thorough supervision". He did not think however that just because an employee reacts badly to supervision necessarily infers that the employee has an obsessive personality.

So it seems from this decision that the courts will take a reasonable approach to these claims, however for employers it is worth while keeping an eye on the work environment in view of the plethora of these types of claims and the possible consequences which flow from them. Of course no employer can determine independently whether or not an employee may be susceptible to psychiatric reaction as a result of work stresses if the employee has not disclosed any information suggesting that this might be the case as this requires expert opinion. Nevertheless we must all be aware that some are more susceptible to the effects of a stressful environment than others.

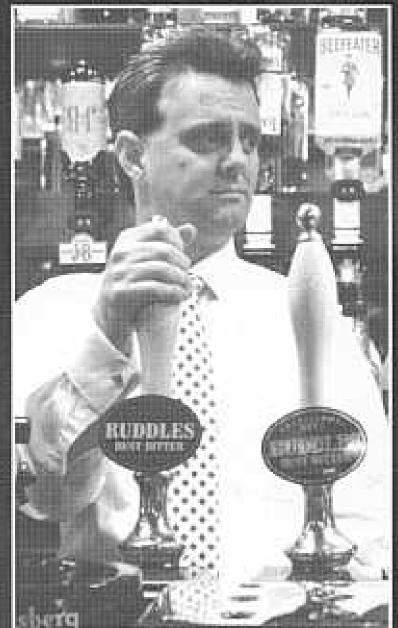
While it is common to hear fellow workers complaining of being stressed, it may be worth investigating the possible causes of that complaint if it is occurring too regularly or is arising in circumstances where it may be that the cause can be easily identified and rectified.

Contributory Negligence

Liability for negligent service of Alcohol

by Curt Schatz

Many readers will be aware of a recent decision of the Supreme Court involving the liability of a hotel licensee for injuries suffered by an intoxicated patron who was hit by a car whilst returning home. This decision, which is currently before the Court of Appeal, was the subject of much media attention, much of which focused not only on the possible consequences for the hotel industry but for the public at large.



However, a careful look at the decision indicates that it will not lead to the drastic consequences the media attention may lead us to believe, but, rather is an example of the application of well established principles in relation to the law of negligence. Generally a person is liable for damage which is the result of their actions where such damage was reasonably foreseeable.

The case involved a regular customer at the hotel who had been drinking at the hotel from late afternoon until closing time. Upon leaving the hotel he was struck by a car when he stepped in front of the car on the main road outside the premises. The customer commenced an action against both the driver and the hotel.

In determining whether the hotel was liable the Court considered the applicable test to be :

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Liability for negligent service of Alcohol

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"It is not negligence merely to serve a person with liquor to the point of intoxication; but it is so if, because of the circumstances it is reasonably foreseeable that to do so would cause danger to the intoxicated party."

As an example the Court stated that a licencee would be liable where the intoxication was so gross as to cause incapacity for reasonable self-preservation and it is or should be known that he or she may move into dangerous circumstances, and no action is taken to avert this.

The Court then considered the relevant facts of the case at hand and applied this test to them. The facts the court considered relevant were:

- The patron had been drinking at the hotel from late in the afternoon until closing time.
- It was his usual habit to go there and drink heavily and become intoxicated.
- It was his usual habit on leaving the hotel to cross at the traffic lights on the main road outside the premises and proceed to the bus stop.
- This usual practice was known to at least some of the hotel staff.

It was these factors, and not merely the fact that the customer had been drinking at the hotel, that resulted in the hotel being found 25% liable for the injuries suffered by the customer. The driver was found to be 30% responsible and the customer 45% responsible.

Whilst this decision was novel for its factual situation the principles applied by the Court are well established. The appeal currently before the Court of Appeal will determine whether the Judge has correctly applied those principles. In the meantime both hoteliers and members of the public alike should note these principles and ensure the responsible service of alcohol to customers and guests.

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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.

Developments in Franchising

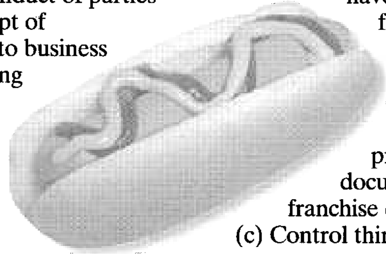
by David Williams

We have reported to you previously on the hiatus which has existed for some time in the regulation of the franchise industry. It appears that this hiatus will shortly come to an end with the introduction of a new regulatory regime for franchising in Australia. The changes to come into effect are widespread and have the capacity to revolutionise the way in which franchising is conducted in this country. The industry will now largely be regulated by the Fair Trading Bill (Cth) when it becomes law and a new franchising code of conduct.

Fair Trading Bill

The Bill will be introduced into the Senate within the next month and it is likely that it will be passed with little amendment. The most important aspects of the Bill are proposed amendments to the Trade Practices Act 1974 (Cth) the effect of which will be to provide avenues of redress to franchisees and small business generally when other businesses engage in anti-competitive conduct.

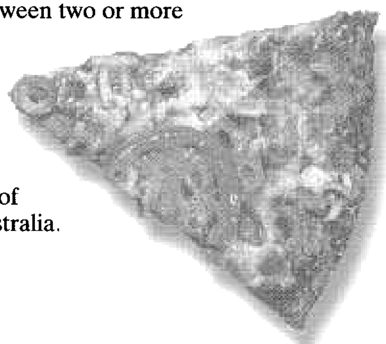
The Bill provides for a new benchmark in regard to the business conduct of parties by introducing the concept of unconscionable conduct to business transactions. In considering what amounts to unconscionable conduct, the courts will be required to consider a number of matters including the respective bargaining power of the parties, whether or not the parties entered into any negotiation as to the terms and conditions of the subject contract and finally whether negotiations were conducted in good faith. Remedies for such conduct will only be available where the claim does not exceed $1 million and will not be available to public companies.



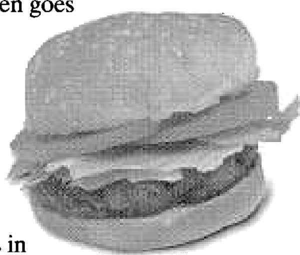
The New Franchising Code of Conduct

The Federal Government recently announced appointments to the Franchise Policy Council, the body responsible for drawing up and administering the new code of conduct for the industry. This process is anticipated to be completed by 30 June, 1998. The definition of what is a franchise has been expanded considerably in the current exposure draft of the new code. A franchise will be defined as:

"...a contract, agreement or arrangement, whether expressed or implied, whether written or oral, between two or more persons... which... authorises or permits another party... to engage in the business of offering, selling or distributing goods of services within Australia.



The definition then goes on to set out examples of the types of matters that characterise a franchise such as the right to use a trademark, the requirement to conduct a business in accordance with a marketing, business or technical plan or system and the requirement of one party to provide ongoing marketing, business or technical assistance. However, it concludes that an arrangement may constitute a franchise notwithstanding that it may lack any or all of these obligations or provisions. This clearly casts a wide net over what is a franchise. What will fall into the definition is only limited by your imagination. There will be many arrangements that whilst at face value may not be regarded as a franchise will, based on this definition, be clearly a franchise.



The balance of the exposure draft of the new code contains significant provisions affecting franchisors in particular which will have the effect of requiring franchisors to:

(a) Disclose all material information relative to the franchise;
(b) Comply with procedures for the issue of documentation and signing of franchise documentation;
(c) Control third party payments via a trust account; and
(e) Engage in compulsory alternative dispute resolution in the event of disputes.

The provisions also limit the rights of franchisors over creditors, create a certification process for the obtaining of independent advice by parties and generally create an increased role for the Australian Competition & Consumer Commission ("ACCC") in the regulation of franchising. It is of concern that with this regime, as with other significant legislation, there is developing a practice of government providing legislative force to codes of conduct without the benefit of those codes being debated on both floors of Parliament.

In general, the new regime presents greater opportunities for franchisees and small business generally to compete with larger businesses and bargain on a more even footing with franchisors than may have been the case in the past. On the other hand, some of the measures imposed on franchisors may have a draconian effect in practice. The true test will be to see how these legislative measures translate into practice in the world of commerce.