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Newsletter of Mullins & Mullins Solicitors & Notary

M&M Report

Editorial

by John Mullins

In this edition of the M & M Report we introduce our new format, which we hope you like.

This is the fifth year of our quarterly newsletter and we appreciate the feedback we have received from many of our clients and associates.

Over these five years this is our first change in format, however, our content has evolved.

Our main aim is to place before you, in a concise form, topical issues which involve your rights, the Law, the Courts and Government.

Our readership covers an extremely diverse group so we strive to balance our articles with specific and general information whilst at all times maintaining that unique "Queensland flavour".

In this edition we outline for you the recent inquiries into the CJC. Much has been written about these enquiries and we hope our article clearly outlines to you the whole protracted matter. In other articles we continue to canvass a wide range of issues from Leases to the new Strata Title Legislation.

The introduction of the Body Corporate and Community Management Act 1997 is a major change to Strata Title ownership in Queensland and replaces the Building Units and Group Title Act 1980. The changes are dramatic and the procedures for conveying units have been revolutionised and there is enormous potential for error and the opportunity to avoid contracts.

Our firm continues to grow and in this newsletter we outline some of our staff changes. With our growth we continue our commitment to providing quality legal services to our clients through our staff, technology, systems and quality assurance.

We would welcome feedback from you on our new format.

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Buying or selling a unit or town house?

by Fiona Wallwork

The new Body Corporate and Community Management Act

The property development industry is now well and truly feeling the effects of the changes introduced by the *Body Corporate and Community Management Act 1997* ("the BCCM Act") which commenced operation on 13 July, 1997. The impact of the BCCM Act is far reaching affecting large scale strata title developers to home unit owners. Whilst many of those in the property industry are now familiar with the new laws and reforms, the "humble" home unit owner also needs to be aware of the new responsibilities and requirements introduced by the Act.

Consumer protection under the act

The traditional rights and obligations under contracts of sale for community titles properties (such as flats, home units and townhouses) have been made the subject of review under the Act. This review has come about primarily in recognition of the fact that the buyer of a community titles property is not only purchasing a new home but is also buying into a body corporate, a body akin to an unlimited liability corporation. Buyers need to fully appreciate the risk associated with being a member of the body corporate and also must be given the ability to fully investigate and assess the risk.

In recognition of this, the BCCM Act provides a certain degree of "consumer protection" to buyers of community titles properties by adjusting the balance of the relationship between the buyer and seller. The seller who is in a position to more fully assess the risk, must:-

- Give to the Buyer an "Information Sheet" which acts as a contract warning to the Buyer. This Information Sheet must be attached to the Contract as the "top sheet".
- Disclose certain Body Corporate information in a Disclosure Statement prior to the Buyer entering into the Contract. The matters disclosed in the Disclosure Statement form part of the Contract of Sale.
- Specifically notify the Buyer of any matters that relate to or effect the statutory warranties which are implied in every contract.

Consequences of failing to comply

The consequences of failing to comply with these obligations are important as the buyer is given the opportunity to terminate the contract (in some cases within 14 days of date of contract) where:-

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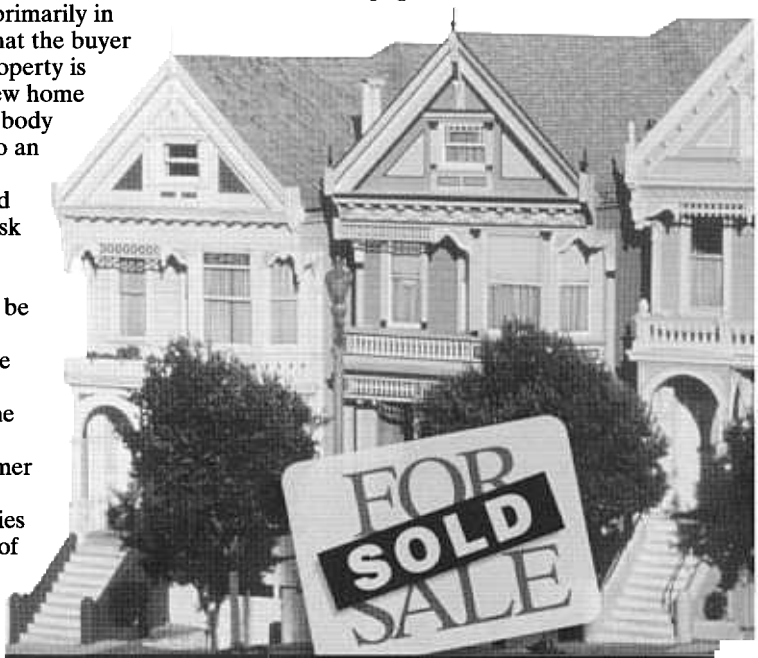

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- The Information Sheet is not attached as the front sheet to the Contract;
- The Disclosure Statement is inaccurate and such inaccuracy "materially prejudices" the Buyer;
- The Disclosure Statement is not attached;
- The Buyer is unable to verify the information contained in the Disclosure Statement; and
- It is ascertained that there is a breach of the implied statutory warranties and such was not disclosed in the Contract.

Impact of the act

The impact of the BCCM Act is significant. Sellers will need to ensure that they strictly comply with the disclosure requirements and appropriately negate the statutory warranties. Buyers although given the right to terminate the Contract, will have to ensure that they fully investigate the Body Corporate within fourteen (14) days of signing the Contract to ensure that they can take full advantage of the consumer protection provisions.

There is little doubt that the BCCM Act gives greater consumer protection to the Buyer. However, as is already evident, the benefit of consumer protection has come at the cost of delays in drawing contracts and the real potential that the termination provisions may be used for purposes other than those for which they were intended.

Queensland: a State

by Anand Shah

Many of you may have been following the trials and tribulations of the Carruthers Inquiry and the subsequent Connolly/Ryan Commission of Inquiry in the media over the last 18 months. You will also be aware that recently, Justice Thomas of the Queensland Supreme Court made an order which effectively ended the Connolly/Ryan Inquiry.

The background to the Court's decision is as follows. In about April 1996 the Criminal Justice Commission (CJC) instituted the Carruthers Inquiry (Mr Carruthers QC being a retired N.S.W. Judge) to investigate an alleged "deal" between the Coalition and the Police Union prior to the last election. This became known as the "Memorandum of Understanding". The allegations were that the Coalition agreed that in return for the votes of the Union's members, it would provide certain benefits to the Police Service in the event the Coalition were to win government.

The Carruthers Inquiry attracted intense publicity. On 27th August, 1996 Mr Hampson QC (Counsel assisting the Carruthers Inquiry) expressed the view that there was "enough evidence" against Mr Cooper, the Police Minister, to support a charge against him under the Electoral Act. Mr Cooper had by this time sought legal advice from Mr Peter Connolly QC (a retired Queensland Judge) in respect of this view. Mr Connolly's opinion was that no such charge could succeed and his written opinion was actually placed before the Carruthers Inquiry on 29th August, 1996.

A matter of days later on 2nd September, 1996 the Attorney General, Mr Beanland, announced an inquiry into the Criminal Justice Commission. At this time, the Carruthers Inquiry was still continuing its hearings into the Coalition's alleged deal with the Police Union. On 7th October, 1996 the Government's Commission of Inquiry was formally established appointing retired Supreme Court Judges Mr Peter Connolly QC and Dr Kevin Ryan QC as Commissioners to head the inquiry. Its terms of reference were to examine and make recommendations in relation to the future powers and operations of the CJC.

The Commissioners at a very early stage, reached the view that part of their task was to investigate the conduct of Mr Carruthers in the carrying out of his inquiry which of course was still continuing. Mr Carruthers strongly objected to the setting up of this new inquiry whilst his inquiry was continuing. He subsequently resigned in protest and his work was completed by two barristers who presented their own report recommending that no action be taken in relation to the Memorandum of Understanding. The Connolly/Ryan Inquiry pressed on with its investigation into the CJC. Questions were raised at various times as to Mr Connolly's suitability to sit on this new inquiry, given that he had previously advised Mr Cooper in relation to the previous inquiry.

After some months had passed, Mr Carruthers and the CJC sought injunctions from the Supreme Court to stop the Connolly/Ryan Inquiry from proceeding. The principle question to be determined was whether the Connolly/Ryan Inquiry should be stopped because of actual or apprehended bias. The relevant test for bias is whether the circumstances of the matter would give rise in the mind of a fair-minded and informed member of the public to a reasonable apprehension of a prejudiced mind or a lack of impartiality on the part of the decision maker. It was the Court's task to decide

Constitutional Law

State sales taxes ru

by Matthew Stapleton

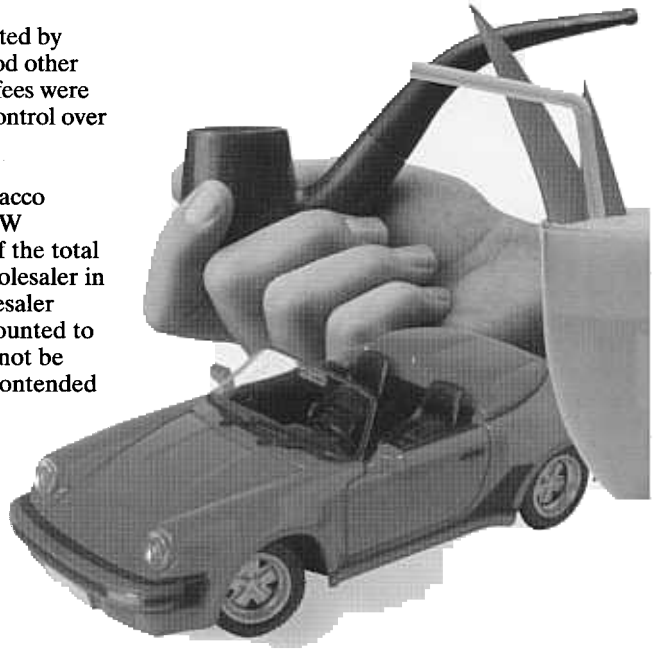
In the light of the recent debate in relation to tax reform, it is appropriate to examine the High Court decision that was responsible for sparking it. The decision in *Walter Hammond & Associates v New South Wales* effectively declared unconstitutional, State taxes on tobacco, fuel and alcohol and left the States with substantial shortfalls to make up in their budgets.

Background

Section 90 of the Constitution states that the power to impose duties of customs or excise upon goods shall be exclusive to the Commonwealth. Generally an "excise" is defined as *"a tax on the taking of a step in the process of production or distribution of goods before they reach the consumer"*. Previous cases had held certain state taxes to be valid on the basis that the taxes were said to be merely fees for carrying on a business and that they were calculated by reference to sales made in the period other than the period of the licence. The fees were considered part of the regulatory control over the particular industry.

The decision

The decision dealt with the "Tobacco Franchise fee" imposed by the NSW Government. The fee was 100% of the total amount of tobacco sold by the wholesaler in the previous 12 months. The wholesaler argued that this "fee" actually amounted to an excise and consequently could not be imposed by the State. The States contended that the previous cases should be applied and accordingly this franchise fee was simply a fee for the operation of the business and that the fees were an important part of the regulatory control over the tobacco industry.



# of Inquiry

whether Mr Connolly QC and Dr Ryan QC were biased in their conduct of the Inquiry.

Justice Thomas, after examining all of the facts, particularly statements made by Mr Connolly whilst the Carruthers Inquiry was proceeding and also comments made by him whilst his own inquiry was proceeding, considered that there was overwhelming evidence of apparent bias against Mr Connolly. Justice Thomas listed some of the reasons which made him form this view on the matter:-

i. That shortly before the Commission was set up, Mr Connolly had given an opinion to Mr Cooper concerning the Memorandum of Understanding such that Mr Connolly's view might be thought to be that the Carruthers Inquiry was a waste of time and money;
ii. His acceptance of the Commission to investigate the conduct of the CJC in circumstances where his former client, Mr Cooper, was sorely aggrieved by the CJC's conduct;
iii. His publicly insulting Mr Carruthers;
iv. His conduct of hearings in a manner apparently more supportive of witnesses adverse to the CJC than those favourable to it;
v. His frequent display of rancour against the CJC and those representing it.

Justice Thomas was of the opinion that, in view of the political controversy surrounding the creation of the Connolly/Ryan Inquiry, it was particularly important that the Commissioners be seen to be impartial and not minded to serve the interests of one side or the other of politics. The Judge also said that whilst he was mindful of the cost to the public of holding such an inquiry without a result, the finding of bias could allow no other decision than to injunct the Commissioners from proceeding. Whilst no finding of bias was made against Dr Ryan QC, the Judge held that Dr Ryan's deliberations had been tainted by his fellow Commissioner's bias and it would be impossible for Dr Ryan to complete the work. The present situation is that the Attorney-General, Mr Beanland, has expressed his intention to personally complete the work of the Inquiry and make recommendations about the future structure and functions of the CJC.

It is yet to be seen what the final result of this process will be. However, the main point to arise from this sorry affair to date is this. It is vital that Commissions of Inquiry, Judges and even politicians act without bias, and be seen to act without bias, in their decision making process. It is only in this way that parties to the process and the public can have confidence in a fair hearing and a just result.

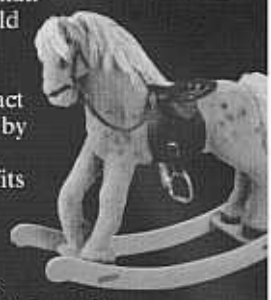
Family Law

Relocating Decision

by Jason Czinki

In our last Newsletter we reported to you on the facts of a recent case concerning the rights of a parent with a residence order to move interstate with a child, and submissions made by the Commonwealth to the Full Court of the Family Court. The decision has now been handed down. The Full Court decided that the trial Judge had correctly applied the legal principles to the case and that the resident parent was able to relocate as it was in the best interests of the child. The Court took into account that:

- the children would adjust to the relocation;
- the costs of contact would be shared by both parties;
- there were benefits of relocation for the mother as far as her future happiness was concerned which would impact on the children; and
- the wife was not intending to move in order to prevent contact, but for a lifestyle change.



The decision has not altered the existing law and the paramount factor for the Court is still what serves the best interests of the children.

ed invalid

In considering the argument put forward by the States, the Court took into account the rapid rise in the rates of these taxes and the amount of revenue raised by them. The majority decided that the amount of money being raised by the fee could not conceivably be regarded as a mere fee. Further the Court considered that there was no real element of regulatory control of businesses selling tobacco. It decided that the fee was *"manifestly a revenue raising tax imposed on the sale of tobacco in the relevant period."* The Court said that the States had *"far overreached their entitlement to exact what might be properly characterised as an excise"*. The Court recognised the ramifications of the decision, however noted that Section 90 provided it with no alternative once it had decided that the fee was actually an excise.

The future

The decision leaves the Federal Government with the exclusive right to impose taxes in respect of these goods and the States with substantial shortfalls to make up in their budgets. It may appear simple to merely provide that the Commonwealth collect these taxes and distribute them to the States, however that position is made more difficult by the fact that each State has different rates of taxes in relation to these items. Section 99 of the Constitution prevents the Commonwealth from giving preference to any State by any law of trade, commerce or revenue. Therefore, taxes implemented by the Commonwealth would need to be uniform across the nation. The problem is further complicated by the need to find a political solution as well as a practical solution. The Commonwealth's control of substantially larger "purse strings" is a notion that does not sit well with the States, given the power of the Commonwealth to attach conditions to grants.

A uniform goods and services tax and an overhaul of the entire tax system is also being widely touted. Whilst this may have benefits in regards to other aspects of the economy, it does not hand back to the States any control over their revenue. The decision still leaves the States with the power to raise a host of other taxes such as stamp duty, land tax and payroll tax. However these are politically unpopular and target a different sector of the community than the invalid taxes.

The decision has immense ramifications throughout all sectors of the economy, and accordingly there is no simple solution that will please everyone. The responsibility is now upon the Commonwealth and the States to come up with an answer that will best serve the interests of the community and the economy as a whole.

Franchise Industry

The absence of a Watchdog

by Curt Schatz

The Federal Minister for Small Business has recently advised that an announcement is expected to be made shortly about the replacement for the former Franchising Code Administration Council (FCAC). This body was created by the former Federal Government as a means of providing self regulation to the franchising industry. It ceased to exist as of 31 December 1996. The Franchising Code of Practice (FCP), which was to be enforced by FCAC, still exists but there is no system of enforcement. The legal framework for franchising continues to be contained in the Trade Practices Act. Corporations Law and other legislation specific to industry within which the particular franchise system operates. The primary issue for the Government's consideration is whether or not there should be specific legislation for franchising or whether there should be self regulation. Until a replacement for FCAC comes about, it is strongly recommended that anybody wishing to become involved in a franchise system should seek comprehensive legal and accounting advice to safeguard against the commercial risks involved.

Staff Update

Our people

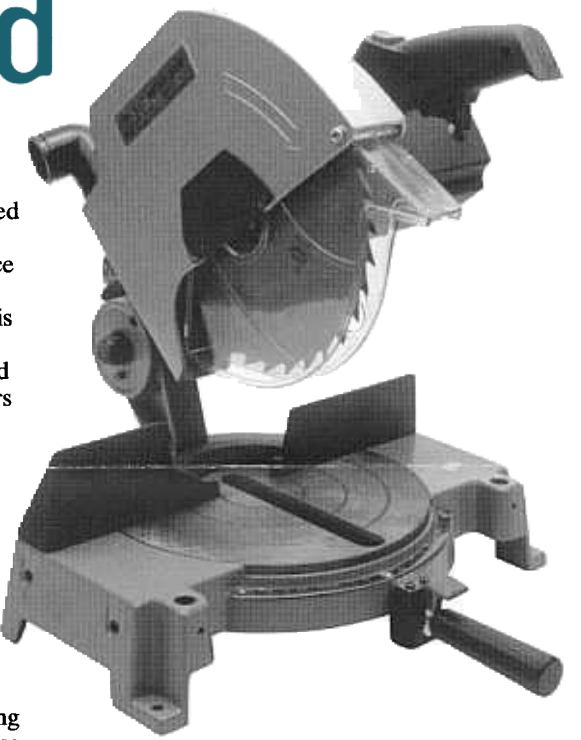
It seems like only yesterday that we reported to you that our staff numbers had grown to 30. As at today, that number has grown to 36 and we anticipate that number will continue to grow to 40 by the end of this year. Robert Stevenson has been appointed as an Associate. Robert practices in the Litigation section having received an Honours Degree in Law from QUT. Susan Brunton joined the staff as of 8th September, specifically to practice in the area of Insurance Litigation. Susan has many years of experience in this area of law. Katrina Main has been appointed as our Business Development Co-ordinator. One of Katrina's many responsibilities is the production of this newsletter. On a happy note we are pleased to announce that Curt Schatz has recently become engaged and by the time you read this Julian Nathan will have been married. We may have failed to note in the previous edition that Doris Chan now has a very healthy baby son named Jordan.

Lessors liability extended

by Julian Nathan

Background

A lessor will generally be liable for a disturbance caused by one tenant to another tenant where that disturbance was authorised by or reasonably foreseeable by the lessor. This principle is based on the implied covenant that the tenants occupation shall not be disturbed by the lessor or by others with the lessors authority. However, a recent decision by the Queensland Court of Appeal in *Marklea Pty Ltd v Aussie Traveller Pty Ltd* has extended that liability to include any disturbance which the lessor has the power to control.



The facts

The case involved neighbouring tenants, one a canvas manufacturer (Aussie Traveller Pty Ltd), the other a manufacturer of timber staircases (Topflight Pty Ltd) who were both leasing premises from Marklea Pty Ltd. The noise of the sanders and planers of Topflight, along with the sawdust created as a result of their activities, was found to render the premises of Aussie Traveller substantially less fit for the purpose for which they had been let.

The Court then considered whether Marklea, as Lessor could be held liable for the actions of Topflight, despite the fact that the actions of Topflight were neither authorised or encouraged by the Lessor. The Court had regard to the control over the Tenant that the Lessor was capable of exercising and in particular the effect of an express clause where the Lessee covenanted *"not to do or permit any act or thing which might be a nuisance or cause damage or disturbance to any other tenant or to the lessor."*

The decision

It was held that this clause gave the Lessor certain control over Topflight. Therefore, had the Lessor sought to enforce this clause it would have been able to control the activities of Topflight. The Court held that once Aussie Traveller had made Marklea aware of the nuisance, by failing to take action, Marklea adopted the nuisance. Therefore, by being in a position to remedy the nuisance and failing to do so the Lessor had breached its implied covenant not to disturb the Tenant's occupation. Consequently, the Lessor was liable for the loss caused by Topflight to Aussie Traveller.

This decision is significant, as it concentrates on the ability of the Lessor to control the Tenant's activities. As clauses which prevent the Lessee from committing nuisances are standard in many leases, lessors will frequently have the power to exercise control over the tenant. The result being that the failure by the Lessor to exercise this control will leave them open to liability from other tenants.

It should be noted that this decision related to a Lease entered into prior to the *Retail Shop Leases Act 1994.* Had the Lease been under the Act there would be an implied provision that the Lessor would be liable for compensation in the event that the Lessor failed to take reasonable steps to prevent any disruption within the Centre which causes loss of profits to the Lessee. Based on this decision, this would also include failing to prevent disruptions caused by the acts of adjoining tenants.

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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.