

## To bind or not to bind

FIONA SEARS



**P**arties to a transaction need always to be conscious of the binding/non-binding nature of 'offer' documentation. It is essential to have final documentation executed and returned to the other party as quickly as possible after negotiations conclude to ensure that parties to

the transaction are locked in.

In the case of *400 George Street (Qld) Pty Ltd & Ors v BG International Limited* (2010) QSC 66 (16 March 2010) the parties executed a letter of offer whereby the proposed tenant, BG International Ltd, was to lease a commercial tenancy in a building that the landlord was to construct. The letter included a clause, which stated, "No legally binding agreement is made by the parties execution of this letter. All documentation is subject to a mutually agreed legal document by both parties."

After the letter of offer was executed, the parties spent some months negotiating the terms of the agreement for lease and lease. When negotiations were finalised, formal documentation was forwarded to the tenant for its execution. The tenant promptly executed documentation and returned it to the landlord's solicitor.

Three of the four entities making up the landlord executed the documents and sent them to the fourth entity party overseas for execution. There was a significant delay (some seven weeks) in the documentation being executed by the final landlord entity.

During this time the tenant's position changed. The tenant company was part of a larger merger deal and as a result of the merger its leasing requirements exceeded that offered by the landlord under the originally negotiated deal. As a consequence, the tenant purported to withdraw from the transaction on the basis that it had not

been notified that the landlord had accepted its offer by signing and returning the agreement for lease and lease documentation.

While the case covered a number of other significant legal issues, the Court found in favour of the tenant and concluded that there was no contract made by the tenant's execution of the agreement for lease and lease. Therefore, until the tenant was notified that the landlord had executed the documentation the tenant was entitled to rely upon the terms of the non-binding letter of offer and withdraw from the transaction.

It is essential when signing 'offers' with respect to leasing transactions that you are clear about whether you require the parties to be bound immediately or you wish to preserve the right for a party to withdraw from the transaction prior to formal lease documentation being entered into.



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# Compensation for Land

PAUL LUTVEY



The Queensland freehold land system operates under the Torrens System of Title, which means that the land register conducted by the Registrar of Titles is conclusive evidence of the registered interest in land known as indefeasible title. However despite the protection of registration of an interest creating an indefeasible title there are some statutory exceptions.

The applicable legislation in Queensland is the *Land Title Act 1994* (Act). This Act amongst other things deals with the numerous interests in freehold land and how the Registrar of Titles is to operate and maintain the register.

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Under this system the legal interest in a lot is not created until registration and upon registration the registered proprietor holds the interest subject to any other prior registered interest that may affect the lot but free of all other or subsequent interests.

There are exceptions to this interest of indefeasible title set out in one particular section of the Act. There is also one other exception where there has been fraud by the registered proprietor in deriving the registered interest.

There have been a number of judicial decisions on this fraud exception in many of the states of Australia and

other countries that operate under the Torrens System of Title.

Some of these decisions are divided, however the majority have consistently found that the actual fraud needs to be perpetrated by the registered proprietor who derives the interest. The mere fact that the registered proprietor's agent or employee may have committed the fraud does not automatically render the registered proprietor liable for such fraud and thus defeat the registered indefeasible interest in the lot.

Given the conclusivity of registration the Act has specific provisions that provide for compensation where an interested party is deprived of a lot or an interest in a lot because of a number of specified reasons. Without listing them all the more common reasons are fraud, incorrect registration, error in or tampering of the register and mistake or breach of duty by the Registrar or members of staff.

Notwithstanding that an interested party may be an eligible claimant there is a further provision in the Act that, for a number of stated reasons, specifies that there is no entitlement to compensation if certain matters exist. If compensation is payable it is paid by the State of Queensland.

Given the substantial financial consequences that flow from land dealings and registration of them we recommend that where you may have any concerns you should immediately consult a legal practitioner for advice. Certainly, in the case of claiming compensation there is a time limit specified in the Act within which a compensation claim must be made. If you think you may have a claim, seek advice.

## Can they do that?

JOHN MULLINS



"Can they do that?" is the most common question in relation to sporting legal issues I am asked. Recent examples of this include:

- "Can they take away the Storm's Premierships?"
- "Can they stop Folau playing in the third State of Origin?"
- "Can you have a salary cap?"
- "Can Jana Rawlinson compete for Great Britain?"
- "Can an athlete appeal against non-selection?"

The difficulty with attempting to answer these questions is where to look to find the answer.

The answer could lie in the law of the land, the rules of the competition or the rules of the National, State or International organising committee for that sport.

The one thing clear is that it is possible for the rules of the sport to be in conflict with the law of the land. These issues, on which many sport loving Australians have very strongly held points of view, can be extraordinarily difficult to ascertain the correct legal position.

The Super League case demonstrated what was initially thought to be the relatively simple process of setting up a rival competition, was in fact sorted out after many days in Court with millions of dollars of legal fees and a series of appeals. A simple question such as "can the Storm have their premierships taken away from them?" involves a review of the rules of the NRL, and possibly the ARL, a determination of who was entitled to make the decision

and the question of whether the legal principle of natural justice was provided in the circumstances.

If the Storm sought to challenge the salary cap, and if the salary cap was deemed to be an unlawful restraint of trade, then could the NRL rely upon a breach of a rule that was determined by the courts to be unlawful to impose penalties?

We see the courts involved in the resolution of employment disputes, breakdown of marriage, disputes over estates arising out of the last will and testament of the deceased, car accidents, domestic violence, white collar crime, bad professional advice and in fact every aspect of our lives, so it should be particularly unremarkable that the law also has a significant role to play in the resolution of disputes arising out of sporting matters.

It seems to me, at least in theory, it would be better if sporting disputes could be resolved without recourse to the courts. The Court of Arbitration for Sport was set up as an alternative to the traditional court system, but in effect, it offers very little benefit over the traditional court system other than a quicker process.

In a perfect world, sports would be able to determine their own disputes. In the ever increasingly commercial world of professional sport, disputes relating to sport seem remarkably similar to commercial disputes that find themselves in the same court system.

So in answer to the question "Can they do that?" the best possible response is "maybe, depends what the Court says".

# Unfair dismissals and serious crimes: how does that work?

NIGEL INGLIS



A recent decision by Fair Work Australia has received widespread media coverage. The Labor Government's new industrial umpire Fair Work Australia has handed down a decision that is likely to surprise many employers who use casual employees.

In *Wilson v Uncle Tobys*, Mr Wilson had been engaged by Uncle Tobys as a casual employee between 2002 and 2009. He was one of a number of casual employees who would be called in to cover absences or during peaks in production. Fair Work Australia found that Mr Wilson satisfied the requirements of the *Fair Work Act 2009* (Act) that he had worked on a regular and systematic basis and had the expectation of ongoing employment.

In 2007 Mr Wilson was charged with various criminal offences and was found guilty in 2009 in relation to eight of the charges. His criminal trial and the outcome were reported in the local press. When Uncle Tobys learnt of these charges they terminated Mr Wilson's employment. However, Mr Wilson appealed the sentence relating to the convictions and at the time of his claim with Fair Work Australia he was awaiting the result of all of those appeals.

It is important to note that where criminal convictions or sentences are appealed the original convictions are 'suspended' and in a sense are not taken to have occurred until the appeals are dealt with. Mr Wilson's claim for unfair dismissal identified that the decision by Uncle Tobys to terminate his employment occurred during this period.

Over the course of the unfair dismissal claim Mr Wilson's appeals were determined as being unsuccessful and he was sent to prison. Some of the charges that Mr Wilson was convicted of related to harassment involving an inappropriate photograph being sent to a female at her place of work, harassment involving pictures of a nude female being sent on a CD to a police officer's daughter and the stalking of a male person. The other matters involved making, producing and the possession of child pornography.

Uncle Tobys was also aware of some unspecified anonymous complaints by female employees of harassing behaviour by Mr Wilson that had been brought to its attention by union representatives. These employees did not come forward at the time.

Most employers would be surprised to learn that Fair Work Australia found Mr Wilson had been unfairly dismissed. However, the issue for Fair Work Australia in deciding that Mr Wilson's termination was unfair, revolved around the fact that Uncle Tobys had never given Mr Wilson an opportunity to *"respond to the newspaper articles and to put any matter that he wanted to put in mitigation. It might then have been appropriate to suspend him from the casuals list until resolution of the (criminal) appeals. As Mr Wilson's convictions were confirmed on appeal it would have been then appropriate for Uncle Tobys to have terminated his employment"*.

A decisive factor in this case is the charges related to some of the conduct that had nothing to do with Uncle Tobys or Mr Wilson's employment. Uncle Tobys did not wait for the convictions and sentences to be confirmed on appeal before they terminated his employment.

This case serves as a timely reminder for employers to ensure that even in the most serious of cases, they provide an opportunity for an employee to explain or offer an explanation for their conduct. It is clear that in the circumstances of this case Uncle Tobys would have been in a position to terminate Mr Wilson's employment, as the events had transpired. However, by not following this process, the actions by Uncle Tobys were still held to be unfair.

# Significant Impact on Trust Tax

MICHAEL KLATT



The High Court of Australia handed down its long awaited decision in *Commissioner of Taxation v Bamford*, *Bamford v Commissioner of Taxation* on 30 March 2010. This decision has a significant impact on the taxation of Trusts. Discretionary Trusts, or Family Trusts as they are commonly known, are often used as an effective asset protection and income splitting tool.

The Bamford Trust had entered into an offshore superannuation scheme. The Trust had made a contribution to a superannuation fund and incurred interest on borrowing to fund contributions in the 2000 and 2002 income years.

After an audit, the Commissioner of Taxation denied the Trust deductions for the interest expenses. As a result, the Trust had a higher taxable income than distributable income. The beneficiaries, who had received distributions from the Trust, then received re-assessments of their tax on the basis that the Trust's taxable income had increased. The Commissioner assessed the beneficiaries' taxable income on their proportionate share of the Trust's taxable income as stated in the Trust's original tax return notwithstanding that the Trustee of the Trust had resolved to distribute a specific amount of income to these beneficiaries in the relevant tax year with the residual amount to be distributed to another beneficiary.

The Trust's 2010 income was also affected as the interest deduction resulted in a further amount of taxable income. In this year, the Trust had a capital gain that the Trustee had distributed to the beneficiaries in specific amounts.

The High Court accepted that the 'proportionate view' is to be applied where the net income of the Trust for tax purposes is different to the "income of the trust estate". As a result, it is important for a trustee to carefully consider how resolutions at the end of each tax year need to be framed to ensure that, if the taxable income varies from the trust income, then the beneficiaries' taxable income will not change. One way of doing this is for the resolution to be framed on the basis that a beneficiary receive an amount of trust income which, when calculated as a proportion of the total trust income, equals \$X in taxable income.

In relation to the 2002 year, the High Court decided that income of the trust estate can mean the income of the trust according to trust law concepts as opposed to ordinary concepts. Accordingly, the terms of the Trust Deed are important. There should be an appropriate definition of net income. There should also be power to allow the Trustee to determine whether costs are attributable to income or capital. Many Trust Deeds allow for income streaming, i.e., the Trustee has power to distribute different classes of income to different beneficiaries.

It is thought that this High Court decision will have flow-on effects so that this sort of streaming is not possible as a result of the strict proportionate approach taken by the High Court.

Given the possible impact of this decision, it is important that Discretionary Trust Deeds are regularly reviewed and amended if necessary.

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JOHN MULLINS  
EDITORIAL

As this edition of the Mullins Report goes to press, Australia is going to the polls.

Recent history has been that when an election is called, business activity goes into hibernation pending the outcome of the election. Business waits to know in which direction the newly elected Government will be heading.

It will be interesting to observe whether in fact this phenomena occurs in this election as it would appear in the early stages of campaigning that both sides of Government are offering us very much more of the same with little variation between them. It may be that the business community will not anticipate any great change after the election and therefore it will be business as usual leading up to election day.

In relation to politics, we have seen recent changes to leadership and we are reminded that when playing for big stakes, the aspirations of ambitious politicians overtake traditional loyalties.

Articles in this edition relate to taxation and unfair dismissal. Certainly these two topics are significant in the election campaign.

The articles on registered interests and whether an agreement is binding or not, both arise out of interest in recent decisions in Queensland.

There have been many interesting decisions of the Courts in recent times, including in the criminal law area where Dr Patel finally had his day in Court. Both sides are now appealing the decision of the Court and given the highly complex legal arguments that arose during the trial, there are many chapters of this story to be written before it is finally completed. There is even talk that the matter may end up in the High Court on a point of law.

The new financial year has started with business activity still somewhat subdued. The lack of confidence in the market and the difficulty in raising finance is keeping the property sector, a major economic driver in South East Queensland, in a holding pattern.

Perhaps we will see renewed confidence and activity after the election. Let's hope so.