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MANAGED INVESTMENT SCHEMES – BEWARE THE FINE PRINT

MARK MADSEN

Some names are now almost common household terminology due to the trail of broken investors left in their wake: Prime Trust, Banksia, MFS, City Pacific, Equititrust... the list goes on. Four Corners recently reported on the extensive damage caused by several failed investment schemes.

In Australia, managed investment schemes operate outside the highly regulated world of banks. Otherwise known as "managed funds", "pooled investments" or "collective investments", generally, people are brought together to contribute money to be pooled with that of other investors or to be used in a common enterprise, with a responsible entity operating the scheme. Schemes may be in the form of cash management trusts, property trusts, equity trusts (both domestic and international), agricultural schemes, and mortgage schemes, to name a few. However, apart from the requirements to be registered if certain thresholds are met and otherwise for the responsible entity to be a registered Australian public company and hold an Australian Financial Services licence, there is relatively little regulation in respect of these schemes.

Both ASIC and the government at large are now faced with the need to overhaul the system in light of the impact on thousands of Australian investors. That impact is all the more concerning when one considers that often it is the substantial life savings of ordinary Australians approaching retirement which are invested without the level of due diligence necessary having regard to the limited extent of the regulatory framework.

Such due diligence would require investigation of the following which have been the undoing of many investors in past schemes: the checks and balances put in place by the scheme itself to ensure it has sufficient funds to back its lending; restrictions on the ability to lend money

to scheme owners or related entities or to engage in other transactions which present a conflict; the fine print in any disclosure, particularly in relation to the amount of brokerage fees, listing fees, management rights / fees with options to increase them, financial planners' fees and trailing commissions, and the rights of the responsible entity under its own constitution to engage in transactions without reverting to members of the scheme.

These are just some of the few factors which have allowed exorbitant amounts to be extracted from some past schemes, or for a Ponzi-style operation to be conducted where existing investors are paid dividends from the funds of new investors to disguise any trading difficulties.

The *Corporations Act* places specific duties upon directors and a prohibition against insolvent trading. However, by the time breaches of any such obligations are discovered, the horse has usually bolted.

ASIC recently recommended tougher laws to overhaul the legislative framework within which these schemes operate. However, at present, that is still on the drawing board and is in any event intended to be phased in over several years. In the meantime, it is very much a case of investors beware.

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BUYING ALCOHOL – IS IT GETTING EASIER OR HARDER?

CURT SCHATZ

Here at Mullins Lawyers we have a large section of lawyers who are experts in all legal issues relating to licensed premises. Those premises may be a pub, a club, a motel, a restaurant, a nightclub, a resort, a casino, or any combination of the above.

Many in the industry have held the view, that under the previous State Government there was too much regulation and too much bureaucratic red tape in relation to the regulation of licensed premises.

The Newman Government has formed an "expert panel" to advise the Government on recommended measures to reduce administrative burden and other regulatory red tape in relation to the liquor industry.

These measures will be broken up into various levels to enable some measures to be implemented immediately where no legislative change is required.

Part of the process for this was to seek submissions from stakeholders, with a doing date of 15 March 2013.

More than 300 submissions were received including:

- 118 from licensed industry businesses
- 94 from members of the public
- 27 from industry associations
- 61 from industry stakeholder groups (suppliers)
- 6 from community groups

You may have seen some media reports on the subject of off-premise/packaged liquor sale laws.

This is unlikely to change any time soon such that liquor will not be available in supermarkets or grocery stores in Queensland.

Some of the red tape reduction initiatives which may have an impact on you in your daily lives might include:

- Exempting community groups from requiring a permit to sell liquor at low risk events such as school fetes, or other community fundraising events.
- Exempting hospitals and nursing homes from requiring a liquor licence in order to serve a small amount (2 standard drinks per day) to patients and residents.
- Ceasing the requirement for liquor and gaming applications to be advertised in the newspaper and government gazette (applications will continue to be advertised via a sign on the main street frontage of the premises, and will also be advertised online).
- Allowing the use of "ticket in ticket" out (TITO) at casinos, clubs and hotels.
- Remove the requirement that an applicant for a liquor licence in respect of low risk restaurant/cafes must prepare a Risk Assessed Management Plan. A Risk Assessed Management Plan is a document subjective to each licensed venue. It sets out how the licensee will ensure that the premises provides a safe environment.
- Remove the requirement that an application for a liquor licence in respect of a low risk restaurant/cafe must advertise their application.
- Grant the commissioner the power to exempt the applicant for a liquor licence in respect of a low risk restaurant/cafe premises from the requirement to provide a community impact statement.

It is likely that there will be other similar measures which, in relation to low risk liquor provision environments, will reduce or remove red tape.

WILL INSTRUCTION SHEET ADMITTED TO PROBATE

KRYSTAL BELLAMY

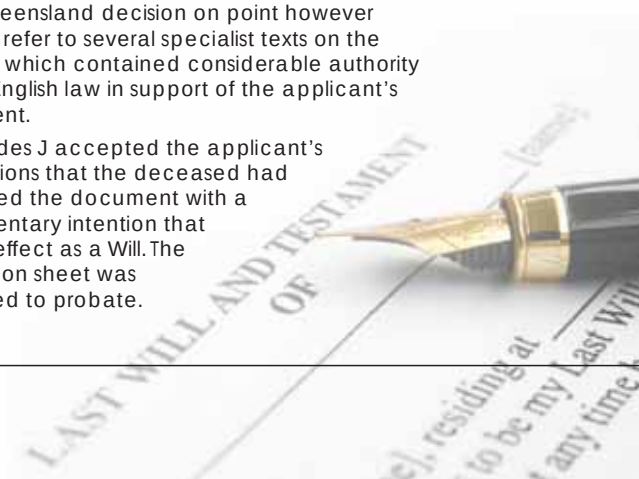
Section 10 of the *Succession Act 1981* (Qld) sets out the formal requirements for the execution of a Will in Queensland. The Will must be in writing and signed by the Testator (or someone else in the presence of and at the direction of the Testator). The signature of the Testator must be made with the intention of executing the Will and must also be made in the presence of at least two witnesses, who must also attest and sign the Will in the presence of the Testator.

In *Re Gloria May Limpus Deceased* [2013] QSC 66, the Supreme Court of Queensland considered whether a signed Will instruction sheet could be admitted to probate. The deceased had given instructions in respect of her Will. The instructions were contained within a seven page Will instruction sheet. The deceased had signed the sixth page in the presence of two witnesses. The seventh page noted a later appointment date for the execution of the Will. The deceased died the day before that appointment. Though the document complied with the requirements for a validly executed Will in all other respects, the probate registrar referred the matter to a judge out of concern as to whether the document had in fact been executed with a testamentary intention.

In submitting that the deceased had signed the document with the requisite intention, the applicant adduced evidence that the deceased had signed the instruction sheet on the understanding that if anything happened to her before she signed her Will, the instruction sheet may form her Will. The deceased's lawyer had advised her about the need for two witnesses and that signing the instruction sheet may revoke an earlier Will. In that respect, the deceased's attention had been drawn to a revocation clause on the first page. The deceased had read the instruction sheet in the presence of her lawyer and another witness, and had confirmed she was happy with the instructions before proceeding to sign the document in their presence.

Counsel for the applicant was unable to locate any Queensland decision on point however she did refer to several specialist texts on the subject which contained considerable authority under English law in support of the applicant's argument.

Philippides J accepted the applicant's submissions that the deceased had executed the document with a testamentary intention that it take effect as a Will. The instruction sheet was admitted to probate.



COSTS IN THE PLANNING & ENVIRONMENT COURT

ANTHONY O'DWYER

The Planning and Environment Court has been given a broad discretion to award costs in proceedings in that Court. This is a dramatic shift away from the limited power that the Court previously exercised.

The cost power applies to proceedings in the Planning and Environment Court that commenced after December 2012. The *Sustainable Planning Act* has set out a number of circumstances which the Court may have regard to when making a decision to award costs however that list is not exhaustive.

It is to be expected that if a party is wholly successful in the Planning and Environment Court then it is likely to obtain an order for costs against the other parties to the proceedings. Commercial competitors are on notice that their status is likely to be one of the circumstances that a Court will take into account. Submitters who join in or take appeals to further a matter of broader public interest might be protected from an award of costs even if they are unsuccessful in the proceedings.

There is a strong emphasis on taking advantage of the dispute resolution processes that are now well established in the Court. If a proceeding is settled early in the process through the dispute resolution processes then it is more than likely that each party will bear their own costs. A Court may order costs against a party when proceedings are settled at an early stage but it is more than likely that it will be necessary to show some action or inaction which would argue in favour of a costs order against that party as opposed to whether or not that party was simply successful or not.

The initial impact of the change to the cost regime in the Planning and Environment Court is probably that fewer appeals will be taken by submitters, particular where those submitters do not seek to gain any commercial advantage from doing so. Where there is a commercial advantage a submitter will obviously have to weigh up the benefit of taking the proceedings as against the detriment of any likely costs order against it. The likely impact of costs orders against unsuccessful councils in the Court will obviously be of concern to councils. Hopefully it will deter councils from failing to grant approvals of worthy applications where those applications might be politically difficult for the council. The prospect of a council deferring the decision to the Court where a council realises that it ought to approve the application but finds it politically expedient to refuse it might be a thing of the past.

GOOGLE!

ANDREW NICHOLSON

Google has had a win in the High Court in successfully defending a claim by the ACCC, which had alleged that Google's search results were misleading and deceptive. The ACCC's claim was based on the "sponsored links" which are paid for by advertisers to appear (via Google's Adwords Product) on Google's website and the selection of "keywords" which are relevant when displaying search results.

The sponsored links contained material that was misleading and deceptive. For instance, STA Travel had placed an advertisement and selected the keywords "Harvey World Travel" when they had no relationship with that company. The result was that a consumer undertaking a Google search for the term "Harvey World Travel" was likely to receive a result containing a sponsored link or advertisement for STA Travel. Another example included Car Sales choosing the keywords "Honda.com.au" as one of its keywords within the Google search.

Google argued that it was merely a publisher (or intermediary) of the material which appeared in its search results and that any advertising material (including specific keywords) were chosen by the advertiser. The High Court accepted that Google had not endorsed or approved the advertising material, simply by displaying the search results on its website or search engine. Contrary to the findings of the Full Federal Court (where the ACCC was successful – hence Google's appeal to the High Court) the Court accepted that Google had not actively participated in the advertising process and had acted as a "mere conduit" for the advertiser.

There are a number of clear messages which are highlighted by the decision:

- Google was found to be in the position of a publisher who did not endorse or approve the advertisements. That will not always be the case.

The result was that a consumer undertaking a Google search for the term "Harvey World Travel" was likely to receive a result containing a sponsored link or advertisement for STA Travel.

- Businesses cannot think that they are able to post material on the internet with impunity. If misleading or deceptive material is posted to the internet, it will be dealt with in the same way as any other traditional (advertising) material.
- We have previously noted that businesses which have an online presence must be vigilant. In particular where a business has a social media presence (Facebook, blog, LinkedIn page, etc) this should be regularly monitored, otherwise the business may be guilty of adopting or endorsing the material posted to those sites (even by third party users).
- Businesses should adopt safeguards in relation to their on-line presence and put in place checks and balances to minimize the risk of infringement/ complaint.

GENDER EQUALITY REPORTING OBLIGATIONS

TRACEY JESSIE

The *Workplace Gender Equality Act 2012 (Cth)* (Act) places new reporting obligations on:

- employers of 100 or more employees in Australia; and
- employers that are registered higher education providers.

The Act applies to any employer (including individual people and incorporated or unincorporated bodies or associations) that employs 100 or more employees. However the Act does not apply to the Commonwealth, a State, a Territory or certain statutory authorities.

The new reporting obligations will be introduced throughout the next two years.

Under the Act employers must lodge annual written reports with the Workplace Gender Equality Agency. From 2014 the reports, which will be public documents, must contain information on gender equality indicators including information about:

- the gender composition of the workforce;
- the gender composition of the governing body;
- the equality of remuneration between women and men;
- the availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees;
- the availability and utility of employment terms, conditions and practices relating to working arrangements that support employees with family or caring responsibilities; and
- consultation with employees on issues concerning gender equality in the workplace.

The reporting period runs from 1 April to 31 March in the following year. At the end of each reporting period an employer must lodge a report between 1 April and 31 May.

The first reporting period concluded on 31 March 2013 and relevant employers have until 31 May 2013 to prepare a report. For this first reporting period the reports must contain information about the employer's workplace profile and limited reporting requirements.

The current reporting period runs from 1 April 2013 to 31 March 2014. At the conclusion of the current reporting period employers must lodge written reports between 1 April 2014 and 31 May 2014 addressing the gender equality indicators.

Once an employer has lodged a report with the Workplace Gender Equality Agency the employer must provide employees, shareholders and members with access to the report. The employer must also take all reasonable steps to notify applicable employee organisations that the report has been lodged.

Employers will face sanctions under the Act for providing false or misleading information in reports or failing to comply with the new reporting requirements.

Minimum standards will be set in relation to the gender equality indicators and the Workplace Gender Equality Agency may conduct random reviews to ascertain an employer's compliance with the Act.

If an employer fails to comply with the Act the Workplace Gender Equality Agency may name the employer in a report to the Commonwealth Government. The Workplace Gender Equality Agency may also name the employer through other means including on the website of the Workplace Gender Equality Agency and in newspapers.

If an employer fails to comply with the Act the employer may not be eligible to compete for contracts under the Commonwealth procurement framework and may not be eligible for Commonwealth grants and financial assistance.

Employers may consider reviewing their workplace practices in relation to the gender equality indicators in preparation for meeting their reporting obligations in 2014.

PAT MULLINS
EDITORIAL

Evolutionary change does not necessarily disrupt the continuity of things. On the other hand, revolutionary change can signal a rupture between what was past and what is to come.

The articles in this Newsletter all deal in some respect with change. I am sure that the Probate Deputy Registrar of the Supreme Court, when I started my Articles in 1976, is turning in his grave at the thought that a Will Instruction Sheet might be admitted to Probate. The finance world is certainly changing with the emergence of very risky, and fraudulent, schemes.

Of course, some change is positive and it is high time that employers were held to account on gender equity in employment. The changed costs regime in the Planning & Environment Court probably reflects current commercial realities. The area of gaming and liquor is far more sophisticated today than it was when Pat Mullins Senior frequented the Licensing Commission. Pope Benedict XVI was renowned for clinging to a less than optimistic world view which feared change as threatening the continuity with the past. He opposed progress if progress meant a rupture from the past. A more positive world view sees the past as finished but nonetheless looks forward to a positively unfolding future.

We need to cultivate our appreciation of history and tradition, taking from the past those positive things that best equip us to face the world today and into the future. We need to avoid romanticising the past and face today's world with our eyes wide open. For the most part, the changes we discuss in the articles of this Newsletter represent positive changes, even though most are a clear (and welcome) break from the past.

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