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MULLINS
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Door to door selling can be unconscionable

TONY HOGARTH, PARTNER

IN 2013, THE FULL COURT OF THE Federal Court found vacuum cleaner company, Lux Distributors Pty Ltd, acted unconscionably in breach of the Australian Consumer Law. Essentially, the Court found the unsolicited, door-to-door sales techniques used by Lux's sales representatives amounted to unconscionable conduct. Recently, as a follow up to the earlier decision, the Court handed down its orders resulting in some expensive consequences for Lux.

Mrs Baird, an elderly woman who lived alone, received a cold call from a Lux representative who said he would be in her area and offered to provide a maintenance check of her Lux vacuum cleaner. Mrs Baird stated over the phone that she did not want to buy a new vacuum cleaner.

The Lux representative called into Mrs Baird's home anyway and demonstrated to her the superior suction ability of a new vacuum cleaner. The Court ultimately described this conduct as a "deceptive ruse" to gain entry to her home, when the true intent was to sell her a new vacuum cleaner.

After an hour and a half of demonstrations, Mrs Baird felt obliged to buy the new vacuum cleaner "because he had unpacked everything out of the box" which he had retrieved from his car for the comparative suction test.

Mrs Baird's existing cleaner had been bought for about $300 ten years earlier and was working without problem. She agreed to buy the new cleaner for just under $3,000.

A few days later, Mrs Baird felt guilty about spending this amount of money on a vacuum cleaner. The purchase was subject to a ten day cooling off period and, after a complaint was made by a friend of Mrs Baird, Lux refunded the purchase price and replaced the old vacuum cleaner.

The 2013 decision found Lux had acted unconscionably in breach of section 21 of the *Competition and Consumer Act 2010*.

Justice Jessup handed down the Court Orders made against Lux, which included:

- two $185,000 fines;
- issuing restraining orders preventing Lux from contacting any person "without disclosing" the person attending the house would be a sales agent;
- Lux establishing a training program for employees and agents. Details of the training program were prescribed by the Court and included appointing a compliance officer, undertaking a risk assessment, establishing a compliance policy, establishing and maintaining a complaints handing system, providing staff training, undertaking annual external reviews and providing certain documents to the ACCC.

This case is a salutary lesson about pushing products on consumers and businesses need to take heed.

The impact and application of the unconscionable conduct and related provisions of the Act are extensive. This is a growing area of law, and businesses need to be aware of the significance of these provisions.

To avoid the serious consequences faced by Lux and other enterprises in recent years, it is important to review your business practices and ensure your business and your sales team don't overstep the mark.

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School and Council not liable for girl's tragic dive accident

LIANA ISAAC, SOLICITOR

THE RECENT DECISION IN UNITING *Church in Australia Property Trust (NSW) v Miller; Miller v Lithgow City Council* found a school and local City Council were not liable after a 12 year old girl dived into the local council's swimming pool and sustained a fracture to her cervical vertebrae, resulting in incomplete tetraplegia.

Emilie Kate Miller, the Plaintiff, was an accomplished swimmer. Over the December 2007 holidays, Emilie's school swimming coach, Mr Critoph, arranged for her to train under the supervision of Mr Brodie (a father of children at the school) at the Lithgow City Council pool. Mr Brodie was not a licensed swimming coach.

The pool was 1.08m deep at its shallow end and there was a "no diving" sign painted onto the concrete surrounding the pool.

Mr Critoph had previously taught Emilie to execute a popular dive in competitive swimming known as a "track start" dive. The dive involves the swimmer placing one foot and both hands on the edge of the pool (or diving block) and the second foot 50 to 60 centimetres behind. The swimmer then propels themself into the water with both hands and feet.

Whilst training under Mr Brodie's supervision, Emilie attempted the track start dive from the shallow end of the pool but her back foot slipped, causing her to propel into and collide with the bottom of the pool.

Emilie brought claims against her school and the Lithgow City Council. A multitude of evidence regarding swimming pools, trained competitors and various competitive dive starts was brought by the parties.

In the end, the primary Judge dismissed Emilie's claim against the Council as:

- the "no diving" sign was directed to the general recreational public and not to competitive trained swimmers. Given the frequency of practiced competitive dives into the shallow end of pools, the Council was not negligent for failing to preclude all dives into the shallow end of the pool;
- given Mr Brodie's experience at the pool, the Council was not negligent in permitting an unlicensed coach to supervise Emilie; and
- having regard to the literature available at the time of the accident, the Council should not have been aware of any significant increase in danger associated with track start dives or the importance of readily grippable coping tiles around the edge of the pool.

However, the primary Judge made a finding of liability against the school on the basis that:

- unlike the Council, Mr Critoph, being a professional swim coach, should have been aware of the elevated risk associated with track start dives and the limited grip in the coping tiles at the shallow end of the pool;
- Emilie should have been trained how to abort a mis-executed track start dive; and
- the school failed to undertake a proper inspection or risk assessment of the pool before instructing Mr Brodie to train Emilie at the pool.

The school appealed the primary Judge's decision which was allowed, and the Court found the school had not breached its duty of care.

The Court of Appeal found:

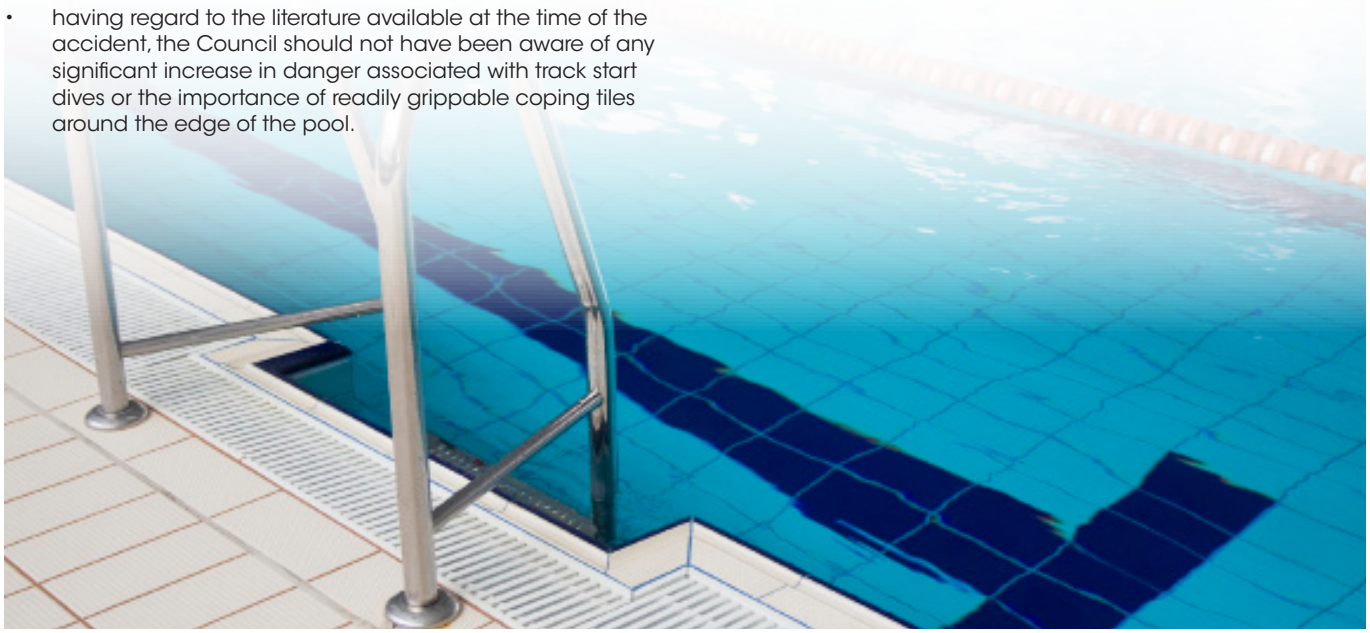
- a track start dive did not present a higher risk of injury compared with other competitive dives. It also found the size or grip of the coping tile around the pool was not the cause of Emilie's injury.
- had Emilie been properly trained, she still wouldn't have been able to safely abort the mis-executed dive. The finding was consistent with the expert evidence presented and indeed Emilie's own evidence that after she slipped she "was going forward and could not stop."
- it was not incumbent on the school to conduct a risk assessment of all pools at which its students might train during the school holidays. It further found that, even if a proper risk assessment had been conducted, the result of the risk assessment would not have been for Mr Critoph to make a decision to prevent track start diving from the shallow end of the pool.

Emilie cross-appealed the decision in favour of the Council but the Court of Appeal upheld the primary Judge's findings.

In concluding his judgment, Leeming JA stated "Ms Miller's tragic accident was entirely blameless on her part, but it does not follow that her injury was caused by a breach of duty owed to her by either the school or the Council".

This a good example of how a plaintiff can fail to establish liability in even the most tragic of cases.

We are pleased to say Emilie now participates in competitive hand cycling and recently secured a gold medal at the UCI Para-cycling Road World Championships.



Can volunteers serve liquor?

JODIE LONARD, ASSOCIATE

IT IS NATURAL TO ASSUME THAT ANYONE working behind a bar has a formal Responsible Service of Alcohol (RSA) certification, but what about volunteers?

We are often asked by clients if volunteers can serve liquor or maintain a bar at a commercial business, a recreational club, a sporting event or at special events.

The motivation to have volunteers can arise from cost cutting, particularly for local recreational clubs with little or no income and not-for-profit organisations. Volunteers are also used to increase engagement with the community or, in the case of recreational clubs, their members.

Whether a volunteer may lawfully serve liquor comes down to a few issues, of course starting with the venue's ability to sell liquor in the first place.

In most circumstances a liquor licence or permit is required from the Office of Liquor Gaming and Racing to sell or supply liquor in Queensland. Exceptions are sometimes made for associations conducting small regional shows and events that are not-for-profit.

If the venue or event is exempt from requiring a liquor licence or permit under the *Liquor Act 1992* (Qld), then volunteers are not required to have formal RSA certification from a registered training organisation.

If a liquor licence or permit needs to be held, any persons selling or supplying liquor must have RSA certification from a registered training organisation. In this instance, licensees are responsible for ensuring that all staff and volunteers who serve or supply alcohol have the appropriate certification.

There are significant penalties for selling or supplying liquor if an exemption is not applicable. Fines of up to $58,000 can be issued for the first offence and up to $118,000 (or 18 months imprisonment) can be issued for subsequent offences.

Even if a liquor licence or permit is obtained, there are other considerations for licensees, such as:

- only selling or supplying liquor from an area which forms part of the approved licensed area;
- complying with the conditions imposed on its liquor licence, including trading hours and noise restrictions;
- complying with other requirements of the *Liquor Act 1992* (Qld), including those pertaining to unacceptable liquor practices and promotions; and
- being aware of any insurance or work health and safety issues that could arise when engaging volunteers in the service of liquor.

Planning any event of significance can be a large undertaking, but sound planning in relation to licences is worth the extra time to reduce risk and minimise liability down the track.

Four grounds for disqualification of directors

ADAM HAMREY, ASSOCIATE

EVERYONE KNOWS A STORY ABOUT A person doing the wrong thing as a company director. It is not surprising that such conduct can lead to a person being disqualified from managing a corporation under the *Corporations Act 2001* (Cth) (the Act). However, criminal conduct in the management of a company is not the only ground on which a person can be disqualified.

Under the Act, the main grounds for disqualification are:

1. **Automatic disqualification for five years** if the person is convicted of:
   - an indictable offence anywhere in the world involving conduct that occurs in the course of making decisions that affect the whole or a substantial part of a corporation's business; or otherwise affects a corporation's financial standing;
   - an offence under the Act punishable by more than 12 months imprisonment;
   - an offence anywhere in the world involving dishonesty and punishable by at least three months imprisonment; or
   - an offence in a foreign country punishable by more than 12 months imprisonment.

ASIC can also apply for this disqualification to be extended to up to 15 years.

2. **Automatic disqualification** while an undischarged bankrupt. Despite the fact that the person may not have otherwise engaged in any wrongdoing.

3. **Disqualification by the Court**, if:
   - the person has contravened a civil penalty provision of the Act or has at least twice contravened the Act while an officer;
   - within the last seven years the person has been an officer of two or more failed corporations and the Court is satisfied that the management of the corporation was responsible for such failure;
   - the person has at least twice been an officer of a corporation that has contravened the Act, and they failed to take reasonable steps to prevent such contravention; or
   - the person is disqualified under a foreign law.

4. **Administrative disqualification by ASIC** if within the last seven years the person was an officer of two or more corporations which were wound up while they were an officer (or within 12 months after they ceased being an officer); and a liquidator's report reveals the corporation may be unable to pay unsecured creditors more than 50 cents in the dollar.

While the primary rationale behind the disqualification provisions is public protection, the Courts also recognise that they can serve a punitive purpose. Although there is a clear benefit in preventing unscrupulous people from being involved in corporate management, there is a danger that a too rigid approach may stifle legitimate enterprise. For this reason, the Court and ASIC retains an overarching discretion to allow a person to manage a corporation.

This article is only intended to be a general summary of the grounds for disqualification. Please contact us if you would like to discuss such issues in further detail.

Your obligations for holding a power of attorney

CHRIS HERRALD, SENIOR ASSOCIATE

AN ENDURING POWER OF ATTORNEY IS A VERY powerful document and it is important to talk about what happens when you have been appointed as someone's attorney.

You've been appointed as someone's attorney, now what do you do?

Firstly, read the enduring power of attorney document. The terms of your appointment will be set out in that document and you need to know what types of matters you have power of attorney for, and when your power of attorney begins.

A power of attorney for personal and health matters will not start until the grantor has lost the ability to make decisions for themselves. The point in time when someone has lost decision making capacity can be very difficult to ascertain, and can often follow a gradual decline. Ultimately, it may be necessary to have a person medically assessed, or make an application to the Queensland Civil and Administrative Tribunal, to determine whether they have lost decision making capacity.

On the other hand, a power of attorney for financial matters will start at the time specified in the document. If it is not specified, then it will start immediately, even if the person still has decision making capacity.

"Being someone's attorney can be far more onerous than being the executor of someone's will."

Does this mean that you, as the attorney, have open slather to interfere in the person's financial affairs? The answer is no, you do not. If you are a person's attorney for financial matters and the person still has decision making capacity, then you should not take any action as that person's attorney without their direction. Once that person has lost their decision making capacity, then you undoubtedly will be presented with some very weighty decisions.

As an attorney, your overriding duty is to act unreservedly in the best interests of the person who appointed you. As someone's attorney, you will be making decisions about someone's life and that fact is often overlooked or downplayed. The enduring power of attorney document is comprehensive about an attorney's role, yet we often find attorneys do not read the document before they start making decisions.

It is not an attorney's job to simply pay the bills. You may have to make incredibly important decisions that will affect the quality of life of the person who has lost their decision making capacity. This can include decisions about where someone lives, how their finances are managed and what health care they receive. If you do not know the ins and outs of the person's life, then you as attorney should make it your mission to find out as much about that person as possible. Where possible, the person who has lost decision making capacity should be involved in the decision making process and their views should be taken into account.

Being someone's attorney can be far more onerous than being the executor of someone's will. In the will, there is a written road map for the executor to follow. As someone's attorney this may not be the case, yet all of these very important decisions fall on the attorney's shoulders.

If you are unsure of what is expected of you as power of attorney we recommend having a chat to one of our wills and estates lawyers so we can put you on the right path.

CURT SCHATZ
MANAGING PARTNER

EDITORIAL

It is almost Christmas and time for a little breather.

On behalf of the partners and staff here at Mullins Lawyers, I wish you and your families and loved ones a very safe and happy Christmas. We hope you enjoy the festive season and we look forward to catching up with you all next year.

Whilst talking about friends and family, we very much treasure our people here at the firm. The partners are always keen to recognise staff who have provided loyal and competent service to our clients. Recently, we had an internal function to emphasize the importance of providing career growth and certainty for our people. We celebrated a number of internal promotions, these were Alan Strain from Special Counsel to Partner, Susan Isaac from Senior Associate to Special Counsel, and Chris Herrald, Krystal Bellamy and David Callaghan all moving from Associate to Senior Associate.

Congratulations to all of these people, and we look forward to seeing their continued involvement with our valued clients and also in the business community.

In this edition, there are a broad group of topics ranging from the general standards required to be a director of a company, to liability for freak accidents. There is also an article on volunteers and the service of alcohol by volunteers.

We typically try to find topics which have general interest, and which are topics commonly discussed at the back yard barbeque.

I trust that these articles will fit the bill for those purposes and that you will draw some relevant knowledge from them.

If you have any queries or questions in relation to any of the articles, please do not hesitate to contact us.

Once again, thanks to all of you for your support in 2015.

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