

The Pub with **NO SMOKE**

By: Curt Schatz



The Queensland Government has recently passed changes to the Tobacco and Other Smoking Products Act thus introducing partial smoking bans from 1 January 2005 with the aim of a total smoking ban in all indoor licensed premises by July 2006.

Given the varying nature of services offered by today's hotels, as well as locations occupied, it may be that some hotels have a variety of obligations to attend to under the new regime.

LIQUOR LICENSED PREMISES (INDOORS)

Dining areas have been non-smoking areas since 2002. However, from 1 January 2005, at least one-third of the total enclosed area of a liquor licensed premises must be non-smoking. This one-third area does not have to be a single area and it can include the already existing non-smoking dining area. Furthermore, "enclosed area" is broadly defined to include any area that has a ceiling or roof that is completely or substantially enclosed. Therefore, licensees can use existing office areas, kitchens and storage areas as comprising part of the one-third non-smoking area. From 30 September 2005, at least two-thirds of the enclosed area must be non-smoking and from 1 July 2006, 100% of the enclosed area must be non-smoking.

LIQUOR LICENSED PREMISES (OUTDOORS)

Similar to the indoor licensed areas, from 1 July 2006, smoking will be prohibited in any outdoor eating or drinking places. Such places are those areas which form part of the licensed area of the hotel but do not fall within the definition of "enclosed area". Hotel owners however will be

able to set up a Designated Outdoor Smoking Area whereby patrons can go outside and smoke. There will be no service of food or drink allowed in this Designated Outdoor Smoking Area and such an area must not comprise more than 50% of the outdoor area. If Licensees establish a Designated Outdoor Smoking Area, they will have to maintain a Smoking Management Plan.

EATING OR DRINKING VENUES – POKER MACHINES

From 1 January 2005, all publicans must ensure that at least one-third of all poker machines at liquor licensed premises are designated as non-smoking machines. Therefore, if a venue has 22 poker machines, at least 8 must be designated non-smoking machines. From 30 September 2005, at least two-thirds of all poker machines must be non-smoking and by 1 July 2006, all gaming rooms must be totally smoke free.

The Law does not require non-smoking machines to be separated from smoking machines and it is allowable for a non-smoking machine to be situated immediately adjacent to a smoking machine.

OUTDOOR PUBLIC AREAS – BUILDING PREMISES

For commercial buildings, it is now illegal to smoke anywhere within four metres of the building's entrance. While the rule does not apply to general licensed premises or hotels themselves, hoteliers should note this rule may possibly apply to detached bottleshops. In this regard the penalties for smoking near a non-residential building are payable by the smoker and not the occupier of the building.

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TWO'S A DIVORCE THREE'S A PROPERTY SETTLEMENT

By: Kirstie Colls

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PENALTIES

As part of its commitment to non-smoking, the Government has introduced more penalties for breaches of the Act. Licensees must install signs such as a non-smoking sign in dining areas and gaming areas or they will be liable to on the spot fines. If a licensee allows a patron to smoke in a non-smoking area, it may be liable to be prosecuted in the Magistrates Court with a maximum penalty of up to \$1,500.00. Such penalties shall increase up to \$10,500.00 after 1 July 2006. There are several defences to such charges if the licensee can prove it could not possibly be aware a person was smoking in the non-smoking area or that the licensee had previously asked the offending person not to smoke on the premises.

Notwithstanding the impact on trade, a failure to comply with these new laws could lead to heavy fines. If publicans have not already set aside non-smoking areas, it would be prudent to do so as soon as possible.



As from 17 December 2004 the power conferred on the Family Court of Australia to bind third parties with orders made in relation to matrimonial property settlements goes further

than it has ever gone before. With the commencement of the *Family Law Amendment Act 2003* the Court now has the power under Part VIIIAA to make orders with respect to matrimonial causes which can significantly alter or diminish the rights of third parties in so far as those rights extend to parties to a marriage.

Part VIIIAA has only taken effect from December 2004 whereas other provisions of the legislation became effective almost 12 months earlier. This was to provide those parties, such as banks and financial institutions, whose rights will be most regularly affected, opportunity to prepare for the new age in property settlements.

Part VIIIAA confers power on the Court to make orders which:

- Direct a creditor of the parties to substitute one party in place of both with respect to joint liabilities owed to the creditor;
- Direct a creditor to substitute one or both parties in place of the other party;
- Direct a creditor to alter the proportions to which each party may be liable for a joint debt but for the order;
- Direct companies to transfer shares from one party to another;

- Restrain creditors from repossessing matrimonial property or instituting legal proceedings against a party;
- Direct third parties to do anything in relation to property of a party that alters the rights, liabilities or property interests of the third party.

The powers of the Court have always enabled it to make orders that directly or indirectly affect third parties, however those powers were limited by the High Court in *Ascot Investments Pty Ltd v Harper*. The court held in that case that orders could not be made which would deprive a third party of an existing right or impose a duty on a third party which it would not otherwise be liable to do.

These powers override any other law, whether written or unwritten, of the Commonwealth, a State or Territory, or anything in a trust deed or other instrument, whether done before or after the commencement of the new laws.

Part VIIIAA now goes far beyond *Ascot Investments*. These powers are to a degree, limited. Orders cannot be made which affect the rights of third parties without affording those parties procedural fairness with regard to notice and an opportunity to be heard by the court. Orders can not be made where there is a likelihood that the result of the order will be that the debt is not paid in full or generally just or equitable.

Are these new powers conferred on the Family Court constitutionally valid? It may be said by some that a constitutional challenge is inevitable.

HIGHWAY TO HELL

By: Roland Davies



The iconic Australian film *The Castle* depicted the quintessential Aussie Battler, Darryl Kerrigan, fighting the Government's attempts to resume his property. Each year many homeowners are faced

with a similar predicament as the Government is forced to acquire new land to build roads for Queensland's rising population.

The Acquisition of Land Act 1967 ("the Act") empowers the Government to acquire land for specified purposes including the construction of roads. Often the owner will first be notified of the Government's intention to acquire their land through receipt of a Notice

of Intention to Resume in the post. The Notice of Intention to Resume is a Notice which outlines the extent of the land being acquired in addition to the purpose for which it is being acquired. The land is taken to be acquired by the Government on the day that a Notification of Resumption is published in the Gazette.

The Act provides that landowners can submit a written objection to the Government in respect of the acquisition of their land. However it is unlikely that the Government will countenance any argument that the acquisition is against "the vibe".

Owners of land acquired by the Government are entitled to

compensation for their loss. Landowners must submit a written claim for compensation to the Government identifying the amount of compensation they wish to claim and the particulars of their loss. The assessment of compensation is made at the date the land was acquired by the Government. It is prudent to engage a valuer to determine the appropriate amount of compensation that should be claimed.

If the landowner and Government cannot reach agreement about the amount of compensation that should be paid then either party can refer the matter to the Land Court for determination.

Courtroom Drama for Sporting Injury

By: Cameron Seymour



Sports administrators and players gasped when ex-New Zealand Rugby League player, Jarrod McCracken won his case in February against Marcus Bai, Stephen Kearney and their club, the Melbourne Storm.

The Court ruled Bai and Kearney intended to cause injury to McCracken in a spear tackle. The resulting neck injury ended McCracken's football career.

Generally, people who play competitive sport voluntarily assume the risk of injury suffered in the game, provided the injury results within the rules.

In the last few years States have introduced legislation which codifies claims for injury suffered in such circumstances. In 2002 the Queensland Parliament introduced the *Civil Liability Act 2003* ("CLA"). All of us owe duties of care to persons who could be injured by our conduct. When we play sport, it is foreseeable that accidental injury could occur and we submit ourselves to that risk. Duties of care still exists but an injury caused within the rules of the game may occur without anyone breaching a duty of care.

The Act clarifies where duties of care are owed and breached. There is a strong focus on personal responsibility. The Act defines the concepts of obvious risk and inherent risk, but does not offer any defence to an intentional injury caused outside the rules of the game.

Broken bones and lacerations (or worse) may be an "obvious risk" or "an inherent risk" (as those terms are defined in the CLA) in a body contact sport such as football. An injury suffered in a legal tackle may not result in any entitlement of the injured party to sue. However, that situation is distinguishable from a

person who suffers injury for example because they were tackled on an exposed sprinkler head which the players did not know existed on the field. In that situation, the risk may not have been obvious or inherent.

Illegal conduct such as an intentional assault unconnected with the run of play or outside the rules of the game would likewise not be considered an obvious or inherent risk and therefore a player suffering injury as a result would have a right to sue the party whose action caused the injury. Criminal prosecution could also eventuate.

GENERALLY, PEOPLE WHO PLAY COMPETITIVE SPORT VOLUNTARILY ASSUME THE RISK OF INJURY SUFFERED IN THE GAME, PROVIDED THE INJURY RESULTS WITHIN THE RULES.

Although the concepts seem relatively clear, there will always be "greys areas" which stimulate debate as to whether the circumstances of an injury arose as an obvious or inherent risk. Take for example a situation where a cricketer fielding a reasonable distance from the batsman is hit on the head by the ball and suffers injury. The injured player is unlikely to succeed against any party because the risk of such injury should have been obvious and not able to have been avoided with the exercise of reasonable care and skill. However, what is the situation where a player, for example a child, is sent in to bat without a helmet and suffers a head injury when facing a fast bowler? The injury may not have occurred as the manifestation of an inherent risk if the batsman was wearing a helmet. Is anyone liable in that scenario?

At the end of the day, the CLA has sought to clarify the existing law in relation to when a person owes a duty to another and when that duty is breached. As is sometimes the case with "clarifying" legislation, when scrutinized in a particular factual matrix a clear answer does not emerge. The law is open to interpretation. Minor injuries will not result in the law being tested. Major or catastrophic injuries however will see the CLA brought into focus in the next few years.



Sandbar Jury NOT DUMPED

By: Sam Kendall Marsden



In the last edition of Mullins Report I examined two 2004 tripping cases (*Boroondara City Council v Cattanach and Lake Macquarie City Council v Holt*) in which the Courts reiterated how they expect pedestrians to take reasonable care for their own safety.

In this edition of Mullins Report I examine the much-publicised recent NSW case of *Swain v Waverley Council* (9 February 2005). At first glance, Swain appears to fly in the face of the emphasis on personal responsibility inherent in decisions such as *Cattanach and Holt* but a closer examination of the decision reveals that is not the case.

Guy Swain was a swimmer who became a quadriplegic after suffering serious spinal injuries when he dived into a submerged sandbar between the flags at Bondi Beach in November 1997. Swain sued Waverley Council on the basis the Council had failed to take reasonable care in positioning the flags and for failing to warn him of the sandbar. The case was heard by a Judge and a four person jury who found in Swain's favour (with 25% contributory negligence) and Swain was awarded \$3.75 million.

The Council successfully appealed to the NSW Court of Appeal. Swain subsequently appealed to the High Court solely on the flag placement issue.

The High Court found in Swain's favour by a 3-2 majority. The majority held there was sufficient evidence on which the jury could have been satisfied the Council had been negligent.

Swain is of very limited precedent value because, as the majority of the High Court pointed out, the case involved the correct approach to be taken by Appeal Courts in considering jury verdicts rather than the liability of local authorities to surfers.

The *Civil Liability Act 2003* ("the Act") was enacted in Queensland in the light of the IPP Report on the Law of Negligence in Australia. The Act specifically excludes jury trials in non-WorkCover personal injury claims and contains various provisions regulating liability. Workers compensation legislation excludes jury trials in WorkCover claims.

Swain is a case which must be viewed in its own context and not as a precedent for similar future cases. The irony is that a person injured in similar circumstances to Swain may now fail where he succeeded because his case and others like it may have been the catalyst which triggered recent tort reform.

The High Court is due to revisit Council liability in *Wyong Shire Council v Vairy* and *Mulligan v Coffs Harbour City Council* which both involve aquatic injuries. It will be interesting to see how these Plaintiffs fare.



EDITORIAL

By: John Mullins

On 31 March 2005 Mullins Lawyers celebrated its 25th Anniversary. On that date in 1980 the firm commenced as Patrick J Mullins Solicitor & Notary Public. Since that time much has changed in Australia, business, the global community and the law. Back in 1980 our firm the size it is today would have been one of the biggest in Brisbane.

Much has also changed in the practice of law. Our firm has changed and grown and technology has been a large driver in these changes as it has led to revolutionising the speed at which business is done. We hope that what has changed very little since the day Dad set up practice in 1980 is our values. We hope that we practice law today with the same duty to our clients, honour, decency and integrity as Dad practised back in 1980.

The recent jailing of former directors of the failed HIH and the disintegration of Arthur Anderson following Enron stand to highlight how standards of honesty and ethical behaviour have deteriorated over the years. It is certainly our commitment to ensure that we seek to maintain the higher standards of ethical and professional behaviour at all times.

We are delighted to say that many of our clients today have been clients with the firm for all or a substantial part of this 25 years. We believe in developing long-term sustainable relationships with clients not short term disposable ones. We sincerely thank our clients for their loyalty and support over the last 25 years and we look forward with enthusiasm to the next phase in the firms' history.

This edition of the Mullins Report as always seeks to deal with some topical issues which includes the very difficult issue of the elimination of smoking from licensed premises. We also report on two highly interesting and topical cases with respect to injury. One arising out of sport and the other occurring at the beach. Both of these cases have received significant publicity.

It is clear to me that the issue of where personal responsibility starts and finishes and where you can hold other people accountable for injuries you sustain will continue to be uncertain for sometime. The spotlight has been focused on the sporting field and what participants in sport consent to and what they do not. Persons should continue to have liability for their actions regardless of which side of the proverbial fence it occurs on but clearly this creates problems for players, clubs, administrators and the sports themselves.



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