



M & M

Report



Editorial



by John Mullins

It was with pride and pleasure when we heard that Mr Pat Mullins Senior, the founder of the firm and our consultant, had received an Order of Australia Medal in the Queen's Birthday List.

Dad received his Order of Australia Medal for service as an honorary legal adviser and to cricket administration through the Queensland Cricket Association.

Dad is a life member of Queensland Cricket and the Queensland Cricketers' Club and his famous cricket library is now part of the Melbourne Cricket Club library.

Over the years Dad undertook honorary legal work for many sporting organizations including the Queensland Rugby League and Queensland Cricket and to this day we act as honorary solicitors to Queensland Junior Cricket. Over the years Dad has acted for and been an advisor of many religious orders and the firm continues to act for most of these today.

Dad was what many would regard as an "old style" lawyer who was honest, worked hard and long and was totally dedicated to his clients. This ethos has been passed on to the firm and has formed the basis for the firm's set of values which we have annunciated and are available on the website for all to see.

The end of the financial year was for us a very busy time as many transactions are required to be completed in one financial year. Over the last six months the firm has been further developing its use of technology to facilitate and improve speed of delivery of services to clients. We have looked at matters such as document creation, precedent development, enhanced library and research tools, particularly online and significant ongoing training of both professional and support staff. We now have a total staff of 59, with a commitment to three new graduate clerks in January.

Regulating Property Agents and Motor Vehicle Dealers



By Bob Lette

The Property Agents and Motor Vehicles Act 2000 came into effect on 1 July, with the aim of regulating dealings between property agents, motor vehicle dealers and their clients.

This Act replaces the Auctioneers and Agents Act and is more stringent in regulating the interaction between agents, dealers and their clients, especially in relation to the disclosure of information, conduct and remuneration.

Appointment

To be appointed within the terms of the Act, a signed written appointment must be obtained that sets out the following:

1. What service is to be performed and how it is to be performed;
2. The way charges and commissions are payable;
3. When charges and commissions are payable for the service; and
4. If the appointment is for a sole or exclusive agency, the date when that appointment ends.

A real estate agent is not entitled to recover any commission unless they have been properly appointed.

A key feature of the Act limits the appointment of exclusive agencies to a period of 60 days unless reappointment occurs 14 days prior to the expiry of the initial period.

Property developers are now also required to be licensed under the Act when they complete more than six residential property sales in any 12 month period and retain or have an interest of at least 15% in any property in which they develop.



Put simply, it means more salespeople will be required to be licensed and thus regulated by the Act, and people who seek to appoint agents will be required to complete a written appointment form prior to any action being taken by the agent on their behalf.

Disclosure

New safeguards have been implemented to require greater disclosure of information to buyers prior to their entrance into a binding contract. Details of any commissions, fees or benefits received by agents for the provision of referrals is now required.

Cooling off periods have also been introduced in circumstances relating to the marketing and sale of land through property information sessions. These
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Regulating Property agents and Motor Vehicle Dealers cont.

cooling off periods allow the buyer to cancel the contract within five days of signature unless this right is waived.

All contracts will have warning statements on the front setting out if a cooling off period is applicable and rights of action should full disclosure not take place.

Conduct

Mandatory Codes of Conduct for agents have now been created. Some of these provisions require agents to establish internal complaint managing procedures to resolve problems that clients may have.

If the internal complaint resolution process does not correct the problem then a complaint may be made to the Office of Fair Trading for investigation.

The Office of Fair Trading Investigators can recommend disciplinary action against agents or their sales people by the Property Agents and Motor Dealers Tribunal.

This body can enforce a range of penalties including reprimands, fines and suspensions or disqualifications of licenses or registration certificates. Maximum fines are \$15,000 for an individual and \$75,000 for a corporation.

If the Code of Conduct is infringed and a monetary loss is caused because of the actions of an agent or their sales persons a claim fund has been created which is overseen by the Office of Fair Trading and the Property Agents and Motor Dealers Tribunal.

All minor claims against agents of less than \$5,000 will be decided by the Office of Fair Trading and any claims over \$5,000 are referred to the Property Agents and Motor Dealers Tribunal.

Time limitations for making a claim exist. A claim must be lodged against the fund within one year of the injured party becoming aware of their loss.

Impact of New Act

Failure to make all necessary disclosure, obtain a written appointment, or otherwise conduct themselves in accordance with a code not only opens avenues for penalties to be imposed on the agent but also provides rights of termination for purchasers.

Compliance with the Property Agents and Motor Vehicle Dealers Act must occur or any transactions entered into may be placed in jeopardy and cause loss of time or money

Asbestos & Work - Do you comply?

By Alicia Hill

A amendments to the Workplace Health and Safety Regulation 1997 which came into effect in November last year will have implications for owners of workplaces that were granted building approval prior to 1990.

By 2004, all owners of such properties must have taken steps to determine whether any asbestos materials are present in their buildings or plant, or be liable to penalty.

If the owner intends to sell, lease, dismantle or demolish such a building prior to 2004, they must also comply with the legislation or be liable to penalty.

How to comply

The owner (who is defined to include managing agents of properties) must obtain an Asbestos Materials Report stating:

1. whether any asbestos materials are present;
2. a description of that type of asbestos material;
3. the form of the material (for example, whether it is friable, poorly bonded or in unstable condition); and,
4. any potential health risks to occupants

or workers on that site.

As well as the building, an inspection must also include essential plant which is located in the building or on the property, including air-conditioning, plant, boilers, cooling towers, escalators, lifts and piping.

If asbestos materials are found, the owner must establish an Asbestos Materials Register and place a visible sign near the entrance of the site or in another obvious position to inform visitors of the existence of the register and where it can be inspected.

The owner must also implement policies and procedure to prevent or minimise exposure to asbestos materials if they are found to be in existence.

Failure to adhere to the requirements of the regulation renders the owner liable to a fine.

What if the owner does not comply?

If the report is not obtained prior to the 2004 deadline or the property is sold, leased, dismantled or demolished without complying with the regulation, not only is the owner liable to a monetary penalty, but the obligation to comply with the regulation passes from the owner to the purchaser or lessee of the property.

The Long Arm of



By Paul Lutvey

With the recent and much publicised insolvencies of major public companies, it is important to appreciate your position if you think that you "got in early" and received payment of your debt prior to a company going into liquidation.

The Liquidator's role

One of a liquidator's functions upon the winding up of a company is to investigate the payments made by the company in the six months prior to what is known as the relation-back day. This day is, in the case of a winding up by court order, the date the application was filed, or in the case of winding up via voluntary administration, the date the administrator was appointed.

A liquidator reviews the payments for the six month period prior to this day, to ascertain if any payments have provided an unfair preference to any particular creditor.

It is important to note that it is only a liquidator who has the power to seek to recover an unfair preference. This power is



not available to a receiver or voluntary administrator.

An unfair preference is defined in the Corporations Law as being a transaction

places

Potential purchasers or lessees of properties that fall within the definition of a workplace should look to protect themselves by ensuring that the owner has obtained an Asbestos Materials Report and have a copy provided to them prior to, or at Settlement.

Approved Qualified Persons

The revised regulation requires a person who compiles an Asbestos Materials Report to be an "appropriately qualified person" and that includes persons who possess qualifications and experience necessary to find asbestos materials in a building.

The Queensland Government is running accreditation courses to ensure that people likely to undertake inspections of properties to compile these reports have sufficient training.

While it is not a requirement, it is recommended that you retain a person who has completed such a course to compile your report to ensure it complies with the regulation.



the Liquidator

that:

- the company and the creditor are parties to; and
- results in the creditor receiving more from the company than they would have if the transaction was set aside and the creditor proved its debt in the winding up.

If a transaction is determined as an unfair preference it is then a voidable transaction pursuant to the Corporations Law and can be recovered by a liquidator.

There is a statutory defence set out in the Corporations Law which prevents the Court from making an order against an entity if it can prove that:

- the entity received no benefit because of the transaction; or
- if the entity received a benefit because of the transaction, then
 - a) it received the benefit in good faith, and
 - b) at the time when it received the benefit it had no reasonable grounds of suspecting that the company was insolvent, and that a reasonable

person in the circumstances would not have suspected that the company was insolvent.

In a voluntary administration, it may be that the directors or a related entity have received a payment which in a liquidation could be recovered as an unfair preference, and therefore propose a Deed of Company arrangement. In this instance, the investigations of the voluntary administrator are critical when advising creditors. Creditors should be advised and need to consider whether to accept the Deed of Company arrangement proposed by the director or related entity, or wind up the company so that the liquidator can pursue the unfair preference.

Seek Advice

This is a complex area of law that has been argued before the High Court on a number of occasions. If you have any concerns in relation to a payment from a company or demand from a liquidator you may have received, it is recommended you seek expert advice.

Investigating Public Notices

By Anthony O'Dwyer

A recent Planning and Environment Court decision has demonstrated how important it is to pay attention to and properly investigate public notices of development applications.

A small shopping centre in a coastal community was to be doubled in size. The application was made, and notices posted to inform the public of the proposal. The notices referred to the proposal as 'Extensions to Existing Shopping Centre'. Objection was taken to the lack of detail in the public notices and the Court was asked to rule on whether the notice was sufficient.

The Court found that the notices did comply with the Act, which did not give any guidance about the level of detail required in the notice. The Court found that the description was reasonable and not misleading. It did not make any difference to the Court's consideration of the sufficiency of the notice that persons interested in the application would have to drive 57 kilometres from the site to the Council chambers to inspect the application in order to find out that the extensions actually doubled the size of the shopping centre.

There is no substitute for investigating the application properly by inspecting it at the Council. Relying on the notice to inform you of the detail of the application can leave you a long way short of the whole story.

Privacy deadline looming

By Michelle Lember

The Privacy Amendment (Private Sector) Act 2000, enacted in December 2000, introduced 10 National Privacy Principles (NPPs) with which organisations are required to comply or risk investigation by the Privacy Commissioner.

Private sector organisations have until 21 December 2001 to incorporate the NPPs into their practices.

The NPPs relate to the collection, use/disclosure, quality, access to and correction of, security and transfer, of personal information relating to individuals. An "individual" does not include a company, however, the NPPs will extend to information held about the directors/guarantors etc of an organisation.

The Privacy Act amendments emphasise the importance of an organisation having in place appropriate compliance procedures and practices.

Making an Advance Health Directive



By Michael Klatt

Making an Advance Health Directive gives you an opportunity to make directions about the medical treatment you receive when you can't give instructions yourself, for example, if you are unconscious or otherwise unable to communicate.

Anyone over the age of 18 who is capable of understanding the nature and effect of health care decisions can make an Advance Health Directive.

The types of directions that you can give are in relation to the treatment you obtain for terminal illnesses, such as whether you wish to have artificial feeding, mechanical

ventilation, or whether you wish to be resuscitated.

An Advance Health Directive is the only document in which you can make a directive that life sustaining medical treatment not be provided. When making one you should consider carefully what medical treatment you wish to have and what effect that may have on your quality of life and how much suffering you would accept in the hope of the medical treatment assisting you.

If you do not have an Advance Health Directive your Attorney for personal and health matters can make decisions for you in most cases, but not in certain situations, such as deciding when to withdraw or withhold life sustaining medical treatment.

If you have no Attorney then your statutory health Attorney would make decisions concerning treatment. This is someone close to you and would generally be your spouse, your carer or a close friend or relative.

Our firm prepares Advance Health Directives, however, the document must be completed with your doctor so that the various medical procedures you may elect to have or not have, are fully explained.

Should you wish to discuss an Advance Health Directive further, please contact Michael Klatt or Catherine Abercrombie from our Personal Legal Services team.



New Gaming Machine Levy for Hotels

By Louise Wallace

On 8 May, Queensland Premier Peter Beattie announced the introduction of a new levy on gaming machines in hotels, the intention being that the levy will fund major public sporting and cultural facilities in Queensland.

From this month, an additional 10% levy will apply to hotels with a gaming revenue exceeding \$100,000 and up to \$200,000 per month. A further 20% levy will apply to any amounts over \$200,000 per month.

Also on 8 May, the State Treasurer Terry Mackenroth announced a



cap on the number of gaming machines in hotels in Queensland, namely that from midday 8 May 2001 no new applications for gaming machines in hotels would be accepted.

This last announcement in particular is expected to have a significant impact with companies now putting plans for new hotels which were to having gaming operations, on hold.

These announcements came as a result of growing concern about the growth in the number of gaming machines and the impact on the community.

Hot off the Press

■ Franchising Code Amended

By David Williams

Amendments to the Franchising Code of Conduct will come into force on 1 October this year.

The code has been amended substantially, particularly in relation to the content of disclosure documents, and the delivery of disclosure documents electronically.

It means that all disclosure documents for the year ended 30 June 2001 should be reviewed as a matter of urgency.

■ Highway Authorities lose immunity

By Cameron Seymour

In two recent high court cases (*Brodie v Singleton Shire Council* and *Ghantous v Hawksbury*), the High Court of Australia abolished the principle of a highway authority's immunity from prosecution in respect of "non-feasance".

Previously, an authority with power to design or construct roads or carry out works or repairs on them could not be sued for failing to exercise those powers ("non-feasance") although it could be sued for acting negligently in the design, construction of roads, or repairs etc ("misfeasance").

Following the two cases referred to above, public authorities, such as local councils, will now be liable for failing to carry out works or repairs where it is reasonable to do so.

We expect this will result in an increase in litigation against public authorities, with an ensuing increase in rates and taxes.



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