



# M & M

## Report



### Editorial



by John Mullins,  
Managing Partner

Sydney has put on a great show and created a benchmark for the Olympic Games. The

Australian athletes did us proud. The residual effect, apart from the magnificent new sporting facilities, is that Australia is buoyant, confident and as competitive as ever.

Recently the Partners of Mullins & Mullins attended their annual planning session to review the last twelve months and to plan for the next three years. We addressed resourcing the firm in terms of people, IT, systems, practices, procedures and knowledge management so that we can compete and succeed in the competitive legal market.

A major challenge is the recruitment and retention of quality staff. Gone is the day when people join an organisation for life. The mobility of talented people is a fact of modern life. This mobility for lawyers is between firms, cities and countries, a major track being to London. Our firm has addressed this in a substantial way by completely overhauling our HR policies and procedures.

Whatever your business size, planning is the key element to success. Businesses often think of accountants when they are looking for planning advice, but the financial side is only one part of the business.

You should obtain advice from your lawyer also. We have experience and knowledge in a wide range of management issues particularly HR.

HR policies and procedures are not simply about complying with the myriad of employment laws. They are about creating a working environment where you can compete in the war for talent.

We have just launched "M&M at Work" a newsletter which focuses on employment, IR and HR issues. If you would like to be added to the mailing list please contact Lysa Taylor.

# Could you be a franchisor without knowing it?



by David Williams and  
Michelle Hurst

As the second anniversary of the commencement of the *Franchising Code of Conduct* ("the Code") is approaching, it is now worthwhile considering the impact of the Code. If you are a distributor of goods or services within Australia, you should take time to consider whether the Code has an impact on your business.

Already there are signs that commercial arrangements that had traditionally amounted to distribution or dealer agreements are by virtue of the Code being interpreted as a "franchise agreement".

There are 4 elements of a franchise agreement. They are:

1. an agreement (which can be in writing, verbal or by a course of conduct);
2. one party grants to another party the right to conduct a business of offering, supplying or distributing goods and services under some sort of system, or marketing plan, influenced by the distributor;
3. the distributor allows another party to conduct its business under a mark, or symbol of the distributor; and
4. some sort of payment, either before or during the relationship.

The key elements are 2 and 4, which are now receiving judicial interpretation. In a Western Australian case, the Court concluded that each of the elements had to be present before it could be said that a franchise agreement existed. A case in Queensland also supported the nature of the elements but was not able to make any findings that the elements did not exist

without the benefit of a full trial. However the judge indicated a narrower view may be followed in the interpretation of these provisions. This case is continuing and it is hoped that a trial will be held in the near future to clarify the meaning of a "franchise agreement" under the Code.

Simultaneous with the findings of the Courts, the Franchise Policy Council ("the Council") together with the Australian Competition and Consumer Commission ("ACCC") recently completed its review in accordance with the Code. It is understood that the report, which was presented to the Minister in May this year, contains recommendations to review the definition of "franchise agreement".

The concern of the Council stems from franchisors and distributors using mechanisms to alter the payment arrangements to avoid the definition. How the Government responds to the report will determine whether the definition of "franchise agreement" is altered, giving a stronger role for the Code for distribution arrangements in Australia.

If the distribution arrangement is a franchise agreement, then the Code imposes significant procedural obligations, disclosure requirements and minimum standard clauses in agreements upon distributors. Compliance with the Code is closely monitored by the ACCC.

Is your distribution arrangement, upon which you receive income, a franchise agreement? If so, are you Code-compliant? If you are involved in any form of distribution or licence arrangement it is fundamental that you seek legal advice about the nature and effect of your agreement.

# Changes to motor vehicle claims



by Kristina Powrie

Compulsory Third Party ("CTP") motor vehicle claims will be affected by significant amendments to the *Motor Accident Insurance Act 1994* which are made by the *Motor Accident Insurance Amendment Act 2000*. The majority of these provisions commenced on 1 October 2000.

These amendments change the procedure of bringing a claim for damages for personal injuries sustained in a motor vehicle accident. The changes are:

## Restrictions on Damages

- Damages for loss of earnings or earning capacity are limited to an indexed rate no greater than three times the average weekly earnings. At present the average net weekly income is \$708.00. This will limit a claim for future economic loss to a ceiling of \$2,124.00 net per week.
- Damages for loss of consortium (the comfort and companionship provided by a spouse) have now been abolished, unless the injured person either:

1. died as a result of the accident; or
2. general damages for the injured person are assessed at \$30,000.00 or greater.

## Claims Procedure

• All motor vehicle accidents must now be notified to the Police before claims can be submitted. The notification requires details of:

1. the claimant's full name, date of birth, address;
2. the date, time and place, and brief description of the accident; and
3. the general nature of the claimant's injuries.

This is a new prerequisite to bringing a claim for damages.

• The Notice of Claim Form must now be submitted within (whichever is the earlier of):

1. nine months after the motor vehicle accident (or three months if the vehicle causing the injury is not identified); or
2. one month after the claimant first consults a lawyer about the

- possibility of making a claim.
- A compulsory conference must now be held before proceedings can be commenced. This requires the claimant and insurer to participate in the conference and actively attempt to settle the claim. If the matter does not settle, mandatory final offers must be exchanged by each party.
- Legal costs for bringing the action are now not recoverable if you recover less than \$30,000 in damages (compensation). There is a ceiling of \$2,500 in costs for claims where damages fall between \$30,000 and \$50,000.

## Effect of Changes

It is predicted the changes will:

1. impact on the general conduct of personal injuries' claims arising out of motor vehicle accidents by encouraging both the claimant and insurer to process the claim as quickly and economically as possible;
2. encourage all parties to actively participate in settlement negotiations; and
3. reduce the burden of small claims on the CTP funds scheme by making it less economical to bring claims for very minor injuries.

Where a person is injured in a motor vehicle accident, it is now even more imperative that they consult their legal adviser in relation to the possibility and procedure of making a claim for damages.

# Impact of GST on Damages

By Kristina Powrie

The introduction on 1 July 2000 of the new Goods and Services Tax ("GST") has impacted on practically all business and domestic activities. Settlements and judgments in claims for damages for personal injury are no exception. The GST has affected aspects of calculating and awarding damages in personal injury claims in a number of areas.

A number of these are significant and are briefly summarised below.

**Question:** Where a Release is required to be signed as a term of settlement, is GST payable on that document by the Plaintiff?

**Answer:** No. The release is a supply by the Plaintiff but is not a "taxable supply" because the Plaintiff did not make the release in carrying on an enterprise. This is due to the personal and domestic nature of personal injury settlements.

This means that individuals who settle claims for damages do not need to be concerned about any extra tax liability due to the GST.

**Question:** Can a court vary a judgment or settlement due to the implications of the GST on the damages?

**Answer:** No. In the recent decision of *Interchase v ACN 010 087*

*573 Pty Ltd & Ors*, the Supreme Court refused to vary a judgment (delivered prior to the introduction of the GST) to include an order that the Defendant indemnify the Plaintiff for any GST liability payable on the Judgment.

The Court considered that the new tax had not only recently come into the Australian community. The Court found the imposition of the GST "was made clear, at least from the commencement of the trial, and there was ample opportunity to formulate such a head of damage and to deal with it in a timely and

appropriate manner".

This decision highlights the importance of carefully considering the full impact of the GST on different heads of damage and including any extra liability created by the imposition of the GST in the claim.

In personal injury claims this will include the increased cost of future expenses, for things such as home modifications or paid nursing care. It is also particularly important in calculations for economic loss or loss of earning capacity due to the new income tax rates in place from 1 July 2000.



# Retail shop leases - changes



by Anthony O'Dwyer

The retail shop lease regulatory regime changed on 1 July 2000 to coincide with the introduction of the GST.

The Retail Shop Leases Act has been amended in a number of key areas; disclosure requirements, advice certificates, GST, rent review and unconscionable conduct.

The regulations have also been changed to make the determination of a "retail shop" clearer. The list of retailing businesses is comprehensive and for the first time wholesaling businesses are excluded.

The most significant changes are to the disclosure requirements. These apply not only to new leases but also to assignments of existing leases, for example, on the sale of a business in a shopping centre.

The landlord's obligation to give a disclosure statement at least seven days before the lease is entered into remains, with some modification to the extent of the disclosure. The changes now require important additional information including the number of car parking bays available for customers.

A landlord can now ask the prospective tenant to give a disclosure statement. The disclosure statement is designed to give the landlord sufficient information concerning the tenant's business experience. The landlord need not proceed with the lease if the disclosure statement is not provided.

Where there is an assignment of a lease, an existing tenant must give the proposed new tenant a disclosure statement seven days before the tenant asks the landlord for consent to the assignment. This disclosure statement is designed to give the proposed tenant an overview of the lease.

The prospective tenant can also be required to give a disclosure statement to the existing tenant and the landlord if requested.

The landlord is required to give to the prospective tenant a disclosure statement and a copy of the lease seven days before consenting to the assignment. Sales of retail businesses now have to be conducted with these disclosure requirements in mind particularly



from the point of view of timing. There are two periods of seven days required for the disclosures. To avoid delays, sellers should provide the disclosure to all prospective purchasers at the earliest opportunity rather than waiting for the contract to be signed.

The Act now requires all prospective tenants to obtain financial and legal advice certificates to be provided to the landlord before the lease is entered into or the assignment consented to. Whilst the prospective tenant will benefit from having to obtain appropriate advice, the landlord will also benefit with a decreased likelihood of claims of unconscionable conduct.

GST cannot be included in turnover for those tenants paying a percentage of turnover as rent. Landlords may charge the GST on rent provided that the lease allows them to do so and a change to the rent to take into account the GST will not amount to a rent review.

Other changes include allowing landlords to adopt more than one method of rent review. Landlords cannot choose the higher of the two methods of review. An example of a valid rent review would be to "CPI plus 2%". An invalid rent review would be "CPI or 5% whichever is the higher".

The unconscionable conduct provisions of the Act have not yet commenced. The object of the new provisions is to give the Retail Shop Leases Tribunal power to deal with claims arising from unconscionable conduct. The inequality of bargaining positions between landlord and tenant, particularly in large shopping centres, is seen as a driving force behind this change and whilst tenants have the ability to have these sorts of matters dealt with in the courts it is expected that the "one-stop shop" of the Tribunal will result in greater access to justice.

## E-commerce legislation



By Matthew Stapleton

The commencement of the *Electronic Transaction Act 1999* means that transactions with Government agencies can

now validly take place by use of electronic communication.

The object of the Act is to facilitate the use of electronic transactions and promote business and community confidence in the use of electronic transactions and it gives business and the community the option of using electronic communications when satisfying the legal requirements of any "Commonwealth entity"

The Act provides that when dealing with a Commonwealth entity, a transaction will not be invalid merely because it took place wholly or partly by means of electronic communications. It provides that certain requirements imposed by a Commonwealth law can be satisfied using electronic communication. These include a requirement to:

- give information in writing
- provide a signature
- produce a document
- record information
- retain a document

The Act explains the circumstances in which each of the above will be satisfied by use of electronic communication.

The most interesting of these is the requirement to provide a signature. The Act allows a person to satisfy a legal requirement (imposed by a Government agency) for a manual signature by using electronic communication if:

- a method is used to identify the person and to indicate the person's approval of the information communicated; and
- having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

There are additional rules which allow a Commonwealth entity to specify that the method used must comply with particular information technology requirements.

This Act is the first of a proposed national uniform legislative scheme to facilitate the use of electronic transactions. All State and Territory Governments have given their in principle support to legislation based on this Act.

## Lid on Binge Drinking Promotions



By Curt Schatz

The *Liquor Act* contains various provisions which place a heavy burden on Licensees and their staff to serve alcohol in a responsible manner. The onus on Licensees to be responsible in the service of alcohol is high and in recent times has probably increased due to court decisions.

The "Chevron" case paved the way by deciding there was a duty of care owed to the customer, when the Licensee knew that the patron could suffer harm as a result of his intoxicated state on the way home.

More recently in Rockhampton, a Licensee was fined more than \$10,000 for promoting a session involving drinking rum and coke from a bucket. The boy concerned was also underage.

Licensing Minister, Merri Rose, has warned Licensees the promotion of binge drinking will not be tolerated. The Liquor Licensing Division has received several reports recently of practices promoting irresponsible consumption of alcohol. Merri Rose said, "some of these practices are deplorable and are downright dangerous - they could have fatal consequences".

Merri Rose has put Licensees across the state on notice that her department intends to stamp out

any practices in relation to binge drinking, including 'All You Can Drink' promotions or other irresponsible incentives to get patrons through the doors. She has stated, "Licensees are well aware of their obligations under the *Liquor Act*. The vast majority are responsible, but a small number are willing to overstep the mark with promotions".

The Liquor Licensing Division will impose stiff penalties (fines of up to \$3,000 for a staff member and more than \$18,000 for Licensees) or cancel licenses where a blatant breach occurs.

The possibility of fines and threats to the Liquor License should discourage Licensees from binge drinking promotions.

## Redundancy Payments. Show me the money!



By Samantha Kane

The developments in relation to the payment of severance benefits to non-award employees send a clear message. Notwithstanding an employee's contractual entitlements, an employee may have recourse, if reasonable severance monies are not paid, as a result of redundancy.

An employee may claim that a termination of employment by redundancy is "unfair" by challenging the severance benefits

offered by the employer. This is quite simple in relation to employees who are governed by an award, which make provision for the payment of redundancy monies.

The situation has not been clear in relation to workers who are not covered by an award, and whose contracts of employment do not provide for the payment of redundancy monies. Strictly speaking, such employees are not entitled to redundancy payments. Recent developments have indicated that, even in case of non-award employees, in an unfair dismissal application the Queensland Industrial Relations Commission may take into account

whether redundancy monies have been paid to an employee in deciding whether a termination by redundancy was fair. Non-award employees who are not entitled to make an unfair dismissal application because their salary exceeds the statutory limit (which in Queensland is currently \$68,000), may be entitled to imply a term into their contract that they are entitled to reasonable severance benefits and sue at common law.

The answer to the question of who may be entitled to a redundancy payment in the event of termination of employment due to a genuine redundancy situation, is not as simple as one might think.

## Employees' Relief in Insolvency



By Elizabeth Sheehan

Earlier this year, the Federal Government announced the establishment of the *Employee Entitlements Support Scheme*. The scheme provides a national safety net for the protection of entitlements of employees whose employment is terminated because of their employer's insolvency.

Depending on employment conditions, an employee may be eligible to receive up to:

- 4 weeks unpaid wages;
- 4 weeks annual leave accrued in the last year;
- 5 weeks pay in lieu of notice;
- 4 weeks redundancy pay; and
- 12 weeks long service leave.

Those eligible to claim under the Scheme are employees in Australia who are not shareholders of the

former employer, or a relative and whose employment has been terminated on or since 1 January 2000 because of insolvency.

Employees can apply at any time within 12 months after the commencement of the insolvency. There is a \$20,000 cap on the amount any individual may receive. In order to ensure that employers do not exploit the Scheme, any benefits paid are recoverable if the distribution of assets or other proceedings provide an opportunity to recover those funds from the employer.

The Scheme was to be jointly funded by the Commonwealth and State/Territory Governments. To date, the Northern Territory is the Federal Government's only partner in the Scheme. In Queensland, the amounts payable under the Scheme are reduced by 50% due to the state government's non-participation in the Scheme.

So far, the Scheme has paid out

more than \$1 million to some 690 workers. Employees of around 31 employers in Queensland have taken advantage of the Scheme. The Scheme has created a lot of debate. However, politics aside, employees should be aware of the Scheme as they may be entitled to relief if terminated due to insolvency.



**Mullins & Mullins**  
LAWYERS AND NOTARY

Level 22 Central Plaza One  
GPO Box 2026, Brisbane Q 4001  
345 Queen Street, Brisbane Q 4000  
Phone: (07) 3229 2955  
Fax: (07) 3229 8075  
Email: [ltaylor@mullins-mullins.com.au](mailto:ltaylor@mullins-mullins.com.au)



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