

## ANALYSING YOUR BARE INSURANCE NEEDS

CAMERON SEYMOUR



Insurance is like strong elastic in your underpants – not very sexy but a risky proposition if you don't have it.

That's why Insurers market themselves to be identified with propositions such as "Wouldn't Be Without It" or "For When You Need It Most".

Insurance policies are available to cover just about any loss. Typically people think of property (house, car, boat etc.) but more sensational examples include body parts (legs, breasts or even John Newcombe's moustache).

As our society becomes increasingly litigious and prosperous, it is important to take stock of the insurance you have or ought to have as part of an asset protection/ risk management strategy.

Because we live in a first world country with strong social values, governments prescribe compulsory statutory insurance schemes to cover us if we are injured in motor vehicle accidents or at work. Medicare Australia defrays a lot of our medical treatment.

For many of us, those compulsory schemes constitute the bare minimum of our insurance coverage but each person has different circumstances and such insurance does not always benefit an injured party. For example, a person injured in a motor vehicle accident caused by another person will recover damages from a fund whereas a person injured in a motor vehicle accident that is their own fault may not recover any damages, regardless of the severity of their injuries. A person injured in the course of their employment will receive compensation (as opposed to damages) if they are a worker, but not if they are an independent contractor. If you are one of these people who 'fall between the cracks' a Broker can advise on appropriate insurance.

Some public liability policies attaching to home and contents policies indemnify the policy holder away from home and some don't. Wouldn't you like to know if your public liability policy attached to your home covers

you for an injury you might cause someone through an unfortunate accident walking down Queen Street?

Although the list could be virtually endless, here is a short snap shot of some more common types of insurance which might be appropriate to your needs: home and contents (including public liability), compulsory third party motor vehicle, motor vehicle property damage, fire and theft, workers' compensation, life, income discontinuance, private health, travel (taking care to ensure your activities and places you visit are covered), professional indemnity, pets, special events, directors and officers ...

Equally as important as identifying the type of policy, is ensuring the policy covers the intended risk. Policies are often dense and difficult to read. A surprisingly cheap premium is a good indicator the policy might not cover the contingency you had in mind. Careful consideration should be given to definitions, scope of cover, provisos and exclusions.

Underinsurance is also often a trap. Although we apply our minds to the issue of insurance when we purchase an asset, we routinely merely pay the policy when it falls due, without considering whether the asset has increased in value. Many of us resist the notion of increasing our policy to reflect the increased value but what is the point of taking out insurance that will only return us a portion of our potential loss?

Next time you are in a spring cleaning mode and testing the elastic in your undies, it may be time to review your insurance needs, policy wording and valuations.



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# WHAT DOES IT MEAN TO BE A MEMBER

JOHN MULLINS



One of the most common challenges encountered by clubs, sporting, and community organisations is the question of how they manage behaviour of people in or about their Club.

For Sporting Clubs there is the issue of dealing with on field behaviour, and most sports have well organised

structures for dealing with disciplinary matters arising out of on field behaviour and these processes are generally well understood, and well respected.

When it comes to off field behaviour there is a whole new world. One of the first questions that has to be asked is "can an organisation discipline the person?". That would appear to be a very simple question, but very often the answer is surprising. Typically an organisation only has the right to discipline a member.

In days gone by, no one really challenged this issue. If an organisation decided to take disciplinary action against an individual because of their behaviour, it was deemed to be acceptable. Most people generally deferred to the right of the organisation as the controlling body of the sport in Queensland to take such action.



More and more we are seeing the raised issue that the body who purports to bring disciplinary action against the individual has no jurisdiction or ability to do so.

For example, we are seeing situations where organisations impose penalties that have an application outside Queensland or even outside Australia, when clearly they have no ability to do so.

We also see situations where bodies purport to suspend individuals where the suspension makes no sense. Whereas you may be able to suspend a player from playing if you have the jurisdiction, how do you suspend an official? You may be able to suspend them as a member, but you can't suspend them from being Secretary!

Whilst all of this may seem very confusing, the starting point of a disciplinary action is to ensure that you have the appropriate authority and jurisdiction. From here compliance with the rules of Natural Justice will ensure that the decision will stand any challenge.

# A WORD ON NOT-FOR-PROFITS

OLIVIA VERSACE



Many not-for-profit organisations have tax exempt status under Division 50 of the *Income Tax Assessment Act (ITAA)*. It is not unusual for a not-for-profit organisation to conduct commercial activities on a 'for profit' basis. A common issue for such organisations is whether their commercial activities will put at risk their tax-exempt status.

A not-for-profit organisation may be granted tax-exempt status if it is a charity or because it has an object that is sanctioned by the ITAA as having the required exempt purpose.

To determine the entitlement to tax exempt status for a charity one should consider the following matters:

- The objects or purposes of the entity;
- The main activity of the entity and ensure that the other activities are incidental; and
- The character of the entity having regard to its objects, purposes and activities.

A not-for-profit organisation is entitled to make profits, it just cannot make distributions to its members.

The 2008 High Court case of *Commissioner of Taxation v Word Investments Ltd* is an important decision as the Court considered the implications of commercial activity on the exempt status of an organisation.

Word Investments Ltd (Word) was established as a fundraising company for Wycliffe Bible Translators Australia (Wycliffe). Word was a company limited by guarantee whose objects nominated charitable purposes and whose constitution prohibited payment of any of Word's income and property to members (other than for services rendered or goods supplied).

Word conducted a funeral business for profit and directed those profits for the benefit of Wycliffe.

Word applied for endorsement as a tax-exempt charitable institution with the Australian Taxation Office (ATO) but this was refused.

The High Court disagreed with the ATO's position and took the view that Word was entitled to tax exempt status. The court held that:

- The purposes set out in the constitution indicated a charitable purpose; and
- An institution could be charitable even where it did not engage in charitable activities other than making profits that were directed to charitable institutions.

One of the key points to take from the Word decision is that it is possible for a charitable organisation to structure its activities to separate its commercial activities from the entity that conducts the actual charitable undertakings without losing its tax-exempt status.

However, such structuring and activities should be approached with caution in light of the ATO's attitude as shown in the Word case and also statements made by the Federal Government following the Word decision and pending public release of the Henry Tax Review.

The Federal Government has adopted a 'wait and see' approach to the Word decision and has said that whilst the decision raises competitive neutrality issues it will await the outcome of the Henry Review before deciding on the 'best reform for the charitable sector'.

The Henry Review was finished in December 2009 but as yet has not been made publicly available. We are expecting it to be made public any day now. So for those of you who have tax-exempt status or wish to obtain it... watch this space.

# BINDING FINANCIAL AGREEMENTS - ARE THEY BINDING?

MICHAEL KLATT



**B**inding Financial Agreements made between defacto partners or married couples during their marriage or when parties are intending to marry can be binding. These agreements are useful estate planning documents but require proper thought and attention to ensure they are binding.

The *Family Law Act* was amended in late 2009, with the amendments commencing on 4 January 2010. The Act previously required each party to obtain independent legal advice in relation to the agreement and a certificate from the legal practitioner had to be annexed to the agreement. The law now is that the agreement needs to be signed by all parties and before signing the agreement each party must be provided with independent legal advice about the effect of the agreement on the rights of the party and the advantages and disadvantages of making the agreement. Each party must be provided with a statement signed by their lawyer stating that advice was provided, a copy of this must also be provided to the other party or their legal representative.

Non-compliance with these formalities may not necessarily render the Agreement unenforceable as new substantial compliance provisions have been introduced so that agreements may still be binding notwithstanding that the parties were not provided independent legal advice or the advice statement.

There are a number of circumstances where a court may make an order setting aside a financial agreement. These include the following:

- The agreement was obtained by fraud or duress;
- The agreement was entered into for purposes including the defrauding of creditors;
- There has been a significant non-disclosure of the parties assets;
- Circumstances have arisen since the agreement, which make it impracticable for the agreement to be carried out; and
- Since the making of the agreement a material change in circumstances has occurred relating to the care, welfare and development of a child of the marriage where the person caring for the child would suffer hardship if the agreement was not set aside.

The broad statement commonly made by people that financial agreements are not binding is simply not true...

It is possible for the agreement to deal with many events including the birth of children. It is also common to plan for a review and to include such a provision in the agreement.

The broad statement commonly made by people that financial agreements are not binding is simply not true, but ensuring that the agreements are binding is not a simple process and requires expert advice.

## ARE YOUR HR MANAGERS UP TO INVESTIGATING COMPLAINTS?

NIGEL INGLIS



**I**n a recent decision by Fair Work Australia the maximum award of six months pay was given to an employee that Commissioner Deegan accepted had been constructively (and unfairly) dismissed. Commissioner Deegan criticised the HR practices within the large corporate employer as

being "beyond belief" that even though no investigation was conducted into workplace harassment complaints by the employee, the HR Manager had notified senior management that there was no basis to the claims that the employee was being bullied and harassed.

This case involved Aristocrat Technologies Australia Pty Ltd and one of its former Business Development Executives (BDEs) who resigned on 1 July 2009 after receiving a letter the day before claiming serious issues about his sales performance and customer relationships, including a brief mention in the letter that the "issues of harassment and bullying" had "been investigated and have been found to be unsubstantiated". However, Commissioner Deegan found that a proper investigation of the employee's allegations about bullying and harassment was required. "It was clear on the evidence of (the HR Manager) that she was either uninterested in investigating the complaints properly or had no idea how to conduct such an investigation. That (the HR manager) notified senior management that the employee's claims were

unsubstantiated having interviewed no one including the employee and the alleged bully about those claims is beyond belief".

Even though there were some legitimate issues that could have been said about the employee's performance, Commissioner Deegan said that Aristocrat had no valid reason for dismissing him.

Commissioner Deegan held that because Aristocrat was a multi-national company, it "has no excuse for the deficiencies in procedure which accompanied the termination of the (employee's) employment", especially where it has "dedicated human resource management specialists and, again, has no excuse for the appalling manner in which this entire matter was handled".

In the circumstances, even though the employee had applied for reinstatement, Commissioner Deegan found that was not appropriate and instead gave the maximum award payable of six months pay to the employee.

This case clearly illustrates the duty that employers have to investigate allegations or claims of workplace harassment and bullying, even though the employer may have concerns about the employee's performance. Dismissing an employee's complaint about bullying or workplace harassment on the basis of it being some kind of reaction to being performance managed is something to be very aware of because not only could it be a wrong assumption to make, it could also be a very costly one.

# RECORD ADULT FAMILY PROVISION AWARDS

MICHAEL KLATT

In a recent decision of *Pizzino -v- Pizzino & Anor* (2010) QSC 35, Justice Mullins of the Supreme Court of Queensland ordered that further and better provision be made for the Applicant, Tony Pizzino, out of his Mother's estate by increasing his entitlement to one-quarter share of her estate (approximately \$900,000) instead of a one-eighth share.

Mrs Pizzino had two children, the Applicant son and also a daughter. By her Will, one-half of the estate was left to the daughter and the other half of the estate equally between the son and his three sons. The estate was worth approximately \$3.6 million. The son had struggled through life with gambling and drug addictions, although Justice Mullins formed the view that he had made genuine attempts to put his gambling and substance abuse problems in the past.

The son had assets worth less than \$20,000 and liabilities, including tax debts, totalling over \$200,000. The son had a number of health issues. He had worked in various occupations and, at the time of the hearing, he was earning about \$5,000 a year from his homeopathy clients and was also employed as a house painter. He had been living in one of his mother's homes rent-free prior to her death. Her Honour increased the son's entitlement and decreased the grandsons' entitlement so the sister's entitlement to half of the estate was not disturbed.



Justice Wilson of the Supreme Court of Queensland in another recent decision of *Currey -v- Gault* (2010) QSC 27, made an award of \$900,000 out of a step-mother's estate in favour of the step-son. The step-son's father and his mother had separated and his father had remarried the step-mother in 1979. The step-son was about 10 years old at this time and continued to live with his mother, seeing his father and step-mother on the school holidays. His father and step-mother had made Wills in 1993, leaving the whole estate to each other, but if their spouse did not survive, then one-half of the estate was left to the step-son and the other half to a nephew. His father died in July 2003 and his whole estate passed to the step-mother. The step-mother then changed to her Will to leave her estate principally to a niece and nephew. The step-son was not named at all. They did not have a close relationship. Her estate was worth over \$3 million. The step-son worked as a security officer earning about \$1,100 per week gross. He had a house at Loganlea with his wife worth \$375,000, but subject to a mortgage of \$150,000. They also had an investment property at Crestmead worth \$260,000 subject to a mortgage of \$165,000, furniture, superannuation worth about \$160,000 and motor vehicles.

Both of these decisions indicate that the Courts are prepared to make large awards in favour of adult children and step-children in appropriate cases and serves as a warning that proper consideration of potential claims by children and step-children needs to be given when making a Will.



Message from the Managing Partner, John Mullins

The 31<sup>st</sup> March 2010 was our 30<sup>th</sup> birthday. My father started our Firm in 1980. He set up the Firm with Patrick J Mullins Solicitor at the age of 57 because of his desire to practice law with his sons. At that stage Pat and I were Articled Clerks still 12 months away from admission as Solicitors.

Our Firm started as a small sole practice. The early 80's were not great economic times in Queensland, and the Firm continued along as a small city firm without much growth for a number of years.

It was drummed into us from a very early age that no success in legal practice was more important than having a good reputation for honesty and integrity.

The growth of the Firm was always something that gave Dad an enormous amount of pride. It was incredibly important to him that we maintained our integrity. This is a philosophy shared by all of our current partners and staff.

There is much more that as a Firm we wish to achieve, and hopefully there will be many more significant milestones ahead for us. This milestone has been achieved thanks to our loyal clients that we have strived hard to service over these years, and to the conscientious and hard working people at Mullins Lawyers.

The practice of law has changed enormously in those 30 years. In 1980 word processing and computers was only starting in law firms, there was no such thing as fax machines, there was no such thing as email, and there was very little in the way of computerised accounting systems. The economy was far less complex. The rate of legislative change was much slower. The regulation that controlled the practice of law was far less complicated than it is today.

Initially, the clients of our Firm tended to be individuals with not much of a commercial practice. We have worked hard over the last 30 years to develop a commercial practice. Individual clients have always been important to the Firm, and they remain important to us today. Our Private Client Group does a great job of the treating individuals as important clients. We have never understood why CBD law firms elected to cease acting for individuals.

In the last 18 months we have moved into the Riverside Centre into what are very nice surroundings, particularly compared to our very humble office in 243 Edward Street back in 1980. Our original office was about 100 square meters, a far cry from the almost 2000 square meters we occupy today.