mullins report
MULLINS
Newsletter of **Mullins Lawyers** | Issue Number 62 | December 2010

Population **Growth**

ANTHONY O'DWYER

Resulting from a surge in population growth, South East Queensland is predicted to undergo major changes.

The State Government's recent planning regime for the south east corner, The South East Queensland Regional Plan 2009-2031, requires councils to provide for an additional 754,000 dwellings by 2031.

The challenges posed by this target are enormous. Brisbane City in-fill development is to cater for 88% of those new dwellings. This equates to 6,900 dwellings (or 78 x 20 storey buildings each accommodating 80 units) by in-fill development each year. This is predicted to change the ratio of houses to units from 70:30 to 12:88.

Whilst natural growth accounts for some of the demand, the majority of the growth will be the result of net overseas migration. Of this net overseas migration, 30% of persons will come from New Zealand, 26% will be students and 14% will be business immigrants. Most of these migrants will be in the 19-29 age bracket.

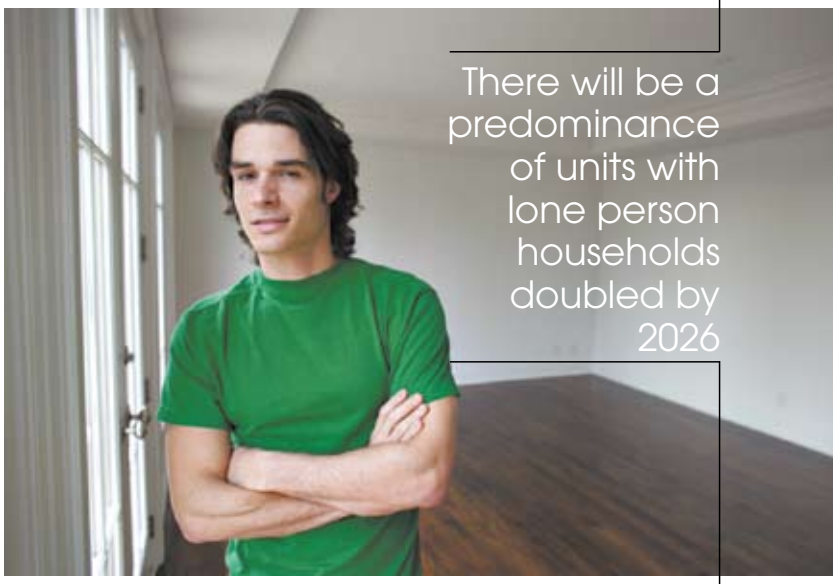
For South East Queensland in 2008/2009 population growth resulted in an average of 1,611 extra persons per week.

With such numbers you might expect the building industry in Queensland to be powering along. A comparison between 2009 and 2008 reveals that approvals for lots were down by 9%, title registrations of those lots were down by 18%, there were 3% fewer vacant land sales and the lowest volume of new and existing dwelling sales since 2001. Dwelling approvals were also down by 23%. These statistics might lead you to conclude that there is enormous pent-up demand in South East Queensland.

Predicted population growth and trends will result in Brisbane looking like a different city beyond 2020. There will be a predominance of units with lone person households doubled by 2026, the most common family type will be couples without children and in 50 years a quarter of the residents will be over 65. The family with 2.4 kids and a labrador could well become quite unusual.

Apart from The South East Queensland Regional Plan 2009-2031 the State Government has undertaken a number of steps to cater for population growth, noticeably through the actions of the Urban Land Development Authority ('ULDA'). For instance, the State has declared the GoPrint site at Woolloongabba as an Urban Development Area and the ULDA has fast tracked planning to deliver high-density residential housing. That type of development is absolutely essential.

Finding 754,000 new dwellings in the south east corner by 2031 certainly provides enormous opportunity for developers to meet that market.



Contents

Job Interview Discrimination

NIGEL INGLIS

On 27 September 2010 the Queensland Civil and Administrative Tribunal ('QCAT') handed down its decision in the case of Bair v Goldpath Pty Ltd and Callaghan (2010) QCAT 483. This was a claim by Mr Bair against Goldpath Pty Ltd ('Goldpath') and Mrs Callaghan (an employee at Goldpath).

Goldpath operate a small family owned school uniform manufacturer in Nerang, Queensland. The respondent (Goldpath and Mrs Callaghan) had advertised for a storeman/driver position. Mr Bair applied for this position.

During the interview, Mr Bair was asked whether he had children and his date of birth. In part, these questions formed the basis of Mr Bair's claim.

In relation to the question about children, the respondent admitted asking the question and said it was part of an informal discussion and general "chit chat".

In relation to asking about Mr Bair's age, the respondent said this question was asked for administration and paper file reasons, so if he was successful these details would be known.

Mr Bair claimed by asking these questions the respondent breached section 124 of the *Anti-discrimination Act 1991 (Qld)* ('the Act'). That section provides:

Unnecessary information

(1) A person must not ask another person, either orally or in writing, to supply information on which unlawful discrimination might be based.

This prohibition does not apply if asking such questions is permitted under legislation. It is also a defence if it can be shown that the information was reasonably required for a purpose that did not involve discrimination.

QCAT held that the respondent had openly admitted the questions were asked and there was no justifiable basis for doing so. Therefore by asking the questions the respondents breached s124 of the Act.

In further evidence, the respondent explained their questions were asked due to a lack of awareness about the Act. Mrs Callaghan had not undertaken any human resources training. She gave evidence at the hearing that she was working from a list of suggested interview questions provided by industry sources.

Even though there were no payable damages in this case by the respondents, it should act as a reminder of how careful employers should be when interviewing applicants for positions. It is important to consider the kinds of questions you are permitted to ask under the Act and those that should not be asked.

Queensland Jurisdiction Change After 10 Years

CHRIS HARGREAVES

For the first time in 10 years the monetary jurisdiction of the Queensland Courts has been increased. The new limits were enacted together with a number of other changes and came into force on 1 November 2010. This article comments only on some of the major changes.

The **Magistrates Court's** upper jurisdiction has seen an increase from $50,000 to $150,000. In addition, appeals from decisions out of the Magistrates Court will generally only be allowed if the dispute exceeds $25,000, or if there is an important question of law or justice involved. To allow for this greater jurisdiction, the scale of costs (relevant to costs orders granted by the Magistrates Court) has been expanded to account for matters greater than $50,000, with a separate scale being added for such matters.

The **District Court's** upper jurisdiction has been increased from $250,000 to $750,000. The District Court has also been given broader statutory powers, which are more akin to those of the Supreme Court under other legislation (for example, the power in the *Property Law Act* to order the removal of a caveat). Previously, only the Supreme Court could exercise such powers.

A number of **Body Corporate** matters have been clarified in the amendments. Now an adjudicator does not have jurisdiction in a debt dispute, but rather the parties should take debt matters to Court or the Queensland Civil and Administrative Tribunal. The legislation also clarifies that the dispute resolution process does not apply to a debt dispute once a proceeding for recovery has commenced.

Court Rules have also been clarified to allow practitioners to file proceedings in any 'central registry' of the Courts (including the Magistrates Court), even if the matter would normally be commenced in a different district. Certainly this update will assist many practitioners (including Mullins Lawyers) in Brisbane who regularly work on matters throughout the State.

The changes bring the Queensland Courts in line with other Courts around the country and allows for a pragmatic approach to many issues by permitting the Supreme Court to deal primarily with matters of the highest calibre and expense, leaving the vast majority of matters to now be determined in the District or Magistrates Courts. It remains to be seen how practitioners or the Courts will adjust to these new requirements.

FAMILY PROVISION APPLICATIONS
the cost of leaving your child nothing!

MICHAEL KLATT

Executors of estates often get frustrated by adult children making family provision applications in circumstances where the adult child has significant assets of their own. From time to time the executors make an application to the court for summary dismissal of the adult child's application. These applications however are difficult because judges are generally reluctant to summarily dismiss an adult child's application without a full hearing of the matter.

In a recent decision of Sylvester and Sylvester, Justice Mullins of the Supreme Court refused to summarily dismiss such an application. In that case, the applicant was an adult son who made a claim on his father's estate. He was one of five children. The estate was worth approximately $4.5 million. He was left nothing in the father's will.

The applicant had worked on his parent's property, which was initially a cattle property that later supported sheep and crops. The applicant was at one point the manager of the family business. The father wanted the applicant to buy the family business and take over the debt, however the bank refused to refinance and a family argument, which escalated to the point where the applicant had grabbed his father's shirt and a farm manager punched the applicant in the face, ensured this did not take place. The father was selling his farming property when the applicant claimed an interest in the water licence attached to the land. Ultimately, agreement was reached that the applicant received $550,000 from the sale proceeds of that property before the father's death.

The applicant gave evidence that his joint and partnership assets were worth about $2.5 million. The relevant consideration for the court was whether the applicant's claim was bound to fail. Her honour considered as material that the applicant claimed he had assisted in building up the father's estate and his material showed a financial need arising from the establishment of this own farming business and possible future health problems, even though her Honour said the strength of his case may be debatable.

It is becoming more common for adult children to make family provision applications. The costs incurred by all parties in relation to these applications can be substantial and unless a court is persuaded to summarily dismiss the matter or the matter is resolved, the matter needs to be determined at a full hearing of the matter before the court.

Punishing The Perpetrator – Punitive Damages

MARK MADSEN

The David Jones case has recently cast a very bright spotlight on sexual harassment, with the media sensationally reporting Fraser-Kirk's $37 million claim but rarely specifying the break-up of that claim. The vast bulk of the amount sought was for exemplary (or punitive) damages, which was not intended to be received by Fraser-Kirk, but rather was to go to a charity, if awarded by the Court.

Exemplary damages are intended to serve two purposes: firstly, to punish a defendant for a conscious wrongdoing done with insolent disregard for the claimant's rights; and secondly, to deter further conduct of the same nature by others.

Whereas compensation (the amount that Fraser-Kirk would have been seeking for herself) is intended to minimise the impact of any wrongdoing upon the claimant personally and therefore, must be viewed from the claimant's circumstances, exemplary damages are considered from the defendant's circumstances. That is, if the defendant is to be punished, any exemplary damages must be assessed with that particular defendant in mind. Hence, the reason for the claim in the David Jones case being so large was that it was based upon 5% of the profit generated by David Jones over a seven year period.

Notwithstanding the sensationalism surrounding the amount claimed and unlike some other jurisdictions around the world, the award of exemplary damages in Australia is relatively rare. The conduct of the defendant must be something more than just objectionable; it must be reprehensible or 'high-handed'. Exemplary damages have been awarded in a wide variety of claims, but in Queensland cannot be awarded in personal injury claims or defamation. Whilst exemplary damages are not limited to sexual harassment cases, it is not difficult to see why that type of claim could lend itself to an award.

... unlike some other jurisdictions around the world, the award of exemplary damages in Australia is relatively rare. The conduct of the defendant must be something more than just objectionable ...

That said, it is worth noting that in the case of *Employment Services Australia Pty Ltd v Poniatowska* (the ESA case) (which is currently the highest payout awarded by an Australian Court for a sexual harassment claim), the Full Court of the Federal Court of Australia refused to award exemplary damages, despite ESA not having appropriate mechanisms in place to deal with sexual harassment complaints.

HIGH RISK LIQUOR PREMISES

CHRIS HARGREAVES

The State Government introduced legislation in October 2010 relating specifically to the banning of 'regular glass' in premises that were categorised as being 'high risk'. Since that legislation was introduced, we have dealt with many licensees under threat of classification pursuant to that legislation, but the majority could be resolved through negotiation rather than litigation.

Justice Wilson of the Queensland Supreme Court recently delivered the first judicial review of a decision to classify a premise as high risk. As the first decision directly on the topic, it certainly stands out. That said, this decision turned primarily on the facts of the case.

The licensee of the Mad Cow was served with a notice proposing to classify it as high risk pursuant to the *Liquor Act 1992* ('the Act').

The licensee, after some dealings with the government regulator, made submissions in accordance with the Act. Following that, the Chief Executive decided to classify the premises as high risk. The licensee then applied for judicial review of that decision on the basis of:

- Denial of natural justice;
- Failure to take into account relevant considerations;
- Taking into account irrelevant considerations;
- Error of law; and
- Unreasonableness.

The Court was persuaded that there had been a denial of natural justice, as the material relied upon by the Chief Executive was not all disclosed to the applicant, and also contained errors in two significant respects (relating to the seriousness of certain alleged incidents).

The Court was not, however, satisfied that the other grounds were made out. Despite that, the denial of natural justice was sufficient for the decision to classify the premises as high risk to be set aside.

The decision highlights to all licensees the importance of ensuring, so far as possible, that the Office of Liquor and Gaming Regulation ('OLGR') is provided with accurate information. It cannot be assumed that the OLGR records are always accurate, as this case demonstrates. The decision also provides that the judiciary will generally protect "natural justice" for licensees.

JOHN MULLINS
EDITORIAL

One of the most high profile cases in recent Australian legal history has been tried in the newspapers and now settled by David Jones. It is too newsworthy and salacious for us to ignore that in this edition of our newsletter.

Perhaps the most interesting part to that story is the strategy used by the applicant and her lawyers and whether at the end of the day aggrieved people are really well served by running their matters in the Court of public opinion through the press. It could be argued that her settlement exceeded what she might otherwise have received had it been done differently, but was the personal cost to her worthwhile.

There is an interesting article in this edition about population growth through infill development in South East Queensland and in particular South Brisbane. It is clear that significant future development in the Brisbane residential property market will also require greater investment in infrastructure and transport within the city suburbs. As our city develops it will be interesting to see what the changes will look like as we accommodate more people living in South East Queensland.

As we head towards the end of 2010, the last 12 months have been very interesting. We have certainly seen a two tier - if not a three tier economy - with some sectors experiencing great growth and vibrancy, other sectors remaining flat and some sectors moving backwards. Interest rates have risen significantly, impacting on the disposable income of many Australians, particularly when combined with cost of living increases on items such as groceries, water and electricity.

Federally, we now have a minority Government and the Australian dollar is almost parity with the US dollar. In South East Queensland dams are so full that water is being released.

Three years ago none of this would have been envisaged. The message is clear: we live in a global village where change occurs very quickly. We have gone from drought to flood and still internationally there has been no real progress with climate change.

In South East Queensland, in my observation, the economy is reasonably stable, but slow. Housing prices are static and house sales are very slow. Economically things could certainly be better, but equally economically things could be a whole lot worse and if you are in Nevada or Miami in the US or Ireland you would certainly know what the slow property market was.

For our firm this year has been challenging and rewarding. We look forward to closing at Christmas as we do annually to enable all of our people to spend Christmas with their family and loved ones. We hope that you are surrounded by those you love at Christmas and that you can have a peaceful and happy time and look forward with renewed optimism for 2011 and beyond. We wish you a very Happy Christmas.

mullins LAWYERS

Level 21, Riverside Centre
123 Eagle Street
Brisbane Qld 4000

GPO Box 2026
Brisbane Qld 4001

Telephone 07 3224 0222
Facsimile 07 3224 0333
email: jmullins@mullinslaw.com.au
www.mullinslaw.com.au

30 YEARS STRONG