

# Civil Law Reform – “A time of Change”

During the Spring session of Parliament we are likely to see the Carr Government introduce legislation that further reforms the Civil Law in New South Wales.

Stage 1 of the NSW Government's Reform Agenda focussed upon unintentional yet negligent conduct causing personal injury. The *Health Care Liability Act 2001* and the *Civil Liability Act 2002* saw a ceiling placed on damages where none had existed before, such as:

1. The introduction of a limit on awards for lost earnings, including both past and future lost earnings, to no more than 3 times the Average Weekly Earnings in New South Wales;
2. Non-economic loss (that is damage for such things as pain and suffering and loss of amenities of life), has been limited to \$350,000.00 in the most extreme case. Less extreme cases receive a proportion of the maximum amount. In cases considered to be less than 15% of the most extreme case, no award will be made.

These reforms come in the wake of an insurance industry crisis, flowing from poor general performance, the HIH collapse, enormous outstanding claims liability and the events of September 11.

The initiative for change reaches beyond State boundaries. The Commonwealth, State and Territory Governments have jointly established a Negligence Review Panel, charged with the task of considering and reporting on a range of aspects of the law of negligence, including:

1. introducing common law principles to limit liability arising from personal injury or death;
2. limiting awards for damages;
3. allowing individuals to assume their own risk, such as in high risk activities like bungy jumping, parachuting etc;
4. reducing the time allowed to bring a claim in negligence from 6 years to within three years of an event occurring;
5. introducing a requirement that the standard of care of professionals, including medical practitioners, in negligence matters, accords

with the generally accepted practice of the relevant profession at the time of the negligent act or omission; and

6. exempting or limiting the liability of eligible not-for-profit organisations such as school fetes, fairs and the like, from damages claims for death or personal injury,

There have also been changes to the laws that regulate the activities of the legal profession. The *Civil Liability Act 2002* primarily deals with personal injury claims, however, the amendments made to the *Legal Profession Act* by Division 5C extend to all Civil claims.

Within Division 5C are provisions that place prohibitions upon a solicitor or barrister acting for a plaintiff or defendant or commencing proceedings in matters where there is no reasonable prospect of success. Providing legal services without a reasonable prospect of success may constitute professional misconduct or unsatisfactory professional conduct and may also result in an order that the solicitor or barrister be personally liable for the costs incurred by their client or costs incurred by another party in proceedings.

This means that clients will need to produce, to their legal adviser, sufficient evidence of any claim or defence before commencing or defending proceedings so that the legal adviser can properly consider whether there is a reasonable prospect of success. The judicial interpretation and application of the provisions could change popular perceptions of access to the civil justice system. An inability to obtain legal services will likely be perceived as a barrier to entering the system.

The recent release of a consultation draft of the *Civil Liability (Personal Responsibility) Bill* further advances the tide of change.

FOR FURTHER INFORMATION, CONTACT  
SCOTT HEDGE (02) 9225 2514  
EMAIL: HEDGES@KEMPSTRANG.COM.AU

## THE KEMP STRANG BRIEF

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- Solicitor



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A summary of  
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THE KEMP STRANG BRIEF IS INTENDED TO KEEP READERS ABBREAST OF CURRENT LEGAL AND FIRM DEVELOPMENTS. IT IS NOT TO BE USED OR RELIED UPON AS A SUBSTITUTE FOR PROFESSIONAL ADVICE. BEFORE ACTING ON ANY MATTER, READERS SHOULD CONSULT WITH THEIR ADVISERS.

A look at pre-sales contracts and the devastating results when they are defective.

# Pre-Sales Pitfalls

On many occasions, a condition precedent to construction and development funding by a Lender will be to require a certain level of enforceable and arms-length pre-sales contracts to be in place. Recently Kemp Strang has reviewed numerous defective pre-sale contracts resulting in tens of millions of dollars worth of pre-sales being voidable at the option of each purchaser.

Many such contracts were deficient due to their failure to comply with the terms of the Home Building Act 1989 and regulations under that Act.

The Home Building Act requires that a developer cannot enter into a contract for sale with a purchaser of a residential property unless the home warranty certificate of insurance is attached to the contract for sale. As is the case in many off-the-plan sale contracts, the developer has not yet commenced works and thus has not yet obtained the home warranty insurance. The applicable Home Building Regulations provides an exemption in this circumstance for the developer provided that certain requirements are met. One requirement is that a specific condition complying with the Home Building Act Regulations be included in the contract for sale. The condition must include a statement to the effect that the developer must produce a certificate of insurance to the purchaser within fourteen (14) days after obtaining the home warranty insurance.

The reason the contracts for sale referred to above were deficient was that the appropriate clause was not inserted into the off-the-plan contracts and so the exemption to attaching a home warranty certificate of insurance was not available. Failure to comply made each contract voidable at the option of the purchaser. Obviously

this can be devastating to a developer who is relying on the pre-sales as a precondition to construction funding.

Kemp Strang has recently obtained Senior Counsel's opinion as to the appropriate method to remedy this defect in these contracts. Opinion received suggests that a purchaser must enter into a specific deed electing to affirm the contract rather than varying the contract to include the appropriate special condition.

In short, both developers and lenders should be aware of these specific requirements of the Home Building Act and Regulations and the serious consequences that failure to comply with these terms can have on residential unit sales.

Failure to  
comply makes  
each contract  
voidable at  
the option of  
the purchaser.

FOR FURTHER INFORMATION, CONTACT  
RORY NOTT (02) 9225 2509  
EMAIL: NOTTR@KEMPSTRANG.COM.AU

# Liquor Licensing Issues for Insolvency Practitioners

Upon taking control of a business as Administrator, Receiver and Manager or Liquidator, many licensing issues arise that may perhaps be overlooked at first instance.

For businesses holding a licence issued under the *Liquor Act 1982* ("the Act"), there are certain provisions that take effect and time frames that need to be met in order to transfer the licence without penalty. Failure to transfer within time results in automatic suspension of the licence, with significant personal risks to controllers in damages.

The Act provides that it is a condition of any liquor licence that the licensee must notify the Licensing Court of any person who becomes interested in the business, within 28 days of that person becoming so interested. The name and date of birth of such person or, in the case of a proprietary company, names of the directors and shareholders, must be supplied to the Court. Upon appointment as controller, care must be taken to ensure the Act is complied with and such notification takes place within the 28 day time period.

Where a person (or company) who has notified the Court of their interest in the business, takes possession of the premises to the exclusion of the licensee, they are deemed under the Act to be the holder of the licence for a period of 28 days. This is to provide the interested party an opportunity to lodge an application for the transfer of the licence. If the application is not lodged within this time and the business continues to trade, the business will be trading illegally and any person (along with the controller) who sells liquor on the premises after that time may be prosecuted for selling alcohol without a licence

and any liquor on the premises may be seized and forfeited to the government. It could be expected that the business may be shut down by the Police. The risk of controllers being liable for failure to protect the licence and the business is real and could give rise to significant damages claims.

In relation to an appointment to a licensed club under the *Registered Clubs Act 1976*, further issues arise for insolvency practitioners. Approval to act as administrator, receiver and manager or liquidator must be sought from the Licensing Court prior to taking up the appointment, unless appointed by the Supreme Court. The application for appointment is heard in open court and the Court requires reports from the Director of Gaming and Racing and Police before making its decision. Practitioners need be aware also that their fees in acting in such capacity with respect to a Registered Club must also be approved by the Licensing Court.

It is very important for insolvency practitioners to be aware of the requirements of both the *Liquor Act 1982* and the *Registered Clubs Act 1976*, especially when a business is to be sold. Selling a business requires the transfer of any necessary licence, and if the Acts have not been complied with, settling a sale of the business may be problematic.

FOR FURTHER INFORMATION, CONTACT  
JIM EAGER (02) 9225 2511  
EMAIL: [EAGERJ@KEMPSTRANG.COM.AU](mailto:EAGERJ@KEMPSTRANG.COM.AU)



Our September interview is with Peter Harrison, partner in our litigation practice group and father of two. We talk to Peter about his work, his interests and how he manages to achieve a work/life balance.

**Tell us about your first job and what you did with your first pay.**

My first job as a solicitor was working as the only employed solicitor for a small two partner firm. Working in such a small practice involved lending a hand in all the areas they dealt with: leasing, litigation, property work etc. I spent my first pay packet on a double-breasted suit - the height of eighties fashion!

**What do you find most rewarding about the work you are involved with now?**

I have a group of clients who have supported me for many years - when you talk to people several times each week you get to build up a strong rapport. I find that knowing them on a personal level makes helping in a business capacity extremely rewarding.

I also enjoy the challenge of strategic planning to get the best result for a client.

**If you could choose your career again, what sort of job would interest you?**

Well, I've always had an interest in politics. I often find myself drawn to the political commentaries in newspapers, so I guess I could see myself as a political journalist or perhaps even an overseas political correspondent.

**How do you balance the demands of a young family and finding time for yourself with a busy legal practice?**

Its not always easy. I have two children, Emma who is 4 and Andrew who is 1 and they both like lots of attention!

Having young children is a great way of enforcing a work/life balance - because my family are always my first priority, taking time out from work to be with them ensures I'm not always burning the midnight oil at the office.

Sometimes, especially around court hearings, my children don't get to see as much of me as usual, but most of the time I manage to work regular hours so that I can see them before and after work each day.

Generally I spend weekends at home with the family and we are regulars at our local park where I spend lots of time at the swings!

When I do have some time to myself I really enjoy emerging myself in a good book - I read a wide variety of fiction and non-fiction - from crime novels to history books. I find escaping in the pages a great way to unwind.



## B e h i n d t h e S c e n e s . . .

Welcome to new solicitors

Lisa Gallate, Joanne Moore, Shan Lai, Sarah Jacks, Tamara Goodwin, Aaron Upcroft, Ross Ward, Skye Watson.

Congratulations!

Our best wishes go with former associate Jarrod White who has been called to the Bar.

Bankruptcy Congress

Kemp Strang are once again a sponsor of the 4th National Bankruptcy Congress to be held on 19 and 20 September.

If you do not wish to receive future mailouts or would like to receive this newsletter electronically, please email us at [info@kempstrang.com.au](mailto:info@kempstrang.com.au) or telephone Marianne Slocombe on +61 2 9225 2578

Level 14, 55 Hunter St  
Sydney NSW 2000  
GPO Box 475  
Sydney NSW 2001  
DX 605 Sydney  
Australia  
Tel: +61 2 9225 2500  
Fax: +61 2 9225 2599  
[www.kempstrang.com.au](http://www.kempstrang.com.au)