

# Macrossan & Amiet Solicitors

news update

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S O L I C I T O R S

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## An "Issue" to Have a Legal Fight About

By Darren Sekac

Our clients who receive our newsletter will by now gather the importance we place on proper estate planning with a carefully drafted Will **and** Enduring Power of Attorney.

There is more and more litigation by dissatisfied children and dependants not receiving a share, or a share they consider inadequate, from an estate of a deceased person.

A recent judgment in the Supreme Court of Queensland delivered on 30 June 2011 by Justice Lyons in Brisbane, demonstrates the type of arguments people who think they should have a share of an estate, or a bigger share, will raise.

In this particular judgment there was a legal fight over the definition of the word "issue".

The word "issue" is often found in Wills.

However, without a proper understanding of the word "issue", the use of the word in a Will can cause the Will to be interpreted to have different consequences than the person who made the Will intended.

In this particular case, elderly Mrs Simpson died and left the main



Darren Sekac

part of her estate for her three children as:-

*"...shall survive me and attain the age of eighteen years provided always that if any such child should die without having attained a vested interest hereunder leaving **issue** who shall survive to attain the age of eighteen (18) years such **issue** shall take if more than one equally between them the share in my estate which his her or their **parent** would have taken had such **parent** survived to attain a vested interest here under"*

One of Mrs Simpson's three children, Charles, died before Mrs Simpson, having been killed unlawfully by his own son Stephen.

Continued on page 5

Local people. Local expertise. Industry leaders.

# Applications to Extend Limitation Period

By Gene Paterson

In Queensland the various Acts that govern the rights of individuals to sue for damages for personal injuries suffered in motor vehicle accidents, work related incidents or public liability incidents provide that if a claim is not lodged pursuant to the relevant Legislation within three (3) years of the date of injury, that claim is barred.

The time limit for bringing an action is not restricted to personal injury actions and there are also time limits on claims for breach of Contract - six (6) years; recovery of land - twelve (12) years; an action in respect of Trust property - six (6) years; claims for further and better support from an estate - nine (9) months.

Section 31 of the *Limitations of Actions Act 1974* (Qld) provides that an extension of the limitation period can be granted by a Court.

In order to obtain an extension, an Applicant must show that a material fact of a decisive character was not within their means of knowledge until a date no more than twelve (12) months prior to the date to which the extension is granted.

The Applicant must show that they have a right of action and that no prejudice has been suffered by the other party through their delay. In practical terms, in personal injury claims the material fact is normally knowledge that a person obtains subsequent to the 3 year limitation period as to the nature and extent of the injury originally suffered.

By way of example; a person may suffer a fractured ankle, undergo medical treatment involving the

plastering of the ankle, non weight bearing for a period and then return to work with some stiffness of the ankle.

Five (5) years later they may find that arthritic changes have occurred in the ankle, the pain suffered on walking affects the person's gait which in turn may have consequences with respect to low back pain and their ability to carry out their employment that they have engaged in for a number of years.

On referral from their General Practitioner to an Orthopaedic Specialist they become aware of the fact that the arthritic changes have occurred, they may require further surgery, possibly a fusion of the ankle and there will be consequences with respect to their ability to work.

At this stage the individual has concerns for their future.

The question always arises as to whether the injured person has taken reasonable steps to ascertain the seriousness of the injury.

The answer to this question depends very much on the warning signs of the injury itself and the extent to which it or any other facts might be thought to



Gene Paterson

call for prudent enquiry to protect one's health and legal rights.

It is difficult to say that a person who finds himself able to get on with life, and returns to employment without significant pain or disability merely because he fails to ask for opinions from his doctor about the prospect of future disability or effect upon his working capacity. (*Healy v Femdale Pty Ltd*).

The Law encourages individuals who have been injured, received appropriate treatment, undergone rehabilitation and who are able to get on with their lives not to seek legal redress in every circumstance. The Courts, in dealing with applications to extend the limitation period, acknowledge that parties who have acted reasonably should not be prejudiced as a result of changed circumstances that were not reasonably contemplated in the three (3) years subsequent to being injured.

If require advice with respect to any claim that is out of time because of the expiration of the three (3) year limitation period, please feel free to speak with one of our Solicitors at Macrossan & Amiet for advice.

## Our December chuckle:

*We like to have a laugh at ourselves...*

A housewife, an accountant and a lawyer were asked **"How much is 2+2?"**

The housewife replies: **"Four!"**

The accountant says: **"I think it's either 3 or 4. Let me run those figures through my spreadsheet one more time."**

The lawyer pulls the drapes, dims the lights and asks in a hushed voice, **"How much do you want it to be?"**

# A Year in Reflection - Where has 2011 Gone?

By John Formosa

As we get to the end of the year it seems to be a common thought that yet another year has raced by without us knowing where the time has gone.

There have been some milestones reached by some of our partners and former partners of this firm this year.

A former partner of many years and good friend Tony Ghush celebrated his 70th birthday which certainly reminds me of how long I have been at the firm as I remember Tony celebrating his 40th birthday.

Gene Paterson, our Managing Partner, celebrated his 60th birthday on 21 October. This occasion certainly did not go unrecognised with several celebrations being held. On Friday, 21 October we held a birthday party for Gene with our staff members at our Gordon Street premises and, certainly, the highlight of that evening was a very well prepared and considered speech by our partner, Pat Carroll. Pat prepared for this speech as he does any legal matter - with great attention to detail, research and added some humour for good measure. Thanks to Pat's insight we certainly all know what we can and can't look forward to in growing old.

The Saturday night following, a larger get-together was held at Gene's "second home" (Brothers Football Club) where there was a larger gathering of all Gene's children, their spouses, grandchildren, Gene's brother who had travelled all the way from Western Australia, Jane's sisters and many of Gene's friends from both Mackay and all over Australia.

The highlight of the night was the many speeches by Gene's children and friends in relation to their reflection on Gene's life. Mention was also made of Gene's

late mum and dad and late sister Keitha.

In addition to Tony Ghush celebrating his 70th birthday this year two long standing friends and former barristers that this firm used for many years, The Honourable Kerry Cullinane Supreme Court Judge Townsville and The Honourable Stan Jones Supreme Court Cairns both also celebrated their 70th birthdays and their retirement.

The occasion of Kerry Cullinane's retirement made me reflect on my younger days as an Articled Law Clerk in the firm when Kerry Cullinane and Stan Jones would be regular visitors to our office and were very entertaining and would "hold Court" in our then library in Gregory Street when the day's activities were discussed over a few beers.

Also I have been able to reflect on the fact that Kerry Cullinane's son Paddy, who is a Barrister in Mackay, is a regular visitor to our office and with my son Paul now working in our Mackay office as a Trainee Solicitor is a great feeling of déjà vu.

This year also marked the return of Ms Georgina Paterson, back working for us as a lawyer after she had spent 11 months in England. It is great to have George back as part of our team. Her bubbly personality and passion for protecting her clients and her passion for the law is a welcome return.

There have been many other great moments of joy in our firm but also there have been moments of sadness. In particular the tragic loss of life of Chris Levi, a son of our long standing and loyal employee Jay Tass has been an occasion which has made us all think of readjusting our priorities in life. Our thoughts and prayers go out to Jay and her family and we all look forward to her early return back to work.



John Formosa

As mentioned in an earlier newsletter we also mourned the loss of our good friend and loyal employee Lyn Staniland who served in our Proserpine office for 21 years. Our thoughts and prayers are also with Lyn's husband Lance and his children and grandchildren this Christmas. There is never a visit to the Proserpine office when I am not reminded of Lyn's presence by her quirky little notes around the office to remind myself, Darren Sekac and Damian Carroll, who also visit this office, to follow her instructions, from anything from filling the coffee machine in the morning, remembering to lock the front door, etc. Lyn is still treasured by us all and truly missed.

With the Christmas period almost upon us it is certainly a time of the year when most people reflect on the year that has gone, looking forward to getting together with friends and relatives that they haven't seen for a while and ponder the prospect of what 2012 will bring us.

On behalf of my fellow partners, Gene Paterson, Pat Carroll, Damian Carroll, Darren Sekac, Andrew Telford, David O'Connell and Stuart Naylor I would like to wish all of our clients and friends a safe and happy Christmas and a prosperous New Year.

I would also like to thank the hard and loyal support we have from our staff members and, in particular, in these times of constant change the large number of staff members that we have both in our Mackay and Whitsunday offices who have been with us for many many years.

# Real Estate in the Whitsundays in 2012

By Andrew Telford

My area of practice is predominately in Property Law. Practicing in this area in the Whitsundays in the last 12 to 18 months has been difficult. For some time I have been pessimistic about the future of the property market, at least in the short term. Having said that, it appears to me that the market may well have hit the bottom. We are now experiencing more confidence and a lot more interest. I suspect that on reflection, now might be a time referred to in the future along the lines of "remember when we could have bought that property for \$....". My advice to friends and family has been, in recent times, to treat now as the time to look for bargains. For Vendors it probably cannot get much worse. So for Buyers, it probably cannot get much better!

There is obviously no guarantee as to when prices might pick up. But inevitably, I am sure they will. To get a bit of an idea of how the area's two leading real estate agents feel about the market in the Whitsundays, I invited both of them to make some comments which are reproduced below:-

## Mark Beale - Ray White Whitsunday

*Is it 6 o'clock?*

*On the property clock 6pm announces that we are at the bottom of the market and most likely going to be level with some increase in the near future. Current feedback from our sales team is*

*that it does feel that 6pm is now upon us. We are receiving more offers on properties, buyers are making quicker decisions and we are seeing more multiple offers which is where more than one buyer want to put an offer in at the same time as another.*

*There is no doubt that the mining boom is creating a lot of our buyers who simply want to get out of Mackay and Moranbah areas and live the lifestyle they deserve in the Whitsundays. I must say I can't blame them! Not only are sales prices a lot lower than these other areas but the rental prices are not out of control. We do talk to a lot of buyers that comment the traffic is that bad in Mackay that they want to get out and move to Airlie and enjoy the lifestyle.*

*Rental prices are on the increase with our research showing that in the last 4 months the average rent per week of houses we have filled for the month has increased from \$350pw to \$450pw. An amazing statistic and one that we believe we most likely rise.*

*We look forward to 2012 and showing the world how beautiful the Whitsundays really is.*



Mark Beale



Andrew Telford

## Rob Taylor - PRDnationwide Whitsunday

*2011 will be described as the year when the property market reached the bottom of the cycle and the later part showing very early signs of a recovery.*

*From the peak of the market in 2007 sales volumes have dropped 70% and prices, depending on the market segment, 30% - 50%. Coupled with a rising interest rate environment and the virtual stopping of construction are also signs of the market bottoming.*

*Sales volumes are now starting to increase which is causing a small reduction in the supply of property. As supply decreases significantly, we will see prices start to stabilise.*

*The reduction in supply has also flowed through to the residential rental market. Earlier in the year vacancy was approximately 12% as the construction workers left town and took with them their large disposable income. (I believe this had a more significant effect on the local economy and therefore the retail and office vacancies than the decline in tourism.) The vacancy factor is now approaching 5% evidencing a growing population. As many appreciate the growth is primarily due to mining families*

## news

choosing to call the Whitsundays home. This growing population together with the disposable income will provide a small recovery in our retail sector.

The most telling sign of a market recovery is when large developers move in and take a position in readiness for the next market uplift. Eight (8) development sites have sold in the second half of this year which is more than the preceding three (3) years.

Additionally, several sale price records have been established. A house at Mandalay sold for \$8 million and another in Cannonvale for above \$1.1 million.

It is unlikely that the market will run to the highs of 2006 and 2007 within the next 12 months due to the large volume of stock that is still on the market. However, even more unlikely is a further significant reduction in prices.

Perhaps now is the time to be investing in the Whitsundays.



Rob Taylor

## An “Issue” to Have a Legal Fight About

Continued from page 1

The matter came before the Supreme Court for a declaration as to whether or not Stephen’s son Taylor (Mrs Simpson’s great grandchild) should receive Charles’ share effectively.

The other two surviving children of Mrs Simpson sought the declaration of the Court that Taylor did not inherit Charles’ share on two bases:-

1. Taylor was not “issue” entitled to receive Charles’ share as mentioned in the clause of the Will above; and
2. Stephen and therefore Taylor would never have inherited Charles’ share of the estate because of Stephen’s unlawful act of killing Charles.

The Judge considered the law as to the definition of issue in the context of Wills and the provisions of the *Succession Act 1981 (Qld)* and decided that because of the particular wording of the clause mentioned above, the word “issue” was only intended to include the children of Mrs Simpson’s children i.e. Mrs Simpson’s grandchildren.

It did not extend to great grandchildren.

A significant reason for that finding was the context of the word “parent” in the clause.

Accordingly, Mrs Simpson’s estate was shared between her surviving two children and Charles’ lineal descendants did not receive any share.

There were two lots of law firms involved in the litigation who each engaged a barrister.

No doubt legal fees were considerable.

If the Will had have been drafted more clearly, then this litigation may never have been necessary. That is, there may never have been the prospect of Stephen’s son (no doubt encouraged by Stephen who killed his father Charles) making a claim.

The estate no doubt has been eroded significantly by the value of the legal costs involved in this stowsh.

We encourage our clients to see us to have their Wills properly drafted, whether or not they have never done a Will or alternatively,

if their Will needs to be reviewed and potentially updated.

It is possible some clients who have Wills drafted years ago either by themselves or with the assistance with other lawyers, think their Wills are in satisfactory terms, but it is advisable we at least check old Wills for clients to confirm whether that is a true assumption or not.

Of course we also espouse similar sentiments to encourage clients to consider making an Enduring Power of Attorney or reviewing the Enduring Power of Attorney even if they already have one.

For example, many clients have an old form of Enduring Power of Attorney pre-dating 1998 which does not provide for a personal/health attorney as the more modern version does. Pre 1998 Enduring Powers of Attorney will only cover financial matters which will not help in awkward situations such as making medical decisions for elderly relatives.

# Land Valuations - The Site Value Methodology

By Georgina Paterson

Each year the Department of Environment and Resource Management (“DERM”) undertakes to value each parcel of land. This valuation is used by our local councils as a basis for calculating the rates payable by the owner of the land, the Office of State Revenue for calculating land tax and by DERM for state land rental purposes.

From September 2011, the *Land Valuation Act 2010* introduced changes to the statutory land valuation process in Queensland.

This meant that from 2011, all non-rural land is valued using the site value methodology and all rural land continues to be valued using the unimproved valuation methodology.

## Site Value Methodology

Site value is the market value of the land in its present state. DERM states that this method of valuation is more aligned with market value, making the valuation simpler and easier to understand. It includes the value of any site improvements to the land (e.g. filling, clearing, levelling and drainage works undertaken to prepare the land for development). However it does not include: -

- Structural improvements on the land such as houses, sheds and other buildings.
- Excavations necessary for structural improvements on the land (such as building foundations, footings or underground car parks); and
- The existence of any leases, agreements for lease, development approvals or

infrastructure credits and their added value.

Once the land is valued, the valuation is sent to the land owner (known as a “Valuation Notice”) advising of the current financial year’s land valuation. A landowner is then given the opportunity to accept or object to the valuation on either of the following grounds:-

- a) The valuation is not supported by property sales; and/ or
- b) A deduction for site improvements.

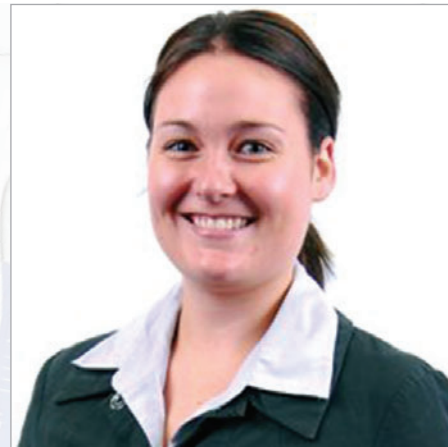
## Deduction for site improvements

If your land is valued using site value, and as the current landowner, you have undertaken site works in the last 12 years (prior to the effective date of the valuation), you may be eligible for a deduction for site improvements.

A deduction for site improvements is a reasonable allowance for site improvements undertaken to the land where it has occurred at the current owner’s expense. This means, for example, if a developer has made site improvements for preparing the land for development in the last three years, they will be able to deduct the value of these improvements for the next nine years, or until sold, in recognition of the cost of development.

Only the current landowner who carried out and paid for the site improvements is entitled to a deduction and will need to meet the following criteria:-

- Paid for the site improvements within the previous 12 years



Georgina Paterson

- Owned the property when the site improvements were paid for
- Still owns the property today
- Can supply details of the site improvements
- Can identify who carried out the works
- Can supply evidence of the costs of the works and when they were paid for.

It should be noted that site improvements are not allowed if the owner of the land was not the owner when the site improvements were made to the land.

The amount of the site improvement deduction may or may not be equal to the cost incurred by the landowner in making the site improvements.

The amount of the deduction will be the lesser of:-

- The added value of the site improvements on the date of valuation
- The costs incurred in undertaking the site improvements as at the relevant date of valuation.

The deduction is also available to eligible landowners who undertake site improvements in the future.

Please do not hesitate to contact Macrossan & Amiet if you require help with objecting to a Valuation Notice or if you would like further information.

# Email Scam Warning

By Gene Paterson

In our last edition Rebecca Robertson wrote about phone and internet scams and how to protect yourself. Our office has recently had first hand experience of an attempted scam.

An email was received in the following terms

**Hello**

***I just arrived United Kingdom and I need your help cos I am in a fix. Can I get a loan of \$2,815? You'll have it as soon as I get home next week. I lost my bank card and can't access the ATM as planned. I'll appreciate what you can give if not all. Please get back to me asap.... I'll advise on how to send it.***

**In appreciation**

***Peter England*** (name changed for the purpose of article)

The email was from an existing client who had placed funds in our Trust Account for work that is in progress. The funds in our Trust Account are in excess of \$2,815.00.

On first sight the email appeared to be a request from a client to have funds in Trust paid back to them to help them in the circumstances where they were overseas and had lost their bankcard.

The Writer authorised the payment of funds and contacted the client by email in the following terms:-

*Our office is prepared to release the sum of \$2,815 out of trust funds. Could you please advise where you would like the money paid.*

A further email was received in the following terms:-

***Hi Jen, (Jenny Moohin) have it sent by Western Union at my name, address, 21-27 Belgrave Road, London SW1VIRG, ENGLAND, United Kingdom. Please get back to me as soon as you have the money sent, once you are done with the transfer, write down the Western Union Control Number and send to me. Please don't desert me at this critical time.***

**In appreciation**  
***Peter England***

The following email correspondence ensued:

*Hi Peter*

*Do you have bank account details for this WESTERN UNION??? I am not familiar with this and have no idea how we send the money.*

*Please advise.*

*Jenny*

***Jen, It's impossible for me to***



Gene Paterson

***access my bank account from here that is why I need your help. Just have it sent via WESTERN UNION using the detailed info that I provided you with.***

In appreciation,

*I have made enquiries and know how the money is to be transferred.*

*The only concern is that Wide Bay have advised that there have been scams involving Western Union recently and I would like to confirm that you are seeking this money - prior to sending it.*

*Could you please telephone me so that we can confirm over the phone your identity.*

*Thanks*

*Jenny*

After the last email the client was rung on his mobile phone and answered the phone at his address in Townsville. The client advised that his Hotmail had been hacked and the password had been changed. The client no longer had any control of his emails and the emails to us were sent by an unauthorised party.

**How to report a scam**

The Australian Competition and Consumer Commission ("ACCC") has a website called SCAMwatch. The website is at [www.scamwatch.gov.au](http://www.scamwatch.gov.au). You can also call the SCAMwatch ACCC Infocentre on 1300 795 995 if you are concerned or require further information.

If you have any queries about any of the articles in this newsletter, please feel free to email [mac@macamiet.com.au](mailto:mac@macamiet.com.au) or phone 4944 2000 (Mackay) or 4948 4500 (Whitsundays) to speak directly with the author of the article.

### Contact us

For further information about the services offered by Macrossan & Amiet Solicitors please contact your nearest office:

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## news

# Conveyancing Update: Buyer Succeeds in Terminating Off the Plan Contract

By Stuart Naylor

In previous editions I have written about the large amount of disputes currently before the Courts between buyers and sellers involving whether contracts to purchase units and other property off the plan are enforceable.

In a recent decision of the Supreme Court, Justice Applegarth found that a buyer was entitled to terminate an off the plan contract because of the misleading and deceptive conduct of the developer.

The case concerned representations made to the buyer about the views that would exist from the apartment. The buyer was told there would be clear views of a lake and the horizon and were told that the developer selling the units controlled all of the sites in front of the proposed apartment building.

What they weren't told was that the developer was planning to build an 11 storey apartment building in front which would significantly interfere with the



Stuart Naylor

views from the unit the buyer was purchasing.

On learning this the buyer attempted to terminate the contract. The developer did not accept the termination and sued the buyer in the Supreme Court seeking to enforce the contract.

The Court dismissed the developer's claim and found in favour of the buyer. The Court found that the buyer was entitled to an order under the *Trade Practices Act* declaring the contract void because of the developers misleading and deceptive conduct. The developer was ordered to repay the deposit to the buyer.

While each case depends on its own facts this decision is a useful example of the increased focus on the way developers sell property and serves as a reminder to buyers of other areas where the law may provide them with rights.

Our office has considerable experience in acting for both buyers and sellers not only in the conveyancing process itself but also in litigation disputing whether contracts are enforceable.



## Wishing you and your family a safe and happy holiday period.

*The Macrossan & Amiet Team*

**Office Hours for the Christmas and New Year period**

**Proserpine Office** - Closed 23rd December - re-opens Tuesday 3rd January 2012

**Mackay Office** - Closed for public holidays from 2pm 23rd December

- Open Wednesday 28th to Friday 30th December

- Closed Monday 2nd January - re-opens Tuesday 3rd January 2012

**Cannonvale Office** - Closed 23rd December

- re-opens Tuesday 3rd January 2012