Thynne Macartney

Agribusiness Newsletter

December 2017

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Family Loans Under the Microscope

By Peter Kenny, Agribusiness Partner

A recent Queensland Court case between elderly parents and their son has shed considerable light on what must be proved in order for moneys which are transferred to a family member to be recognised as a loan, rather than a gift.

The facts in the case of Bergham & Anor v Bergham were as follows:

- throughout 2009, the son's business was under significant financial stress;
- after the son approached his parents, the father arranged for $98,000 to be transferred to the son;
- the son continued to ask for further moneys and the father complied, arranging for further transfers to be made to the son;
- in late 2012, the son asked to borrow his father's credit card and incurred further expenditure of $13,471.09 on that card; and
- when asked to repay the moneys, the son refused to do so, asserting the transfers were gifts.

The parents eventually sued their son in the District Court claiming that the $268,471.09 which had either been transferred to the son in cash or incurred as expenses on the father's credit card was, in fact, a loan. The son defended these proceedings and initially won. The trial judge found that:

- the parents had failed to prove there was an intention by parties to create a legally binding agreement for the loans;
- there might have been a moral obligation to repay the loan, but this fell well short of a legal obligation to do so;
- because the parents did not keep a ledger of the funds transferred to the son, this indicated that the parents did not intend to require the moneys to be repaid;
- the fact that the parents' daughter worked for the son's company was also considered to be important because the security of the daughter's employment could be seen as a strong motivation for the parents to consider the transfer of the funds to the son's company as more charitable in nature;
- the fact that the parents allowed the son to use their credit card when the son was injured and had very little money was more indicative of a charitable gesture than a legally binding business arrangement.

The parents lodged an appeal to the Queensland Court of Appeal which found in favour of the parents. The Court of Appeal made the following findings:

- the fact that the parents did not keep a ledger of the funds transferred to the son should not count against the existence of a enforceable loan agreement between family members;
- the lengthy period of time it took the parents to demand repayment of the money owed should not count against their assertion that a breach of the loan arrangements had taken place; and
- the motive the parents had in transferring the money to the son, be it "charitable" or otherwise, was not relevant. Rather, of relevance was what the parents' objective intentions were when making the transactions.

The Court ordered the son to pay his parents $286,471 plus interest.

This case could have very important ramifications for families involved in the agricultural sector, particularly where farming and grazing lands are transferred from one generation to the next on the basis of an informal or undocumented financial arrangement that the parties agree is to apply in the years to come.

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More Paths for Planning Succession

By Hannah Byrne, Agribusiness Associate

More widely applicable transfer duty concessions and new succession planning grants mean there's never been a better time for primary producers to consider the succession of their family businesses.

Extension of duty relief

Transfer duty, which is a calculated on a sliding scale up to 5.75% of unencumbered value, is a significant impost on transfers of land and other business assets in Queensland.

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Farm Management Grants are available to offset the costs of professional advice associated with succession planning

In a succession planning context, an important concession has been available on the transfer of property used to carry on family businesses of primary production. The applicability of this concession has been expanded dramatically in recent years.

Since 1 July 2014, the recipient of a property has not needed to be a direct lineal descendant of the transferor and instead can be a spouse, child, grandchild, parent, grandparent, sibling, aunt, uncle, niece or nephew.

Since 1 July 2016, the "gift" requirement has been removed meaning that, provided the other requirements are met, no duty is payable even where the recipient pays for it or assumes debt in conjunction with the transfer.

Since 12 October 2016, the concession has been expanded to include "other assets" such as water entitlements, brands and business names.

With effect from 23 May 2017 to 22 May 2018, the eligible recipients of the property have temporarily been expanded to include first cousins (and their spouse).

Succession planning grants

Farm Management Grants are now available to Queensland primary producers to offset the costs of professional advice associated with succession planning. The advice must come from a qualified professional such as a solicitor, accountant or financial planner.

No duty is payable even where the recipient of the property pays for it or assumes debt in conjunction with the transfer.

Rebates of up to 50% are available with a cap of $2,500 per applicant (family member) per financial year.

Applications for the rebate can be made through the Queensland Rural and Industry Development Authority (QRIDA).

Thynne + Macartney's agribusiness lawyers can help with the development and implementation of a succession plan that achieves a family's goals and minimises transaction costs.

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Blue Dots, White Areas and Red Tape

By Ari McCamley, Agribusiness Partner

Across Queensland, landholders have been discovering "blue dots" on the Government's vegetation mapping for their properties (available at https://www.dnrm.qld.gov.au/qld/environment/land/vegetation/vegetation-map-request-form).

The blue dots are the result of regulations under the *Nature Conservation Act*. The Department of Environment and Heritage Protection (**DEHP**) maintains records of historical and reported sightings of protected plant species and the areas within a two-kilometre buffer around these sightings become "high risk areas" (blue dots) on Flora Survey Trigger Maps.

The protected plants regime under the *Nature Conservation Act* is separate from the more familiar tree clearing laws in the V*egetation Management Act*. As a result, clearing that is permitted under the *Vegetation Management Act* can be unlawful under the *Nature Conservation Act*. For example, Category X areas recognised under the *Vegetation Management Act* are not necessarily exempt from the protected plants regime and clearing them without regard to any "blue dots" could inadvertently affect landholders trying to do the right thing.

The *Nature Conservation Act* has more limited exemptions, with those relevant to agriculture including:

- clearing in compliance with a self-assessable vegetation clearing code for thinning, managing weeds or managing encroachment;
- clearing for routine maintenance of existing infrastructure (such as roads, fences, stockyards, water facilities and buildings), maintenance in the course of plantation management or maintenance in the course of cropping on land that was previously lawfully cleared;
- establishing or maintaining a firebreak or fire management line within certain parameters; and
- clearing to reduce or avoid an imminent risk of serious injury or death to a person or damage to buildings or property.

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Where no exemption applies, before clearing in an area covered by a blue dot, landholders are required to engage a suitably qualified person to conduct a flora survey in compliance with certain guidelines (estimates of the cost of the survey are in the order of $5,000). If the flora survey does not detect any Endangered, Vulnerable or Near Threatened (EVNT) plants, a landholder must complete an exempt clearing notification. If EVNT plants are detected, the landholder must apply for a clearing permit (fees for which range up to $2,866), which will be assessed against DEHP's guidelines. DEHP can impose a condition on the clearing permit that requires the offset (protection of another area) of any EVNT plants to be cleared.

Unless a landholder follows that process, the clearing is potentially an offence under the *Nature Conservation Act* carrying a maximum penalty (depending on the number and classification of plants cleared) of up to $378,450 or 2 years' imprisonment.

The "blue dot" restrictions on clearing "Category X" (non-remnant) areas under the *Nature Conservation Act* naturally raise several concerns from a landholder's perspective, especially given the reliance many landholders have placed on having "locked in" Category X areas under a Property Map of Assessable Vegetation. It must be questioned whether the protected plants regime is fulfilling its statutory premise to protect plants "in the wild" or whether, by extended into non-remnant areas, it is reaching further than is warranted.

If the process is not followed, clearing can be an offence with a maximum penalty of up to $378,450 or 2 years' imprisonment

The *Nature Conservation Act* is due for review in 2018 and landholders should have an opportunity to present better alternatives to the current regime as part of that review. In the meantime, landholders should follow the survey/permit process when contemplating clearing within "blue dots" unless an exception applies.

Thynne + Macartney's agribusiness lawyers frequently assist landholders to analyse vegetation mapping against the current laws and to respond to Departmental investigations into clearing.

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Handgun Law Changes Mean Uncertainty for Licensees

By Alex Ramsey, Agribusiness Senior Associate

The recent adoption of the National Firearms Agreement between the Federal and State governments and a decision by the Queensland Civil and Administrative Tribunal, (**QCAT**) have led to changes in the licensing regime for handguns.

Previously, handgun licences could be held by primary producers if the use of the handgun was a necessary "occupational requirement" and a "genuine need" existed for the use of the handgun on a rural property. These requirements were able to be met by farmers and graziers on the basis that handguns were a safer option than rifles when destroying livestock and feral animals in certain situations, such as within a crush or a trap.

The new National Firearms Agreement requires that a handgun licence holder prove that the same "occupational requirement" exists and also that the "genuine need" cannot be met by other means (such as by the usual rifle licencing classes). This test requires licence holders to prove to the Queensland Police Service that the scale of the rural operation and previous use of the handgun warrant their licence to be renewed.

In addition to this policy change, a decision of QCAT known as *Feeney (2017)* highlights the extent to which part-time or casual employment in a rural enterprise will affect the ability to hold a handgun licence. In that case, QCAT refused the renewal of a handgun licence held for 20 years on the basis that the holder's less-than-full-time business of agisting livestock and destroying feral pests on adjoining properties were not adequate "occupational requirements".

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A number of handgun licence holders are now reporting that their licences are not being renewed by the Queensland Police Service on the same basis. We expect that there will be any number of appeals to QCAT as the renewal process continues and Thynne + Macartney's Agribusiness lawyers are able to assist with these issues.

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Another Bill to Encourage Co-Existence

By Ari McCamley, Agribusiness Partner

Introduced to the Queensland Parliament in August, the Palaszczuk Government's *Mineral, Water and Other Legislation Amendment Bill* 2017 (**Bill**) had not been passed by the time of November's election. If revived, it will change the rules that govern relationships between landholders and resource companies seeking access to private land.

By introducing new mechanisms to encourage resource companies and landholders to reach agreement, the Bill should minimise the number of land access negotiations stalling and being referred to the Land Court. Further, it will give landholders more certainty around the circumstances in which their costs will be paid by the resource company. Unfortunately, it also contains a few surprises detrimental to landholders' interests.

Exhausting the possibility of reaching agreement

The Bill proposes to introduce a new right for either a landholder or resource company to elect for an alternative dispute resolution (ADR) process if agreement has not been reached at the end of the 20-business-day "minimum negotiation period" after a resource company commences negotiations with a landholder. The type of ADR process (for example, mediation) and the identity of the facilitator is to be decided by the Land Court or a recognised institute if the parties cannot agree. The resource company must pay the costs of the ADR facilitator.

The Bill also introduces a new alternative to heading to the Land Court if agreement has not been reached at the end of the minimum negotiation period or the ADR process. An arbitrator can be appointed at the election of either party to make a binding determination on the issues in dispute, including the amount of compensation payable.

Worryingly, neither party is entitled to legal representation during the arbitration process unless the other party agrees. This is of particular concern to landholders given resource companies will often have specialist teams of negotiators in their ranks to represent them in arbitration. Without the same specialist "in house" skills and experience, landholders will be disadvantaged without the right to involve their lawyers.

Landholder costs paid even if agreement is not reached

One major flaw with the current laws is that a resource company only becomes liable to pay the accounting, legal and valuation costs a landholder incurs in negotiations once a conduct and compensation agreement is signed. Unless satisfactory alternative arrangements are made, landholders can therefore be left significantly out of pocket if agreement is not reached, including if the resource company delays or cancels plans to access the landholder's property.

The Bill proposes to establish a landholder's right to recover necessarily and reasonably incurred negotiation and preparation costs regardless of whether agreement is ultimately reached. Further, the costs of an agronomist will be added to the list of costs that potentially can be recovered.

Threat to compensation for off-property activities

At present, a landholder is entitled to compensation from a resource company for certain impacts relating to the landholder's land. To qualify for compensation, the landholder must own or occupy land within the area of the resource authority (or recognised "access land"). However, the claim for compensation does not have to relate to activities on the landholder's property. It can be for impacts caused by the resource company's broader project.

However, the Bill proposes a change to the definition of "compensatable effects" that will limit a landholder's rights to compensation to the impacts of the resource company's activities on the landholder's land. Especially in the context of projects where significant disruptive infrastructure is installed on neighbouring properties (including those owned by the same landholder) or activities on neighbouring properties cause contamination in a broader area, this change could represent a significant erosion of landholders' rights.

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