Client Newsletter

No. 4, 2010

In touch with the law

The law is constantly changing and this newsletter describes developments which may be relevant to you. If you are in any doubt about these or any other aspects of the law, please make an appointment to see your solicitor.

PROPERTY & BUSINESS LAWYERS

COMPENSATION FOR RESCUERS

Aftermath of accident causes mental harm

A recent case improves the likelihood that rescuers and emergency workers who suffer 'pure mental harm' in the course of their duties can gain compensation.

After a severe train derailment in NSW, in which seven people were killed and many others seriously injured, two police officers, who spent hours rendering assistance to accident survivors and moving them from the wreckage to safety, claimed damages from State Rail for psychiatric injury.

Many accidents have the potential to create a wide circle of mental suffering to bystanders, family members or others not physically injured themselves, and it has traditionally been thought "impolitic" that everybody so affected should be able to recover damages.

The High Court decision in this case clarifies the position of rescuers who usually attend an accident scene after the event has occurred and, being unrelated to the victim, are normally denied access to compensation by the courts.

It confirms that in the case of non-relations, compensation is not restricted to those present at the time an accident occurs. Rather, the time frame over which one may witness, at the scene, a victim being killed, injured or put in peril may include certain aspects of an accident's aftermath.

There will still be circumstances which may exclude a damages claim. Some events can occur in an instant. A person who arrives at a scene after someone has fallen from a roof, for example, may not, in circumstances of no further risk, sufficiently witness the victim "being killed, injured or put in peril" as required by the law on liability. ❑

SELF-MANAGED SUPER

New law removes special trustee status

A law brought in on 1 July removes trustees of self-managed super funds from the Office of State Revenue's definition of special trustee.

The change means that if any continuing or new trustees of a self-managed super fund are or can become beneficiaries, duty will be payable on the value of the dutiable property transferred from the old to the new trustees.

To meet exemption requirements all new self-managed super funds should now have a corporate trustee and be drafted to include a non-revocable clause precluding the corporate trustee from becoming a beneficiary.

On the retirement or death of a trustee of an existing self-managed fund, the transfer to a new trustee will not be liable for full duty if the remaining trustee retires and a new corporate trustee is appointed.

In such an event, the existing fund would need to be amended to include a non-revocable clause precluding the corporate trustee from becoming a beneficiary.

It does not matter if the beneficiaries of the trust are directors and/or shareholders of the corporate trustee.

Your solicitor will be able to help you with the trustee arrangements of your fund. ❑

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COMMERCIAL OFFICES

Sellers or lessors must disclose energy efficiency

Energy efficiency is now a legal consideration when leasing or selling commercial offices space of 2,000 square metres or more.

Disclosure obligations under new laws mean many sellers or lessors of office space will be required to obtain and disclose an up-to-date energy efficiency rating.

The start date for disclosure is 1 November 2010, with a 12-month transition period to 31 October 2011.

During the transition period, building owners and lessors will need to disclose a valid NABERS (National Australian Built Environment Rating System) Energy star rating when offering for sale, lease or sublease commercial office space with a net lettable area of 2,000 square metres or more.

After the transition period, from 1 November 2011, a valid Building Energy Efficiency Certificate will be required.

Owners and lessors should ensure that sales and letting agency agreements, building management agreements and agreements to sell or lease a disclosure-affected building, or disclosure-affected area of a building, adequately address the requirements of the new laws for their circumstances. This includes provisions to allow access for energy efficiency improvements to be made and for audits to be conducted on premises.

Owners and lessors who don't comply with the Act risk delays in the sale or lease of the building if they are not ready for mandatory disclosure.

If they proceed without disclosure, they risk a fine or prosecution. Civil penalties of up to $110,000 for the first day and $11,000 for each subsequent day may be imposed by a court for each breach of a disclosure obligation. Alternatively, the Australian Government Department of Climate Change and Energy Efficiency can issue infringement notices of up to $11,000 for the first day and $1,100 for each subsequent day of non-compliance.

NABERS Energy ratings are valid for 12 months, and the required information only needs to be disclosed at the point of sale, lease or sublease to potential buyers or tenants.

The program is designed to improve the energy efficiency of Australia's large office buildings. ❑

DRAFTING THE CONTRACT

Interpretation is more than words in isolation

A recent UK case shows the importance of clear and unambiguous drafting, and that contractual interpretation is not simply a matter of considering words in isolation.

It is dangerous to assume that any words in a contract will have a fixed meaning. In a recent UK case, an agreement provided for a software licence that would be a "perpetual licence". On termination of the support agreement, a company thought its licence should continue, but the company providing the support claimed that the termination of the support agreement meant that the licence agreement should also terminate.

The UK courts found that the word 'perpetual' can carry different shades of meaning. It can mean 'never ending' in the sense of incapable of being brought to an end, or it can mean 'operating without limit of time', subject to any contractual provisions governing termination. In this case, the latter interpretation was found to be the correct one.

Consequently, although you might have expected the word 'perpetual' to mean 'never ending', in looking at the broader contractual matrix, this will not always be the case.

Contact your solicitor for advice on drafting contracts. ❑

TAX SHELTERS AND SCHEMES

Alerts and schemes

So far this year the Tax Office has only issued three alerts as early warning of "significant new and emerging" higher risk tax and superannuation planning issues or arrangements that it has under risk assessment.

Some schemes, particularly primary production tax shelters, have been given Tax Office approval, though the Tax Office stresses that it gives no assurance of their commercial viability. In recent years, there has been a demise of primary production tax shelters, perhaps because more often than not they are commercial failures.

However, some remain. If you ask your solicitor's advice on whether you should participate in a tax scheme, they will likely ask if the Tax Office has provided a ruling on it.

Up to 30 June this year, the Tax Office provided 17 product rulings. This contrasts with previous years – in 2000, for example, there were 119.

Overwhelmingly, product rulings have been used by people seeking to promote primary production tax shelters. Of the 17 rulings, four were for financial arrangements and 13 for primary production shelters. The latter were mainly forestry schemes.

Promoters were much more imaginative in 2000, with rulings made for tax shelters involving wine, crocodiles, cattle, cotton, olives and coffee. Contact your solicitor for further advice. ❑

NOT JUST THE MONEY

Suspension of employee a loss of 'non-pecuniary attributes'

In a recent case where an employee had been suspended on full pay, the courts found that employees have rights to more than just a pay cheque.

The courts found that the employers had failed to take into account the person's "legitimate needs" or treat her fairly and reasonably despite having a duty to do so.

The person had been working in the public service and had been suspended for seven months. The judge was careful to highlight that the workplace is not simply a place of economic sustenance but "provides employees with purpose, dignity, pride enjoyment, social acceptance and many social connections".

The denial of these "non-pecuniary" attributes of employment was having a personally detrimental effect on the person.

In addition, the court accepted that her continuing suspension was detrimental to her reputation in a specialist field and her ability to develop and maintain her professional expertise.

Awarding some "interim relief", the judge stated that "success at final trial, and an award of damages, is not likely to provide an adequate remedy ... by reason of the significant non-pecuniary harm that she is likely to be subjected to". ❑

KEY CHANGES

New guardianship laws

Several changes to guardianship laws came into effect in September 2010.

A responsible person can now consent to the administering of addiction drugs to patients who lack the capacity to consent, and removes the requirement to get the consent of the Guardianship Tribunal before such drugs can be administered.

New revised forms to appoint, revoke or resign the appointment of an enduring guardian are easier to understand and use.

The class of eligible witnesses to enduring guardianship appointments, revocations and resignations has been extended to include employees of the NSW Trustee and Guardian or the Office of the Public Guardian who have been approved to perform this role by the chief executive officer of the NSW Trustee and Guardian and have completed a course of study approved by the Minister. It has also been expanded to include overseas-registered foreign lawyers.

The new laws also add previously unrecognised enduring guardianship appointments made under WA law to those bodies which can be recognised as interstate enduring guardians in NSW. ❑

HYBRID DISPUTE RESOLUTION

Getting the best of both worlds

Courts are streamlining their processes around the world. 'Just, cheap and quick' is the objective. One option being entertained is the use of a hybrid process in appropriate cases.

The practice of combining mediation and arbitration with the same person has been traced back to ancient Greece and Egypt. 'Med-arb' as it is known, ensures certainty that, either by agreement or by award, a dispute will be resolved, and you can place a time limit on the process in your med-arb agreement.

Using only mediation runs the risk of not settling all the issues in dispute. If you use only arbitration, you know that all the issues will be resolved, but deprive yourself of the creative options your own negotiated solution could provide.

New laws in NSW this year require the parties not merely to consent at the outset to the arbitrator mediating, but consent in writing, after the mediation has terminated, to the arbitrator proceeding to arbitrate.

They also require the arbitrator, before taking any further steps, to disclose to the parties any confidential information learned during the mediation which the arbitrator considers material to the arbitration.

The kind of dispute most suitable for med-arb is one in which there appears to be 'win-win' possibilities that may be explored in mediation without having much debate about who is right or wrong. ❑

ABORIGINAL CULTURAL HERITAGE

Improved protection and harsher penalties

New laws have come into force to improve the protection of Aboriginal cultural heritage.

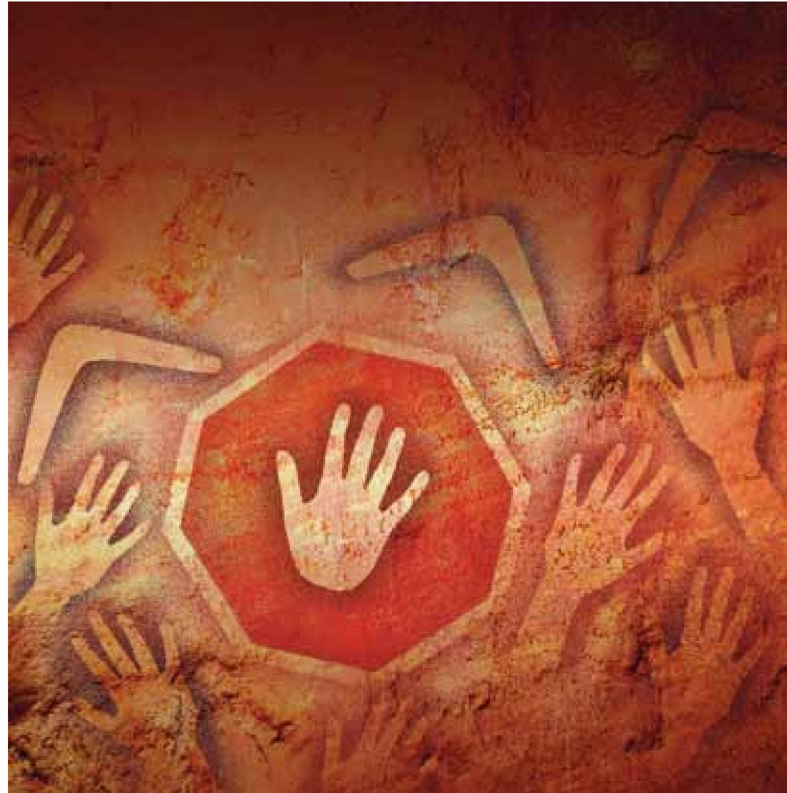
In the new laws, Aboriginal cultural heritage is defined as Aboriginal objects and places. Aboriginal objects can include things which are associated with traditional societies, such as stone tools, art sites, and burial grounds, as well as contemporary things. Aboriginal places are those areas that are considered to be of such special significance to Aboriginal people that they are afforded special protection under the law.

The changes introduce two new offences of harm to or desecration of Aboriginal objects. There is also a strict liability offence of harm to declared Aboriginal places.

'Harm' is defined to mean to destroy, deface or damage an Aboriginal object or a place, and in relation to an object, it also means to move the object from the land.

There will be greatly increased penalties for these offences. For knowingly harming or desecrating an Aboriginal object, the maximum penalty will be up to $275,000 for individuals or one year's imprisonment or both. Where there are circumstances of aggravation it will be up to $550,000 or imprisonment for up to two years or both. For a corporation it will be $1.1 million.

Circumstances of aggravation include those where a person committed the offence in the course of carrying out a commercial activity, or it was the second or subsequent occasion on which the person is convicted for an offence under the relevant section. ❑



DUTY OF CARE

Managing agents and caretakers responsible

Managing agents and caretakers might like to check their contracts in light of a recent case which found that the owner of premises had effectively delegated the duty of care. The courts also found that an indemnity clause in the agency agreement did not give the managing agent indemnity.

In a recent case, someone visiting a friend who rented a retail shop was injured when he fell down an unlit flight of stairs while returning from a common property toilet.

Lights in the area, controlled by automatic switch, only turned on from 8am to 6.30pm each day. This followed instruction from the owner to the managing agent over 20 years before, when he had begun managing the premises. Lack of a common manual light switch in the common area meant lessees and visitors to the premises were unable to turn the lights on outside the hours controlled by the automatic switch.

The managing agency agreement empowered the agent to undertake works which touched on the operation of the lighting system. One clause specifically empowered the managing agent to "arrange repairs and maintenance to be done in accordance with the principal's obligation to repair".

In the judge's view, the concept of 'management of the premises' "extended to the taking of, or recommending that the owner take, reasonable steps to have the premises fit for the purpose for which they were used, namely as a small retail and commercial complex". The judge found that the contractual indemnity clause did not entitle the managing agent to indemnity, finding the owner 40 per cent and the managing agent 60 per cent responsible. ❑

PURPLE WINNING COLOUR

Another colour is trade marked

After another court case over the colour purple ended up in the Federal Court, the company Mars Australia has gained the right to register a particular shade of purple in promoting its brand of cat food.

In a series of recent colour trade mark claims, companies have been keen to secure their familiar colours. Chocolate company Cadbury in a landmark case fought to protect its use of the colour purple in its packaging against Darrell Lea.

In this case Mars said its European arm had created its particular shade of purple "from scratch" in order to market its cat food and the court accepted it was part of its brand identity. The colour had been used in Australia since 2000.

After rival Nestle withdrew its opposition, the courts gave Mars the go-ahead to register its Whiskas purple as a trade mark. ❑