

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.

Strata law

Win for owners corporation against builder

A Court of Appeal decision will assist residential strata schemes to sue builders for negligent building work.

The Mantra Chatswood Hotel, a serviced apartment business managing units in a strata plan, brought a claim for negligence against the apartment's builder, Brookfield Australia Investments. It was seeking compensation for loss arising from the cost required to repair building defects.

The court found the owners corporation was vulnerable and was owed a duty of care by the builder because there was no way it could have protected itself from the builder's negligence.

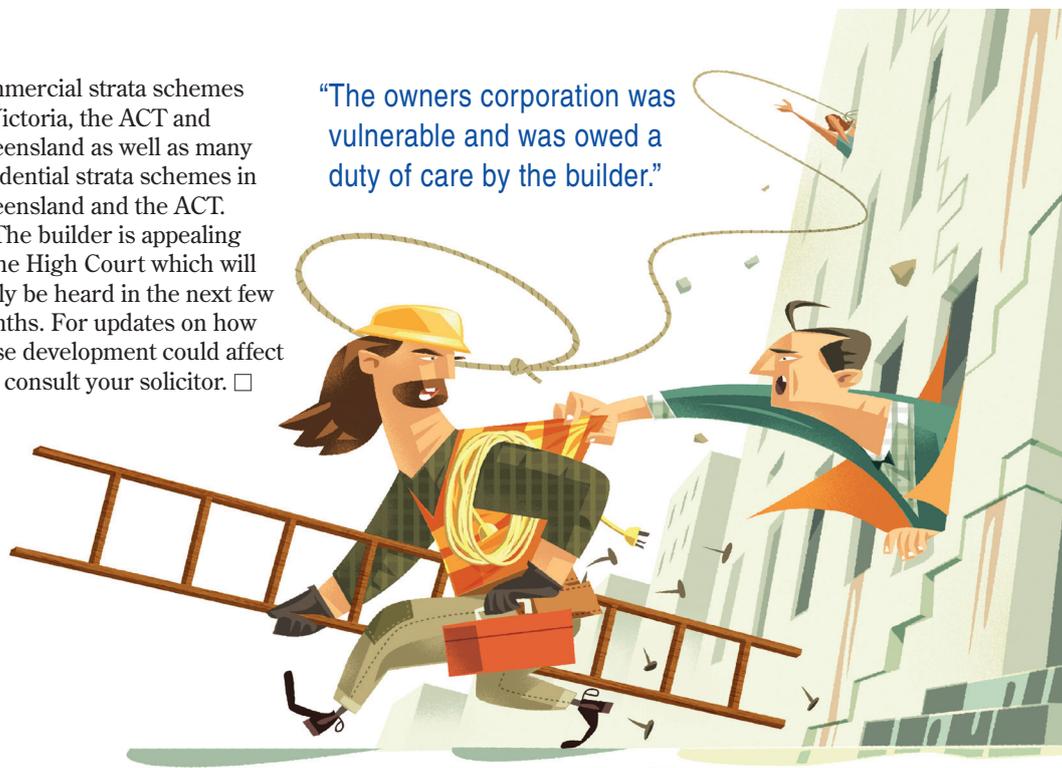
As a result of this case, it is likely that the expense of rectifying defects which could cause property damage, including to lot property, could be claimed from the builder. This could mean the builder could be responsible for the leaking window or balcony that gives rise to water damage within the property.

Although the case is not binding in other states and territories, it is certainly persuasive. It should also assist

commercial strata schemes in Victoria, the ACT and Queensland as well as many residential strata schemes in Queensland and the ACT.

The builder is appealing to the High Court which will likely be heard in the next few months. For updates on how these development could affect you consult your solicitor. □

“The owners corporation was vulnerable and was owed a duty of care by the builder.”



New super tribunal

Bringing tribunals under one umbrella

New tribunal, the NSW Civil and Administrative Tribunal (NCAT), began operations on 1 January this year.

NCAT is an umbrella organisation integrating most of the tribunals of NSW into one structure. People can approach any of the tribunals through this “one-stop shop” via one phone

number and website.

The NCAT portal covers 23 tribunals, from relatively small bodies such as the Chinese Medicine Tribunal to the much larger Consumer, Trader & Tenancy Tribunal and the Guardianship Tribunal.

The intention is to provide more streamlined access to

justice – the system before was described as “complex and bewildering”.

The NSW model differs from the super tribunals of other states in preserving different tribunal specialities so you can still directly approach the tribunal you need. NCAT can be reached on 1300 006 228. □

Multinationals' obligation to redeploy

Overseas posting not a right

A Fair Work Commission decision sheds light on the obligation of multinational companies to consider overseas employment for employees affected by redundancy.

The commission found the failure of a multinational company to redeploy an employee who was made redundant into an overseas position was not unfair.

The company, part of a

multinational employer group, was found to have complied with its obligation to consider reasonable redeployment options, even though it declined to place an employee in an available position overseas when it made employees in its Brisbane office redundant.

The commission found that only after considering basic questions about a company's structure, such as whether it has a formal

overseas relocations policy and central management control over the relevant overseas office, need the task of assessing an employee's skills, experience and qualifications against available positions be undertaken.

At any given time there may be a number of vacancies in a firm's overseas offices. This decision establishes that it will only be necessary to consider international options

for redeployment in certain circumstances.

A number of other factors which the commission said need to be considered include the costs of relocating an employee from one country to another and training to fit relevant job requirements or gain necessary language skills.

Do you have international operations? Contact your solicitor if you have questions about employment issues. □

Paying it forward

Former employers up for workers compensation

If a worker becomes ill with a disease of gradual onset as a result of working for more than one company, who foots the compensation bill?

In a recent case, a worker sought workers compensation from Weathertex, his most recent employer. He was diagnosed with nasal cancer on 15 February 2004 as a result of exposure to wood dust while sawmilling hardwood logs and chipping planks at a masonite factory in Newcastle. He worked at the factory from 15 March 1965 to 31 October 1998, while CSR Timber Products owned it, and from 1 November 1998 to 16 February 2004, while Weathertex owned it.

The Workers Compensation Commission held that Weathertex was the employer that last employed the

worker and was liable to pay compensation. Weathertex disputed this claim on the basis CSR was liable because the injury was caused by CSR's earlier employment of the worker.

The High Court found that Weathertex had the right to pursue CSR in order to gain indemnity for the workers compensation payments.

The High Court's decision could expose former employers of workers that contract a disease of gradual onset during the period of their employment with that employer to the risk of having to indemnify a subsequent employer that has been ordered to pay compensation by the Workers Compensation Commission. To find out what this could mean for you, talk to your solicitor. □



Hard sell not tolerated

ACCC unconscionable conduct appeal

The ACCC is likely to be emboldened by a new court decision against Lux Distributors.

In a significant decision with implications for both businesses and consumers, the court has found in favour of the Australian Competition and Consumer Commission (ACCC) in its case

against Lux Distributors Pty Ltd.

The ACCC alleged that Lux, a seller of vacuum cleaners, had engaged in unconscionable conduct in relation to three elderly women by using "free maintenance checks" of the women's existing vacuum cleaners as a deceptive ruse

to gain access their homes. Salespeople then exercised a range of pressure-selling techniques to get the women to purchase Lux products.

In a unanimous decision, the court agreed with the ACCC, finding the actions breached consumer laws.

Businesses should revisit their contracting arrangements and ongoing business practices to ensure any previous risk assessments are in line with

the full court's thinking, which explicitly considers social norms and questions of fairness. Consumers should also be

"Businesses should revisit ... their contracting arrangements and ongoing business practices."

aware of their rights when subject to visits by salespeople within their homes. For more information consult your solicitor. □

Technology

3D printing

Design revolution or intellectual property nightmare?

For a designer or manufacturer, 3D printing is set to transform the industry, as it is an on-demand manufacturing model. It allows the manufacture of most objects from prototype to end product in a matter of hours, resulting in lower shipping and packaging costs. However, it could lead to a loss of sales of genuine products if widespread, unauthorised 3D printing occurs. At the moment, the price of a 3D printer is prohibitive – approximately \$20,000 – but they will inevitably become cheaper and enter the mainstream.

Designers and manufacturers need to start now to find the best protection against unauthorised 3D printing by registering their designs. Registration of designs should happen before the product is on the market or promoted anywhere in the world and is valid for 10 years. To be registered, the design is tested against what is already available and then

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certified if it is novel.

The law contains robust infringement provisions against designs which are substantially similar as well as direct imitations. So creating a 3D model from an original 3D object, attempting to match its design and form exactly, will

constitute an infringement of a registered design.

However, the test is strict and would not prevent 3D copies that differ sufficiently from the registered design – including relatively slight alterations. This is particularly relevant in the consumer goods market where there are many products with small variations between them.

There might be other means of protecting your design, including patents or trademarks which a solicitor might be able to help you with. □

ground of “intersex status” recognises being intersex as being about biological variations not gender identity.

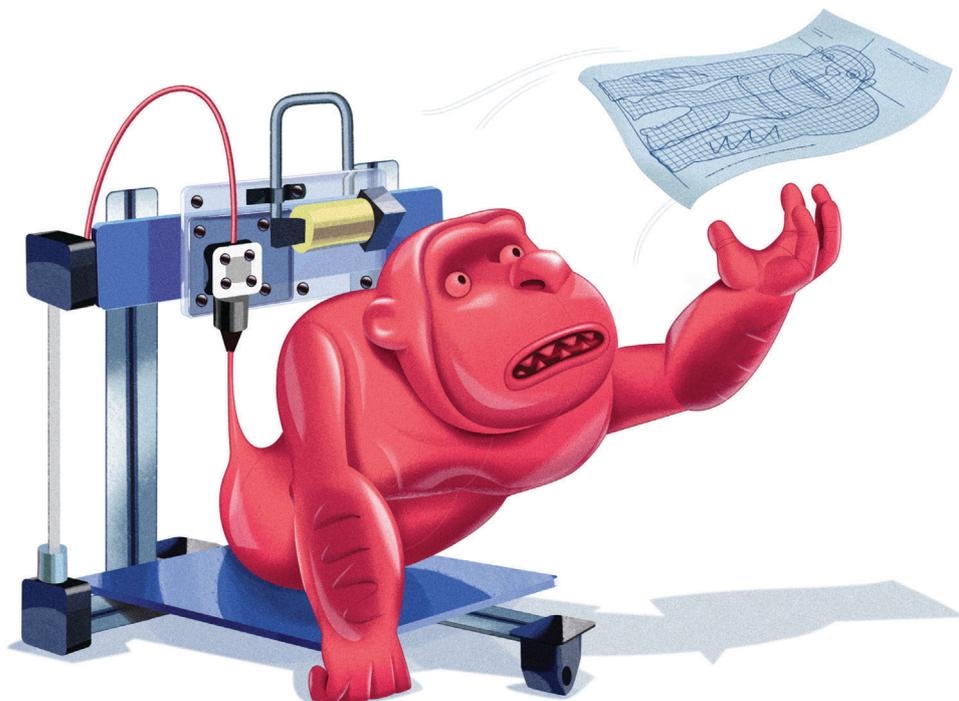
“Different sex” rather than “opposite sex” is used throughout the legislation, consistent with the new definitions of gender identity and intersex status in recognition that a person may not identify as either male or female.

The laws also now cover same-sex couples – “marital or relationship status” replaces “marital status” and “de facto partner” replaces “de facto spouse” to cover both opposite-

and same-sex couples.

Consistent with these new protections, sexual harassment provisions state that a person’s sexual orientation, gender identity, intersex status and marital or relationship status are all now circumstances which can be taken into account when considering whether or not a reasonable person “would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated”.

Further information on the changes is available at www.humanrights.gov.au/new-protection. □



What is waste?

Environmental law

A new court decision has limited the scope for resource reuse and recovery, especially for material such as demolition waste.

A company that carried out demolition and excavation work and then transported the by-products of those activities to build roads was charged with unlawful transportation of waste. The company argued that the material was not actually waste, as it was wanted for re-use in the construction of roads.

Initially, the court agreed, but its decision was later overturned on appeal where it was found that the only appropriate test for whether material is waste or not is whether the owner (or generator) of the material at the time of transportation has a continuing use for the material.

Given the decision, those involved in reuse and resource recovery will need to be very careful. Unless a clear intention to re-use/recover the material is established by the owner of the material prior to transportation, that material is treated as waste in the eyes of the law – even if intended for ultimate reuse or recovery by other parties. □

New laws on sex discrimination

Categories extended to include same-sex couples

Changes in the law expand the areas of possible sex discrimination. Now discrimination on the basis of sexual preference, gender identity or intersex status is outlawed. Previously, federal law only examined discrimination on the basis of “sexual preference” in the area of employment or occupation.

The definition of gender identity has been expanded to include the way a person expresses or presents their gender and recognises that a person may not identify as either male or female. The new

Freezing orders

Applying for freezing orders



Where there is a real danger that the other party in a dispute may dispose of assets to defeat a claim, you can apply to the court for freezing orders.

In a recent case, X and Y lived and worked in the same area of the Hunter Valley. Y, who had judgment ordered against him in court had, a year before court proceedings, listed his residential property for sale. A few days after the court decision, X drove past the home and saw a 'for sale' sign in the front yard.

Worried that the house would be sold, he went to a higher court seeking that any proceeds from the sale of the residential property be frozen, up to the amount of the judgment debt and any costs.

The court said that the order should have been sought from the court where the judgment would be enforced. It said

X must show that there was sufficient prospect that the judgment would be enforced, and that there was a danger that assets would be lost.

In this case, the court considered that there was no threat of assets dissipating such that judgment in favour of X would remain unsatisfied.

“[A person] must show that there was sufficient prospect that the judgment would be enforced, and that there was a danger that assets would be lost.”

There was little risk of the assets being hidden or shifted to another person, and allegations of fraud were unfounded.

Therefore, the court ordered X to pay costs because he should have known that there was no real prospect of success. It was exacerbated by his allegations of fraud against Y. □

Workplace relations

Unfair dismissal for mental illness

Employers face significant challenges and risks when seeking to dismiss employees suffering from mental illness.

The Fair Work Commission has found that an employee had been unfairly dismissed from his position on the basis of his mental illness.

The employee had undergone psychiatric assessment at the request of the employer, where it was found that he had paranoid schizophrenia and was not getting help or taking medication for the condition. The expert said the employee did not have a current capacity for work and might be disruptive in the workplace. The expert also said the employee would need treatment and a certificate saying he was fit to return to work before he returned.

The employee's employment

was terminated based on the psychiatric report.

However, the commission found that the reason for dismissal did not accord with the expert's opinion. In fact, the commission said the evidence described the employee as not having "a *current* capacity to return to work".

While the commission agreed that the employee had been unfairly dismissed and should be reinstated, it did not automatically mean he should immediately return to the workplace. The employee was required to first produce clearance from both a treating psychologist and a treating psychiatrist that he was fit to return to work.

Management of employees with mental illness is often a vexed issue for employers; a bespoke approach is needed, fashioned to the circumstances of the individual case. □

Temporary residency

What income is taxed?

Normally, Australian residents will pay Australian tax on their worldwide income but non-residents will only pay Australian tax on income with an Australian source.

An exception to the general rule is temporary residents, including most of those on 457 visas (a 457 visa allows non-residents to work in Australia for up to four years).

Executives who are temporarily resident are not subject to Australian tax on most foreign-sourced income and capital gains. However, they are taxed on non-Australian sourced income which relates to employment undertaken or services provided while a temporary resident of Australia.

If, for example, a temporary resident receives interest from

an overseas investment, that interest will be exempt from Australian tax. But if they receive income from working

“If they receive income from working overseas while a temporary resident it will be subject to Australian tax.”

overseas while a temporary resident it will be subject to Australian tax.

A problem which particularly concerns executives who are temporarily resident is how employee share schemes will be taxed.

Contact your solicitor for further information. □