Client Newsletter

No. 2, 2011

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.

NEW CONSUMER LAW

Mandatory reporting

Suppliers of goods and product-related services now face criminal offence penalties for failure to report incidents of harm to consumers.

Under the new Australian Consumer Law, suppliers of consumer goods and product-related services who become aware of a death, serious injury or illness caused by the use of a consumer good, must now report the event to the Australian Competition and Consumer Commission within two days or risk being guilty of a criminal offence.

An injury or illness will be reportable if medical treatment has been sought and someone believes the incident was related to the good or service supplied. This is a broad interpretation, setting a low threshold for required reporting.

Suppliers should familiarise themselves with this new obligation, the guidelines and the regulations, and take steps to ensure that internal policies and procedures enable them to promptly and efficiently monitor, receive and assess information about relevant incidents and comply with the reporting obligation. Failure to comply is a criminal offence punishable by a fine.

Suppliers are those who sell, lease, exchange, hire, or make available for hire-purchase, consumer goods. Suppliers of product-related services provide, grant or confer those services. Consumer goods are goods intended or likely to be used for personal, domestic or household use or consumption. A product-related service includes services such as installation, maintenance, repair or cleaning, assembly and delivery of consumer goods.

The reporting obligation does not apply to suppliers of general or consumer services. A supplier's obligation to notify is only engaged where the supplier is aware of a death, serious injury or illness, and considers, or another person considers, it was, or may have been, caused by the use, or foreseeable misuse, of the consumer goods.

Any awareness, however acquired, is likely to trigger the obligation.

Suppliers can comply with the new law by completing and submitting an online form via the ACCC website. ❑

COURT ORDERS

An inconvenient truth

If you believe your intellectual property, such as a trademark, is being copied, you will usually want the other business to stop straight away, but as a recent high-profile incident shows, a strong case is not the only consideration.

Organic Marketing's application for a court order to stop Woolworths Limited using the words "honest to goodness" in a food marketing campaign succeeded in arguing that the retail giant had a case to answer, but failed on the 'balance of convenience' test.

This test involves an assessment of whether the inconvenience or injury which the applicant would be likely to suffer if a court order were refused outweighs or is outweighed by the injury which the defendant would suffer if a court order were granted.

Woolworths successfully argued that there would be huge losses – both direct and brand-related, if it had to abandon a $3 million national campaign, compared to the then undetermined damage to Organic Marketing's business reputation. ❑

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EVIDENCE

Signatures, squiggles and electronic signatures

If it is a symbol, a squiggle or in electronic form, can a signature still authenticate a document or piece of writing as that of the signatory?

Traditional manual, hard-copy signatures still endure, while electronic commerce continues to revolutionise how life is lived and how business is done.

A signature is a person's name or mark made to authenticate a document or writing. It can be in any form or symbol. If in doubt, there must be evidence that the signatory had the intention to sign. Beyond that, there is no law prescribing the form that a signature must take. It can be any version of the signatory's name so long as it has been adopted by the signatory with the purpose of authenticating a document. It can be a printed signature, a rubber stamp or computer-produced. It can be the appearance of the name of the signatory. It need not be made manually.

An electronic signature is no more than an electronic means of performing the functions of a signature – authentication and intention to be bound.

The law has quickly adapted to electronic commerce with, for example, the e-administration of the law and the legal process, the computerisation of land title and conveyancing, the recognition of the formation of contracts electronically – offer and acceptance by email or by fax – and the imposing of liability for breaches in electronic format of duties of care.

The common law accepts an electronic signature in paperless transactions to authenticate a document and indicate intention to be bound.

The law takes electronic signatures at their face value, and does not yet require the use of action to authenticate or identify them. However, a document's integrity (unaltered content), authenticity (sender's identity), and confidentiality (of the signatory's identity or document's contents) are not ensured merely because an electronic signature is provided.

Electronic commerce in Australia has been helped by a special law that ensures electronic transactions are equivalent to a hard-copy version, and that there is technological neutrality. This law has replaced the thousands of instances where there was the need for notice in "writing" or that a document be "signed". ❑

NEIGHBOURS

Building good fences may take negotiation

There is no requirement to have a fence if you and your neighbour don't want one. But if you want a fence and your neighbour doesn't, you should get a quote for one to be built and discuss it with the neighbour.

If you don't reach agreement, you can give the neighbour a written notice specifying the fencing work proposed. If after serving the notice you and your neighbour still cannot agree, either of you may ask the Local Court or land board to make an order about the fencing work required. If a fence is to be built, you and your neighbour usually, though not always, will have to share the cost.

Usually, you will both share equally the cost of repairs to any fence between your properties. However, if the fence was damaged because either of you was careless (for instance, by a fire or by trees or structures in poor condition) then the responsible party must pay for repairs. If agreement cannot be reached about who is responsible for the repair work, a court or land board can be asked to make an order before the work is carried out. ❑

NO CLIENT CONFIDENTIALITY

Employer's right to view lawyer's email

A recent US case noted that an email sent by an employee to her lawyer from her work computer was not a 'confidential communication between a client and a lawyer'.

The employee had acknowledged her workplace rule that communications are not private and may be monitored. The court likened this to claiming privilege when consulting her attorney in a workplace conference room in a loud voice with the door open.

The court found that there was no waiver of privilege since there was no privilege in the first place.

The privilege legislation requires that the communication be transmitted by a means which "disclosed the information to no third persons other than those who are present to further the interest of the client in the consultation".

Client privilege is not affected by the general fact that third parties assist in the delivery of email. ❑

EASIER SUPPRESSION ORDERS

Protecting people living with HIV

The ability to make suppression orders is an extremely important power of the court to protect the confidentiality of people, for example, those living with HIV who are often discriminated against or victimised.

A new law introduced late last year makes it more straightforward for parties to get suppression orders, though the courts have always had powers to make them.

The law confers powers on NSW courts to impose suppression orders and non-publication orders on certain defined grounds. Non-disclosure orders – by publication or otherwise – allow courts to order pseudonyms to be used instead of parties' names, and for matters to be heard in closed court, under certain conditions.

It does not dilute protections in existing laws that already protect the identities of those with HIV.

Importantly, the courts maintain their discretionary power to weigh relevant interests in the particular case before them. This means balancing the public interest in having open courts against protecting confidential medical information and HIV-positive individuals from further discrimination and detriment as a result of the disclosure of their condition.

Without a way to protect their confidentiality, people living with HIV would, in many instances, be extremely reluctant to proceed with complaints.

This has to be balanced against the public interest of having open courts where information, including a person's HIV status, may be raised and widely circulated to members of the public and the media. ❑

SUB-CONTRACTORS

Gain new right to earmark funds owed to contractor

Under recent changes to the law, subcontractors can now claim against principal contractors for payments due to them from contractors.

If you are a subcontractor, the changes effectively enable you to earmark money owed to a contractor from the principal contractor to secure the former's liability for progress payments to you. It minimises the risk of non-payment due to a contractor's insolvency.

You must first lodge an adjudication application and then serve on the principal a "payment withholding request".

On receiving this, the principal contractor must hold back from any money owed to the contractor an amount equal to that specified in the request, pending a court decision. This obligation extends to owners.

The result is that a principal contractor who does not comply with a request becomes liable (together with the contractor) for the debt owed to you. The obligation to withhold payment also operates as a defence for the principal contractor against claims for recovery of the money it owes to the contractor.

The principal contractor's obligation to withhold an amount equal to that specified in the request remains in force only until:

❑ the adjudication application is withdrawn;

❑ the contractor pays you the amount;

❑ you serve a notice of claim and debt certificate on the principal contractor; or

❑ a period of 20 days elapses after the principal contractor has been served with the adjudication determination; whichever occurs first.

A payment withholding request allows you, in effect, to use money owed to the contractor by the principal contractor as security for your entitlements to progress your payments under the subcontract. ❑

FINANCIAL REPORTS

Company officer shares liability for failure to lodge

The company secretary of a business listed on the Australian Stock Exchange was placed on a good behaviour bond for six months and ordered to pay court costs earlier this year after failing to meet the reporting requirements that are part of the laws governing corporations. His company was fined and also ordered to pay costs.

The government investigators found that the company had failed to:

❑ hold an annual general meeting within five months of the end of its financial year;

❑ lodge a half-yearly financial report with within 75 days of the end of a particular period;

❑ provide its financial report, directors' report and auditor's report to its members within four months of the end of a financial year; and

❑ lodge its annual report within three months of the end of a financial year.

Under the law, company secretaries can be held responsible for the failure of companies to lodge their financial reports.

If you are a company officer and suspect that your business may not be able to meet its financial reporting and AGM requirements, see your solicitor about what options may be available to seek an extension of time. ❑

ADVERSE ACTIONS

Broader protections withstand the test

If you are an employee and union member facing disciplinary action because of your union activities, two recent decisions by the courts may come to your rescue.

Under new workplace laws, it is unlawful for employees to be injured in relation to their employment, have their position altered to their prejudice, or be dismissed because they engaged in industrial activity. These protections have not been tested until recently.

In the first case, a union delegate's employer disciplined him for sending what it claimed was an inappropriate email to other employees. The delegate argued he had been participating in lawful industrial activity.

The court held in favour of the employee, saying the disciplinary action was connected to the worker's industrial activity – that is, informing other employees, also union members, of issues happening at work. Therefore, the law protected the employee when he was acting in his capacity as a union delegate.

The court said the disciplinary action was connected to the worker's industrial activity.

In the second case, an employee had made an inquiry and complaint about his pay. His employer suspended his (and other employees') overseas postings and telephoned him and spoke to him in an intimidating fashion.

The court accepted the worker had a right to make an inquiry or complaint in respect of his pay. It found the suspension of overseas postings and intimidating phone call were designed to prevent the employee from pursuing his pay claim, and constituted an injury to his employment. ❑

NOT YOUR ALTER EGO

Private companies are tax identities

The failure to recognise that a private company has a separate identity, and that dealings between one and its shareholders and directors have tax implications, is a misconception which causes taxpayers a steady stream of problems.

The fact that companies and individuals have different tax rates creates tax complexity, allowing for deliberate – or sometimes accidental – tax planning.

It makes tax sense for shareholders and directors to use company profits, say by way of loans or use of assets owned by the company, instead of the company paying taxable dividends to them.

Not surprisingly, the tax law tries to prevent this. A payment or loan by a private company to its shareholders might be taxed as an unfranked 'deemed dividend'. It used to be possible to avoid this by the company giving a shareholder *use* of an asset instead of giving them the asset but since an amendment to the law in mid-2009, 'payment' has included provision of an asset for a shareholder's use.

Not all loans count. One area of contention is whether an 'unpaid present entitlement' is a loan. Last October, the Tax Office announced that if the accounts of a trust or company have incorrectly classified an unpaid present entitlement, they have until 31 December 2011 to self-correct.

The restrictions only apply insofar as the company has a distributable surplus. In a recent case a company had made non-tax deductible payments to an offshore entity which the Tax Office claimed should be assessed to the taxpayer as deemed dividends. The taxpayer argued that the company did not have a distributable surplus, claiming the amount of the company's net assets should be reduced by the amount of the payments, the additional tax payable as a consequence of the non-allowance of tax deductions for them and the interest on the additional tax, and the court agreed. There could be far-reaching implications for other cases.

Contact your solicitor if you would like to discuss your company's tax issues. ❑