

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.

## Consumer law

### Group buying deals so hot they can burn

**Many legal issues arise for advertisers when deciding to promote or sell their services and goods on group buying websites.**

As the name suggests, group buying involves buyers making a commitment to buy a service or product at substantially discounted rates, and the purchase is not finalised until a certain level of sales is achieved. Group buying sites offer advertisers a guaranteed amount of profit and

demand after a promotion on a group buying site.

Advertisers may then run foul of Australian consumer laws, and group buying sites – due to their profile – may also be caught in the web.

If you're contemplating offering your services via a

**“Be aware of your obligations under the Australian Consumer Laws, such as the guarantee that services are supplied within a reasonable time frame.”**

be aware of your obligations under the Australian consumer laws, such as the guarantee that services are supplied within a reasonable time frame;

shop around for the most suitable group buying site;

be prepared to negotiate better terms with the group buying site if, for example, the site targets your niche; and

find out whether you will have control over the promotional material because, in the event of any misleading or deceptive conduct or passing-off claims, you may be held responsible.

Much of the same applies to group buying sites, which also need to:

be aware of a new code of conduct, which some of the larger sites have signed up to, confirming their commitments to consumers, and other legal obligations such as spam and privacy laws;

have a policy to deal with advertisers who fail to deliver;

make sure your brand is protected and that you

are indemnified against third party claims;

have a marketing strategy and think about how to get your best advertisers coming back; and

train staff on areas of potential liability.

exposure to a sizeable and new audience.

But things can, and have, gone wrong. There are numerous examples of advertisers who have been caught unawares and unprepared for the unexpected

group buying website:

do your research on how the sector works, whether your product can be sold on a group buying website, and what your competitors are doing;

do the maths for the best and worst case scenarios;

## Proof of identity

### New requirements for stat decs

**New laws require authorised witnesses taking affidavits – who include solicitors, Justices of the Peace and court commissioners – to see the face of a person making a statutory declaration or affidavit, and either have known them for 12 months or confirm their identity through identification documents, and certify on the document that these rules have been complied with.**

They are exempt from having to view the face if the person is wearing a face covering which the witness is satisfied they have special justification not to remove. This includes legitimate medical reasons, such as wearing a bandage after an accident. A person's face is defined as “from the top of the forehead to the bottom of the chin, and between (but not including) the ears” and “face covering” as “an item of clothing, helmet, mask or any other thing that is worn” that “prevents the person's face from being seen (whether wholly or partly)”.



# Legal capacity

Assessing a person's capacity can be a tricky issue under the law



**Lawyers take it as a professional obligation to make sure their clients have the capacity to give instructions in a legal matter.**

**It is an obligation that sits alongside our other professional obligations, such as maintaining confidentiality and acting in the best interests of the client.**

Legal capacity is the ability to enter into legal relations, and to make decisions that have legal consequences. However, it can be a tricky issue and can cause difficulties for solicitors, clients and family alike.

There is a presumption that all adults have legal capacity, yet someone's capacity can be affected by various factors,

including mental illness, ongoing medical conditions, stress and age.

Solicitors will be on the lookout for warning signs from clients. Disorientation, forgetfulness, confusion and lack of mental flexibility can all be indicative of an impaired capacity.

However, solicitors are careful not to make assumptions simply based on appearance or age, and are aware also that communication difficulties can stem from cultural differences, or hearing or vision impairments, rather than incapacity.

Capacity can be a complex area of law. Considerations often involve the interaction between a client's right to self-determination and the danger of a client making important decisions when lacking the necessary capacity to understand the ramifications. □

# Videolink not popular with courts

Witnesses to be there in person

**While courts now have broad discretion to allow evidence and submissions by way of phone, videolink or other forms of communication, the line is developing in NSW that witnesses required for cross-examination must attend court in person, absent good reason.**

The courts are proving reluctant to allow evidence by videolink where the evidence is central to a case and where cross-examination involves documentary examination or a challenge to credibility.

In a recent case in the Land and Environment Court, a witness who had moved interstate to Victoria applied to have their evidence heard by videolink from the local court in Bendigo. In support of the application was that travelling to Sydney for the hearing would take eight to ten hours, and incur significant cost, compared to a two-hour trip at minimal cost to give evidence in Bendigo. The court rejected

the application on the basis that the witness's credibility was to be challenged and cross-examination would involve documents.

In another court, while the judge said courts should strongly encourage cost-effective and reliable technology even if it delivers a product not as good as

evidence given in person, he noted there would be exceptional cases where there were good grounds for proceeding with the tried and true, and rejected allowing two UK residents who refused to travel to Sydney, to give evidence via videolink from London. He found the case was an exceptional one where

the cross-examiner and the court would be at a real disadvantage in dealing with the credibility of the witnesses, the witnesses' evidence was centrally important and the cross-examination likely to be long and complex, since it was taking the witnesses through a minimum of 18 volumes of documents. □

# Security of payments

Identifying commercial and residential works

**Laws relating to security of payment claims do not apply to home owners and home buyers, as a recent case has shown.**

The case involved a property bought by a family trust. The director of the trustee company lived in the property, but also stayed in a flat in Sydney where he worked during the week. The director commissioned a builder to develop a one-storey

residential building on the land, but failed to pay for the work. The builder then served a payment claim against him.

Under the law, creditors can serve payment claims for works carried out under a construction contract, excluding "residential building work".

The court found that the plans for the property comprised three bedrooms,

living and dining areas, bathrooms and other rooms appropriate for a residence.

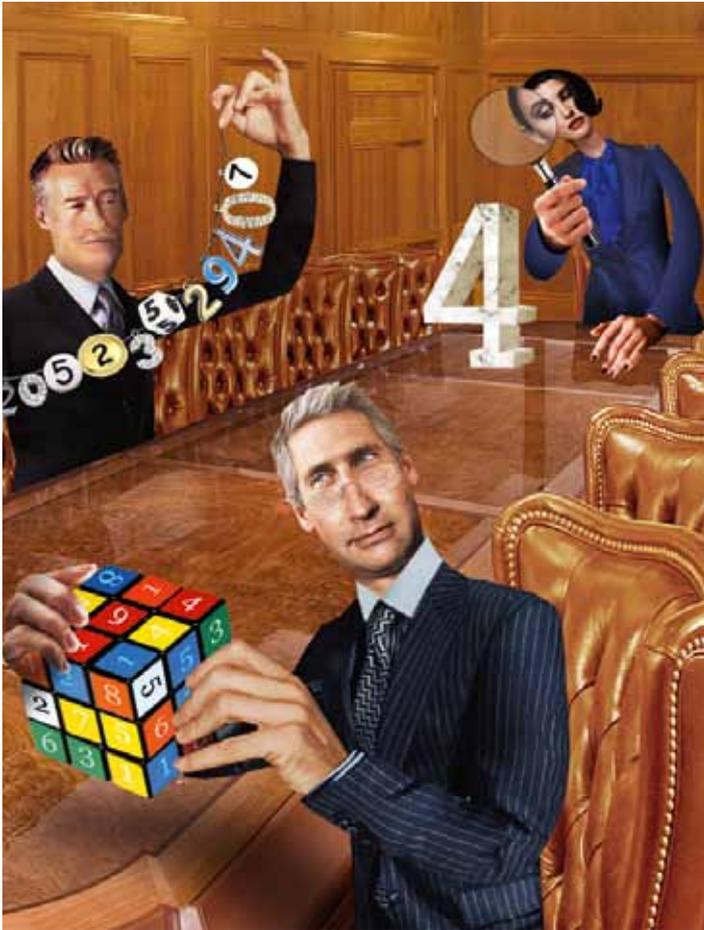
It also found that the director proposed to reside in the newly constructed property – the law did not require a person to only have one residence.

Therefore, the building contract was one for residential works, and the builder was unable to enforce his payment claim. □

# Director liability

## Clarifying roles and limiting liability of non-executive directors

Recent cases have shown that courts will not hesitate in holding company directors liable for breaches of the law, so companies need to look at limiting the liability of their non-executive directors.



“Companies should look at what non-executive directors’ duties are, which in essence are to supervise, including guiding, monitoring and oversight.”

It is generally accepted that for most companies listed on the stock exchange, non-executive directors provide a worthwhile contribution. But at present, the law is not settled about their roles and, therefore, their potential liability is unclear.

Companies can easily limit non-executive directors’ liability by documenting their roles. This document can be published on the company’s website so that it can be continually updated –

a type of live letter of appointment or an up-to-date job description. It can then be used in communications with current and potential investors, as well as regulators

and shareholders. The document has to be true in practice or its value will be minimal. It should refer to the company’s circumstances and the non-executive directors’ responsibilities as required by law.

When creating the document, companies should look at what non-executive directors’ duties are, which in essence are to supervise, including guiding, monitoring and oversight. The general

# Net cast for tax cheats

## Is it tax evasion or tax avoidance?

**The Tax Office is becoming increasingly sophisticated in identifying tax cheats.**

The Tax Office has published benchmarks which provide a guide to the expected profitability of over 100 businesses and has a data-matching program which identifies those not lodging returns or not reporting all their income. More than 500 million transactions were matched in the past year.

As part of its audit program, the Tax Office highlighted its review of coffee shops and hardware stores suppliers. It has information about coffee shops buying more than 15 kilos of coffee a week from suppliers and those shops will be checked to ensure they are reporting all their income.

In the period July to September last year, the Tax Office says close to 500 people and companies were prosecuted and convicted of taxation and superannuation offences and 12 people received prison sentences.

Tax evasion occurs when a taxpayer deliberately does not report to the Tax Office all the income they should have reported, most commonly associated with the cash economy, or claims tax deductions they know they are not entitled to claim.

In more sophisticated arrangements such as Project Wickenby schemes, otherwise deductible expenses are artificially inflated by the interposition of a sham tax haven entity between a taxpayer and the true supplier.

Those intentionally making a false or misleading statement to the Tax Office can be subject to an administrative penalty equal to 75 per cent of the tax sought to be avoided. Alternatively, they might be subject to a criminal penalty. If a taxpayer intentionally keeps false records, the maximum penalty is currently \$5,500 and/or 12 months imprisonment for a first offence and \$11,000 and/or two years imprisonment for any subsequent offence.

If you are caught evading tax, one option is to go cap in hand and make full disclosure. Tax Office practice in such instances is to reduce the penalty. It is unlikely that where there has been voluntary disclosure the Tax Office will refer the taxpayer to the Director of Public Prosecutions, but that is always a risk.

If you decide to take the risk that you will never be caught but are then caught by the Tax Office, you will both be subject to pecuniary penalties and be more likely to be subject to criminal penalties. □

responsibilities may be to:

- provide an independent perspective to the overall running of the company;
- constructively challenge management and advisers;
- critically review information from management and advisers against their knowledge of the company and general business affairs;
- ask questions where required;
- fulfil non-delegable legal responsibilities such as approving financial statements;
- either avoid or minimise conflicts of interest with the company; and

appoint, assess and, if need be, terminate the chief executive.

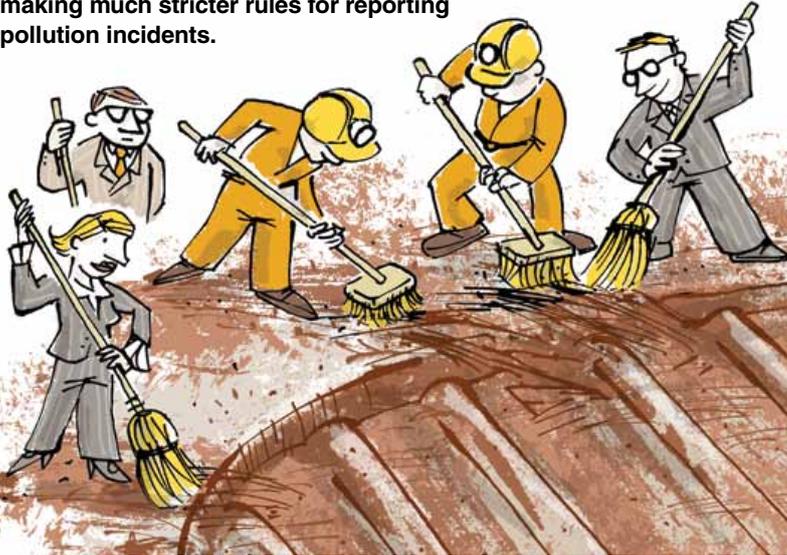
The special responsibilities may be to:

- review and approve the management strategy;
- review and approve the annual budget and business plan;
- review operational performance reports;
- review and oversee the risk management system; and
- undertake succession planning for non-executive directors and the chief executive, and oversee succession planning. □

# Pollution spills

## Immediate notification now obligatory

New laws have been put in place in NSW, following last year's Orica chemical leaks, making much stricter rules for reporting pollution incidents.



description of the action to take immediately after a pollution incident, procedures to follow in notifying and coordinating with relevant authorities, and action to combat the pollution. A further change to the law also requires occupiers of premises to have pollution response management plans.

Public concerns, along with the newly strengthened independence and powers of the

Environment Protection Authority, mean that it is likely to take action against those who breach the new rules.

Penalties for failing to notify have doubled – in the case of corporations to \$2,000,000 and \$240,000 each day an offence continues, and for individuals \$500,000 and \$120,000.

Contact your solicitor for advice on compliance with the environmental laws. □

The new laws make directors and managers of organisations liable if pollution incidents are not notified immediately to relevant regulatory authorities. “Immediately” is not defined, but it’s expected the ordinarily understood meaning will apply, which may place significantly increased reporting and administrative burdens on companies. Previously, the law required someone becoming

aware of an incident to notify the appropriate regulatory authority “as soon as practicable”.

Pollution incident response management plans now need to have a clear procedure and chain of responsibility for notification in place, along with appropriate staff training to identify incidents requiring notification.

Information that must be provided includes a detailed

# Taxation

## Courts’ doors open to full tax reviews

**The High Court has confirmed that taxpayers can have tax cases reviewed afresh by a court or tribunal.**

It was argued in a recent case that the Administrative Decisions Tribunal had powers to review the merits of a decision and substitute its decision for that of the Chief Commissioner, but that the Supreme Court could only hear appeals, that is, if there was an error in the initial decision.

The High Court has decided that the Supreme Court has the power to conduct a full merits review and effectively substitute its own decision for that of the Commissioner of Taxation.

This means that taxpayers may now choose to approach either the Supreme Court or the Administrative Decisions Tribunal to have their matters heard.

Consult your solicitor about choosing which forum will provide you with a better chance of success. □

# Restraint of trade

## Enforcing post-employment conditions on executives

**The courts have thrown light on how they will deal with cases involving the enforcement of post-employment restraints.**

In one recent case, the court ordered that two former executives be restrained from competing with their former employer, even though the restraint period in their contract was due to expire the following month. The decision shows that the potential inconvenience suffered by a former employee is not superior to a former employer’s right to enforce the restraint.

In this case, both executives had signed employment

contracts containing a term that restrained them for a certain period from engaging in any business in competition with their former employer.

The judge decided that it was right to force the executives to give up their jobs until the restraint period ended, saying that the short period between the judgment and expiry of the restraint period was a matter which cuts both ways. Although the court’s order would likely cause the executives to suffer a serious interference, the judge said this had to be looked at in light of the fact that both of them had been very senior employees paid significant

remuneration under their contracts, and that the restraints that were part of the bargain should be upheld.

In another case, however, the court ordered only partial enforcement of post-termination clauses – the consequence being that a former manager was able to continue to work for a competitor of the former employer, though not look for new business until the restraint period was completed.

In this case, the employee, a national sales and marketing manager, had a contract with a 12-month post-termination restraint clause. After he was made redundant, the manager

started working for a company that had once sold its product through his former employer, but no longer did so.

In allowing the employee to continue in his new employment, the judge said that the manager was not the author of his own misfortune, but rather his former employer had created the situation when they terminated him by reason of redundancy. The judge also said that enforcing the non-compete provision would deprive the manager of earning until he found alternate employment, and also prevent him from working in an area of his choice. On the other hand, enforcing the non-solicit provisions would not have such adverse impacts, but would protect the interests of his former employer over customer connections. □