Client Newsletter

In touch with the law

No. 3, 2011

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.

SOCIAL NETWORKING

Can you control it?

Social media is a double-edged sword. Businesses are increasingly starting to use it for marketing purposes but also face the risks of their employees abusing it, either at work or through comments they or their friends post online.

Facebook has more than 500 million active users; 200 million of whom access it via their mobile devices. Banning the use of Facebook or any social media applications from computers at work will not prevent employees accessing it on their mobile phones or home computers.

Attempts at controlling all discussions about the workplace or postings by employees' friends about work will most likely infringe industrial law provisions.

The solution will be found in a social media policy that allows you to use social media to improve communication while maintaining productivity and network security.

You must consider a social media policy within the context of your particular workplace environment. The role of the policy is to provide guidance for staff and management, especially in outlining the difference between representations made on social media platforms on behalf of the business and personal use.

An effective policy will assist in protecting your business's reputation by preventing loss of confidential, sensitive or privileged information; ensuring compliance with the law; and protecting your business against claims for defamation, unlawful dismissal, cyber-bullying and harassment and invasion of privacy.

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You will also have to review your company's network security policy to enable the safe and secure use of social media sites.

When formulating a social media policy, you should consider:

- ❑ type of use;
- ❑ nature of the policy (what it should include);
- ❑ the law, particularly industrial and anti-discrimination laws, codes of conduct and workplace agreements;
- ❑ consequences of breaching the policy; and
- ❑ the policy's currency.

Speak to a lawyer about the legal issues you should be aware of when formulating your workplace social media policy. ❑

FACEBOOK

Liability for publication

Businesses using social media need to closely monitor what goes up on such sites, particularly when they have the ability to delete content posted by customers.

A business has recently been held liable for misleading testimonials posted by customers on its Facebook fan page.

The court found it was not necessary for there to be any positive conduct on the part of the business for it to be considered a publisher of the words. If the business had the power to delete the posts, that was enough.

The case is a clear warning to all businesses using social media as part of their marketing strategy that compliance with the law does not only relate to words they post online, but those that their customers, clients or 'friends' say as well.

If you are unsure of your status when marketing via social networks contact your solicitor. ❑

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ILLUSORY SAVINGS

Misleading two-price comparisons under attack

The ACCC has been vigorously pursuing companies that quote misleading higher prices in comparison to so-called sale prices.

Two-price advertising, often called comparative price advertising, contrasts the sale price with a higher price for the same or a similar product. It usually takes one of four forms: recommended retail price, 'was/now' advertising, strike-through and competitor price advertising. A powerful marketing tool, it generally doesn't offend Australian consumer law if the overall impression created is genuine. Any price comparison must not be illusory.

Ads risk breaching the law if the calculated saving is based on the difference between the current sale price and a higher price at which the product has not actually been sold for a reasonable period of time and in reasonable quantities immediately before the date of the 'discount'.

Whether conduct is misleading or deceptive is largely determined by the overall impression created in the minds of consumers. A fine-print disclaimer may not be enough to stop consumers being misled over the true nature of savings.

A significant number of ACCC investigations into advertising practices conclude in companies making enforceable undertakings to take corrective advertising, implementing compliance programs and acknowledging the undertakings will be available for public inspection. ❑

SHAM CONTRACTING

Two parts to employee test involves intuition

Whether someone providing services to a business is classed as an employee or independent contractor can be difficult to assess, but the distinction is important, and failing to establish it correctly can prove costly.

In a recent case, an interpreting and translating business which classified its interpreters as independent contractors found itself facing penalties.

The business engaged skilled people who could not renegotiate the rate at which they were remunerated but who were free to reject jobs and undertake work from rival companies.

Having recognised most of the interpreters as independent contractors, the company had not made employee minimum superannuation contributions for them.

The Tax Office, however, assessed the company as liable for super contributions for over 2,500 interpreters on its books over a five-year period and the case went to court.

In considering the matter, the judge said he looked beyond the mere contractual description to the real substance of the parties' roles, functions and work practices which establish the "totality of the relationship" – an approach involving what he described as a "smell test", or a level of intuition.

There were two aspects to the test: Is the person performing the work an entrepreneur who owns and operates a business? And do they represent that business rather than the business receiving the work? "If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee," the court held.

The company presented evidence of seven interpreters which the judge did not consider was a representative sample. He found only two of the seven owned and operated their own business and that the company had failed to establish the majority of its 2,500 translators and interpreters were independent contractors.

As a result it was liable to pay the superannuation guarantee charge. Employers need to be wary of sham contracting – if they fail to provide required employee entitlements they face a maximum penalty of $33,000 for each breach. ❑

YOUR WILL

Where is it?

Where should you keep your will?

Keep your will in a safe place. It is preferable not to keep the will yourself in case it is mislaid. If the will is mislaid, it may be presumed to have been revoked. Solicitors hold wills on behalf of clients, usually at no charge. You should keep a copy of your will and note on it where the original is kept.

It is advisable to tell your executor where your will is kept. If you want to give personal instructions that you do not want to appear in your will, you can simply leave your executor a letter of instructions. ❑

CLOUD COMPUTING

Legal issues for service contracts

Before you decide to sign up for cloud computing, there are issues relating to location of data, security and reliability, and data exit that you should be aware of.

'The cloud' relates to providing computing services such as computer power, data storage and applications over the internet. Businesses can usually buy these services from companies such as Microsoft, Salesforce, Google or Telstra.

For businesses, the benefits of the cloud are that it can be cheaper than the outlay on hardware or software, more flexible, easier to manage and efficient.

There are, however, some issues to consider. A key question is where your data is stored or processed. The cloud may not be tied to any location, and the service provider may not know where your data is residing. The issues that arise here relate to your responsibility for data protection and privacy.

Before you consider moving to the cloud, you will need to perform proper due diligence. This should cover the parties in the cloud relationship, enforceability of the contract, and liability for breaches.

One remaining issue to be aware of relates to being locked-in to certain applications or systems – and if you want to transfer data or applications, whether the data is portable between service providers. You need to be aware of this, particularly in relation to data retention laws and regulations. Depending on the situation, data needs to be accessible for five, seven or 10 years after creation.

If you are thinking of joining the cloud, you should have your solicitor look carefully through your cloud computing service contract and its terms and conditions of use. ❑

FAMILY TRUSTS

Losing out on land tax threshold

A businessman with a family discretionary trust also had a block of land on the coast and plans to redevelop it.

He inherited the property, worth about $1.5 million, from his parents and it had been in his name for some years.

He also held a share portfolio in his family discretionary trust and decided to transfer the property into the trust before adding value by building a new holiday home. What he hadn't taken into account was this would increase his land tax bill.

The businessman was familiar with the process. The land value of the property was the same as the previous year – about $1.25 million. He calculated land tax at $13,808 – $1.25 million minus the $387,000 land tax threshold ($863,000) multiplied by 1.6 per cent (the land tax rate).

However, the land tax threshold doesn't apply to special trusts and, in essence, most trusts are special trusts, except those that jump through the hoops of the definition of 'fixed trust' under the Land Tax Management Act. To be a fixed trust, beneficiaries must be presently entitled to the income and capital under entrenched provisions.

This is the opposite to a family discretionary trust where beneficiaries only become entitled to income at the end of each year and often don't become entitled to the capital until the trust ends.

Unfortunately, just because the property is owned by the family trust, land tax will be an extra $6,192 each year. ❑

MEDIATION

Court is not the only way to resolve a dispute

Mediation can be a much more user-friendly way of resolving a dispute than going to court, and it has a proven success rate. Mediation is informal and, if successful, provides a cheaper and quicker means of settling differences.

Statistics show that more than 90 per cent of cases are settled before they reach court. Mediation can enable settlement to occur even earlier. Early settlement reduces the stress inevitably involved in court proceedings, particularly where a person may have to give evidence. It also reduces legal and other costs, such as those involved if you have to take time off work or from business for prolonged court attendance.

Mediation can also help the relationship between parties to survive their dispute, because it allows them to formulate their own mutually acceptable solutions.

Even if parties do not settle their dispute, they do clarify and narrow the issues at the mediation, which can reduce the time and expense of the court hearing. At the very least, parties who have been through a mediation will have had an opportunity to discuss and clarify the disputed issues.

Your solicitor can advise you on whether your dispute is suitable for mediation, prepare your case and attend the mediation with you, and also help you draft a settlement agreement. ❑

GREEN RETROFITS

New environmental upgrade agreements

Market barriers that have previously prevented owners from improving their buildings' green credentials have been removed with new laws allowing for environmental upgrade agreements.

If you are a building owner, the opportunity may be there for you to improve the energy efficiency of your building through the newly introduced environmental upgrade agreements (EUAs). The agreements can relate to non-residential or multi-residential strata buildings with 20 or more lots.

Businesses can make use of EUAs to take concrete practical action on climate change that could be consistent with your long- and short-term business plans and corporate social responsibility.

The EUA is a financing mechanism that allows money borrowed for environmental upgrades to be considered as a council charge. This charge becomes a debt that will run with the land, providing additional security for lenders.

An EUA must specify the works to be carried out, the amount to be advanced, and the repayment structure.

The works must reduce energy or water consumption, reduce greenhouse gas emissions, enable the monitoring of environmental quality or encourage alternative methods of transportation.

Parties to the EUA need to work out how they want the charge to be levied – either by a single annual instalment or quarterly instalments or other means.

Strata lot owners will pay increased strata levies, representing their proportion of the charge. The charge may be passed on to tenants depending on whether the lease already allows recovery of any council charge.

Eventual sale of the land with an environmental upgrade charge should also be dealt with in the EUA.

Councils can bring legal proceedings to recover unpaid money and can also sell the affected land if the charges remain outstanding for more than five years.

For advice on entering an EUA, contact your solicitor. ❑

OVERSEAS JAUNTS

Tax Office review of conference expenses

The Tax Office recently issued a tax alert that claiming tax deductions on conference attendance are under review. Self-study programs are under particular attention.

To show expenditure is tax deductible, taxpayers need to be able to demonstrate the required connection between outgoing and assessable income.

It is not for the Tax Office to judge how much someone should spend in deriving assessable income, which means, for example, that it can't say someone should have travelled economy rather than first class. The Tax Office can only say whether the expenditure was incurred in deriving income or not.

Normally, there is no issue about claiming deductions for travelling to overseas conferences. The principal difficulty arises in determining how to apportion expenses when someone wants to both attend a conference and take a holiday. (It need not necessarily be on a time-spent basis.)

But some might find fitting in a conference interferes with other activities. Formal conference sessions at a ski resort are often held between seven and nine in the morning so as not to interfere with a day's skiing.

Sometimes, even, it can be hard to find a conference somewhere one wants to visit. Self-study programs by some travel companies seem to overcome this. They allow study at a time and location of your choice and you can undertake the program alone or in a group.

The Tax Office has said that these types of arrangements are under review. What perhaps should be of most concern to people wishing to attend overseas conferences is the inference that the Tax Office is also interested in programs which allow a period of time to be spent at the taxpayer's own leisure. It seems also to be concerned where seminars are conducted on cruises.

Contact your solicitor for advice on tax issues. ❑