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In touch with the law

CLIENT NEWSLETTER

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.

BYO devices

The risks and trends

As more employees use their own devices to do work, businesses need to be aware of privacy, security and intellectual property rights issues.

The current shift in working practices – from the traditional nine-to-five work day based in an office to working remotely and being connected 24/7 – has led to the rise in cloud computing and bring-your-own-device (BYOD). There are, however, certain legal, technological and commercial risks associated with this more mobile workforce and businesses need policies in place to reap the benefits.

First is the issue of privacy, especially when an employee uses their own device for work. Businesses need to put in place policies to manage personal information on BYOD effectively, as well as prevent privacy breaches.

Second is the risk of data breach. Businesses need to update corporate policies to include how and what types of work data can be stored on BYOD and how third-party consumer applications like Evermore and Dropbox can be used. Many are choosing a 'virtualised' approach, where no physical data is held on the device and if it is lost or stolen, it can be switched off or killed remotely. Employees must be trained to ensure they take all reasonable steps to secure their devices, including regularly updating passwords and installing virus patches.

Businesses should also be aware of intellectual property issues that can arise and review existing employment contracts to ensure that any and all intellectual property created on a BYOD, whether at work or outside, is owned by the organisation.

Other issues to look out for include:

☐ retention of records for litigation purposes;
☐ software licensing arrangements for devices, which may not extend to BYOD;
☐ insurance policies, which may not cover user-owned devices; and
☐ human resource issues such as availability of the policy, what happens when the employee ceases employment with the organisation, content and acceptable use obligations, device payment obligations and interaction with other corporate policies. ☐

Privacy

Businesses need to be prepared for new laws

Organisations risk being caught out if they don't start acting now to update policies.

New privacy laws come into force on 13 March 2014. With less than a year to review their privacy policies and information systems to ensure ongoing compliance, businesses need to consider changes to any policies relating to the receipt of unsolicited information, direct marketing and the retention of personal information.

Companies need to have processes to deal with unsolicited information, for example, how to destroy or de-identify it if it could not have been lawfully collected.

Under the new laws, individuals can request that an organisation not disclose their personal information to facilitate direct marketing. So businesses need to review policies and practices to ensure compliance.

Finally, contractual arrangements with third parties involving the disclosure of personal information should also be reviewed, particularly in relation to direct marketing and cross-border transactions. ☐

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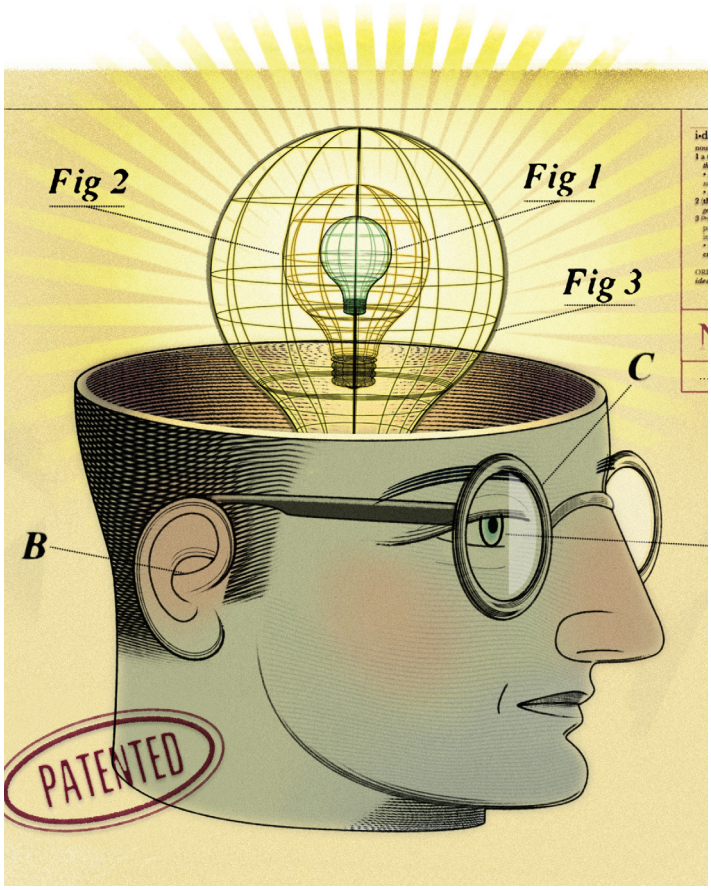
Raising the bar

Patents and intellectual property



New laws that came into force from 15 April make it tougher to successfully patent an invention.

The laws are designed to more closely align the Australian system with international standards and, in the process, raise the bar for the successful patenting of inventions in Australia.

In particular, there is a shift towards examining the practical applications of the invention by specialists in the field. From 15 April, budding inventors will need to work harder to provide enough information in their specifications for an expert in the appropriate area to understand, as well as perform the actions to which the invention could potentially be put.

Common general knowledge outside of Australia is also included as part of the test for inventiveness for the first time and inventors now need to show that the claims they make are adequately supported by the documentation they include with their application.

The new laws significantly bolster the principle of free access to patented inventions for regulatory approvals and research. This means actions that would otherwise be infringements on patent are exempt when performed for the purpose of obtaining approval required by Australian law. For example, if a generic drug company wishes to make preparations for sale of its generic equivalent to a patented drug by seeking regulatory approval before the patented drug comes off patent, it may do so. It may also produce quantities of its product and run a trial or submit its product for testing in order to gain regulatory approval.

For those seeking to block approval of a rival's patent there are new time limits to be considered.

Commonly used reasons for extensions of time such as a witness or attorney being unavailable will no longer be permitted. □

Emails

Does your company own your CEO's emails?

A UK court has found that a company does not own its CEO's emails if they are not held on its servers.

A former CEO of a UK company had his company emails automatically forwarded to his personal email address. A dispute arose around the construction of a 50,000 dead weight tonnage vessel, relating to failures to meet two contract milestones, and liability to pay sums totalling US$30 million. There was evidence that the CEO had agreed to a separate arrangement and the company wanted access to his emails. The emails were not on the company's servers, because once a message was forwarded, it was deleted from its servers.

The UK court was asked to decide on the narrow question of whether the company had any claim to ownership of the content of the CEO's emails. It found the company had no right to the content, denying it access to the CEO's emails. Australian courts would probably have arrived at a similar conclusion, so businesses should try and ensure that emails are located on their servers rather than on those of a third party. Possession is nine-tenths of the law, even in the digital era. □

Family law

Changes to family violence definition

The definition of 'family violence' has been broadened to include economic and other forms of non-physical abuse.

Recent changes to family law aim to more accurately reflect the experience of family violence, taking better account of the complexity of the issues involved and the varying patterns of behaviour the violence may take.

The new laws broaden the definition of violence in a family context to include economic abuse as well as other forms of harmful, non-physical behaviour. For example, denying a family member financial autonomy would now fall under the definition.

> "The new laws broaden the definition of violence in a family context to include economic abuse as well as other forms of harmful, non-physical behaviour."

Another example of non-physical violence would be the prevention of a family member making or keeping connections with their family, friends or culture.

Importantly, the changes do not necessarily require the family member in question to feel fear as a consequence of the behaviour, rather the focus is on the actions of the perpetrator and their state of mind. The central question being: is the perpetrator aware of the effect or consequences of their behaviour on the victim?

Protecting children and their interests remains paramount. In fact, some provisions in this regard have been strengthened – the courts are to give greater weight to the need to shield children from the harm of being exposed to family violence over the benefit of children having a meaningful relationship with both parents.

If you need advice on a family law matter, contact your solicitor. □

Are executors of wills entitled to be paid?

Not as often as you'd think

If you're chosen to be executor of a will, it helps to know when you're entitled to payment. And if you prepare a will, and wish the executor to receive payment, you should make some provision for this through what is commonly called a "charging clause".

Professionals with business, legal, accounting or financial skills are often asked to fill positions of trust for friends and clients, such as trustee or executor of a will. In general, an executor who is a professional is not entitled to charge for their services.

As executor, you are entitled to reimbursement for expenses but only to pay for your actions if allowed by the court, by a charging clause in a will, or if approved by the beneficiaries. The beneficiaries need to have decision-making capacity, be informed, and not have a conflict of interest.

Recent cases where fees were wrongly charged suggest a common lack of understanding of the options.

In one case, a will executor and accountant, who had been the deceased's financial adviser for about 20 years, paid himself over $200,000 for his duties as executor of the estate, which had a gross value of approximately $2 million, claiming to do so under a charging clause in the deceased's will. The sum was described by the judge as "an enormous amount of money for an executor to charge".

In another case, a financial manager – the son-in-law of the deceased's niece – was appointed by the Guardianship Tribunal to handle the estate and advised he would only charge out-of-pocket expenses. However, over a four-and-a-half-year period, his firm charged and received fees of over $200,000. The judge pointed out the principle "that a trustee must not profit from the trust".

Your solicitor can provide you with further advice on drafting and executing wills. □

Employment law Restraining ex-employees from poaching clients

Contracts to stop an ex-employee from poaching a company's clients need to be carefully worded.

A post-employment solicitation restraint is a clause in an employment contract that seeks to ensure employees leaving a company do not take the company's existing clients with them.

This generally means an employee is forbidden from advertising or soliciting custom from former clients, but what is the legal situation when it's not clear if there was direct solicitation involved?

A personal trainer worked at a sports centre as an independent contractor. When she left their employment she began working for a rival gym franchise. The franchise offered discounted membership rates to people the trainer had coached previously, including those whom she had trained while at the sports centre.

The personal trainer also posted various messages on her Facebook page advising her Facebook friends of the various agreements and deals with her new employer.

As her original contract with the sports centre prevented her from soliciting work from the centre's customers for three months after her work with the company ended, the sports centre took her to court seeking redress.

At trial the judge found the wording of the personal trainer's contract meant that there was no restriction on who she could train, so long as those who sought her services were unaffected by her solicitation or canvassing efforts. The difficulty for the sports centre came in proving that the customers the personal trainer took with her had knowledge of, or were influenced by, her canvassing efforts online.

"A post-employment solicitation restraint ... clause ... means an employee is forbidden from advertising or soliciting custom from former clients."

The personal trainer was ordered to take down any postings on Facebook that could entice customers away from the centre and into her new workplace, but ultimately kept the clients that had followed her from the sports centre already.

Post-employment solicitation restraints drafted as part of employment contracts can be complex.

For advice on appropriate wording of employment contracts consult your solicitor. □

Mis-selling a lesson to banks and investors

Bank's "cynical" awareness of risks "extraordinarily disturbing"

In a recent class action by three councils, Lehman Brothers was found liable for the big losses they suffered when the global financial crisis hit. In assuming the role of trusted adviser, the bank owed a duty of care in providing advice that aligned with the investors' risk profile.

The councils took action against the bank for recommending and selling them complex, high-risk financial products as investments. The courts found the councils had been misled into buying financial products that in no way matched their need for capital security and liquidity. The products were so complex the judge noted that even he was not sure he understood fully how they worked by the end of the trial. Had the councils been told of the risks they would not have invested.

In finding the bank liable on all counts for breach of contract, negligence, misleading and deceptive conduct and breach of fiduciary duty, the court focused on its process of mis-selling. This occurred in a plethora of ways. The investments were described as having features such as a high level of capital security and liquidity when the opposite was true. Their offering memoranda – withheld from the councils – clearly highlighted that the investments were illiquid, buy-to-hold investments, and only suitable for investors who could withstand a total loss of capital. The misrepresentations were conveyed to the councils by presentations, pitch materials, term sheets, emails and oral communications. Awareness of the true risks in the bank's internal emails was described by the judge as "extraordinarily disturbing" and "cynical".

The case shows that advisers may be liable for misleading and deceptive conduct if they do not take care in explanations or information given about high-risk products they offer. Disclaimers may be ineffective if they are irrelevant or not given prominence. □

Sellers of land face GST bill

Sub-divided farm land not exempt

If you've owned farm land since before the introduction of capital gains tax, you might expect that the significant capital gain you stand to make in selling part of your property will not face a GST bill. But that may well not be the case.

A couple owned land jointly and operated a farm business in partnership. As business turnover was greater than $75,000, they were registered for GST.

The plan was to subdivide three 25-acre blocks, selling them for $250,000 each. Although not GST experts, they knew from the front page of the standard contract for sale of land that GST is not payable on the sale of subdivided farm land.

But subdivided farm land is only GST-free if subdivided from land on which a farming business has been carried on for at least five years, and the supply is to an associate of the supplier without benefit, or for less than market value.

As none of the purchasers were associates and the sales were at market value, the sales were not GST-free. The sellers faced GST of $75,000.

To make matters worse, as none of the purchasers was going to use the land for farming, it was not possible to rely on the usual farm-land exemption or try to rely on any warranty by the purchasers in order to recover GST from them. The purchasers had no contractual obligation to pay the GST.

Contact your solicitor about GST responsibilities. □

Changes to directors' liability

Increased burden of proof in less serious environmental offences

Changes in the law reduce the circumstances in which directors and managers should face liability for environmental offences by their corporations. The new laws categorise actions into more and less serious offences.

The burden of proof now rests with the prosecution for less serious offences. Importantly, the prosecution is required to prove a corporate officer's involvement, whether by act or omission, in the commission of the offence. This shift is expected to reduce the number of prosecutions of corporate officers.

However, the presumption of responsibility continues to apply in cases of most serious environmental offences.

These include such offences as failing to comply with conditions of an environment protection licence, polluting waters and failing to notify authorities of a pollution incident.

Contact your solicitor if you would like more information about your directorial responsibilities. □