

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 media

Loose tweets sink fleets

Businesses need to be aware of the potential legal risks when using social media to engage with their customers.

Social media is a cutting edge way for businesses to engage with their customers – but it comes with a certain amount of legal risk. The core concept that businesses must come to terms with is that social media is no different in the eyes of the law than any other communications channel.

The easiest trap to fall into is a breach of the misleading and deceptive conduct laws. It is much easier to make comments that will invite trouble on social media channels because many businesses don't have the same structures and review processes in place that they do for more formal or traditional advertising. The courts have found that consumers will place weight and rely on a business's official Twitter account or Facebook page. Businesses should therefore have a well-drafted social media policy and train their staff in how different social media platforms work.

Businesses should also ensure they have processes that identify and allow for changes to misleading, deceptive or defamatory statements before they are posted. These procedures need to be quick



and efficient because of the immediacy of social media.

Be prepared to monitor and moderate different platforms to ensure that third party comments which could offend or breach legal obligations are deleted or amended. For example, the Advertising Standards Board has deemed official Facebook pages and other official social media accounts to be advertising. This means such pages need to comply with certain codes and community standards, the same as if they were on TV, radio or other traditional advertising medium – including comments

made by 'fans'.

For businesses listed on the ASX, new Listing Rules suggest that certain companies should have processes to monitor social media channels for information the market is trading on and be ready to respond to any speculation. This could include discussions and rumours that can lead to a false market, particularly in the lead-up to a market announcement or when a market-sensitive announcement is being released. □

The good oil

New food standards

Businesses have three years to complete the transition to new food standards which were introduced in January.

The new Health Claims Standard will regulate the use of both express and implied nutrition content and health claims made on food labels, as well as in associated advertising and promotional material. They complement existing consumer law by addressing concerns that consumers are being misled by the presence of health claims on foods of low nutritional value.

There are 212 pre-approved food-health relationships in the Health Claims Standard. Food businesses can also self-substantiate some health claims. Foods which are less nutritious than is required by the nutrition profiling scoring criterion will not be able to carry a health claim under the new regime. Therapeutic claims continue to be disallowed.

The new standards will operate alongside a transitional standard for three years. During this time food labelling must comply with either the old or the new regime but there will be no sell-off period for businesses to sell stock at the end of the transitional period. □

Personal injury

Liability for dangerous recreational activities

A court has found that if the risk in a dangerous recreational activity is obvious, a person cannot claim damages from the operator.

A student pilot sued his instructor for injuries he sustained when participating in a flying lesson. Part way through the lesson, the plane's engine failed and the instructor took control of the aircraft and made an emergency landing into a bush gully. The instructor was an experienced pilot who had been involved in a number of emergency landings over his career. The student claimed negligence and sought damages for his injuries.

The court found that the instructor had been negligent in not flying towards an appropriate landing strip when



the engine started to fail, instead continuing to fly and resulting in the subsequent forced landing. However, because the activity was a dangerous recreational activity, and the risk of injury was an obvious one, the court found that the student was unable to recover damages.

The courts have recognised that participants in dangerous or adventure activities cannot expect to have these experiences yet be 'wrapped in cotton wool' and protected from all injury. A balance must be struck, ensuring operators provide a relatively safe experience, but not necessarily a risk- or injury-free one.

Operators can also provide a very risky activity with full disclosure and acknowledgment of those risks in accompanying waivers and exclusions. □

Family Law

Relocating your child

When a parent independently relocates with a child, without the full knowledge or consent of the other parent, courts may take a dim view of their action.

In a recent case, the Family Court found that a father who unilaterally decided to relocate his child "lacked insight" and was an indictment of his capacity to understand the needs of the child.

The parents met in Japan and had a child, but then separated. After the 2011 tsunami in Japan, the parents agreed that the father would take the child to live with the paternal grandmother in Australia.

Later, when the father started a relationship with another woman in Japan, the mother sought interim orders to take the child back to Japan for a specified period of time. She did not return the child as required.

The father then, without consent or prior warning, obtained emergency travel documents for the child and returned with the child to Australia. He also obtained orders to keep the child in Australia.

The mother sought orders for sole parental responsibility for the child and for her to return permanently with the child to Japan.

She was successful as the court concluded that by removing the child from Japan without the mother's knowledge, the father had demonstrated an ignorance of the possibility that the child could suffer psychological harm as a result of his actions. The court also doubted his willingness and ability to facilitate, and to encourage a close and continuing relationship between the child and mother. It ordered the child be returned to the mother and the father restrained from removing the child from Japan.

Separated parents wishing to relocate within Australia are likely to face the same issues as those wanting to relocate externally. □

Immigration law

Penalties for failure to ensure employees have correct work visas

New laws introduce no-fault civil penalties for employers who fail to ensure employees have correct work visas and provide new investigative powers to the Department of Immigration and Citizenship.

Changes to migration laws mean an employer who allows a foreign national to work without the correct work visa will be fined. The fine is currently \$15,300 for an individual; and for

valid visa and complies with its conditions. Reasonable steps include using the department's Visa Entitlement Verification Online service (at tinyurl.com/yc5pjeu) prior to, or within a few days of, an employee commencing employment.

"An employer can avoid the civil penalty if they have taken 'reasonable steps' to verify the worker holds a valid visa."

a corporation the penalty may be five times that.

There is no distinction between innocently allowing someone to work without permission or knowingly acting in disregard of the law. However, an employer can avoid the civil penalty if they have taken "reasonable steps" to verify the worker holds a

The new laws also provide the immigration department with investigative powers to require employers to provide documents or information about possible contraventions and offences, and empower the courts to issue search warrants to search premises, operate electronic equipment and download material and seize evidence.

Contact your solicitor for information on work visas. □

Repudiation of contract

Duties and responsibilities as important as job title

Employers should be aware that varying an employee's duties and responsibilities may have the effect of repudiating the employment contract, particularly if it materially impacts on the employee's status within the organisation or industry.

In a recent decision, a judge found that a company's executive chairman, who had hired an executive, in effect, in the same position as an existing executive, had repudiated the latter's employment contract.

Apart from identifying the title of his position, the latter's employment contract provided no specific detail about his role within the firm. The judge noted that repudiation may refer to conduct which "evinces an unwillingness or an inability to render substantial performance of the contract".

The well-recognised test

for repudiation is whether, objectively, the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.

There are circumstances where a considerable change in the nature of an employee's duties may not amount to a repudiation. The circumstances of a particular case may permit a degree of flexibility in approach.

Contact your solicitor if you would like information on employment law.

Wills

Logging off for life

Take steps now to ensure your online presence is managed appropriately after death.

Digital assets do not have an expiry date. The question of who should have post-mortem access to digital assets is of particular importance in the context of estate planning and management. Dealing with digital assets may not be as simple as leaving login details with a third party. Sensitive information left in the wrong hands could lead to disastrous consequences.

Executors may have legitimate reasons for seeking access to digital assets, including:

- online banking accounts which can hold vital information such as account and credit card details for proper administration of the estate;
- Paypal and Ebay accounts which may contain funds of significant value that the executor must collect for distribution; and
- online photo accounts that

might hold sentimental value and will be memoirs for family members.

When making a will, you should consider:

- making a list of your digital assets and online accounts;
- making a record of user names and passwords to each account, including answers to any security questions (ideally, this should be kept separately from your will);
- giving your executors access to some or all of your digital assets which refer to where the full list and password information can be found; and
- how you want your digital assets to be dealt with, for example, whether you want family members reading your personal emails or accessing other personal information, or simply deleting all online accounts.

See your solicitor about making a will now.

Unfair contract terms

Let the supplier beware

The Australian Competition and Consumer Commission has signalled its intention to adopt a more enforcement-based approach to protect consumers.

Early this year the consumer watchdog released an industry review of unfair contract terms and amendments to its compliance and enforcement policy. Both signal a tougher stance, requiring business to be more proactive when reviewing consumer contracts.

The unfair terms regime applies to standard-form consumer contracts, and renders void any provisions which are deemed unfair. While many businesses view the risks as being low, the potential effect of contract provisions being void can significantly affect the bottom line.



All standard-form consumer contracts must meet strict tests for fairness under the Australian Consumer Law. They need to be expressed in reasonably plain language, be legible and presented clearly, as well as made readily available to affected parties.

Terms that are confusing, unclear or inconsistent are much more likely to be

considered unfair. For example, an airline ticket printed with the words "NON ENDNON REF" was found not to be clearly or legibly expressing a restriction that the ticket was non-refundable, even though accompanying documentation referred to non-refundability.

The unfair terms regime can also apply to organisations which may supply goods or

services that would not usually be thought of as consumer goods. For example, if an individual buys a photocopier for personal use then the unfair terms regime would apply to that one transaction.

Your solicitor can draft a standard-form consumer contract to minimise the possibility that it will be voided by the use of unfair terms.

Workplace relations

Making an appearance

Individuals should be prepared to present their case in the Fair Work Commission.

A new case in the Fair Work Commission (FWC) has confirmed that lawyers need to seek permission to represent their clients in matters before it. This means that individuals should be prepared to present their own case if their lawyer is refused permission to represent them.

Proceedings brought within the FWC are intended to be conducted with less procedural formality than other jurisdictions. The general rule under the law is that each party bears their own costs and can only be legally represented with the FWC's permission. In the past, it has been assumed that permission will be granted as a mere formality, but not anymore.

In this case, the worker, who suffered a mental disability, filed an unfair dismissal case against his employer. The worker was self-represented and the employer was represented by a solicitor. The worker was unsuccessful in his case. On appeal, the FWC found it was unfair of the judge not to have considered and applied the constraints of the law when faced with a party who was mentally disabled and self-represented, against a trained solicitor.

When considering whether to grant permission for parties to be represented, the FWC will look at whether:



- the matter can be dealt with more efficiently, taking into account the complexity of the matter;
- it would be unfair not to allow representation because the person is unable to represent themselves effectively; or
- it would be unfair taking into account fairness between the parties.

If you have a case before the FWC, make sure your solicitor has trained and prepared you as best as they can to conduct your own case.

Exemption from land tax

Deciding on a principal place of residence

In a recent case, a parcel of land was found to be exempt from land tax where the land owner was living in a garage he had built on the land. The law exempts land that is a “principal place of residence” from land tax.

The person had bought land three doors away from his mother and decided to build a new residence on it. First though, he built a garage which he claimed to live in as his principal place of residence.

The Commissioner of State Revenue argued that it was not, primarily because he felt the land owner did not really live in the garage which had been built on it. The Commissioner argued that the architectural design and physical character of a garage was inappropriate for residential purposes and that a mere sleeping place was not “residential” in the relevant sense.

The Tax Office has standard

procedures in seeking to show a parcel of land is not a person's principal place of residence, invariably looking

“The Commissioner argued that ... a mere sleeping place was not ‘residential’ in the relevant sense.”

at tax returns, electricity bills, driver's licence and the like, in order to match up the addresses on those returns, bills and licence with the address of the claimed principal place of residence.

In the case, the tribunal decided that the land was not used for anything other than the development of the new house and as the person's residence.

Workers compensation

Window opens for lump sum claims

Some workers may be able to pursue claims for lump sum compensation for permanent impairment despite recent changes in the laws.

New workers compensation laws introduced in mid-2012 sought to restrict access to lump sum benefits to workers who establish an 11 per cent whole person impairment (WPI) to a single claim for injuries after 19 June 2012.

Now a court has found that a worker who had made a claim of 6 per cent WPI before that date is entitled to pursue a claim for deterioration and pain and suffering. If you've been injured at work, talk to your solicitor about workers compensation.