

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.

ANTI-SPAM LAW RAMPED UP

Unsubscribe facilities do not infer consent

Regulators are increasing efforts to pursue those in breach of the anti-spam law and they can impose substantial penalties – up to \$1.1 million per day – against a corporation that repeatedly breaks the law.

Recently, two infringement notices of \$110,000 were issued to a major telecommunications company for sending out 20,000 SMS messages. The messages promoted the company's entertainment service, with the sender identification shown merely as a three-digit number.

Clear and accurate sender identification, along with accurate information about how to contact the sender, is one of three legal requirements of sending commercial electronic messages with an Australian link.

The message must also contain an unsubscribe facility to allow the recipient to opt out of receiving messages from that source, and it must be sent with the recipient's consent. It can be express consent or inferred from existing business and other relationships – such as where the individual is a member of a club, a subscriber to a service, or a client the organisation deals with on an ongoing basis.

Consent may be inferred

if an individual conspicuously publishes a work-related electronic address, such as on a website, or in a brochure or magazine, and the address is not accompanied by a statement that the person does not want to receive unsolicited commercial electronic messages. This inference of consent is limited to commercial electronic messages relevant to the person's business, functions or duties.

In one case, a company admitted that its principal method of obtaining email addresses for its databases and lists was the use of address-harvesting software, or obtaining harvested address lists from external parties.

It sought to infer consent from the failure of email



recipients to request removal from its lists. However, the courts found that there was no obligation to reply to such a message, and that the mere

presence of an unsubscribe facility does not infer consent. Penalties of \$4.5 million were imposed on the company and \$1 million on its director. □

FIRST HOMEOWNER GRANT

Penalties if you don't meet criteria

Current low interest rates and the increase in the government's first homeowner grant to \$21,000 for a new house purchase may be tempting, but you will have to repay the grant if you do not meet the eligibility criteria.

The residency requirement is that you move into the property within 12 months after completion and live there for a continuous period of six months.

If, after receiving the grant, you do not fulfil the requirements, you need to advise the Chief Tax Commissioner of what has

occurred and repay the grant. You may have to pay a penalty as well as the grant amount.

To make matters worse, based on the recent stance of the Tax Office in court, you may have to pay tax on the capital gain when the property is sold, because you never used it as your main residence. □

DOCUMENT RECOVERY

Make it easy on yourself

Recovering information from backup or disaster recovery systems is almost always very expensive and consumes valuable employee resources.

If you are (legitimately, of course) destroying documents, you should probably consider the adequacy of destruction.

Deleting from a live IT system doesn't mean files disappear from backups or disaster recovery systems. Those records may exist on dozens of backup tapes or other media.

The information is now of no use to you and there is no legal requirement to keep it, but if you end up in court, your long-forgotten backups may be called into play if the other side believes they contain useful evidence to support their case. This can be a costly and time-consuming drain on your business.

It makes a lot of sense to have well-crafted retention and destruction rules. This



implies that you consider triggers for the destruction process. For example, you might decide that employee records will be maintained until the relationship is terminated. Termination could then trigger the start of a retention period

of, say, seven years, after which the documents would be destroyed.

If you can easily determine whether documents have been destroyed according to business rules, you should know without expensive searching that they

do not exist anywhere else. Processes need to address common law, statutory and prudent commercial retention requirements, including holds or freezes on documents that may be required for any legal or commercial inquiries. □

TERMINATION

Keen interest for employers to get it right

Wrongful termination of an employee can be a costly business. It is in an employer's interests to get it right.

There are generally two scenarios in terminating someone's employment.

In the first, when an employee has conducted themselves in a manner to warrant summary dismissal, the employer does not have to provide a period of notice or payment in lieu to the employee.

In the second, where an employee has done nothing to justify summary dismissal, the employer must provide notice, or payment in lieu, in accordance with the express or implied terms of the contract.

The situations in which employers can summarily dismiss an employee will therefore be of keen interest to them. This is especially so because employers who wrongfully summarily terminate an employee may be liable for breach of contract.

One way an employer can be justified in summarily terminating an employee is if the employee disobeys a lawful direction the employer gives them.

However, if the employer acquiesces in such disobedience, or condones the employee's conduct, the right to terminate in such circumstances is lost.

Failure to clarify an employee's rights and failure to intervene in wrongful conduct constitutes condoning it.

An employer who wrongfully terminates the employment of an employee can be liable for a significant

sum – in a recent case, \$500,000 had to be paid out in damages to an employee who was wrongfully dismissed. □

TAX

Longer to appeal

A recent court of appeal decision affects the future conduct of state tax appeals generally, whether they concern stamp duty, land tax or payroll tax in NSW.

The court of appeal has found that where the Chief Commissioner of Tax refuses to give permission to lodge an objection to a decision after the

60-day period allowed in the tax laws, an objection may still be lodged under another part of the law.

For the person in the case, it kept alive his right of objection and appeal for earlier tax years 1997 to 2004 when he had lodged objections against his assessment for land tax after the 60-day period. Contact your solicitor for further advice. □

MANAGING SUPER FUNDS

Breach of rules can lead to imprisonment

A fund must be deemed a super fund under the superannuation laws for contributions to be tax-deductible and the fund concessional tax.

The strategy of tax planning through super funds is a simple one – you contribute as much as possible to a super fund whose income is then subject to, at most, 15 per cent tax, and in due course withdraw the contributions and income as a tax-free pension or lump sum.

However, the government imposes a quid pro quo. It expects that the super fund will be managed in accordance with its rules. The tax office regulates self-managed super funds. If a fund fails to comply with the requirements and becomes a non-complying fund, it will lose its ability to accept tax-deductible contributions and will not be taxed at concessional tax rates. Penalties can also be imposed on trustees and others.

The tax office appointed an auditor to one fund after

deciding it was non-complying by having failed to keep proper accounting records. The trustees had felt that a small, single-member fund should not have to comply with those regulatory provisions. They were wrong; as a consequence the tax office could quite clearly deem the fund to be non-complying. In this case, the trustees of the fund had to roll over the fund into an industry, retail or public-offer fund, forfeiting their ability to manage their own superannuation.

A regulated fund, with limited exceptions, must not intentionally acquire an asset from a related party of the fund. A trustee or investment manager who intentionally breaches this rule can be imprisoned for up to one year.

The tax office claims that it first wants to educate trustees, and that penalties are only necessary where non-compliance or ‘game-playing’ with the law is intended.

Contact your solicitor for information on super funds. □

RICH CATS

How to leave a legacy for your pet

Trouble was the name of a cat which had its legacy of US\$12 million cut back to US\$2 million after a court case by unhappy human dependants. Your pet may not benefit by as much, but to ensure its future wellbeing, carefully prepare the legal groundwork.

Pets cannot inherit from a will directly, since they are classified legally as property and have no capacity to hold money or property themselves.

There are several options. A simple clause in a will leaving your pet and a sufficient gift of money to a carer you nominate, while not binding, will enable the carer to use the legacy to care for your pet. Talk to the person first to see if they are willing.

It can also be done with a cash amount for the pet’s maintenance or as a proviso to receiving a cash legacy. In the latter, if the person cannot or will not take the pet, the legacy will fail. However, it is impossible to ensure that someone will continue to care for a pet if they do accept a legacy or that they will use money left for maintenance for its proper purpose. Ongoing care of a pet cannot be a task

which an executor could be expected to oversee.

A legacy program with an animal charity is another option. This involves leaving a gift of money to the charity in exchange for the charity looking after your pet.

Or you could set up a trust in your will for the care and maintenance of your pet. It is important to choose a trustee who is dependable, as a trust will not be enforced by an

Australian court if the trustee is not prepared to carry out its terms. Remember to put aside enough money in the trust to cover your pet’s lifetime needs and to give your trustee relevant written information about the pet’s behaviour. Also, give further instructions about what is to happen to any unspent funds once your pet passes away.

Some people do not want their pet to suffer the grief of

separation and the possibility of an unsuitable new home. If you wish to have your pet euthanased, canvass this first with the person who is appointed in your will to follow out your instructions. They will arrange for your pet to be euthanased following your death.

See a solicitor to have your will professionally drafted to ensure that it is valid and your wishes are carried out. □



COMPULSORILY ACQUIRED LAND

Claiming loss of profits

Claims for compensation are often made not only by landowners but also by businesses which operate on acquired land.

Many state authorities have the power to compulsorily acquire land for public purposes. The law ensures that compensation is paid for the market value of the acquired land and for 'disturbance' to the dispossessed owner.

An 'owner', for the purposes of the law, means any person who has an "interest in the land", which would include, in most cases, any business operating from the land with a

lease or similar arrangement. Some public works may also have a short-term impact on a business's profits.

In a series of cases in the past year, the Land and Environment Court has made some important comments about loss-of-profit claims with interpretations favouring the acquiring authorities.

However, every claim turns on its own unique facts. The success or otherwise of a claim for loss of profits will depend on properly preparing the legal case and understanding the words used in the law. Speak to a solicitor if you want advice on claims. □



REDUNDANCY

Tax concessions on payments

On being shown the door, an unwanted employee is likely to be paid accrued salary, entitlements to unused holiday pay and long-service leave, and possibly a redundancy payment.

Accrued salary is assessed in the normal way and accrued annual leave paid in respect of service on or after 18 August 1993 is fully assessable.

A redundancy payment has to be for a genuine reduction in a company's staffing for part of it to be tax-free. This tax-free amount is indexed annually, and the amount for the year ended 30 June 2009 is \$7,350 plus \$3,676 for each whole year in the period, or the sum of periods, of employment to which the payment relates.

There will also only be genuine redundancy if the employee is dismissed. An employee is dismissed notwithstanding their electing to accept redundancy – for example, where an employer

makes redundancy offers to groups of employees generally.

Payments made under an early retirement scheme may also be tax-free.

A scheme is an early retirement scheme if it provides for the termination of the services of a class of persons – for example, where an employer

wants to replace employees who have particular skills with those of different skills.

As with amounts paid on a genuine redundancy, part of the amount paid to retiring employees will be tax-free.

A more adventuresome way of reducing tax is for the employer, instead of making a

payment to the employee, to make an additional contribution to a superannuation fund for the benefit of the employee (a form of salary sacrifice).

Employers can gain tax deductions for lump-sum amounts paid as accrued salary and leave entitlements, and for amounts paid for redundancy. □

PROFESSIONAL RISK

Failure to warn

Professionals must be careful to fully inform clients to avoid accusations of negligence.

A recent case considered a failure to warn a medical patient.

It was argued that a doctor was negligent by not adequately warning a woman that a sterilisation procedure might fail, exposing her to the risk of becoming pregnant again.

The doctor had described

his personal failure rate using the procedure as one in 2,000, rather than referring to a professional publication which wrote of a risk of one in 500 women who had the operation becoming pregnant.

The judge said the doctor was in breach of his duty to warn since he did not make it clear that the ratio of one in 2,000 related to his personal experience. For a proper balance of information, the

patient should have been informed of the failure rate in the medical literature.

In a failure-to-warn argument, the outcome depends on what it is thought individuals would do had they been adequately warned. This case was finally unsuccessful as the patient was unable to persuade the court that she would have declined the sterilisation, even if told that the risk of failure was one in 500. □