

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.

DISCRIMINATION ON FACEBOOK

Banning social networking sites at work may not protect employers

If there is a connection with employment or other area of public life, people making discriminatory comments on internet sites like Facebook may be subject to discrimination laws.

The Australian Human Rights Commission reports receiving an increasing number of complaints about harassment occurring on social networking websites.

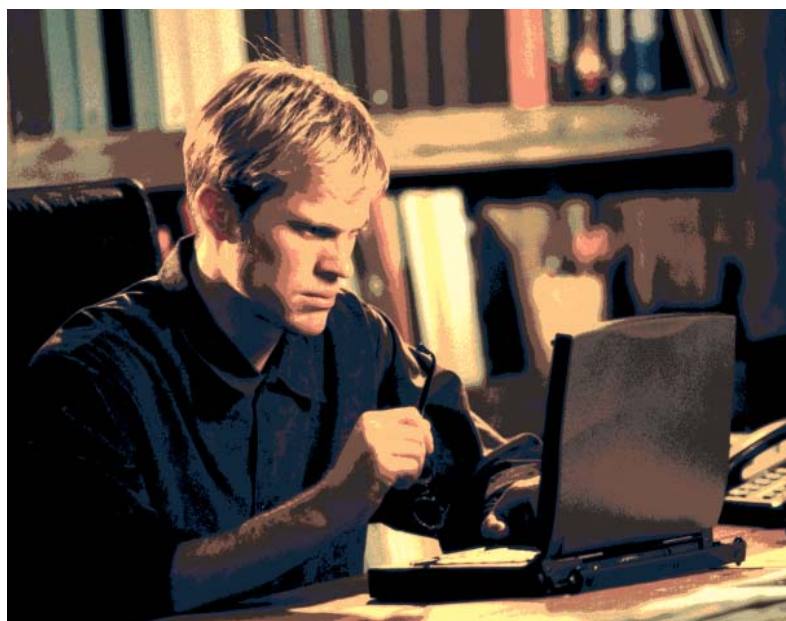
One complaint was about comments of a sexual nature made by one employee to another on Facebook after they had become Facebook friends.

In another, disparaging comments about a fellow employee's disability were made

to a Facebook group which bore their employer's name, though the group was not created by the employer.

Another complaint involved an exchange of racially offensive comments between colleagues after posting photos of a work function on Facebook.

Rather than developing special policies restricting the use of social networking sites, employers seeking to avoid liability for discriminatory conduct may do better to focus on formal policies and practices that seek to develop a non-discriminatory workplace culture, and ensure a workplace that is free from discrimination and harassment. □



INTERNET PUBLICATION

It takes two to publish, and more can't be assumed

The courts have said that material on the internet is not available in comprehensible form until downloaded by someone else, and damage to reputation is only done when it is downloaded. Where it is downloaded is where the defamation is committed.

In a recent defamation case, the court said that there was "no presumption of law that there has been substantial publication of an internet publication". The person making the complaint had to prove the material was accessed and downloaded.

While there was no dispute

that the material complained about had been posted on the internet, the court decided it couldn't be assumed that it had also been downloaded and read.

The ABC had posted the material on its website at 4.19 pm, but after a suppression order was made it was withdrawn, likely to have been a short time after

6.14 pm. The court found that there was 'no platform of facts' on which an inference could be made that substantial publication of the article had occurred within South Australia and no evidence that anyone other than solicitors for Channel 7 (preparing the legal case) had downloaded the article. □

PHOTOS AS EVIDENCE

How the courts interpret the picture

In a recent case where a woman suffered catastrophic injuries on a coal haul road while driving to work, photographs of the state of the road were crucial, and the place of photographic evidence in court proceedings was further developed.

The injured woman had had a general recollection of “feeling unsafe” on the road, but no specific recollection of the accident.

In the first court to hear the case, the judge studied photographs of the road surface and heard expert accounts of what the photographs indicated about the state of the road.

The judge decided that the woman had lost control of her vehicle because she couldn’t differentiate the hard running surface from the softer edge, as the road was covered in coal dust. He found that when the left-hand wheels of her vehicle entered the soft shoulder, she overcorrected and lost control. The vehicle rolled several times, causing severe injuries including quadriplegia. He awarded the woman over \$8 million in compensation.

However, the coal company which was responsible for the road appealed, and the first judge’s decision was reversed by the appeal court.

One appeal judge said it was “necessary to bear in mind the colour, and uniformity in colour, could be affected by the quality of a photograph and the conditions in which it was taken” and considered that there was



a “well discernible difference in colour between the central part of the road and the shoulders”. The judge did not believe the injured woman would have been misled to the extent of driving onto the shoulder.

The case shows that judges will look at photos and form their own views. They are not required to confine the use of photos to describing what a witness says they saw.

It also shows that,

importantly, photographs can be treated as primary evidence, though the circumstances under which they are taken must always be taken into consideration when deciding what weight to attach to them. □

TRAVEL RESTRICTIONS

When the tax office can stop you leaving the country

In a recent case, a man was refused permission to leave Australia to visit his former wife, the mother of his children, who was dying and had only a few weeks to live.

Where a person owes tax and the tax office believes on reasonable grounds that it is desirable to ensure they don’t leave the country without paying, or making satisfactory

arrangements for payment, it may issue a departure prohibition order preventing them from leaving Australia.

There are restrictions on that power. Before a prohibition order can be issued, the tax office must have assessed a person for tax – mere suspicion that there might be an unassessed tax liability is not enough.

Taxpayers can apply to the

courts to have a departure prohibition order set aside. As an alternative, they might ask the tax office to issue them with a departure authorisation certificate.

Before issuing any such authorisation, the tax office can require them to provide security for the payment of tax.

The law says that if a taxpayer is unable to give security to the satisfaction of the tax office, the tax office can still allow the person to leave Australia on humanitarian grounds.

In the case of the man wanting to visit his former wife, the tax office argued that if it believed the person could provide security but had not done so, as here, it did not have the power to allow them to leave the country on humanitarian grounds. □

ONLINE HELP IN FAMILY BREAK-UPS

www.familyseparation.humanservices.gov.au

A new website offers separating families a rich online resource to help them through the emotional and legal tangle of a break-up.

My family is separating – what now? stemmed from recommendations for a one-stop shop that would help people navigate the financial, legal and emotional issues they

need to consider when going through family separation. It was developed and tested in consultation with community service organisations and family law partners. □

EMAIL EVIDENCE AND THE PAPERLESS TRAIL

Making a contract by email legal

Laws on electronic transactions in the US and Australia make emails valid as written documents. But court cases emphasise that it is the content rather than the form of email communications that determines whether they make enforceable contracts.

Email exchanges can be like phone conversations, where, as one judge said, “the parties are really just ‘talking’ with the help of the internet, and not sitting down across a virtual table to electronically ‘write up’ a memorandum of any contractual significance”.

In one case where someone was suing over an alleged email contract for sale of land, the court found that the exchange of emails exhibited no meeting of the minds. The emails lacked the essential terms of the contract, including the amount of the deposit and how the parties intended to deal with a commercial lease on the land.

But emails can constitute enforceable contracts. In a recent case, the judge said: “While ‘writing’ often contemplates writing on paper, it is nonetheless writing and not speech, if written in invisible ink. It is nonetheless writing, and not speech, if written in the sky by an aircraft engaging

in skywriting. To my mind, it is nonetheless writing, if it appears on a computer screen, as a result of the entry of data into a computer.”

Whether or not an email satisfies a statutory requirement for writing depends on the circumstances in which the email was made.

See your solicitor if you need advice on emails or any other documents on which you are considering basing important decisions. □



Avoiding forgery

Day-to-day, we make decisions of trust around emails we receive. But evidence that an email is authentic may be necessary if it is required as evidence in court.

For the most part, email authenticity isn't a problem, and we manage to muddle along with email as one of our primary modes of communication.

However, there is a need for greater scepticism when it comes to email evidence.

Comparing the essential properties of email and paper, we can see that modifying text on paper leaves a mark, whereas the substance of emails can be modified without obvious trace.

Handwritten signatures are distinctive and serve to authenticate the author. An email equivalent of a signature is technically possible, but it is not widely used.

Determining an email's authenticity requires both corroborating evidence and technical expertise. Email metadata is information stored as a part of each email, but

usually hidden from view. It can indicate, among other things, the path an email has taken from sender to recipient, and when it was received. Careful analysis can detect tampering or outright forgery. There are also mail server logs – records maintained by email-handling systems.

Further, records of an original email typically remain on the computer on which it was composed. At the simplest level, identifying an email in the 'Sent Items' folder of a computer will go a long way to establishing that the person in possession of the computer was the author. □

VISAS New emphases on refusals and cancellations on character grounds

New guidelines issued by the Minister of Immigration have introduced major change in the way in which decisions to cancel a person's visa are made.

Under migration law, a person's visa can be cancelled if the minister reasonably suspects that the person does not pass the character test. This

is a complex test; it includes having a substantial criminal record, defined as being sentenced to imprisonment for 12 months or more, or not being of good character on account of past and present criminal or general conduct.

However, the new guideline is notably different to its predecessor. The guideline directs a decision-maker to

consider the nature of any harm a person might cause to the Australian community and the risk of that harm occurring, but a wide range of other factors must also be considered: whether the person arrived in the country as a child, the length of residence, and any related international law obligations are now not only relevant but

are primary considerations.

The new rules stipulate that it may be appropriate to accept more risk “where the person concerned has, in effect, become part of the Australian community owing to their having spent their formative years, or a major portion of their life, in Australia”.

Contact your solicitor if you require information on immigration issues. □

LIMITATIONS ON REDUNDANCY

Changes to rules on unfair dismissal



The new industrial relations laws introduced in July change the thresholds and qualifying periods for unfair dismissal claims.

The Fair Work Act has reduced the small-employer-exempt threshold from 100 employees to less than 15. These include casual workers employed on a “regular and systematic” basis. As some compensation, the protection

against unfair dismissal claims provided by earlier legislation has been extended for small employers to 12 months.

The new laws increase the number of employees who can access the unfair dismissal laws from 44 per cent to 80 per cent of the workforce. Interestingly, the government has perhaps sought to limit the number of potential applications by shortening the period in which an application for unfair

dismissal must be brought from 21 to seven days of termination of employment.

Claims for unlawful dismissal can be made within 60 days. For both claims, the new authority handling claims may allow more time if it is satisfied there are exceptional circumstances.

The capacity to lay off staff for operational reasons is now far more circumscribed. The Fair Work Act replaces the term “genuine operational reasons”

with “genuine redundancy” which it defines as “the person’s employer no longer required the person’s job to be performed *by anyone* because of changes in the operational requirements and ... the employer has complied with any obligation in a modern award or enterprise agreement that applied ... to consult about the redundancy”.

It appears that employers will also have to review their associated companies to see if they can redeploy employees rather than make them redundant; the term ‘redeploy’ is yet to be tested and defined.

Importantly for employers, the new regulations have not altered the meaning of the term “serious misconduct” or changed the criteria for deciding whether a dismissal was harsh, unjust or unreasonable.

The new laws effectively continue to exclude high-income earners from the right to bring an unfair dismissal claim, offering considerable protection to large employers who employ a highly remunerated workforce. The high-income threshold at 1 July 2009 was \$108,000 and it is to be indexed on 1 July each year. The threshold includes not just base salary but can include the “real or notional money value” of non-monetary benefits. □

END OF LIFE

Enforcing your wishes with an advance care directive

End-of-life issues are currently being discussed in the media here and overseas. They were highlighted by a recent case in NSW where a patient had made an ‘advance health care directive’ which recorded his wish to avoid certain treatments aimed at prolonging life.

An advance health care directive is a document that states your wishes or directions regarding your future health care for various medical conditions. It comes into effect only at a stage when

you are unable to make your own decisions. You may wish the directive to apply at any time when you are unable to decide for yourself, or you may want it to apply only if you are terminally ill.

In the NSW case, a patient was being kept alive by mechanical ventilation and kidney dialysis.

When the health service became aware of the existence of an advance care directive refusing dialysis treatment, it sought legal clarification on whether the directive was valid, and whether the health service would be justified in complying

with the person’s wishes.

The courts held that in general “whenever there is a conflict between a capable adult’s exercise of the right of self-determination and the state’s interest in preserving life, the right of the individual must prevail”, although there may be exceptions to that principle.

The hospital was required to give effect to the advance care directive, even though withdrawal of dialysis would hasten the person’s death.

Consult your solicitor if you would like to discuss age care issues. □