

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.

BIOBANKING

Accommodating development and biodiversity

Changes to the law have been introduced to improve protection of species threatened by urban development.

Biodiversity certification began in 2005 and biobanking in July 2008.

Where a development application likely to significantly affect a threatened species, population or endangered ecological community is lodged under environmental planning laws, a species impact statement has to be prepared before the development can be approved.

In determining whether a proposal is likely to have a significant effect, the consent authority must have regard to a 'seven-part test', as well as assessment guidelines.

On any site where threatened species is likely to be an issue, a developer will usually engage an ecologist to prepare a brief flora and fauna report which addresses the seven-part test, based upon which the consent authority will decide whether or not a species impact statement is required.

In the new biobanking scheme, following assessment, a developer may be issued with a statement outlining the credits required to offset a development's impact.

The Department of the Environment and Climate has

published online its biobanking assessment methods, which guide the department in determining how many credits, and of what type, are required to offset the biodiversity impacts of a development.

A landowner can use the system to assess a potential biobank site before entering into a biobanking agreement to undertake management action to conserve biodiversity. The landowner can then agree to manage the site for conservation, generate biodiversity credits, and sell them to developers requiring credits to offset their developments. Credit payments go into a biobanking trust fund from which annual management payments are paid to the biobank site manager. □



COMPUTER EVIDENCE

Risks in both deleting and uploading

Destruction of obviously relevant material held in computers can give rise to significant adverse inferences in court.

This is currently happening in music-sharing cases to defendants who, being without professional legal advice when a statement of claim arrives, immediately react by wiping

their computer. Proper care needs to be taken of computer records (particularly an issue with home computers), to avoid facing inferences that incriminating evidence has been purposefully destroyed.

Also, putting your profile up on sites such as MySpace or Facebook can have an adverse effect on employability or reputation. In the USA,

prosecutors have been using unflattering photos from such sites during character cross-examination or sentencing. Photos of drunken defendants on a wild night out, which are likely to carry more weight than the obligatory character reference from the local priest or school teacher, have been put to witnesses in drink-driving cases. □

INVENTIVE

Keeping employees' good ideas in-house

A recent court decision undermining the certainty of ownership of intellectual property by universities could have an impact on drafting terms of employment in business generally.

The important lesson from the case is that an express contractual term may be the only way for employers to establish rights to intellectual property developed by their employees.

If drafting an employment agreement to secure intellectual property rights, there are several points to focus on.

Ensure that the agreement states that any inventions discovered by an employee while acting in the course of employment are declared to be owned by the employer, whether they are discovered alone or with others.

Ensure that the inventions are kept confidential (that is, the agreement should deny freedom to publish).

Ensure that the scope of



duties imposed on the employee are carefully considered and expressed – particularly that the employee has a duty to advance the commercial interests of the employer, protect and preserve their property rights and interests, not make any secret profit or receive secret payments, act as a trustee of the employer's assets and property in the control or possession of

the employee, and to research and invent (if such be the case).

Also, ensure that the scope of the term relating to the 'course of employment' is drafted broadly to cover using the resources of the employer, or while engaged in any duties to research or invent imposed upon the employee, or in any way related to the scope of the employment or the business

of the employer. Make sure that the resources of the employer are defined to include the employer's confidential information and intellectual property rights.

Your solicitor is best placed to review the terms of your company's employment contracts. Good professional advice can help avoid problems down the track. □

FALSE ATTACKS

Beyond the defamation laws

Corporations may think themselves without a remedy in the face of false attacks resulting in lost revenue, particularly if made by the media or by a person not engaged in trade or commerce. Not so. Corporations may still prosecute a claim in injurious falsehood.

A corporation which employs ten or more people, whether employees under a legally binding contract or persons whose services are merely used in some other capacity, is barred from commencing defamation proceedings, unless the corporation is a charity.

This disposition against issuing injunctions to restrain potential or ongoing

defamations is primarily due to the need to ensure the balance is tipped in favour of free speech over protection of reputation.

However, the notion of such competing interests does not, in many circumstances, apply to injurious falsehood, which is inherently designed to protect property or economic interests rather than reputation.

Additional favourable considerations are that the limitation period for defamation is one year, while it remains at six for bringing an action of injurious falsehood. It is possible for a deceased person's estate to pursue a claim, though the estate cannot claim exemplary damages or damages for lost future earnings. Further, if the person who published a

matter complained of dies at any time following publication, even after commencement of proceedings, a defamation claimant ceases to have a case. No such restriction applies to injurious falsehood claims.

The courts have flagged that the question of "how far the

action for injurious falsehood extends beyond concepts of business or property" is open to future consideration.

If your company has been subjected to malicious lies and lost revenue as a result, contact your solicitor for further information and advice. □

DEBT

Can I get a judgment set aside?

If a judgment of debt has been entered against you – for example, because you ignored the statement of claim or didn't turn up in court on the date set for the hearing – in some circumstances you may apply to the court to have the judgment set aside.

You will have to explain to the court why you failed to lodge a defence or did not attend court, and you will also be required to file your notice of grounds of defence within a specified time. In most cases you will have to pay your creditor's legal and court costs, as assessed by the court. □

OFFSHORE SCHEMES

Tax office attacks

In 2006 the tax office began a serious attack on offshore activity schemes. Australian tax law contains a number of provisions designed to prevent income being sourced offshore or kept outside the Australian tax system. Given the existence of the Australian Transaction Reports and Analysis Centre, and the funding which has been given to the tax office, taxpayers would be naive to think that they might escape attention.

The Director of Public Prosecutions has indicated that he will not prosecute a taxpayer who makes voluntary disclosure, where there has not been significant criminality by the taxpayer, and where the taxpayer provided information

to the tax office – that is, dobbed in a tax-scheme promoter.

Penalties for non-disclosure can be levied at rates of up to 90 per cent. If voluntary disclosure is made and the tax avoided is less than \$20,000, no penalties will be levied; if the tax avoided is \$20,000 or more, penalties will be limited to just 5 per cent. Interest will still be payable, and often the interest will exceed the tax bill.

In some instances it will be possible to mount a defence, although there is always the risk that in mounting a vigorous defence the tax office might be provoked into referring the case to the Director of Public Prosecutions, who could prosecute. Areas of defence might be that:

- the deductions were properly allowable in the first place;
- the tax office acted improperly

in raising assessments based – as sometimes might be the case – on illegally obtained information, particularly if it did not act innocently in doing so; and

□ the deemed dividend provisions were improperly applied by the tax office in assessing Australian-resident recipients of money returned by the promoter. □

SAFETY AT WORK

Hire companies' responsibility

An architect fell ten metres to his death from a hired cherrypicker after he received an electric shock when a metal tape he was using to measure height from the ground blew against live power lines.

The man was in the cherrypicker with the director of the equipment's hire company at the time, but neither was wearing a safety harness.

The judge fined the hire company \$95,000 and its director \$9,500, indicating that the risk was entirely foreseeable.

WorkCover NSW has pointed out that when equipment is hired, all necessary instructions for its safe use should be provided initially by the hire company. However, it is then the responsibility of the company hiring the equipment to ensure their employees are sufficiently competent to operate it. □

MOTOR ACCIDENTS

More stringent procedures on claims

New rules have been introduced to procedures for insurance claims after a motor accident.

Failure to report an accident to the police within 28 days will result in a claimant being required to provide a full and satisfactory explanation for not complying. The insurer can reject the explanation, in which case the claimant will need to apply to the claims assessment and resolution service to determine whether the explanation is satisfactory.

The insurer loses the right to challenge a claim on the ground of delay if it does not request an explanation within two months of receiving the claim or reject the explanation within two months of receiving it.

The insurer is required to make an offer "within one month after the injury is sufficiently recovered to enable the claim to be quantified"

and within two months of the claimant providing all relevant particulars. There is clearly some uncertainty about when the operation of the new rule is triggered, as there is considerable scope for disagreement about when

a claimant's injuries will be sufficiently recovered to enable a claim to be quantified.

Parties must participate in a settlement conference as soon as practicable after an insurer makes an offer of settlement. A claim cannot be referred for

assessment if this has not been done, unless one party can demonstrate that it was ready to participate in a settlement conference but the other party had refused.

Contact your solicitor if you would like further information. □



SHAREHOLDERS

Defining rights and responsibilities

It is not unusual for parties entering into business together to choose to incorporate a company as the vehicle to operate the business. However, in many instances little or no thought is given to the need to define the rights and responsibilities of the parties as shareholders, directors or employees of the company, and an assumption is made that the company's constitution will sufficiently address any important issues.

This approach fails to appreciate the limits on the constitution and the Corporations Act in regulating the rights and responsibilities of the shareholders and directors. It is particularly of concern in 'quasi-partnerships' where many

of the rights and obligations of a partner normally found in a partnership agreement or implied by the Partnership Act are not mirrored in the company's constitution or covered by the Corporations Act.

While the Corporations Act confirms that a company's constitution operates as a contract between the company and each shareholder and director, and also between each of the shareholders themselves, constitutions do not cover all areas which might ordinarily be considered important in a business relationship.

For example, the rights under a company's constitution are not normally sufficient to confer personal rights upon a shareholder, such as:

- the right to be employed by the company;
- the right to ensure that other



- shareholders do not compete with the company;
- the right to confidentiality in respect of a shareholder's information;
- detailed rights and obligations protecting the interests of minorities;
- 'drag along' and 'tag along' rights in the event of a proposed sale; and
- termination, forced sale and other exit provisions.

A shareholders' agreement

is a useful tool in defining the rights and obligations of the parties when a private company is used as a vehicle for a business venture. It serves to fill the gaps in areas not covered by the Corporations Act or a company's constitution, and explicitly confirms important commercial terms of agreed arrangements which would not otherwise be captured in a contract between the shareholders. □

DISMISSAL

When is it not unfair?

When does inappropriate conduct by an employee justify their dismissal?

In a recent case a Sydney Water Corporation employee had, as a favour, delivered a stove to his brother's rental property. Although not performing SWC duties, he was in SWC uniform and using an SWC vehicle.

Misunderstandings arose about the purpose of the visit, and the employee verbally attacked the tenant in a "hostile and inappropriate" manner. A complaint was made to the SWC which, after an investigation, dismissed him.

The termination was found to be justified. The employee had been absent from work an hour longer than normally permitted and had used inappropriate behaviour and language at the tenant's premises, while wearing the

SWC uniform and using a SWC vehicle, which had identified him as representing SWC.

The employment relationship is a contract which can be terminated if an essential condition is breached or

repudiated. Misconduct can be such a breach. An employee can be summarily dismissed if guilty of misconduct that is incompatible with the faithful performance of their duties or destructive of the necessary confidence between employer and employee.

Although the mere presence of a valid reason for dismissal is insufficient to ensure a

dismissal is fair (the employer, for instance, must also provide procedural fairness), it can be of considerable significance. Important in deciding this is whether there is a connection between the impugned conduct and the employment relationship.

Contact your solicitor for further information and advice on employment matters. □

STAMP DUTY

No exemption on deferred transfer of assets

New laws abolish stamp duty on business assets from 1 January 2011, but it will not be possible to defer the transfer of assets to benefit.

Broad new anti-avoidance provisions are designed to catch duty on any transfer or transaction entered into following an option to purchase, or any other arrangement made before 1 January 2011, the only main purpose of which is to

defer the transaction in order to avoid tax duty.

One couple did not want to miss out on buying a profitable business for \$4 million, but did not have the budget for the stamp duty. They wanted to enter into a put-and-call option for purchase of the business that would not be exercisable until after 1 January 2011. The vendor was going to continue working in the business for a few years under a management

and profit-sharing agreement.

Put-and-call options give the purchaser the right to enter a contract for sale within a specified time period and the vendor the right to require the purchaser to enter into the contract for sale.

However, when the couple come to exercise the call option in late 2010 they would be liable to pay stamp duty of over \$200,000. Contact your solicitor for information on stamp duty. □