

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.

INFORMATION CHAMPION

Major reform of freedom of information laws

An information commissioner with broad investigative – and some coercive – powers is just one element of major freedom of information law reform in NSW.

The reforms substantially alter the focus of freedom of information laws in the state. They introduce a presumption in favour of the release of government information. A range of other improvements significantly enhance public access.

Information from public authorities (including government departments, ministers and their staff, local councils and courts) must be made publicly available on their websites, unless it would impose unreasonable additional costs on the agency.

The laws make it mandatory to disclose 'open access information' – which includes a publication guide, a disclosure log and register of government contracts.

The publication guide describes an agency's structure and functions and the kind of information it makes available. Additionally, agencies must keep disclosure logs to record access applications that have been approved if these relate to information they consider may be of interest to other

members of the public. Details must include the date of the application, a description of the relevant information, whether it is now publicly available and how it can be accessed.

Agencies must also keep and publish a register of all their private sector contracts with a value of \$150,000 or more. Relevant information must be entered into the register within 60 days of the effective date of the contract. While the law previously required agencies to disclose information about certain government contracts, this obligation now extends to local councils and, subject to limited exceptions, state-owned corporations.



The role of the information commissioner is proactive, to promote public awareness of the new laws and give advice and training to agencies.

People can request access

to government information by submitting a 'valid access application'. Fees and charges are the same as before, but agencies may waive, reduce or refund them. □

ILLEGAL DOWNLOADS

Internet service provider not held responsible

In their continued grappling with the role and function of law in cyberspace, courts are showing increasing understanding of internet-based business models.

In a recent case the courts found that it was not in a service provider's commercial

interests to have users infringing copyright. They found that Australia's third largest internet service provider had not authorised copyright infringement by continuing to make the internet available to users who downloaded films and TV programs using the BitTorrent system after it had

knowledge that infringements of copyright were occurring.

The case suggests that courts will increasingly demand direct evidence of infringements rather than being prepared to draw inferences from high-level surveys or reports carried out by infringement investigators. □

ESTATE EXECUTORS

Know your tax obligations

Agreeing to be executor of an estate means accepting obligations to the tax office.

As executor you are answerable as the taxpayer in respect of all an estate's income and for paying tax on it. You will have to lodge returns which are the same as practicable as the deceased person would have been liable to make.

An estate's tax return is prepared as if it were an individual. But except for capital gains tax, the estate does not inherit the tax profile of the deceased. For example, if a person had tax losses, including a capital gains tax loss, the availability of those tax losses would die with them.

If the deceased had acquired an asset before the start of capital gains tax on 20 September 1985, any capital asset disposed of by

the executor will be deemed to have been acquired by the estate at its value at the time of death.

This means that if an asset has increased in value since the date of death, a capital gain might be realised. On the other hand, a loss could be realised if the value of the asset has diminished since the date of death.

The tax office can release a taxpayer from paying tax if the dependants of the deceased individual would suffer serious hardship were the executor required to pay a tax liability.

However, once an estate is fully administered, its beneficiaries will be taxed in their own right on their share of the estate's income, which can itself be a problematic issue.

Contact your solicitor if you would like to discuss wills or estate issues. □



VOTING RIGHTS FOR VISION IMPAIRED

Secret voting a right

The NSW Electoral Commission has been reconsidering its position since the courts found it had unlawfully discriminated against someone who was blind by failing to provide a Braille ballot paper.

The courts found that the law intended that a person record their vote without anyone else knowing what it is, implicitly demanding that the process be a private one.

An expert witness said that "the right to vote in secret is

now such a well-established, deep-rooted principle that many view absolute secrecy of the ballot as a necessary ingredient to maintaining democratic integrity ... voting with assistance at the polling station means that voters

are denied the rights and protections associated with the secret ballot".

The NSW Electoral Commission made voting more accessible for those with vision impairment by providing Braille ballot papers for the state elections, but technology has moved on since then.

Electronic voting has now been employed on a trial basis in the ACT with success. Electronic voting benefits people who are vision impaired, as well as those who are unable to cast a vote due to other sorts of physical disability.

By reading instructions to voters electronically, electronic voting also assists those who cannot effectively follow written instructions in completing a ballot paper due to intellectual or learning disability, or even those with limited English. □

REGISTER TRUST DEEDS

Stamp duty costs if the deed is lost

The cost of registering an original trust deed generally pales into insignificance compared to the cost associated with a lost one.

One couple who had decided to change the business structure of their investment properties couldn't find a copy of the trust deed.

As the trust was created a number of years ago, they were

also unable to find any evidence confirming stamp duty had been paid.

Unless they were able to locate a copy of the stamped and signed deed for their trust, or at least evidence that it was signed and stamped, they would have to pay stamp duty on the value of the dutiable property owned by the trust, being half of the mortgaged value of all of the investment properties.

If an original trust deed is registered with the Department of Lands after it is signed and stamped, a copy can be obtained from the Land and Property Information agency. This will be as good as the original.

Or a copy of an original deed could be stamped as a duplicate alongside the original. The likelihood of losing both stamped deeds would be significantly lower. □

BUILDERS' PAYMENTS

Residential restriction on security of payment law

In a recent case a builder failed in a claim for payment from a homeowner who was not living in the property while the work was being carried out.

Initially, under building security of payment laws, the homeowner was found liable to pay the builder a progress payment of over \$300,000.

However, the homeowner challenged the claim in court on the basis that he proposed to live in the seven-bedroom waterfront property he had inherited once construction work was complete. He had previously lived there for about 25 years prior to his father's death, but in the past ten years had also had alternative residences.

The security of payment law does not apply to "a construction contract for the carrying out of residential building work ... on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in".

The courts found that the homeowner did not cease to reside at the property when he moved out to allow renovation work to proceed. According to the court "residence does not require continued physical

presence", and for the purpose of the building construction industry payments laws, a person can be resident at more than one place, the test being continuity of association.

The courts referred to a number of cases, particularly taxation and migration, in which an individual was found to be

resident at a particular place while spending the majority of time away from it, or at another place where they also had a home.

The courts found that whether a homeowner proposes to live in a property after work has been completed depends on their intentions for the

future use of the property. If it is their intention to return, even if provisional on a number of different factors, this is sufficient to establish residency.

The courts also rejected the builder's argument that the homeowner's intention to reside in the premises needed to be communicated to him. □

TENDER BIDS

When price can change after closing date

Price is an essential element of a tender, and courts have found that an offer which is uncertain on price cannot form the basis of a binding contractual relationship. An issue often faced is the extent to which corrections can be made to price schedules following close of tenders.

In Australia, subject to the tender conditions, a very limited amount of amendment in the case of a clerical transcription or arithmetical error may be permitted.

An interesting recent Canadian case over a project for the town of Newmarket involved

a tender in which one bidder's stipulated price plus GST amount did not equal the total cost of work.

The town's evaluation committee took the view that the firm had made an arithmetical or clerical error in its bid form and recalculated the GST and total cost of work on the basis that the stipulated price was correct. As a result of these amendments the committee recommended the firm be considered the lowest priced tenderer.

When the matter was challenged, however, the court decided that the pricing mistake was not one capable of rectification, but was so fundamental that the tender was

too uncertain to be accepted.

Tender conditions and bidding rules in invitation to tender documents need to be drafted to ensure that they give owners the widest discretion possible to accept compliant, non-compliant or substantially compliant bids in order to ensure achieving a value-for-money outcome.

For those tendering, the case is an important reminder to ensure that pricing information is correct at the time of submission, as it is likely that correction following the closing date will only be permitted in limited circumstances, if at all.

Contact your solicitor for information about tenders. □

RESALE ROYALTIES

Sellers – and buyers – of art works may have to pay

A new law introduces a five per cent royalty payable on the commercial resale of works of visual art, including ceramics, fine-art jewellery and sculptures.

Sellers and their professional agents are primarily liable to pay the resale royalty, which is considered to be a debt due at the time of the resale. However, in certain circumstances, buyers may also be liable.

Sales not covered include those where the sale price

is less than \$1,000 (inclusive of GST), first sales, sales other than for monetary consideration, and sales outside the formal art market (that is, sales that do not involve an art market professional acting in that capacity).

The royalty will ordinarily be collected on the artist's behalf by Copyright Agency Limited and will apply to resales after 8 June 2010. Artists can register with the agency to protect their interests. □



THIRD PARTY LIABILITY

A 'reasonable response' to risk of criminal act

A truck driver was tragically killed when four youths dropped blocks of concrete from an overpass into the freeway below.

In the case which followed, his employers, having paid benefits to the man's family, sued the Roads and Traffic Authority which owned and controlled the bridge, seeking to recover the money.

As a general rule there is no duty in law for one party to prevent a third party from harming another.

As one judge put it, "The unpredictability of criminal behaviour is one reason why, as a general rule, and in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even

A special relationship appears to exist in connection with nightclubs and hotels.

Initially the RTA was found liable for either not screening the bridge when it was built in the 1970s or for not screening it soon enough when the increased risk of persons dropping objects from overpass bridges became known in the early 1990s.

On appeal, the court considered the resources, range of activities and areas of responsibility to be taken into account when evaluating a public authority such as the RTA. It also examined the degree of seriousness of risk, burden of taking precautions and probability of harm.

The court found that a duty of care can be owed by road authorities in relation to criminal conduct by members of the public in certain circumstances. Nevertheless, the random and unpredictable nature of criminal activity is relevant when considering whether the duty has been breached in the circumstances. It is therefore a reminder of the significant difficulties that such a claim will involve.

Road authorities can continue to take a measured and principled response to any issue of risk in the area of their responsibility.

if the risk of such harm is foreseeable."

"Special relationships" where the relationship between two parties may mean that one has a duty to take reasonable care to protect another from the criminal behaviour of third parties (random and unpredictable as such behaviour may be) can include those between employer and employee or school and pupil.

In terms of occupiers, a category of special relationship appears to exist in connection with nightclubs and hotels with an obligation to prevent injury to patrons from the criminal actions of others. □



MORTGAGE TRAP

Stamp duty payable on vendor finance

Structuring a loan transaction correctly is important to avoid unnecessary stamp duty.

In one case where a couple decided to purchase a commercial property for \$2 million, the vendor agreed to lend them \$1 million to assist

with the purchase. The \$1 million loan was secured by a first registered mortgage over the property, repayable in five years' time, incurring stamp duty of almost \$4,000.

But if the contract had referred to the payment of the purchase price of \$2 million via instalments, and the draft

mortgage had been annexed to the contract to secure the balance of the purchase price owing after settlement, stamp duty of only \$5 would have been payable. The reason is that there would have been no 'amount secured' as defined by the law, as no 'advances' made by the vendor to the couple. □