

# 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.*

## SPAM ACT

### Restrictions on business use of unsolicited emails

**A new law means that if you use email to promote particular goods and services, you will now have to take measures to avoid substantial penalties for being a 'spammer' – with fines of up to \$1.1 million.**

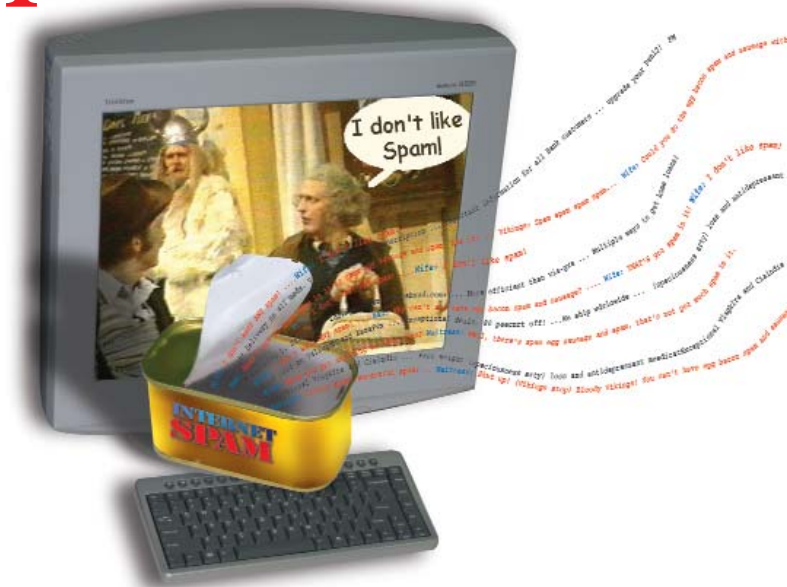
The term spam was given to junk advertising emails by computer programmers in homage to a *Monty Python* sketch in which every item in a cafe menu contained Spam, the brand name of a variety of canned ham. Although many are oblivious to the word's origins, spam is now entrenched in our psyche as something we cannot avoid in our inbox, rather than our lunch box.

From 10 April 2004 it is illegal to send most commercial electronic messages to or from Australia without the recipient's consent, expressed or implied. An existing business or personal relationship with an individual may give implied consent for you to send them information about new services you provide.

It is also illegal to supply, acquire or use address-harvesting software or harvested addresses, and the new law also applies to mobile text messages and faxes.

Commercial electronic messages must now clearly identify who authorised sending the mes-

sage and provide accurate information about how to contact that person or organisation. They must also provide a clear statement that recipients can use a given electronic address to unsubscribe from receiving further messages from the sender. These must be accurate for at least 30 days after the message is sent, or be reasonably expected to be so, and the unsubscribe facility at all times during that period be capable of handling the number of responses one could reasonably expect. An address must generally be unsubscribed within five business days of an unsubscribe message being sent.



Certain 'designated commercial electronic messages' are exempt from the consent requirement – these include some gov-

ernmental, political, religious, charitable or educational organisations' messages. Your solicitor can advise you on the new laws. □

## PROPERTY

### Warning against misleading contract prices

**The Supreme Court has warned the property industry against inserting misleading prices in contracts for the sale of land, and then attaching "special conditions" providing for a different price.**

The practice came to light in a recent case where the stated price on the front page of the contract was \$450,000, but a spe-

cial condition inserted an agreement that no deposit was payable and that on settlement the vendor would allow the purchaser a rebate of \$100,000 off the sale price so that the balance of monies payable on settlement would be \$350,000.

The Court found that the special condition "can be inserted for no other purpose than to mislead persons such as lending authorities and purchasers of other

units in that development".

The Court also noted that the contract price of another lot in the development was \$349,000, while the schedule price was \$450,000. This was explained as making an allowance to the purchaser who is or was the builder for the development. If that is so, the Court found, "the contract gives a false figure and is a fraud on the Chief Commissioner for Stamp Duties". □

# BULLYING

## Tackling nasty behaviour

**'Bullying' is a term often used to describe unreasonable and inappropriate workplace behaviour. It can define conduct ranging from teasing a fellow employee to stalking them. Generally, behaviour considered to be bullying intimidates or insults a worker, possibly in front of co-workers, clients or customers, and includes physical or psychological harassment.**

In a recent case an employee was dismissed for breaking his firm's code of conduct. He had a history of unsavoury behaviour in the workplace. He had made life very difficult for a co-worker, refusing to transfer files that had been reallocated to her. When she tried to retrieve them, he physically pushed her out of his office and screamed at her.

He behaved in a contemptuous way to administrative staff, at one meeting yelling at a staff member that she 'did not need

any more space' because she was 'just an admin', visibly upsetting the employee.

At another meeting he kept standing up, leaning over one of the other workers, grabbing papers and yelling. After the meeting one of the employees was clearly shaken. Another employee was ready to resign after four days as a result of his behaviour, feeling her personal space had been "aggressively invaded". The Industrial Relations Commission found that even if there had been no code of conduct in his firm, it would have concluded that there was valid reason for termination.

There are difficulties in tackling bullying behaviour in the workplace. There is no clear definition of bullying, and no direct remedy. However, there are a number of legal avenues of redress. If an employee is able to prove that the alleged bullying conduct falls within one of the grounds of discrimination in the *Anti-Discrimination Act*, such as race, sex, gender, marital status,



disability or responsibilities of a carer, they will be able to bring an action.

Other avenues include application for workers compensation, a common law action for breach of the employer's duty to

take reasonable care for the safety of its employees, and, if an industrial agreement is in place, notification to the Industrial Relations Commission of a dispute. Contact your solicitor if you have concerns in this area. □

# SUPERANNUATION

## Timely warning from the Tax Office

**Many taxpayers balk at the fact that their superannuation funds are 'preserved' – that is, they cannot access the funds until they are 55 years old at the earliest – more recently not until they are 60.**

The Tax Office has issued a generic warning in a 'taxpayer alert', directing taxpayers against schemes that are designed to overcome the preservation rules.

Taxpayer alerts are part of the Tax Office's psychological battle with taxpayers. By issuing such alerts the Tax Office aims to discourage taxpayers from entering into arrangements which it considers suspect.

They don't have the authority of law, but it would be a foolish taxpayer that entered into an arrangement that had been the subject of a taxpayer alert, unless they were feeling litigious.

The alert on superannuation warns that a breach of the preservation rules could result in substantial fines and/or a jail term and the fund could lose its complying superannuation fund

status, which would mean that tax at 47 per cent would be levied on the previous income of the fund. Contact your solicitor if you have questions about the status of your fund. □

# SECRET FILMING

## Peep filming offence extended

**New laws have been passed to convict people who secretly film others for sexual gratification.**

Secretly filming someone by using a hidden camera or web cam is now an offence in a situation where the person has not consented and could have reasonably expected some privacy.

The legal change has been brought about

in response to a case two years ago where a person hid a camera in his flat to secretly film his flatmate in the shower. He could not be prosecuted successfully for the offences of offensive conduct or 'peep and pry' because the secret filming had not taken place in a public place but in his own home.

It is also now an offence to install a device to facilitate filming for indecent purposes. □

# FOREIGN ACCOUNTS

## The ins and outs of offshore tax planning

**At their simplest, offshore tax arrangements can amount to little more than illegal tax avoidance.**

A taxpayer might derive assessable income personally, rather than through any entity associated with that person, and simply decide not to declare it to the Tax Office. In such instances an offshore bank might be used to hide the income from Australian revenue authorities.

But arrangements which rely purely on non-disclosure are not tax-planning arrangements – they are simply tax avoidance. As a consequence, if they prove to be ineffective, administrative penalties can be levied at up to 75 per cent of the tax avoided. Alternatively, criminal penalties can be

applied. And if the arrangement can be categorised as an arrangement to defraud the revenue, there may be penal implications.

### Controlled foreign companies

Broadly speaking, a controlled foreign company is a company resident in a tax haven owned by five or fewer Australian residents or by one Australian resident who owns 40 per cent or more of the capital of the company.

If the tax rules apply, Australian residents owning a share in such a company are subject to tax on that part of the income of the company which is attributable to them, even though that income may not be distributed to them. The rules do not apply if the Australian residents do not control the offshore com-

pany. Most obviously, they do not apply if a foreign trust that is not controlled by an Australian resident owns the shares in that company. But there is a disadvantage in such an arrangement – while it may be legally effective, it may have adverse and unacceptable commercial implications.

### Tax on income

Assuming a taxpayer has been successful in establishing an acceptable offshore structure, the structure will be ineffective if it derives income subject to Australian taxation. This is not so difficult to avoid if any income derived by the offshore structure has no connection with Australia, but harder when it does.

In such a case, the structure will only be effective if the in-

come is not sourced in Australia for Australian tax rules, is not subject to Australian capital gains tax or is not subject to transfer pricing rules. And of course there are always the anti-tax avoidance provisions of the *Income Tax Assessment Act*.

At the end of the day, notwithstanding how effective an offshore arrangement might be, the taxpayer might still want to 'bring the money home'. It is not much use having money in a tax haven if you really want a new house, or to pay off a mortgage, or are thinking long term and want to tidy up your affairs for the benefit of your dependants.

Your solicitor will be able to advise on business structures that are effective and stay within the law. □

# AGENCY WORKERS

## Who is liable for cover of employee rights?

**A view emerging in the courts is that the labour-hire agency and the host client can be joint employers of a worker.**

The simple matter of using hired labour can have a number of unintended legal consequences – liabilities for superannuation, workplace health and safety, workers compensation and termination payments.

If you are using labour-hire arrangements you must ensure the arrangement is genuine and not merely an attempt to bypass employer obligations. The facts of a particular case, and not necessarily the labels the parties use, will determine whether or not a worker is defined as an employee.

Historically, in a formative case over ten years ago, the agency worker was viewed by the courts as an independent contractor. However, more recently, variations in some cases have resulted in the worker being characterised as an employee of the agency. And in the following recent case, by digging

beneath the labels used by the parties, the court found that an agency worker was an employee of the client, not the agency.

Mr X was employed as a cleaner on a full-time basis. Two years later he was allegedly asked to resign from his employment with the company and contract his services to another company. In turn, this company would supply his labour back to the first one. Mr X continued to work the same shifts at the same location. He also continued to wear his usual company clothing, was provided a van with the company livery, and was given a mobile phone to enable his supervisors to contact him. He submitted timesheets to both companies.

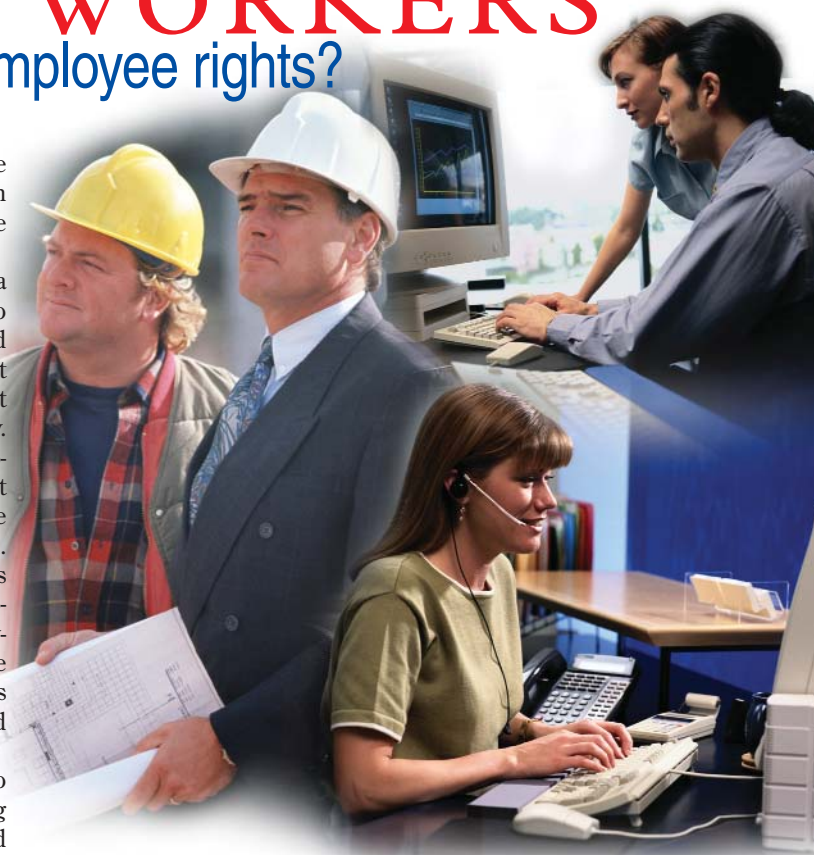
One day Mr X was called into the office and told he was losing the mobile phone and van and was to be relocated. However, he couldn't work at the new location without a van. He was offered no further work by either company and subsequently made an unfair dismissal claim.

Initially, he was viewed by the

courts as an independent contractor, not an employee of the first company. However, on appeal, it was found that he had not entered into a contract with the second company and that the

sole purpose of its intervention was to allow the first to avoid its obligations as an employer.

Contact your solicitor for further information about labour-hire arrangements. □



# LAND ACQUISITIONS

## How to determine special value

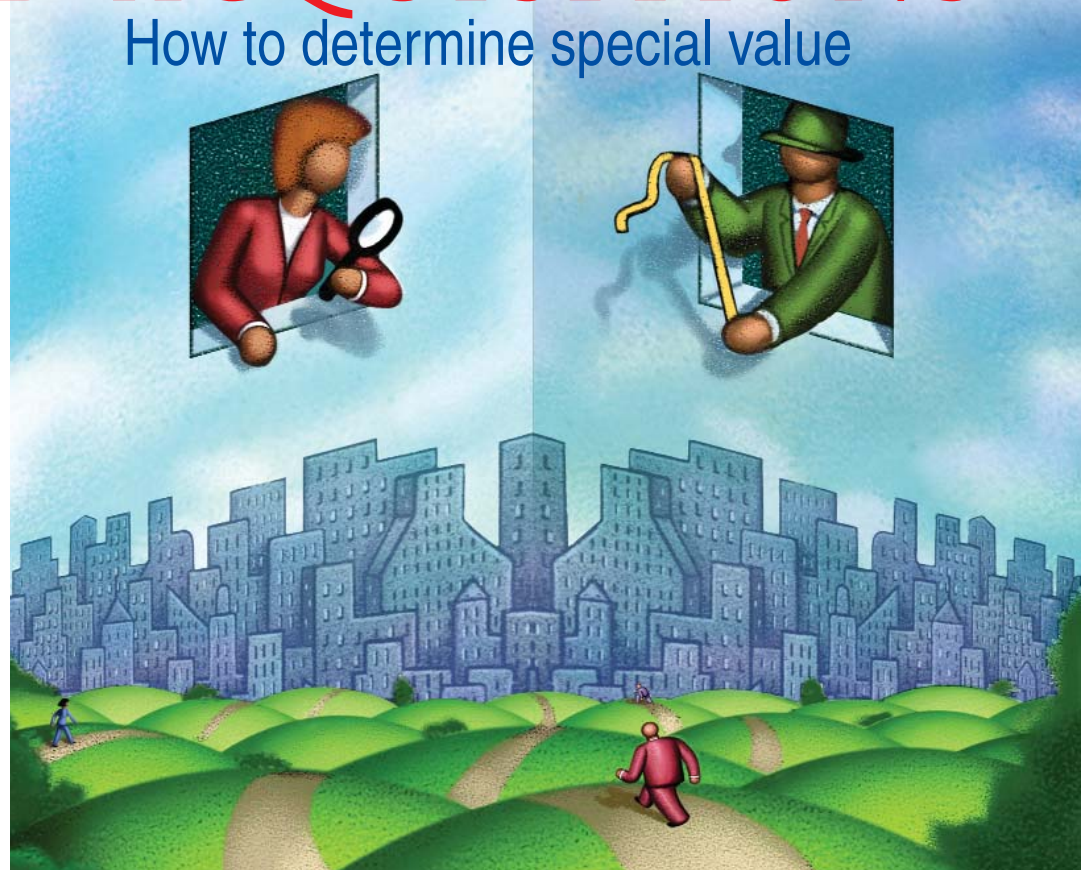
**Compulsorily acquired land may have a 'special value' to its owner or to a purchaser, and there are various means the law can use to assess it.**

The special value principle argues that an owner is entitled to be compensated for what land is worth to them over and above its market value: what "a prudent man in their position would have been willing to give for the land sooner than fail to obtain it".

This does not justify a ransom value that might be extracted from a hypothetical purchaser with a special need for the land. Nor does it include compensation for disturbance or reinstatement. The 'special value' to the owner is its value at the time it is taken over, excluding any which will result from the carrying out of the scheme for which the land is being acquired, and it cannot be used to compensate for the sentimental value of the land.

A valuation can also be based on a property's best and most advantageous use, rather than its current use and market value.

There has been some disagreement about whether an increased price is justified where there is only one purchaser who,



attracted by the special adaptability of land, might be persuaded to pay in excess of market value.

In a case in India in the '30s, heard by UK authorities, an Indian statutory authority constructing a harbour compulsorily acquired adjoining malarial swampland in order to carry out

anti-malarial work and because it was a source of fresh water which was required for industrial users of the harbour. On the available evidence the land had no value to parties other than the statutory authority, and its future value lay in the very scheme for which the acquisition

was made.

In a decision which has been followed by Australian courts, it was held that the land was to be valued on the basis of expected future use, which included the uses of the compulsory acquirer who, but for speculators, was the only possible purchaser. □

## GST HOOPS

### Property sales – private assets or trade assets?

**What happens if you buy a block of land, with the intention of building a house to live in, but then move and sell the house after it is completed?**

As an example, say 'Susannah' bought a five-acre block of land near a country town, intending to build a house as the family home. She had no intention of developing the land for resale at a profit. She installed electricity and laid founda-

tions, before uncertainty about job prospects and worry about finances led her to abandon the project. Marrying and moving to Sydney, she bought a home there with her husband.

She then made enquiries about the prospects of selling the property as it was, but prospects were not good, and she borrowed money and finished the house before finding a buyer.

Not registered for GST and not carrying on any other business for GST purposes, you

might suppose that Susannah would not have to worry.

However, on similar facts the Tax Office has taken the view that the nature of the work Susannah did in the building and sale of the house had a commercial flavour, and that the extent of the activities made it "an adventure or concern in the nature of trade".

Although the property had been acquired as a private asset, the later activities were enough to change it, at least in the opinion of

the Tax Office, to a trade asset.

This puts the activities within the definition of 'enterprise' for GST purposes and a sale greater than \$50,000 requires Susannah to register and pay GST.

More bad news for Susannah is that she may possibly have to pay income tax rather than capital gains tax on the profit she makes on the development. The profit from 'an adventure in the nature of trade' is normally income, according to ordinary concepts, and assessable as such. □