

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.

DRINK DRIVERS

Alcohol interlock devices offer a new option

A new sentencing option for drink-driving offences could help combat the tendency of some drivers to become serial drink-drive offenders.

If faced with the prospect of such a case, it is worth asking your solicitor to seek the new Disqualification Suspension Order.

New laws provide courts with the option of referring an offender to a responsible-driver program involving the use of an approved interlock device – a reasonably-priced device which the driver has to purchase and have installed in their car. Studies overseas show that offenders whose cars are equipped with an ignition interlock device have significantly fewer repeat arrests than offenders who have their licences suspended.

An alcohol interlock device is an electronic breath-alcohol analyser with a micro-computer and an internal memory, wired into a vehicle's ignition system.

It measures the driver's breath-alcohol concentration prior to each attempt to start the vehicle and also while the vehicle is in motion. If the driver's breath sample exceeds a pre-set limit, the ignition locks and the car is immobilised if stationary. If it's mobile, the horn will sound and the lights flash until the car is halted and the ignition turned off.

Once a person is convicted of

the drink-driving offence, thereby attracting a disqualification period, the court may order the disqualification be suspended, after the person has served a shorter period of disqualification, if they participate in an interlock program. The court must indicate at the time of sentencing that it is applying an interlock Disqualification Suspension Order. It cannot be sought afterwards.

It is worth noting that it is possible for a person to voluntarily enter into the interlock program, at a cost no greater than that imposed on those who enter it following a court order. It is possible that courts, which might have been reluctant otherwise, may be persuaded to consider a Disqualification Suspension Order if the person has already entered an interlock program or shows a willingness to do so. □



WATER ACCESS

New legislation on water management

As a result of changes to the law, water access licences, which were formerly a part of land tenure, now automatically become separate access licences in those water sources covered by the NSW Government's plans for water sharing.

Any legal arrangement involving water access licences should now separately identify the access licence. Any transaction involving a water access licence, such as a transfer in conjunction with a land sale, or following a will or court order, will not take effect until it is recorded in the new Water Access Licence Register. For further information contact your solicitor. □

ENVIRONMENT

New disclosure requirements for investment products

Companies' disclosure obligations have expanded in recent years to include some consideration of environmental and social issues.

A recent amendment to the Corporations Act requires disclosure of the extent to which consideration of environmental, social and ethical factors have taken place with investment products – such as superannuation, managed investments and investment life insurance.

It is now mandatory for institutions offering financial products with an investment component to disclose in their product disclosure statements “the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment”. This includes an obligation to disclose whether such matters are being taken into account at all. If a financial product

issuer does claim to be incorporating social and environmental considerations in its investment decisions, two disclosure obligations ensue – to outline those issues it considers constitute labour, environmental, social or ethical considerations, and to ex-

plain the extent to which those matters are being taken into account in the selection, retention or realisation of the investment.

The Australian Securities and Investment Commission has produced guidelines which provide fairly general guidance on

the relevant issues to be considered. They suggest that the disclosure statement include such information “as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product”. □

HOME BUILDING

More changes to the law

There has been a period of considerable legislative churn in the building industry, with the forecast of more to come. Amendments to the home building laws were passed almost two years ago, but they have only recently come into effect, and further changes have since been introduced.

Among other things, the amendments introduced a cool-

ing-off period in residential building contracts; licensing of building consultants who conduct pre-purchase inspections; and mandatory provisions for residential building contracts, including written requirements for compliance with the Building Code of Australia.

Further changes introduced by new regulations in December 2003 substantially narrow the effect of the amendment provisions – for instance, they remove

the need to provide home warranty insurance for multi-storey buildings.

A licensed builder must now provide a brochure which explains the operations of the Home Building Act and the procedures for the resolution of contract and insurance disputes should they arise.

For further details on multi-storey buildings, building consultants and the cooling-off period, consult a solicitor. □

INDUSTRIAL DESIGNS

After a century, new laws for registered designs

Design laws passed in June this year herald a new era in the registration of industrial designs.

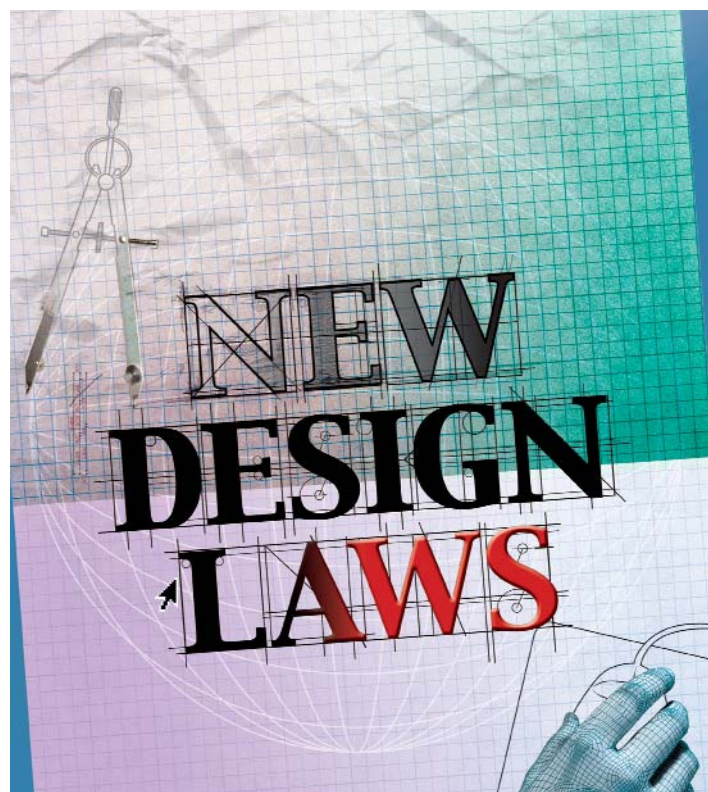
Industrial designs protect the shape, configuration, pattern or ornamentation of manufactured products.

The previous legislation protecting designs caused widespread industry concern that it was too easy to avoid infringing a registered design. In comparing designs in the new legislation, the concept of ‘substantial similarity in overall impression’ is critical for both registration and infringement.

A person now infringes a reg-

istered design if the person, without the consent of the owner of the registered design, makes, imports, sells, hires or offers for sale or hire “a product, in relation to which the design is registered, which embodies a design that is identical to, or substantially similar in overall impression to, the registered design”.

A design is to be assessed from the point of view of an ‘informed user’ – someone familiar with the product to which the design relates. Expert evidence should become far less relevant than under the old law. The maximum term of registration has been significantly reduced from 16 years to ten years. □





DUTY OF CARE

Whose fault is it if your house develops cracks?

The duty of care owed by architects, engineers and builders to subsequent owners of a property has come under recent scrutiny in the courts.

In a case in the mid-90s, the courts decided that a builder owed a duty of care beyond that owed to the original owner of a

home. Subsequent owners of a property could also rely on the builder's duty of care.

The case caused controversy as it created potential liability for builders to an indeterminate number of people, not to mention the ramifications for other building professionals, particularly architects and engineers.

Since that case, a number of

others have revisited the issue, most recently in April this year. From this it appears that if a purchaser had the opportunity of having a building inspection done, and did not do so, there may be no duty of care.

While there is still some uncertainty about the extent of liability, it is safe to say that it is confined to structural problems

which could not be reasonably detected by the purchaser of the building; and in a situation where there was no limitation to liability in the contract between the architect or engineer and the original owner. The principle applies generally, not just to residential buildings. Consult your solicitor if you would like further information. □

NEW VENDOR DUTY

A tax on profits in property transactions

Those selling property in NSW now face a new stamp duty introduced on 1 June this year. Vendors now need to determine whether any sale of property will be liable to the new duty prior to the sale, or whether it may benefit from one of the exemptions or concessions in the new law.

Vendor duty has to be paid before or at the time of settlement. This means that if the sale is likely to attract vendor duty, you will need to discuss in advance with your solicitor options for payment. These include pay-

ment before settlement from your own funds, the release of part of the deposit, payment by Electronic Duties Return, or settlement at a place where duty can be paid at the time.

The new stamp duty does not apply if you are selling your principal place of residence or selling a farm. Nor does it apply to those selling new buildings suitable for use or occupation which are unoccupied or which have been completed for less than 12 months. The latter exemption gives developers a 12-month window from completion of construction to sell new buildings which have had tenants.

Where there are multiple buildings on the land, the exemption does not apply, unless all the buildings are new or heritage buildings.

Subject to exemption, vendor duty at a rate of 2.25 per cent will now be imposed on any transfer, agreement for sale or transfer, or declaration of trust over 'land-related' property.

There are exemptions where the property is sold at a loss, or at a profit of less than 12 per cent. The duty payable is phased in between 12 and 15 per cent profit.

However, the concept of profit in the new law is the differ-

ence between the original purchase value and the sale value. It doesn't account for improvements made by the vendor, transaction costs or inflation. Thus the actual profit the vendor receives, or whether in fact a profit is realised, is irrelevant.

The new law also provides exemptions corresponding to some allowed from purchaser duty, such as change of trustee, deceased estates and relationship break-ups. An important area not exempt is a sale by a mortgagee, which is likely to affect lending criteria. Consult your solicitor if you would like further details. □

NOT THE REAL THING

Misleading labels lead to court action

A recent court case has found that a well-known company breached the Trade Practices Act and misled consumers by depicting fruit on packaging when its products didn't contain any extracts of the fruit.

There were pictures of bananas and mangoes on the labels of the company's banana-mango flavoured cordial, as well as the words 'banana mango' in large print, and a 'Go Bananas' motif. The court found that the labelling would convey to a sig-

nificant number of reasonable consumers that the product contained real bananas and mangoes.

"The most important element in conveying that impression," the judge found, was "the pictorial representation of bananas and mangoes." There was a similar problem with the apple-kiwi flavoured cordial concentrate.

The Australian Competition and Consumer Commission has welcomed the decision, which it says highlights the importance of the overall impression of labelling in conveying the content of products. □



CAPITAL GAINS TAX

Nothing personal, it's taxable

There are all sorts of seemingly innocent situations where capital gains tax applies. Wherever someone pays money to another in exchange for the creation of a legal right, there is a taxable gain.

Consider the hypothetical situation of Gloria, an elderly lady who is looking for security in her living situation. She gets on well with her daughter Sue. Sue has a big house with a granny flat. The family have been kicking around ideas for some time and Gloria would like Sue to have the benefit of her savings. They are aware that if Gloria gives whatever she owns to Sue now, she will qualify for a pension in five years.

They have decided that Gloria will give her investments of around half a million dollars to Sue in exchange for the right to live in the granny flat for life. But in this scenario Sue would incur a capital gain equivalent to the market value of Gloria's right of residence.

A capital gains tax event occurs when a person creates a

contractual right or other legal right in another person – such as Sue giving Gloria the right to live in the granny flat for life.

In another situation considered by the Tax Office, one person had an obligation to pay an annuity to another. When the

one making regular payments got sick of this and offered to pay a lump sum in exchange for a release from the obligation to continue the payment, the Tax Office viewed the recipient as incurring a capital gain.

Binding financial agreements

under the Family Law Act and deeds of release under the Family Provisions Act are just two examples of financial agreements which incur capital gains tax. Consult your solicitor if you would like further information on this matter. □

AGE NO BARRIER

Company directors have age restrictions removed

Changes were made to the Corporations Act last year to prevent age discrimination in the boardroom. Prior to that time, company directors over the age of 72 had to present themselves for re-election at annual general meetings. That section of the legislation has now been repealed.

In a recent case, an NRMA member who wished to stand for election as a director, was successful in having an age restriction removed. The restriction was considered oppressive, unfairly prejudicial or discriminatory.

Companies with clauses in their constitutions which impose a compulsory retirement age on directors should now consider removing them. Their retention might contravene anti-

discrimination laws.

Usually, to do this needs member approval by special resolution, which may be most readily done at an annual general meeting. If directors or potential directors consider themselves discriminated against by age restrictions in a company's constitution, they can take their case further. Consult your solicitor if you would like more information. □