

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.

ONLINE CONTRACTS

ebay auction is binding

In a recent case following a sale on eBay, the judge ordered that an auction for a Wirraway Warbird aircraft for the reserve price of \$150,000 was binding on the vendor. The vendor had also offered the aircraft via the eBay 'Buy now' button for \$275,000.

The aircraft had attracted no bids until 20 seconds before the end of the auction period, when a bid for \$150,000 was made.

The prospective purchaser wanted to go ahead with the transaction, but the vendor was not happy with it and the matter ended up in court.

The vendor said he had had another expression of interest for \$220,000 and argued that the eBay auction was no more than an invitation to treat. He also argued that any agreements which might have existed were between each party and eBay, not between the vendor and purchaser directly.

The vendor was clearly trying to get the best price he could for his rare aircraft from several avenues. The problem for him was that one of them was eBay and he had conducted an online auction.

The judge said the auction was an ordinary auction, albeit without an auctioneer (eBay



claims not to be one) or a gavel. It had a method of ending the auction and it created a binding agreement, although in a non-traditional fashion.

Contact your solicitor if you have any concerns about contracts. □

CULTURE OF COPYING

'Almost identical' design infringes copyright

In a decision with particular implications for the building industry, but with ramifications that extend to many others, a court has found that a home building company has infringed another's intellectual property rights in copying its original house design.

The company with the original designs contended that its design plans for a special section comprising a kitchen, meal area, rumpus room and outdoor space under a single roof-line had been copied.

The court agreed that the house plans satisfied the

originality requirement for copyright protection.

The judge described the similarity between the original and copied designs as "striking", and "almost identical".

He also noted that the infringing company had "a corporate culture which accepted the copying of

competitor's designs".

As well as finding that the company had infringed the original company's designs, the managing director and product development manager of the infringing company were also found personally liable for authorising the conduct. □

MADE IN CHINA

Getting what you paid for

Australian and Chinese legal systems are fundamentally different. In Chinese law there is no binding effect of previous Chinese legal decisions, but there is an increasing trend in the courts for later tribunals to carefully examine reported cases with similar factual scenarios. In practice, a concept of ‘persuasive authority’ is building within Chinese law.

In 2004 a US buyer took his case against a Chinese seller of stocks of ginger to the Chinese People’s Courts.

The ginger which had been delivered in New York was wet and rotten and did not accord with applicable US standards. The buyer got rid of the ginger and incurred other costs, such as inspection and waste collection fees, in the process.

The Chinese People’s Court found that the UN Convention on contracts for the international sale of goods and Chinese law should be applied in resolving the dispute. It found that the seller had a “quality conformity obligation” which was “the most important contractual obligation that a seller must perform”.

The time limit for the buyer to make a claim was hotly disputed, as the UN Convention states the buyer must give the seller notice within two years of receipt of the goods. Chinese law allows four years to respond. The court acknowledged that the question of the time limit for claims under international



sale of goods contracts was a highly controversial issue in the Chinese legal community. Here, it found it reasonable to interpret the two-year time limit rule as a “specific quality deficiency time limit”.

It is important to properly identify international commercial disputes and

respond quickly and assertively.

Those who import goods from China would do well to review their China-sourcing contracts, take prompt action to address contractual risks and implement timely mechanisms for identifying sale-of-goods problems and for making claims against defaulting parties. □

RESPONSIBILITY TO EMPLOYERS

Employment agency’s duty of care

In a recent case the courts decided unanimously that the Commonwealth Employment Service had breached its duty of care to a prospective employer by referring to him a man with a criminal record who subsequently shot him four times.

On-hire arrangements are proliferating in the workplace and throwing up interesting legal questions.

In labour-hire arrangements individuals are employed by a labour-hire agency which directs an employee to complete work at the ‘host’ sites of third parties. Employment referral agencies, on the other hand, do not employ individuals but instead refer them to employers who then decide whether to employ the individual or not.

‘Reasonable care’ would ordinarily entail disclosure of a

potential employee’s criminal history to the prospective employer (or host if a referral from a labour-hire company), or not sending the individual at all.

If someone fails to take due care to look after their own interests and is thus guilty of contributory negligence, the court can reduce the damages payable by up to 100 per cent. In this case the courts found that the employer would not

reasonably have foreseen that an individual referred by a referral service had a criminal record such as would put him at risk of the injury he suffered. And although he might have inquired about what the employee had been doing in the periods he was not exercising the skills relevant to the new position, it found it unlikely that an employer would have asked questions that might have led to them discovering that

an employee had been in jail. As such, the employer was not guilty of contributory negligence and was awarded almost \$240,000 damages plus interest; his wife was awarded \$50,000.

Although the case concerned the liability of a government employee referral agency, it is likely the decision will also apply to commercial employee referral agencies, as well as labour-hire companies. □

INTERNET LAWSUIT

Blogging the enemy

A lawsuit has been filed against one of Australia’s largest online forums, where some messages posted were allegedly critical of products and services of a software company.

The company claimed that the comments had caused “a severe downturn in monthly sales” of approximately \$150,000 per month.

The lawsuit, for the common-law tort of ‘injurious falsehood’,

could have far-reaching implications for both firms and operators of internet forums and discussion sites.

Contact your solicitor if you have concerns about internet activity. □

BUYING ASSETS

Structuring for capital gains tax

Exposure to capital gains tax may depend on how the acquisition of an investment or business is structured, whether bought individually, through a partnership or via a trust or company. While commercial factors might dictate the choice, all structures have different income tax and capital gains tax consequences.

Individual purchase is the simplest in buying an asset as it has no adverse capital gains tax consequences. Individuals are entitled to the general 50 per cent capital gains tax discount if they owned an asset for more than a year, as well as various small business concessions.

However, because it provides no protection against liabilities, this alternative is often commercially unacceptable.

Further, direct purchase is normally unacceptable for tax purposes. In particular, it will not allow deferment of tax or the splitting of income/gains.

Conceptually, partnerships are no different to individual ownership of assets. They can be used within a family group to facilitate the splitting of income/gains. They also share unlimited liability disadvantages. Where they become more complex is in the choice of partners. Partners are not restricted to individuals – a popular structure involves partnerships of a number of discretionary trusts. What this means is that when working out whether capital gains tax concessions are available or not, one looks at the partners, not the partnership.

A company is not the best structure when it is hoped that an asset might be sold for a

capital gain. This is because the general 50 per cent capital gains tax discount is not available to companies. However, some companies are required for commercial reasons, or you might have acquired a business by acquiring the company.

Small business capital gains tax relief is available when an

asset being sold is an 'active' asset, meaning being used in a business, and where the net value of the taxpayer's business assets do not exceed \$6 million. How you can plan to get the value down below \$6 million is another issue.

Contact your solicitor for further information. □

FOREIGN LAND

Who will get your estate?

If you have property abroad, you might find your wishes about what will happen to it after your death frustrated by laws overseas.

Distribution of all or part of an estate according to a formula set by law may be a requirement

in the foreign country. In both Spain and the UK, for example, the law requires a particular distribution of all or part of the estate which can frustrate your own wishes as expressed in your will.

Contact your solicitor for information about wills. □

LET THE DOGS IN

Disability laws protects right to bring assistance animals

Last year the Federal Court found that a health service had unlawfully discriminated against someone by refusing entry to two of its premises when the person was accompanied by an assistance dog.

On six occasions the person had been refused entry to non-sterile areas of a hospital and a community health care centre and denied health services when he was accompanied by one or both of his dogs. Security guards intercepted him and escorted him from the premises or denied him entry outright, advising him that the administration had issued a notice not to allow him in with his dogs.

The health service had refused to allow access because it considered the dogs ill-behaved and badly controlled with inadequate evidence of proper assistance-dog training.

The person had trained the dogs himself over a number of years to help alleviate the effects of a psychiatric disability.

While the judge expressed concerns about the possible consequences of a broad interpretation of the disability discrimination laws in this area – pointing out that a Shetland pony, for example, could be an assistance animal – his decision has implications for all service providers.

Hospitals, dentists, surgeries, taxis, trains, airlines, restaurants and shops need to consider whether they have in place a fair, meaningful, objectively assessable and publicly available policy and procedure for all animals seeking entry to their premises. Staff customer-service training and induction material should cover situations where customers may be accompanied by assistance animals. An internal complaint-handling process should be

set up for cases where a person is refused a service because accompanied by an assistance animal, and contact made with established assistance animal organisations for access to timely

expertise. Policy change may not be enough; a genuine attitudinal shift is likely to be just as important. □



LIQUIDATIONS

You can't hide the assets

Running down the assets of a company in advance of a likely bankruptcy can be invalidated by the courts, if it is seen as an attempt to defraud creditors.

Two companies had set up a joint venture. Company A, a civil engineering company, carried out development, contracting and subdivision works; Company B laid stormwater and sewerage pipes in subdivisions. Company A approached Company B proposing a joint venture to contract for and carry out earth-moving and pipeline laying, with the profits to be divided. Company B would do the field work and Company A the paperwork.

Following a falling out between the two, Company A commenced court action against Company B to recover its investment in the project, but before the hearing Company A started a voluntary wind up and a liquidator was appointed.

After reviewing Company A's assets, the liquidator found insufficient funds to pay all creditors. Company B claimed that Company A had been running down its assets.

Searches established that Company A owned five acres of land which it was in the process of transferring through another complicated joint venture agreement. To Company B this was a clear case of Company A trying to defeat its creditors.



The court decided that Company A was not able to transfer the land out of its ownership, and highlighted some disturbing elements, including a falsely dated document and false documents

presented to the liquidator. The stop gave the liquidator around \$1.3 million for the benefit of all creditors, but since the proceeds must be shared it remains to be seen how much will go to company B. □

MISLEADING THE CUSTOMER

Online search engines taken to task

A company that recommends health insurance policies via an online search engine on its website and a call centre has been taken to task for engaging in misleading conduct in contravention of the Trade Practices Act.

The company can arrange for consumers to purchase a policy which it recommends, and it receives a commission from insurance companies on the sale.

Australia's consumer watchdog, the ACCC, was concerned that the company misrepresented the range of insurance policies it compared when recommending a policy to consumers. In particular, it was concerned that the company misrepresented that it compared all the health insurance covers available for consumers and could find the best-suited policy for a consumer's needs at the lowest price.

Following ACCC action, the company has now made court-enforceable undertakings that

for a period of three years it will not make such representations in specified circumstances where they may be misleading. It will also inform certain customers for whom it arranges the purchase of a health insurance policy of the range of policies it compared for them. It will also maintain

a trade practices compliance program.

The ACCC has also instituted legal proceedings against Google and Trading Post for alleged misleading and deceptive conduct in relation to sponsored links on the Google website.

The case revolves around

'dynamic keyword insertion', a Google tool that automatically inserts an advertiser's chosen keywords into its ads. It has international implications for search engines as well as for all businesses, large and small, who make use of them to reach customers. □

SELF-MANAGED SUPER

Be wary of financial pitfall

A trustee or investment manager of a regulated super fund must not lend fund money to a member or their relative or give them any other financial assistance using fund resources.

A couple planned that when they retired they would leave their farm to their daughter and sell off a block of land they had that wasn't attached to the main farming area. They decided to sell the block to their self-managed super fund,

leasing it back to their farming partnership. They liked the idea of still being able to use the land in their business and leasing it back, forcing themselves to save for their retirement.

Since they had owned the land from before September 1985, they thought no capital gains tax would be payable when they sold the land to the super fund.

However, financial hardship through the drought resulted in them not making the lease and interest payments,

thinking they could pay later. Unfortunately, by not paying rent and continuing to use the land now owned by the super fund, they are receiving financial assistance from it. The breach could result in a fine of up to \$220,000 or imprisonment for up to five years. It could also result in them being banned from being trustees of a super fund and their fund losing its concessional tax status.

The only way to avoid this would have been to keep paying the rent. □