Client Newsletter

In touch with the law

No. 4, 2005

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.

NEW TRUCKING LAWS

Chain of responsibility gets longer

New road transport laws enforce uniform national mass, dimension and loading requirements for heavy vehicles, and impose new obligations on those involved in transporting road freight, even extending to those packing and loading vehicles.

The new laws apply to any vehicle with a gross mass greater than 4.5 tonnes, and to some smaller vehicles at times.

At the core of the new laws is the concept of a 'chain of responsibility'. All parties with responsibility for actions or inactions which affect compliance with the relevant requirements are now legally accountable if they fail to discharge their responsibility.

The laws seek to address widely held concerns that while transport operators and their customers have had strong financial incentives to breach regulations on speed, driving hours and overloading, drivers bore a disproportionate share of the penalties. The responsibility now rests with those who are best able to control, and have the potential to gain from, non-compliant behaviour.

It is simply no longer possible for a company shipping goods to expect road carriers to speed to meet deadlines or to push down unit costs by overloading trucks without now facing substantial liability themselves.

For example, one of the new requirements is that operators have a duty to supply a driver with a complying container weight declaration. Drivers will have a duty to sight the declaration before commencing a journey. An error recording the weight of goods in a container can lead to prosecution.

This issue was raised by a delegate at the recent NSW Farmers Association AGM who argued that typographical errors in weight calculation could occur. However, the legislation provides a defence in those circumstances, provided it can be shown that all reasonable steps were taken to avoid a mistake.

The new laws extend liability for offences, making it clear that action can be taken against any or all persons, including company directors and managers. An employer will also be liable for any relevant road-law offence committed by an employee.

The laws also contain protection for whistleblowers. It will be an offence for an employer to dismiss or act to the detriment of an employee or contractor because that person has given information or complained about a breach of a relevant road law. ❑

BUYING A HOME

When what you see is not what you get

All the 'fixtures' of a property are automatically included in a sale without having to be specifically mentioned in the contract, but the items a buyer thinks should be considered as fixtures may not always in fact be so.

Generally speaking, a fixture is something attached to the land or building that cannot be either simply lifted up and taken away, or unscrewed and taken away without doing any damage.

For example, most electric stoves are wired in, so they are fixtures, but most refrigerators are plugged in, so they are not. With other items the distinction may not be as clear cut, so the safest course is to ask your solicitor to specifically include in the contract any items about which there can be any room for doubt.

Your solicitor will be aware of the problem areas. ❑

LEASES

Negotiating to protect telecommunication site owners' rights

Radio communications equipment is often installed literally on a handshake, with site owners failing to appreciate not only the economic value of sites, but also the nature and extent of the legal risks to which they expose themselves.

Site agreements for installing such equipment should be approached in the same manner as any long-term agreement for the occupation of property. Only some 140 carriers have statutory rights to install equipment and then only in limited conditions.

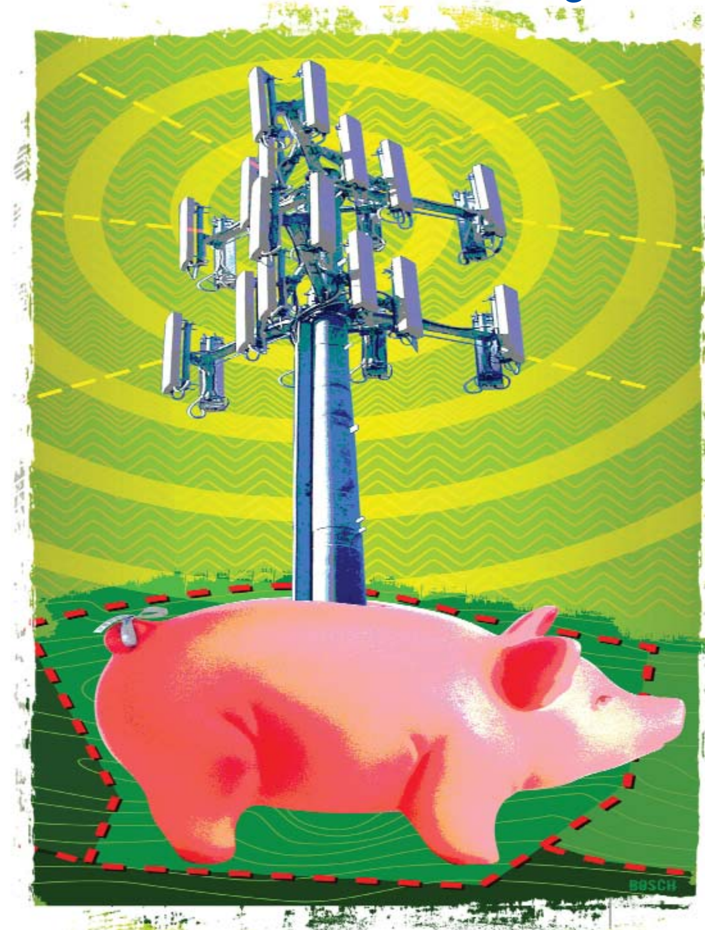
While some operators have an expectation that access should be provided at minimal, if any, rent and may resist the introduction of formal agreements, others are only too keenly aware of the value of sites, and may rent something at a peppercorn rent to then sub-let at a handsome profit. The only true universal rule on rental levels is that operators will normally have a better idea of their value than the owner.

Any agreement should specify equipment in detail or an owner may miss opportunities to reflect an increased value in rental – the rental value to the operator may be affected by the nature of the equipment installed.

The circumstances of a site largely determine the appropriate form of site agreement: normally licences are for sites where supporting infrastructure such as a pole or tower is shared or where control of all or part of a property is given to a particular operator. Owners should ensure that they do not have to resolve disputes about interference between operators, or that an agreement's non-interference provisions compromise the primary uses of the property.

Standard site agreements generally suffer from two fundamental defects. They strongly favour the operator with provisions which sometimes reverse the landlord/tenant obligations typically found in commercial leases – owners may, for example, give indemnities and warranties normally made by tenants.

Second, they may not include rudimentary provisions ex-



pected in standard commercial leases addressing indemnities, assignment and sub-letting, or the sale or redevelopment of property. Check any site agreement against a standard lease check list to identify such missing provisions.

Site agreements for mobile carrier infrastructure commonly have a five-year base term with four largely automatic extensions. As in any other long-term commercial arrangement, owners should have the right to require operators to relocate. The main issues here are the period of notice and payment of relocation costs.

Carriers commonly seek to have the owner pay their relocation costs. One way to deal with this is to oblige the carrier to bear relocation costs but allow those costs to be offset against future rent.

Make sure you consult your solicitor before signing any agreement over communications equipment on your property to ensure your rights are protected. ❑

MANAGING FRAUD

Businesses need simple, inexpensive preventive measures

A survey of companies in Australia and New Zealand has estimated that fraud affects half of all businesses.

Survey responses from around 500 companies last year found that almost half of them had experienced fraud in the previous two years and they had lost a total of more than $450 million. In 44 per cent of the major frauds there was no recovery of the amount stolen.

The survey found identity fraud one of the most pervasive developments in recent years. Nearly ten per cent of organisations responding reported being a victim of identity fraud in the previous two years.

This could take a number of forms, including someone borrowing money or obtaining employment using another person's identity, using fake documents to open bank accounts to launder money, or adopting the identity of a legitimate business supplier in order to submit false claims for goods and services not provided.

More than 40 per cent of firms replying had taken measures to confirm the identity of suppliers, while 70 per cent had taken steps to confirm the identity of employees before confirming their appointment.

The most common perpetrators of the major frauds identified were non-management employees, and their most common motivations were greed and gambling. The 'typical fraudster' found in the survey period was a man in his early thirties who had been with the company for about six years.

To deter fraud, organisations require effective internal control systems and risk management strategies which need to be regularly monitored and updated. ❑

PRE-NUPTIALS

Can you break an agreement?

For the past four years pre-nuptual agreements have been legally enforceable in Australia. Their usual aim is to protect pre-marital property. However, the longer a couple live together, the more likely a 'pre-nup' may come to seem unfair as partners mingle their finances, depart from envisaged arrangements or have a child. Some ways to escape an agreement are by establishing that it is not binding, by claiming against any property not dealt with in the agreement, or by querying its enforceability.

There are certain basic requirements a pre-nup must meet, including that it be in writing and signed by both parties. The parties must also have received independent advice on the advantages and disadvantages for them of making the agreement.

The agreement must deal with the property, financial resources and spousal maintenance of the parties.

However, it may not deal with all of the property of the parties. Property which may not be covered in the agreement includes that acquired after the date of the agreement or after the date of the marriage, inherited or gifted, owned prior to marriage but which has increased in value (to the extent of the increase), purchased as joint tenants, gifted by one party to the other, and windfalls such as lottery wins and damages awards.

Assuming the basic requirements of an agreement have been met, it may be set aside if, for example, it contained fraudulent statements, if later unforeseen circumstances make it impractical for it, or part of it, to be carried out, or if there is a material change in circumstances of a child of the marriage so that the child or an adult with caring responsibilities for the child will suffer hardship. ❑

SEX DISCRIMINATION

Systemic unfair treatment claimed in professional roles

A wave of recent cases has seen professional women suing their employers for sex discrimination in the workplace.

A highly successful employee of an international firm for 17 years was appointed European market executive. Several months after beginning her new post, her boss became concerned about her performance and continuing company losses. Although he spoke to her about the problem he did not issue a specific warning. Instead, he appointed someone else to a position between himself and her.

The relationship of the latter two was incredibly poor. At one point she told her new boss that she had been working very hard and he replied, "My maid works hard". On a business trip, while sitting in a corporate jet in a seat near the drinks cabinet, she was asked to serve drinks to other managers aboard the plane. When they reached their destination, her new boss implied in conversations that she was no longer head of the European section. Eventually, she was offered two inferior positions which she rejected prior to being dismissed. She then took action against the company on grounds including sex discrimination.

While the Tribunal was critical of her firm's treatment of her, it was unable to find any conduct that constituted sex discrimination. It held that anybody, male or female, who occupied the place in which she had sat in the company jet, would have had to serve drinks to others aboard the flight. Nevertheless, it found there had been some degree of victimisation and that she was unfairly dismissed.

Such avenues of redress for aggrieved employees often lead to adverse media attention and other repercussions. The case is a timely reminder for firms to review employment practices, in particular to consider whether they exclude workers because of their gender. ❑

NO HONEY POT

Ensure the label sticks

Australian manufacturers need to ensure that if they label something 'Product of Australia', the product is substantially if not wholly produced in Australia and comprises Australian ingredients.

The Australian Competition and Consumer Commission took a Japanese company and a related Australian company to court, alleging they had misleadingly labelled a honey drink they promoted. Product labelling, promotional brochures, videos and the company website represented the honey drink as a product of Australia, manufactured and bottled in Australia, and a 'gift' from Tasmania, containing 28 per cent leatherwood propolis extract.

In fact, Australian honey made up only two per cent of the product. It was both manufactured and bottled in China and contained about 38 per cent Chinese honey.

The companies were restrained from making their false representations and had to take substantial remedial action. ❑

TAX OBJECTIONS

What is the timeframe to appeal a tax assessment?

As a general rule, you must lodge an objection to a tax assessment within four years of the Tax Office serving it. 'Shorter period of review' taxpayers (those with simple tax affairs) must lodge any objection within two years.

If an objection is against an amended assessment, which is more likely in self-assessment, an objection must be lodged within four years of the original assessment (two for a 'shorter period of review' taxpayer), or 60 days after the amended assessment was served, whichever is later.

You should lodge any objection to a private ruling by the Tax Office within 60 days of the ruling, or within four years (again, two for a shorter period of review) of the lodgment of the return for the relevant year, whichever is later.

However, if you want to lodge an objection out of time, you can send it to the Tax Office with a reason explaining the delay, requesting that it be treated as having been lodged within time.

If the Tax Office disallows an objection on appeal, you can appeal to the Federal Court or the Administrative Appeals Tribunal within 60 days. Appeals can be lodged against Federal Court decisions within 21 days, or against Tribunal decisions within 28 days.

Contact your solicitor if you have questions about tax assessment or other tax issues. ❑

OFFICE ART

Can your super fund buy it for you?

If artwork is used in your business you are entitled to a tax deduction for insurance, lease costs if it is leased, and interest if you borrowed to acquire it. If the supplier had to pay GST, you are entitled to claim a GST input credit for it. This is because buying a piece of art is no different conceptually from buying any other piece of furniture for the office.

But what if you think it would be nice if your work of art was not hanging in the office but rather hanging in the dining room at home?

If you were given it as a retirement present, the firm would be making a disposal and would have to pay GST on the market value of the artwork disposed of.

If it is your own business, and you take the art home, you have to respond to the GST laws which say that where you change the purpose of why you acquired something, you have to make an adjustment to any GST input credit allowed to you. Provided the value of the artwork is $1,000 or more, you will effectively have to pay back any GST credit you might have received on acquiring it.

You might think it would make sense if your super fund were to buy your artwork. But if the artwork is used by a member of the fund for home purposes, it is quite likely that this will cause the fund not to be a 'complying superannuation fund', with all the complications and disadvantages this might involve.

What if your super fund were to acquire the artwork and then lease it to your business? This would allow the fund to secure income. It would also mean that you could claim a tax deduction, perhaps at a rate as high as 48.5 per cent, while the fund would only pay tax at 15 per cent.

However, any such arrangement is caught by the in-house asset rules: broadly, that no more than five per cent of a fund's assets can be 'in-house assets'. A trustee who causes a fund to breach the in-house asset rules might be subject to a civil penalty. For further information contact your solicitor. ❑

THE FAMILY FARM

Life estates can be dealt with tax effectively

If you have a life estate, there are ways to remove it without suffering adverse taxation consequences.

Consider this hypothetical situation. Bob leaves the family farm, which he owned prior to the introduction of capital gains tax in 1985, in trust to his wife Betty for life, and, after her death, equally to his children, Bill and Sue. Under his will, Betty is entitled to all the income from the trust and Bill and Sue to the capital after her death.

Bob leaves his interest in the business on the farm to Betty and Bill equally. Bill wants to embark on a major development on the farm but ensure before doing so that he will one day receive the entire farm. Betty and Sue are happy to sell.

A Tax Office interpretative decision of a similar situation stated that the surrender of the life interest would be a capital gains tax event. Betty would have to include the value of her life interest, less any incidental costs associated with its acquisition, as a capital gain in her assessable income. However, the general capital gains tax discount means she will only pay tax on half the value of her life estate.

In addition, based on a Tax Office private binding ruling, the small-business 50 per cent capital gains tax reduction will be available to Betty if the terms of the will are suitable and the transfer of the farm to Bill is structured correctly.

If her net assets are worth less than $5 million, Betty can take advantage of the small-business CGT concessions to reduce the taxable capital gain to zero.

Interpretative decisions are not legally binding on the Tax Commissioner and rulings are only binding on the person or entity on whose behalf they were sought. In situations like this one, a private ruling is desirable. Contact your solicitor if you would like advice on trusts, wills or capital gains tax. ❑