

# 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.*

## MISLEADING CONDUCT

### Employees found personally liable

**The courts have recently found employees personally liable for misleading conduct, even though it was conduct in the course of their employment and on behalf of their employer.**

Two employees of an internet company had represented that a website operated by their employer was "perfect" for Mr X's business, and that the facility would permit customers to pay online using major credit cards with funds directly clearing to Mr X's account.

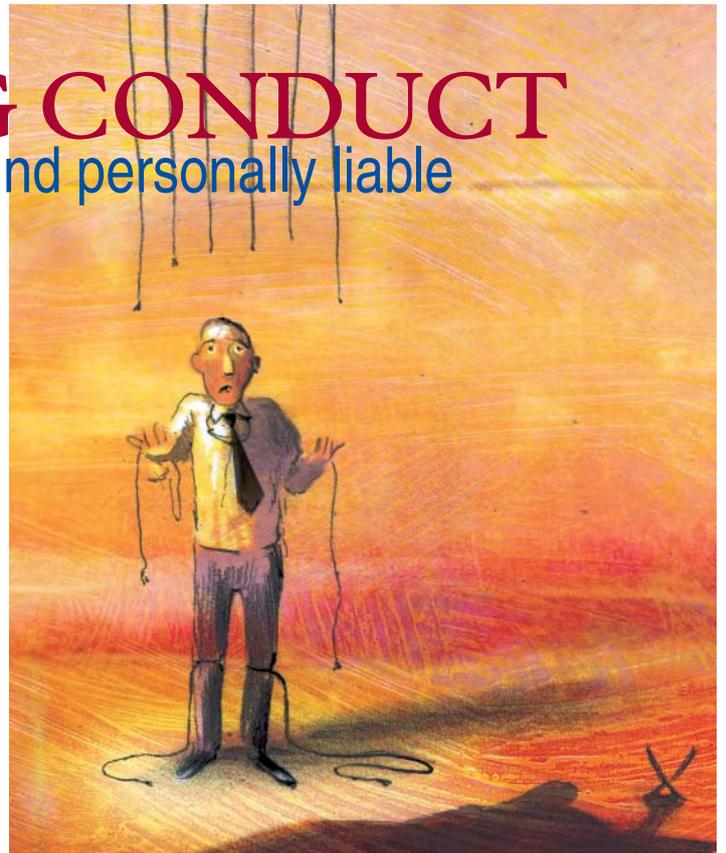
Mr X signed up for the online service only to find there were significant bank requirements before the facility could go

ahead. Meanwhile, he had to pay a higher mark-up and sales tax at a higher rate.

To preserve credibility and goodwill with his customers, Mr X operated on the commission basis he would have charged if the representations of the two employees had been true. He conducted his business at a loss for 12 months, but then moved to a different cost structure which returned a profit to his business.

The two employees, as well as the internet company, were held liable to the tune of \$60,000.

The courts did not consider it necessary to prove that the employees had knowledge of a breach to find them liable. □



## BUYING AND SELLING PROPERTY

### Who bears the risk of damage?

**The risk of damage to buildings and other fixtures remains with the seller until settlement, or some other time if it is stipulated in the contract. However, the risk passes to the buyer immediately if the buyer moves into possession of the property before settlement.**

If buildings or other fixtures are substantially damaged after the contract is signed, and before the risk of damage passes to the buyer, the buyer can cancel the contract by notice in writing within 28 days after first becoming aware of the damage. In such a case, all money paid by the buyer under the contract must be repaid.

Where buildings or fixtures are damaged, and the buyer is either not entitled to cancel or chooses not to cancel, the purchase price should be reduced on settlement by an amount that is justifiable in the circumstances.

If a property is damaged or destroyed after exchange of contracts and before settlement, the

buyer is deemed to be insured under the seller's insurance policy. Whether this is of any use to a buyer depends, of course, on whether the seller has a valid and adequate policy.

Contact your solicitor if you are in any doubt about your rights or liabilities over damage to property under a contract. □

# PARENTING PLANS

## New laws to share looking after children

**New shared parenting laws which came into effect last year view a shared parenting plan as a preferred method of recording parental agreements.**

The figures show that increasing numbers of men are now applying to become the primary carer of their children after relationships end. Also, non-custodial parents who pay child support are spending more time looking after their children.

With the shared parenting concept comes a change in terminology. A child now 'lives with' rather than 'resides' with one parent, and 'spends time' rather than has 'contact' with the other. For many years in the past one parent had 'custody' and the other had 'access'.

As part of its new approach to family law, and in response to widespread relationship breakdown in Australia, the government has established a network of

family relationship centres. Parents are encouraged to use the centres to voluntarily enter into parenting plans that address allocation of parental responsibility, where a child will live, and how the child will communicate and spend time with the other parent.

These parenting plans are not legally binding, but as one federal magistrate has observed, people will still need legal advice before going to a family relationship centre, while they are receiving its services, and afterwards.

In many cases legal precedent is used as a reference point to determine a settlement range for a particular type of dispute. This is so despite one of the underlying principles and claimed attractions of mediation being that parties may reach a creative resolution suitable to their own particular case.

The live-with parent may genuinely struggle emotionally with the idea of a child's right to have as much time as practicable with



the other parent, but a positive change observed since the introduction of shared parenting laws

is the reduction of attempts to impose conditions on the other parent's arrangements. □

## FINANCE

### Partners' bitter end if timing is wrong

**A bad decision about when to end their financial partnership cost Tom and Harry \$10,000.**

Tom and Harry had a joint venture partnership, in which each held a 50 per cent share. The partnership owned land valued at \$1 million, which was mortgaged to the bank to secure a debt of \$500,000.

When the two fell into disagreement about how the development should proceed, Tom agreed to buy Harry out. This amounted to \$250,000, being half the partnership net value of \$500,000 (land value of \$1 million minus debt of \$500,000).

After negotiations which went on for some time, the two signed an agreement confirming the date of the dissolution of the partnership at the end of the previous month, and obliging Tom to pay

Harry \$250,000 and take over the debt in exchange for a transfer of Harry's interest in the land.

Unfortunately for Tom, he is now liable for stamp duty on half the unencumbered value of the land (\$500,000), amounting to \$17,990. Had the agreement provided for the dissolution of the

partnership on the last day of the current month, duty would have been \$7,240, being the duty on Harry's half-share of the net partnership value.

Once the partnership is dissolved, the two own the land jointly. Had the agreement said the partnership was to dissolve at the

end of the current month, it would have been in existence when the document was signed and, since duty is payable at the date of first execution of a document, the relevant dutiable property would have been partnership interest rather than interest in the land. Contact your solicitor for contract advice. □

## TRANSITION OVER

### Work Choices record-keeping to be enforced

**After a transitional period for employers to comply with the new requirements, it is now obligatory for them to produce and retain certain employee records.**

The records include hours worked, pay, annual leave and personal leave. Records must be legible, in English, and in a form readily accessible to a workplace inspector. Employers must also issue pay slips to employees.

Records generally need to

be kept for seven years. If an employer is found to breach the law, a court can order fines of up to \$5,500 per offence. An employer can be found liable whether aware or not of the need to comply. Contact your solicitor if you would like further information. □

# LANDLORDS

## Are you covered for damage caused by subtenants?

**Over the term of a lease, it is common for tenants to decide they no longer need part of their premises or that sharing part of the premises with another business will offset the financial burden of meeting monthly rental payments. But landlords who consent to such arrangements need to be careful that any sublease adequately protects their interests.**

In a recent case the court found that a tenant was not liable

for damage to the leased premises caused by its subtenant. A clause in the head lease between the landlord and the tenant stated that the tenant would only be liable for structural repairs which were necessary by an act or omission or default on the part of the tenant or by the tenant's use or occupation of the premises.

The bitumen areas of the premises in question were suitable only for light commercial vehicles and cars, but the subtenant had used fork-lifts, heavy machinery and equipment, and

stored heavy goods such as loaded sea containers on the bitumen. As a consequence, the bitumen developed cracking and potholes, and by the end of the term of the sublease was in need of substantial repair.

Unfortunately for the landlord, the tenant was not held to be liable for the cost of these repairs.

The court held that while the tenant had 'used' the premises for the purposes of subleasing, this was not the 'use' which had caused the damage. Rather, the damage was caused by the

'use' of the premises by the subtenant.

Landlords should make sure that all leases contain provisions which oblige tenants to accept liability for the actions of subtenants, and equally, that subtenants contract directly with the landlord to comply with the terms of the head lease, particularly with respect to repairs and maintenance. Similarly, tenants should ensure that indemnities are obtained from subtenants to guard against nasty surprises in the event a subtenant causes damage to the premises. □

# INJURED EMPLOYEE

## What penalties for an employer with no insurance?

**In NSW an employer must have a workers compensation insurance policy or face a fine of 500 penalty units (currently \$55,000), or imprisonment for up to six months, or both.**

In addition to these penalties, an uninsured employer whose worker suffers compensable injuries may need to reimburse the WorkCover Authority of NSW for compensation it pays to, or on behalf of, the worker. In some instances this can exceed \$100,000.

The WorkCover Authority can issue a notice to an uninsured employer to reimburse compensation it pays out. The notice will specify a time period for any response. Currently, the relevant time period is 28 days from the serving of a notice.

However, the Commission has a broad discretion to adjust the rights of the employer and the WorkCover Authority as it thinks fit. In a recent case a carpenter who carried on a one-man operation was assisted by a neighbour on a job. The neighbour



fell from a ladder and suffered significant injuries. He claimed compensation from the carpenter who denied an employment relationship.

The court found that the neighbour was a worker and awarded compensation, but declined to make an order for the carpenter to reimburse WorkCover.

It was important to the court that the working arrangement between the two was "very casual" and lasted only for a few hours on the date of the injury. As such, the carpenter was not seen as reasonably expecting to be the employer of the neighbour.

The court pointed out that the Industrial Commission has

discretion to waive the liability of an uninsured employer to reimburse WorkCover for compensation paid to an employee, because of the "personal position" of the employer, but it needs to be done within the time period specified in the notice. Contact your solicitor if you need further information. □

# FARM DEBT

## When is a rural property not a farm?

**Through the Farm Debt Mediation Act, mediation is required before a creditor can take possession of property or take other enforcement action under a farm mortgage. In the Act 'farm' means land on which a farmer engages in a farming operation. But what is a farming operation?**

In one recent case, the court decided that a fish hatchery which grows fish for pet shops is not a farm for the purposes of the Farm Debt Mediation Act. The court said that farming operations "ought to be confined to traditional agricultural pursuits".

However, the court left open the question of whether a fish hatchery which grows fish for human consumption would be held to be a farm.

In another case, the court decided that a company running a riding school fell outside the definition of "farming operations" as required by the law.

The operator of a small market garden fared better in being considered to be engaged in farming, despite also being engaged in other occupations, including computer consultant, finance broker, property developer, mercantile agent, cleaner and private investigator.

In his loan application, the borrower had described himself as a "computer programmer" with a second job as a "computer specialist". However, he gave evidence that his other jobs occupied only two to three days per week, often only at night, while the balance of his time was spent attending to horticultural matters.

The result was that the farm



debt mediation law was found to apply. The mortgagee's writ of possession over the borrower's

land was stayed, and the mortgagee was ordered to pay the costs of the proceedings. □

# LATENT INJURIES

## What is the timeframe to make a claim?

**Once a person receives a diagnosis from a professionally qualified person that they have a psychiatric injury, the time for initiating a claim starts to run.**

In psychiatric cases, the courts have held that a person does not 'know' that they have suffered an injury until a psychiatrist tells them that they have a psychiatric disability. Since the law does not recognise a right to compensation for normal reactions to stress or traumatic events, someone who suffers from anxiety, depression, nightmares or other symptoms, but has not had a formal diagnosis of a psychiatric illness, does not 'know' relevantly that personal injury has been suffered, or may not know the nature of the injury

and its broad extent.

A primary consideration for the courts is whether or not any delay that occurs has caused significant prejudice to

a defendant, making chances of a fair trial unlikely.

Although that is the primary consideration, it is not the only one. If the delay is unexplained,

the person is unreliable as a witness, or the person has failed to act reasonably in their own interests, it may result in the refusal of a claim. □

# COMPENSATION

## Employment must 'significantly' contribute to the disease

**A recent court decision has changed the rules on the relevant contribution of work to a disease under the compensation laws.**

Previously, it was necessary only to show a link between one's employment and the disease.

Employees suffering from a disease now have to prove that,

having regard to all relevant contributing factors, their employment significantly contributed to the disease.

The employment contribution must be "more than a mere contributing factor". It is now necessary for an employee to show that there is a "close connection between the disease and the employment in which

he or she was engaged".

The judge considered the definition of "materially" in the Shorter Oxford Dictionary – "in a material degree, substantially, considerably" – probably captured the essence of what was intended in the law.

For further information on work conditions contact your solicitor. □