

# 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.*

## FRANCHISES

### Franchisors must give franchisees a fair go

**New ethical norms of conduct demanded in commercial relationships make it illegal to disadvantage the business of a smaller party in a significant way or bully it into submission.**

In a recent case a business which supplied training and ma-

terials for making bread and related products in the home was taken to court by the Australian Competition and Consumer Commission for its behaviour towards its franchisees.

The franchisor was found to have been competing with the franchisees involved in the case. He had refused to deliver franchised products to franchisees

for contrived reasons. In addition, he had omitted franchisees' names from brochures advertising the franchise's product range (while providing contact details for the franchisor) and refused to negotiate or discuss issues of concern to the franchisees, treating them in a hostile and pugnacious manner.

The judge pointed to this

being an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour by the franchisor towards the franchisees, establishing unconscionable conduct, and costs were awarded against him. □

## PREGNANCY

### Avoid discrimination at work

**Direct or indirect discrimination on the basis of pregnancy or potential pregnancy is unlawful. This includes treatment of casual workers, apprentices, trainees, full-time, part-time and temporary workers.**

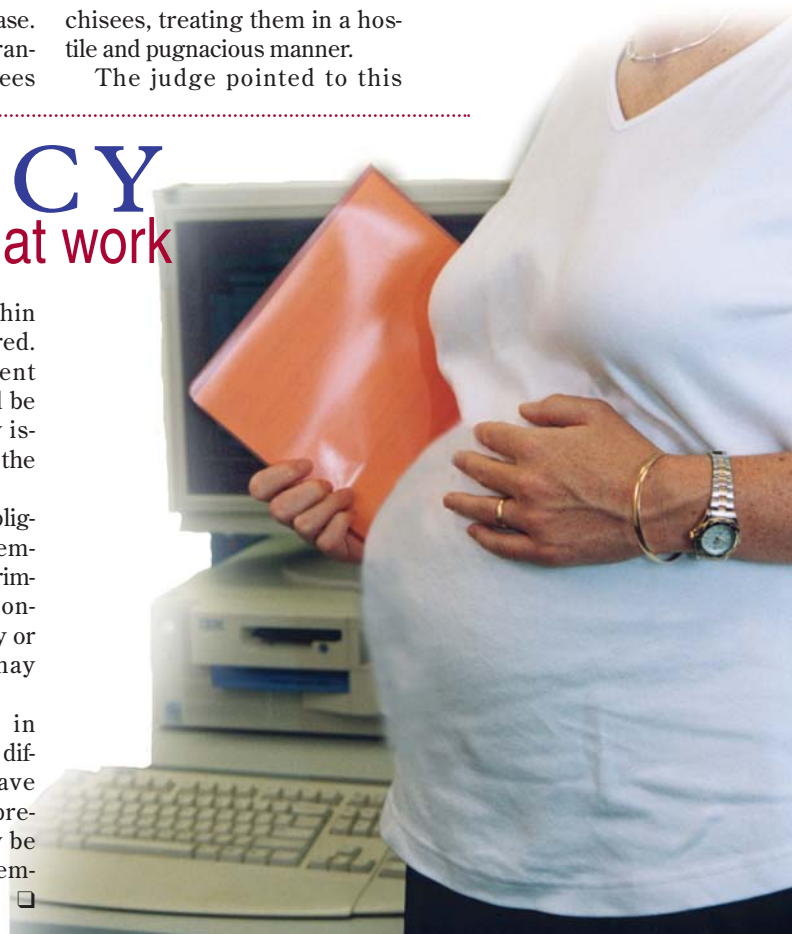
Contrary to the assumptions of many people, most women are able to carry out standard duties during pregnancy, though some adjustment may be required to the work environment to enable them to do so. Reasonable adjustments may include provision of seating, additional toilet breaks, access to drinking water and altering work hours.

Where adjustments cannot be

made, alternative posts within the business should be offered. Any changes to employment terms and conditions should be based on medical or safety issues alone and apply only for the duration of the pregnancy.

Employers also have an obligation to ensure that other employees behave in a non-discriminatory way – badgering, constant references to pregnancy or unnecessary touching may amount to discrimination.

Without clear policies in place employers could find it difficult to prove that they have taken reasonable steps to prevent discrimination and may be held vicariously liable for employees' discriminatory acts. □





# TAXATION

## Relief for small businesses from capital gains tax

**There are various conditions for small business owners to gain relief from capital gains tax. In some cases it can mean that no capital gains tax is payable or that liability to pay may be deferred, perhaps indefinitely.**

In general terms, there is a minimum of two basic condi-

tions that must be met to benefit.

First the net value of the assets of the taxpayer and certain associates and related entities must not exceed \$5 million. This is, essentially, what 'small business' means.

Second, the asset that gives rise to the capital gain must be an "active asset", that is, used to carry on a business and not

mainly to create passive income such as rent, interest or royalties.

There are additional basic conditions if the asset is a share in a company or an interest in a trust.

Tax relief is also available for individuals if they have owned the asset continuously for 15 years and the event involving

capital gains tax relates to their retirement.

When establishing a new business structure, acquiring additional business assets or restructuring an existing business it is worth getting advice on conditions of capital gains tax relief as actions now can have an impact on the availability of the relief many years down the track. □

# PATENT PROTECTION

## When confidentiality agreements lose their bite

**The Court of Appeal has reduced damages awarded against a company after the company produced an invention strikingly similar to one it had previously been developing with an inventor under a confidentiality agreement.**

The inventor had created a new design for a foldaway ironing board and sought patent protection for, and commercial exploitation of, his new design.

He began discussions with a company to develop the invention, requiring it to execute a deed of confidentiality before divulging any information.

However, the invention was then shown at trade fairs to gauge market potential. Because of this, together with the patent application, the courts felt, and the inventor acknowledged, that third parties, including competitors, could have gained access to the information contained in the confidentiality agreement free of charge.

Negotiations between the company and inventor subse-

quently broke down and the inventor requested the return of the disclosed information.

Shortly afterwards the company began distributing a wall-mounted foldaway ironing board in Australia and a drawer-mounted version in Germany.

The Court of Appeal rejected the legal status of the confiden-

tiality agreements. Among other reasons it considered that any injunction would have to be limited to information that was not publicly available.

The Court reduced the damages previously awarded to the inventor from \$25,000 to \$5,000. It also set aside the injunction previously awarded which pre-

vented the company from manufacturing or distributing any wall-mounted ironing board based wholly or in part on information from the inventor's documents or prototypes.

If you are entering an agreement about intellectual property discuss with your solicitor how best to protect your rights. □

# CONTRACTS

## What happens when the terms are broken?

**Once you make a contract you will be committing a breach if you do not comply with its terms, or if you change your mind and decide not to go ahead with the contract.**

If a party breaches a contract there are a number of remedies available, including:

- Damages (a sum of money) to compensate the 'innocent' party for any loss suffered;
- An Order from the Court requiring the party who has breached the contract to carry out his or her obligations;

□ An Order from the Court forbidding the party from breaching the contract; and

□ An Order from the Court declaring that the contract is at an end and requiring the party who has breached the contract to put the 'innocent' party in the position he or she was in before the contract was entered into.

The type of remedy and its availability would depend very much on the type of contract and the type of breach. A solicitor can advise you as to the best means of dealing with the problem. □

# UNFAIR DISMISSAL

## Recording your rights

**Audio or video recording of counselling and exit interviews may become far more common in future. Such recordings are likely to be admissible in any proceedings following a termination of employment and their use may benefit both employers and employees.**

In a recent case before the Industrial Relations Commission the employee was able to submit a secretly filmed video of her own dismissal as evidence.

She had recorded a private conversation with two officers of her council employers by hiding and activating a video tape recorder in a washing basket shortly before the officers visited her at home.

The previous evening another senior council officer had telephoned her, informing her that her employment was to be terminated forthwith. She was told that council officers would deliver a termination cheque the following day and recover items,

such as a car, which had been part of her remuneration package. No reason for termination was given.

The video corroborated her claim that, as late as the date when the termination cheque was delivered, she had never been provided with a reason for

losing her job.

It was considered that the recording of the conversation was “reasonably necessary for the protection of the lawful interests” of the principal party.

The decision means recordings may well be able to be admitted as evidence in future,

even if the information is secretly recorded.

This could benefit employers as well as employees in the same way that arguments concerning ‘police verbals’ have largely disappeared from criminal cases since the recording of interviews was made mandatory. □

## FAMILY TRUSTS

### Changes of trustees must be registered

**Be aware of the necessity to register the deed appointing a company as the trustee if you run your business as a family trust and are currently the trustee.**

If you run your business in a family trust you would be wise to appoint a company as the trustee to limit your liability in the event of uninsured claims. Trustees are

personally liable for trust debts subject to their indemnity against trust assets.

However, even if one of your trustees has been given the power to appoint and remove trustees in the trust deed, be aware that until it is registered the deed has no effect.

This may leave you personally liable and would also mean that any purported distribution of income by the new trustee company would be of no effect. Discussing the situation with your solicitor will ensure that you know your rights and obligations. □

# WATER RIGHTS

## How will the new Act affect you?

**Water rights are in a transitional phase in New South Wales with the introduction of parts of a new Water Management Act. Mortgagees may need to review their security of water entitlement.**

One of the provisions of the new Act is a register of access licences. Such a register will show all “interests in an access licence” and action will need to be taken by mortgagees if they are to get on the register.

While water entitlements under the old Act are generally covered by the new one, care should be taken if entitlements are held in names other than the registered proprietor. If they are held by associates of the landowner/mortgagor, the mortgagee needs to examine whether they are protected against such associates selling the entitlement once the provisions of the new Act come into effect.

Also, mortgagors will now have to obtain an easement by negotiation or court order if they are to continue to extract and transport water to their land after a transition period. The good news is that mortgagors have some time to do this – at a minimum the period is two years. □



# BUILDING CERTIFICATES

## Beating the demolition order

**An order to demolish an illegally erected building need not be the end of the matter.**

At its discretion a council can issue a building certificate, even where the court has declared that a building is unlawful and has ordered its demolition. And where it refuses, its decision can be appealed.

The best course of action, where the building in question is worth saving, may be to apply to the council for development consent for the use of the building, as well as a building certificate, and appeal the demolition order.

In one recent case the judge suspended the injunction requiring the demolition of an unlawfully erected building to allow an attempt to regularise its position under planning law.

Subsequently, an application for a building certificate and a development application in respect of the use of the building were lodged with the council.

Ultimately, on appeal, the council issued a building certificate and granted development consent to the building's proposed use.

Solicitors can advise on a range of options which are legally available. □



# PROPERTY TRANSFERS

## Parity in exemptions in marriage and de facto break ups

**There are new criteria to gain stamp duty exemptions when transferring property after relationship break ups which will apply equally to marriage and de facto relationships.**

For partners whose marriage is breaking up, restructuring the finances no longer has to wait for a decree absolute – which may not occur for a year – or proof that a marriage has been annulled or dissolved or is going to be. Now it will be sufficient for the Chief Commissioner to be of the opinion that a marriage has irretrievably broken down.

A statutory declaration that the partners intend to apply for dissolution or annulment or that they have separated and there is no reasonable likelihood of cohabitation being resumed is sufficient evidence.

Some people who are separat-

ing may not wish to dissolve their marriage, perhaps because of custom or religion or for the sake of their children. The change will allow them to restructure their financial affairs quickly and with minimal impact following separation.

Those who have been in a de

facto relationship are similarly required to provide a statutory declaration indicating the relationship has terminated.

Charging duty at a concessional rate on refinancing a mortgage also follows from a statutory declaration in similar terms.

However, capital gains tax rollover relief is not available in the case of binding financial arrangements. Also, exemption from stamp duty on the transfer of shares between spouses in a private company, following a sale by auction, may now be in question. □

# INVESTMENT

## Pitfalls in self-managed super funds

**You may be aware of the benefits of having investment real estate in a self-managed superannuation fund. But you also need to be aware of the pitfalls.**

For instance, did you know that the trustee of a regulated superannuation fund must not acquire an asset from a fund member?

A person who contravenes this is guilty of an offence punishable on conviction by imprisonment for up to one year.

A fund may also be declared a non-complying fund and therefore become subject to income tax at 47 per cent of the fund's assets.

So it is important to know what kind of property can legitimately be transferred. □