Client Newsletter

No. 2, 2005

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.

PRICE FIXING
Courts send out warning

Heavy penalties have been imposed, highlighting the seriousness of price fixing.

In a recent case, a wholesaler of skincare products was penalised $250,000 for trying to prevent retailers from discounting its products.

The company sells products to over 700 retailers in Australia. It describes its products as a 'premium brand', pitched in price towards the higher end of the market. Sold and used by professional beauty salons, the products are unavailable for purchase in supermarkets or other stores. Retail prices are recommended to retailers on the company's order forms and on price lists.

Two Australian beauty salons had offered the company's products for sale on their websites at prices lower than that recommended. The company's response to the salons' discounting led to allegations that it was breaking the law by engaging in price fixing.

Sales representatives for the company said to staff at one salon, "I would hate to see this problem cause the company to cancel your account". She also provided staff with a print-out of the website policies of the parent company. These included, "Deviating from current suggested retail prices is strongly discouraged," and "A violation of this policy can result in account termination and legal action". Company representatives made similar comments to the second retailer, saying: "Yeah, we can even cut off supply and close your account".

The judge described the company's conduct as "somewhat aggressive" and noted that the penalty imposed, which is a quarter of the company's profits in Australia for the year, would have been considerably higher but for its cooperation with authorities.

In another case, a number of petrol companies in country Victoria were found to have been involved in a long-standing arrangement to fix retail petrol prices. Penalties of over $23 million have been imposed, including penalties of up to $200,000 against company directors and area managers.

Companies must comply with trading laws, and have programs in place to ensure staff are aware of them. Speak to your solicitor for further information. ❑

FASHION FLING
Sends director to jail

A company director has been sent to jail after spending company funds to support a fashion designer's fashion week show.

The former managing director of the company, which has now gone into liquidation, spent over $220,000 of company funds on the show. Although he argued that it was a company investment, brochures for the show said "brought to you by [the director]", and made no mention of the company. The company's board of directors was unaware of the payments.

Taken to court by the Australian Securities and Investment Commission, and found guilty of making improper use of his position as a company officer to gain an advantage for himself, he has been sentenced to two and a half years' jail – six months of which he is to serve, followed by a two-year good behaviour bond. The chairman of the Commission said that the former director had "blatantly abused his responsibilities as a director", and that his jailing should remind directors about their corporate governance responsibilities. ❑

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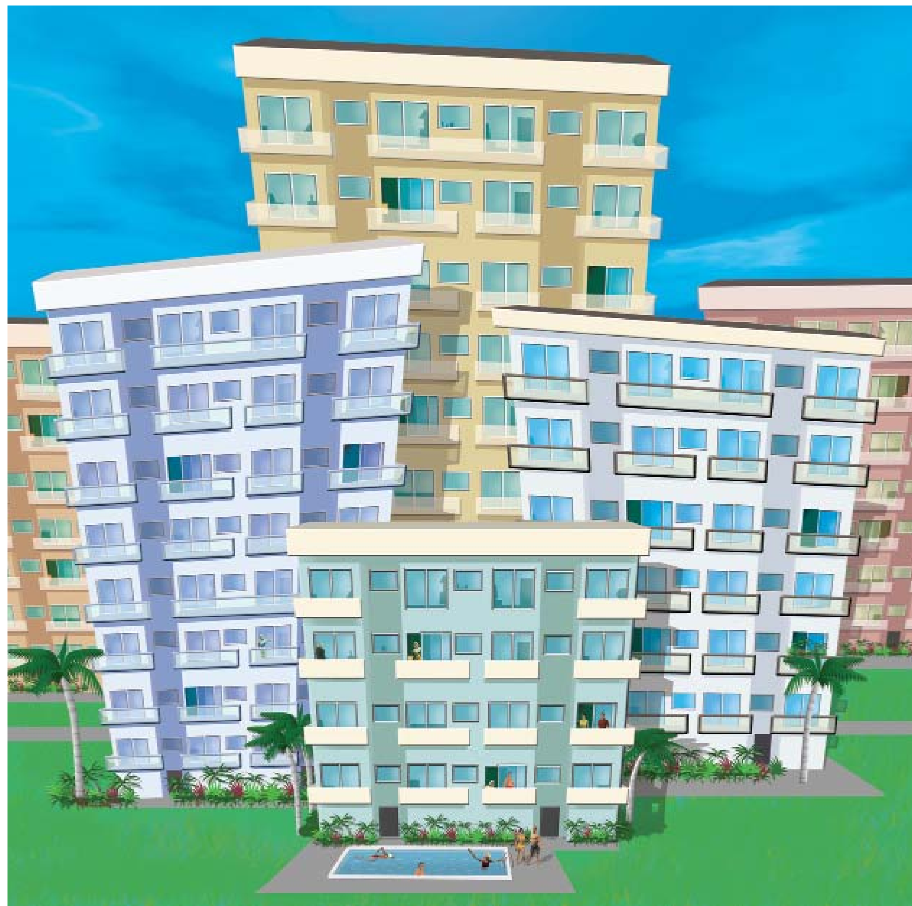
HIGH-RISE LIVING

New strata title laws for 100 or more units

Big apartment complexes are booming and there are now special laws to govern how they are run. These are the most significant changes to strata title laws since they were introduced in 1961.



The new laws are part of a process over the past few years to overhaul the management of strata schemes in NSW. Their most important aspect is the creation of a new category of strata title scheme – the large strata scheme.

Until now, laws about strata titles applied equally to all schemes, irrespective of their size. There are now differences for large strata schemes with 100 or more lots (not including parking or utility lots), particularly with regard to finances and the conduct of meetings.

At the annual general meeting, an owners corporation of a large strata scheme must now prepare an estimate of contributions and expenditures on each item it intends to expend money on, or on which it is aware money is likely to be spent, over the period before the next AGM.

The executive committee of an owners corporation cannot spend more than ten per cent above the estimate given on any one item before the next AGM without the resolution of the owners corporation, and an owners corporation must obtain two quotes before it spends anything on any one item above $25,000. There are exceptions for emergency situations, such as the repair of burst or blocked pipes or an unexpected electrical or security system failure.

The accounts of an owners corporation of a large strata scheme must now be audited, whereas it is optional in other strata schemes at the request of the owners corporation. Provisions for notice and minutes of meetings and proxy voting also differ.

There are other changes to strata legislation generally. Certain documents and plans must be handed over by a developer at the first annual general meeting. All records required to be kept must be retained for five years. And all insurance taken out by an owners corporation must be with a government-approved insurer.

Also, all new strata developments must establish a ten-year sinking fund plan of anticipated major expenditure, and the plan must be reviewed regularly. ❑

SAFETY AT WORK

When driver fatigue is the employer's responsibility

A recent court case extends an employer's workplace beyond what it has been commonly thought to be. The case also found that that the director of a trucking company was personally liable under health and safety legislation for a fatigue-induced accident that resulted in one of its drivers being killed.

With estimates that 17 per cent of fatal crashes in NSW involve heavy trucks, though they only make up around two per cent of registered vehicles, the case has far-reaching implications for companies in the transport industry and their obligation to effectively manage the risks of driver fatigue.

Apart from examining the system of work for breaches of safety regulations, a second issue in the case was the legal definition of 'place of work'. The judge noted that place of work included any vehicle, and he rejected the notion that the employer's place of work be limited to a fixed geographical location such as a central office. He concluded that the company's trucks, wherever they may be, including the one being driven at the time of the accident, were places where the company's work was performed.

The case sends warnings to all employers in the transport industry, and emphasises that they must take an active role in the promotion and maintenance of safety as it relates to fatigue. Contact your solicitor if you have concerns about your legal obligations over workplace safety. ❑

AFFIRMATIVE ACTION

What 'special measures' are allowed to achieve equality?

'Special measures' are permitted by Australia's sex discrimination laws to achieve substantive equality between men and women – that is, equality of outcome rather than equality of opportunity. Special measures go beyond merely ending discriminatory practices, and can include correcting or compensating for past or present discrimination, or preventing its recurrence in the future.

A recent court case on the special measures laws involved a union whose rules provided that particular elected positions on the branch executive were available only to women.

A male applicant had complained that the rules discriminated against men and were unlawful. He objected that the union policy of ensuring 50 per cent representation of women in the governance of the union exceeded the proportional representation of women in some union branches.

Consequently, women were guaranteed representation in particular branches of the union in excess of their membership, to the disadvantage of men.

The union successfully argued that these rules were 'special measures', designed to achieve substantive equality between men and women.

The judge was satisfied that the union believed substantive equality between its male and female members had not been achieved, and that solving this problem required having women represented in the governance and high echelons of the union.

She was also satisfied that the actions of the union were reasonable ones which could generally be regarded as being capable of achieving their goal. ❑

SUPER BENEFITS

Are you permanently disabled if you can work part-time?

How 'total and permanent disability' is defined is important if you are looking to receive benefit from a superannuation trust or insurance policy, and there has recently been a shift in the way the law looks at the issue.

In the past, a common definition has been that entitlement to benefit arises if a person is unable to undertake work for which they were suited by education, training or experience. In a case in 1993, the judge said that in this context employment should be limited to full-time employment.

However, in more recent decisions a different view has emerged. In a case in 2003 the judge said, "The requirement that the member be totally disabled is stringent and excludes disability from doing part-time work".

In the most recent case involving this question, the Superannuation Complaints Tribunal dealt with a definition of totally and permanently disabled which referred to the member being unable to engage in any gainful occupation. The Tribunal held – and the court on appeal supported its view – that if someone could carry out part-time sedentary work they were not totally and permanently disabled. If you have concerns about superannuation benefits consult your solicitor. ❑

BUYING LAND

Look beyond the title deeds

A much-awaited ruling in the property industry has now been made, but it will bring little joy to those purchasing land.

When the case first went to court the judge decided the purchaser of a plot of land would have to comply with a right of way which had been approved by the council, but not disclosed in the title deeds when the land was later subdivided.

The purchasers challenged the judge's ruling and the case made its way up to the High Court. The Court has now confirmed that unfulfilled conditions relating to the use of land can be enforced against owners subsequent to the registered proprietor who obtained a council's original conditional consent.

It is now necessary for purchasers to look beyond title deeds and search local council records for any outstanding conditions of consent to a development to be sure of where they stand. Prior to this case, this was not common practice. Consult your solicitor if you have concerns. ❑

DISCLAIMER PROTECTS

When the real-estate brochure doesn't tell the truth

Inaccurate information in a real-estate agency brochure advertising a residential property for sale thwarted the purchasers' plans to develop. But the agency was protected by its disclaimer clause.

The purchasers who bid at the auction of a substantial waterfront property in Sydney's northern beaches, after completing inspections with expert advisers, were in for a nasty shock. They had decided that the property could be developed as an investment property, with plans which included realigning the swimming pool at the rear of the property and constructing a substantial entertainment area.

The real estate agency had prepared a glossy brochure for the sale, based on information from the vendor. It included a survey diagram obtained from the vendor's solicitors which appeared to show a rear boundary fence on the water side of the swimming pool, and the high-water mark beyond.

However, the diagram was inaccurate, and the purchasers were subsequently advised that they would not be permitted to realign the swimming pool.

Ultimately, they obtained a court order for the return of their deposit plus interest from the vendor, and sued the real estate agency for misleading or deceptive conduct.

The agency argued that it was simply passing on information about the property from the vendor, and specifically pointed out its disclaimer. This appeared on the front and back of the brochure and read, "All information contained herein is gathered from sources we deem to be reliable. However, we cannot guarantee its accuracy and interested persons should rely on their own enquiries".

The judges observed that the purchasers were "intelligent, shrewd and self-reliant", and had engaged "appropriate professional advisers"; with that, and the words of the disclaimer, they considered it would have been plain to a reasonable purchaser that the agent was not the source of the information said to be misleading.

Situations where a company will not contravene the law when it passes on wrong information are:

❑ where the circumstances make it apparent that the company is not the source of the information and is merely passing it on;

❑ where the company, while believing the information, disclaims personal responsibility, for example by disclaiming personal knowledge; and

❑ where the company, while believing the information, ensures that its name is not used in association with the information. ❑

FALLING TREES

Who has legal responsibility?

Various factors may be considered when there is damage from a falling tree, but ultimately a court has to decide whether a relevant duty of care has been established, and if it has been breached.

In a recent case, a man was killed while sleeping in his bed when a tree blown over by very strong winds fell on the roof of his house. The tree was one of four next to the house and was the subject of a preservation order, requiring council consent if it were to be cut down.

According to his wife's evidence, the man had requested the council's advice on the health of the trees in fear for the safety of himself and his family. An officer had inspected the trees and advised that they were healthy and safe, and should not be cut down.

Initially, a court decided that the officer had exercised reasonable care and that the advice given and the refusal to allow the trees to be cut down did not amount to negligence.

However, the appeal court overruled this. It awarded damages of almost $750,000 to the man's wife for damage to the house, for rent payable during reconstruction, and as damages for the death of her husband.

The council's liability was based partly on the "significant and special measure of control over the safety of home owners who brought to the council's attention their fears that overhanging trees were dangerous".

Through its officer the council had agreed to advise the family whether the trees were dangerous. The officer's expressed opinion was a representation by him of his capacity to advise, based upon his expertise and experience. This raised the standard of care required of him.

In the circumstances the advice was negligent.

Expert evidence at the trial revealed a number of contributing factors, including water-logged soils and a decayed root system, which would have been revealed by a more thorough inspection.❑

This newsletter is for the benefit of our clients. It is not intended to be a definitive analysis of legislative or other changes and professional advice should be taken before any course of action is pursued