

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.

SURVEILLANCE AT WORK

New law requires employers to inform employees

In a first for Australia, New South Wales has introduced laws to restrict surveillance by employers of employees at work. Employers need to take steps, including adequate workplace policies, to ensure they comply with the requirements.

In general, if an employer seeks to carry out surveillance of an employee at work, it must notify the employee in writing (by email is OK) at least 14 days prior to the surveillance commencing.

The notice must indicate what kind of surveillance is to be carried out – computer, tracking or camera. The notice must also indicate how the surveillance will be carried out, when it will start, whether it will be continuous or intermittent and whether it is for a specified period, or is ongoing.

If someone starts employment after the surveillance has begun, it is sufficient for the employer to notify them of it before they start work. An employer is also required to provide notice to any employees of a labour-hire company performing work for them, or employees of any related corporation subject to their surveillance.

There are additional requirements and restrictions. For example, camera surveillance must include visible signs notifying people that they may be under surveillance in that place;



if tracking an employee in a vehicle, there must be a notice clearly visible on the vehicle indicating that it is the subject of tracking surveillance. Surveillance of employees in change rooms, toilet facilities and shower or other bathing facilities is prohibited.

Computer surveillance includes but is not limited to examining the sending and receipt of emails, and access of websites. Where an employer wishes to carry out computer surveillance, it must do it in accordance with the company's IT policy. This

must have been notified to the employee in advance "in such a way that it is reasonable to assume that the employee is aware of and understands the policy". A larger employer could achieve this by providing induction and training courses and regular email reminders. A smaller employer might do it by discussing the policy with each employee individually, and placing a copy of it on the work noticeboard.

Covert surveillance by employers is prohibited unless authorised by a magistrate. A mag-

istrate will only issue a covert surveillance authority for the purpose of establishing if an employee is involved in unlawful activity at work – not to monitor their work performance.

An employer who carries out covert surveillance may escape liability if they can prove that it was undertaken solely to ensure the security of the workplace or persons in it. This defence is only available where a real and significant likelihood of danger exists if the surveillance is not carried out covertly. □

CHILD MAINTENANCE

New law will give right to recover wrongly paid support

The federal government has passed a new law which will allow the right to recover child maintenance if it has been wrongly paid.

Once the law comes into effect, people who are later found not to have had any duty to sup-

port a child will be entitled to recover child maintenance they have paid.

The government has said that this right will apply in all cases, unless there are exceptional circumstances.

Other changes the new law will bring include allowing modi-

fication of parenting orders when an original parenting order has been found to be unworkable.

A court will now be able to vary the order. Contact your solicitor for further information on these and other elements of the new law. □

SPORTS DANGER

Tackle seen as an injury with intent

Five years ago Jarrod McCracken was injured during a tackle while playing rugby league football. He has not played football since. In a judgment earlier this year, the court decided that the action was intended to cause injury, and that McCracken's claim for compensation should not be limited by the new civil liability laws.

McCracken was tackled by two players during a first division rugby league match. The tackle was hard, and the court had the benefit of a video recording which, it said, "whether run at normal or slow speed permits no doubt that the actions of the second and third defendants [the two players], not only in

tackling the plaintiff but in lifting and upending the plaintiff ... were intentional and done with the intent that he should fall heavily on the ground".

When the new civil liability laws were introduced into NSW, acts done with intent to cause injury or death or acts involving sexual assault were excluded from a scheme that generally limits an injured person's right to compensation. The exclusion ensures that compensation for injuries arising from serious criminal acts is not limited by the new law.

The judge's finding that some injury had been intended could be significant for McCracken, since any claim for compensation will not now be limited by the cap of three times average weekly earnings set by the new laws. □



TAX AVOIDANCE

Danger for directors in illegal tax advantage schemes

The Tax Office has been telling company directors for several years that they should think of tax more often than they do. Currently, its focus is on anti-tax avoidance. Tax is complex, and the tax consequences of a company entering into a transaction may not be obvious, but the tax cost if something goes wrong will be high – 30 per cent tax, plus penalties which could see directors going to jail.

Managing the tax affairs of a company is usually the job of its executives, not its directors. However, directors are expected to take reasonable steps to guide and monitor the company's management. Also, a director may have to make a declaration that the financial statements and notes of a company are true and fair. This will not be possible if the company is subject to an unrecognised, even though unassessed, tax liability.

There are situations where a company director is liable for the tax or tax penalty a company incurs. Directors – in fact, all professionals – should not forget the conspiracy to defraud the revenue provisions of the Criminal Code. If there has been an evasion, rather than mere avoidance of tax, and a director is party to the evasion, he or she might be guilty of a charge of conspiracy to defraud the Commonwealth and could be sent to jail.

Directors should ask a variety

of questions when considering tax arrangements placed before them by managers. Are they of the sort ordinarily used to achieve that particular commercial objective? Do they seem more complex than necessary? Are there steps in the arrangement that appear to serve no real purpose other than to gain a tax advantage? Does the tax result appear at odds with the commercial or economic result? Does the company have little or no risk in circumstances where significant commercial risk would normally

be expected? Or, alternatively, does it need to eliminate substantial risks that arise because of steps introduced to secure a tax advantage?

Directors uneasy about the answers they receive should consider obtaining further advice. Directors do not have to be tax experts, but someone on the board should have the capacity to ask the right questions and evaluate the answers. Consult your solicitor if you are unsure about tax arrangements presented to you. □

MISLED ON PAY

Claims of potential earnings must be realistic

A company has admitted it misled a candidate in a job interview about the amount of commission he was likely to earn in the position.

After the Australian Competition and Consumer Commission took the company

to court, the court ordered it to pay the candidate who had accepted the position a confidential sum to compensate him for lost earning opportunity and costs.

The company also gave an undertaking to the ACCC not to make any unfair representations to interview candidates for

equivalent posts for the next three years. As part of this undertaking, it will implement and maintain a trade practices compliance program to make staff aware of their responsibilities. See your solicitor if you require any assistance with trade practice compliance issues. □

STRESS

Onus on employee to send early warning signals

A court has recently found that employees must give clear signals about work-related ill-health.

In the case, an employee who worked three days a week in supermarket merchandising found her workload excessive from the outset, and advised her employer on many occasions that the work expected of her had to be changed, or she should have more

time or help to do it. However, her complaints made no reference to the fact that her workload was affecting her mental health.

Five months after starting work, the employee fell ill. Initially diagnosed as physical, the illness was later described as psychiatric. Her work was found to be a cause of depression and fibromyalgia syndrome, a psycho-physical disorder which results in pain amplification.

On appeal the court found

that a reasonable person in the employer's position would not have foreseen the risk of psychiatric injury. It rejected a proposition that all employers must recognise all employees as being at risk of psychiatric injury from stress at work.

The court's decision confirms that employers are not expected to be clairvoyant about the mental state of employees. To recover damages for psychiatric injury due to workplace stress, the

onus is firmly on the employee to send early warning signals.

These signals can be expressed or implied by, for example, frequent or prolonged uncharacteristic absences from work. They must indicate not only that the person may be experiencing difficulties in discharging their duties, but also that those difficulties are having or are likely to have a detrimental effect on the person's mental health. □



SNIFFER DOGS

Evidence from over-keen pooch excluded

In a recent drug case a man sitting in a Byron Bay cafe was approached by police with a sniffer dog. Witnesses said the dog had immediately put its head under the table and nudged the man in the groin before sitting down next to him. Police searched the man and found 26g of cannabis.

On appeal, the evidence obtained following the police search was excluded from the case on the basis that the dog

had made improper contact with the man before the police officer had formed any reasonable suspicion on which to base a search.

At common law, any intentional physical contact can be considered a 'battery', and therefore unlawful. The judge decided that the police behaviour was improper and decided not to include the evidence.

The police must take all reasonable precautions to avoid sniffer dogs making any contact with a person. □

SUB-DIVISION

Vendor's obligation to register the plan

A vendor selling a lot in a prospective sub-division must use their best endeavours to get the plan registered within six months. If not registered within that time-frame, the purchaser, or both parties jointly, may annul the contract. However, the vendor can withdraw only if he or she has done 'everything reasonable' to register the plan.

Registering a plan for a sub-division, whether of numerous lots or only two, usually needs the specialised services of surveyors and engineers to comply with the requirements of the council and other statutory bodies, such as Sydney Water. A de-

veloper is rarely directly involved in the practical steps of registering a plan.

However, the failure of a third-party specialist to do something that is necessary for registration of a plan within time will not give a vendor the right to rescind the contract.

Some court decisions in the last three years show that the obligation to do everything reasonable under the Contract for Sale of Land can be troublesome.

In one case the judge found that the contract imposed a strict obligation on the vendor. The vendor's personal circumstances, knowledge of or ignorance of what is required and reliance on agents or contractors, are all *irrelevant* to the vendor's

obligations, the judge said. "If a step is reasonable the vendor must take it ... The only protection the purchaser has against rescission is the stringency of the condition."

An earlier case found that liability for things which were within the seller's own personal responsibility was unqualified, but that the seller was not liable for delay caused by specialists, such as architects, engineers and builders, unless they failed to remedy the delay when they could have done so by, for example, hiring another builder. □



RADIO WAVES

Owners and managers responsible for exposure risk

Owners and managers of properties which house radio communications towers or antennas have strict obligations to limit exposure to electromagnetic radiation by those who visit relevant parts of the premises.

Radio communications sites are commonly located on buildings because they offer good coverage by, for example, offering line of sight to a CBD or a major highway. They can be found on buildings such as hotels, hospitals, apartment blocks, office buildings, industrial and rural properties. There are an estimated 10,000 such sites in NSW.

The sites are not just mobile phone towers or antennas. They include the radio communications of taxi companies, paging companies and radio and TV broadcasters.

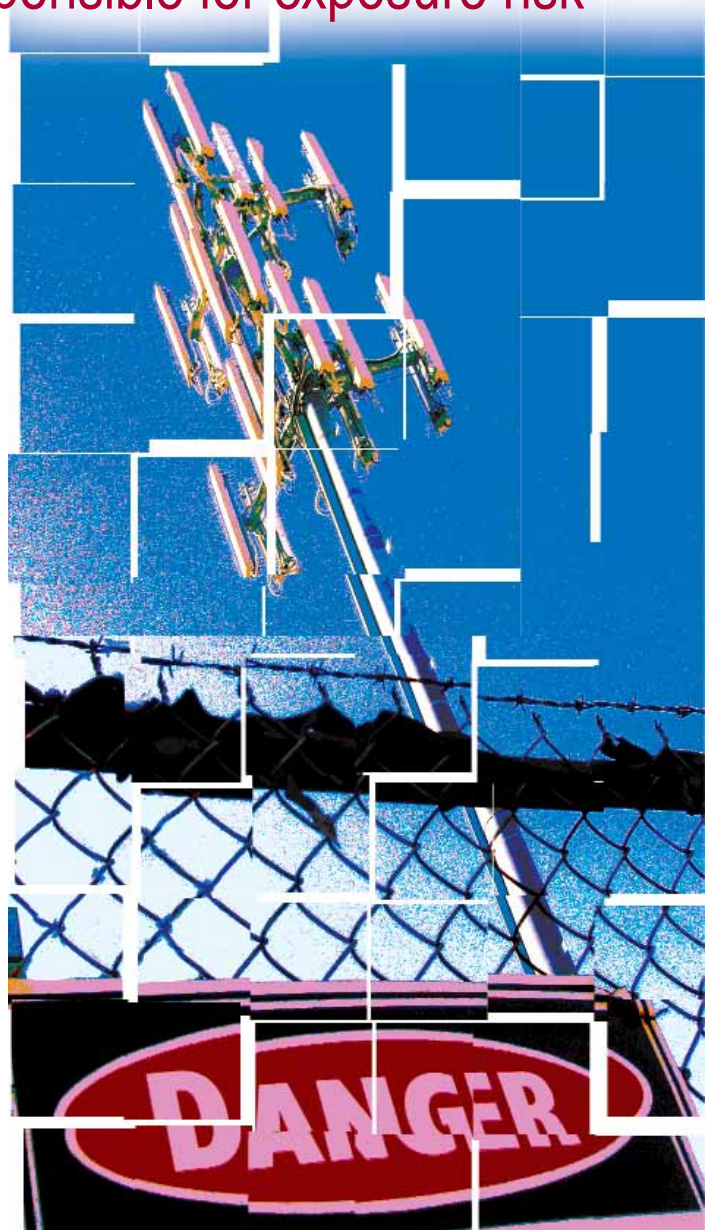
A legal standard establishes limits for exposure to electromagnetic radiation by setting general public and occupational exposure reference levels. (A member of the public is any person who is not a "trained RF worker" – broadly, these are the employees or contractors of radio communication licensees, such as the technicians who install, maintain or remove the equipment.) The roof-tops of

buildings which house such equipment are commonly visited by a surprising range of people, including lift mechanics, window cleaners, maintenance workers, construction industry personnel, public health inspectors, air-conditioning mechanics and, last but not least, the occasional smoker escaping from a smoke-free workplace.

The legal standard sets out a procedure to ensure against over-exposure. It includes determining areas where no access should be permitted, providing appropriate signs, and informing the relevant authority if exposure exceeds the limits.

Those in charge of premises used by people as a place of work have a legal obligation to ensure the premises are safe and without risks to health. It is common for building managers to have little or no idea what antennas are on their roof-tops. The 'forgotten floor' may be littered with antennas installed on the basis of little more than a handshake. Some managers are even unaware of what antennas are operated by their own organisation.

The fact that carriers at a site comply with safety codes does not mean site controllers are meeting their legal obligations. Contact your solicitor if you would like further information. □



JOINT VENTURES

How much do you have to share with your partners?

It is important to document carefully the exact nature and scope of a joint venture to avoid a legal battle if one partner independently pursues a profitable opportunity which arose while the relationship existed.

In a recent case, three parties had acquired a site to develop,

planning to let out existing units on the site pending the anticipated approval of a development application. No formal agreement was signed by the parties, but the key terms of their joint venture were set out in a letter.

A development application was lodged but not approved, because the proposed eight-storey development was too large for the site. The council suggested

that the adjoining two properties be acquired and amalgamated to maximise the site's development potential.

One of the parties then joined with a different group to purchase the adjoining properties, with a view to a larger development. The subsequent court case examined the allegation that this party had acquired information that was highly perti-

nent to the partnership, failed to disclose it and exploited it for his own benefit.

To avoid being held liable to account, and perhaps unable to justify a transaction if challenged, it is prudent to obtain the informed consent of joint venture partners for any profitable course of action you might propose to pursue independently. □