

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.

malouf  solicitors

LAWYERS, CONSULTANTS & ADVISERS

DISABILITY TRUSTS

Window of opportunity to convert existing trusts

Families may now make private financial provision for the future of a family member with severe disabilities through the creation of a special disability trust.

Long-awaited means test concessions now allow a severely disabled person's pension to be unaffected by a trust income or asset up to the value of \$500,000.

For these to apply, the trust must strictly comply with the new law and any department rulings, and it must be established for the sole purpose of providing care and accommodation for a person with a severe disability.

The first step in establishing a severe disability trust is to verify

with Centrelink or the Department of Veteran Affairs that the person for whom the trust is being established is severely disabled within the terms of the new law.

The trust must have only one principal beneficiary and its sole purpose during their lifetime, as provided in the trust deed, must be to meet their reasonable care and accommodation needs required because of the disability.

If a trust was created before 20 September 2006 and does not comply with the new law, the trustee can apply for it to be treated as one. It may be exempted from the requirements or be required to comply with some specified conditions. These need to be met by 30 June 2007 when the transition period expires. □

PLANNING AHEAD

Enduring guardians can help if you lose capacity

An enduring guardian is someone you appoint, at a time when you have capacity, to make personal, health or lifestyle decisions for you should you lose the ability to make them for yourself.

You can appoint more than one enduring guardian if you wish, and you should choose which decision-making areas you want them to have responsibility for.

You can give them as many or as few functions as you like. For example, you can authorise one



to decide such things as where you may need to live or what medical treatment you should receive.

Your enduring guardian must act within the principles of the Guardianship Act, in your best interests, and within the law. You cannot give your guardian a

function or a direction that would involve them in an unlawful act, such as euthanasia.

Your solicitor can explain the finer details about appointing an enduring guardian to you, and can prepare the necessary documents and arrange the signatures and certificates required. □

VICTIMISATION

Health and safety watchdogs given protection

Victimisation of employees occurs when an employer subjects or threatens to subject an employee to any disadvantage because they act in a particular way. It is a major threat to equality and other rights in the workplace.

An important area of concern is where an employee is victimised for complaining about something considered unsafe or a risk to health in the workplace, or where they have carried out occupational health and safety consultations with other employees as required under the Occupational Health and Safety Act.

In a recent case, a container transport company was found to have victimised a driver who complained about dangerous overloading.

The company had employed Mr P as a truck driver for about ten years. He was elected a union co-delegate and had been a shift supervisor for about five years. In a letter to his employer Mr P had outlined his concerns that the overfilling of sugar bins posed a threat to the safety to drivers and the public, because



high loads made the bins more susceptible to wind disturbance at highway speeds.

He also complained that some harvesting crews were failing to use the levelling bars provided when stacking trucks with sugar cane – a task drivers had no input in and for which he emphasised that as a driver he should have no liability.

The company drivers signed

a petition about the overloading of bins, to which Mr P was the first signatory. The next month the company announced that it had lost the contract to transport sugar from the mill, and staff were encouraged to apply for positions directly with the three local mills. Mr P subsequently received a low score from his company when it was asked for a reference check and failed to get one of the jobs on

offer. The judge found that Mr P had been victimised and ordered the company to find him a job and pay him for lost remuneration.

On the appeal, the Commission considered the term 'making a complaint' and found that even expressing dissatisfaction about a workplace matter may amount to the making of a complaint, and workers must not be victimised for it. □

TAX TIPS

Timing can save you money

Many legal documents have tax consequences and can determine when income is assessed and deductions allowed.

When a document provides for one party to pay what will be income to another, the way the document is drafted can impact on when that income is assessed for tax purposes.

Conversely, where one party has to pay a tax-deductible amount to another, drafting can impact on the timing of deduction of the payment. If the document relates to disposal of an

asset, one party might attempt to influence when it will be subject to capital gains tax.

People often ask – particularly when they have agreed to dispose of an asset just prior to year end – what they can do to cause any capital gain they make not to be taxed in that year but in the next. The obvious answer is to be patient, though, of course, a vendor may want to lock in a purchaser.

Normal tax accounting rules do not apply to capital gains tax – it is levied on an accruals basis. Tax is assessable when a taxpayer disposes of an asset

and not when he or she gets paid. The time of disposal is when a taxpayer enters into a contract for disposal or, if there is no contract, when change of ownership occurs.

Normally, there need not be consistency between the reporting of income and the claiming of deductions. For example, a taxpayer might both report income on a cash basis and claim deductions on an effective accruals basis.

Special rules apply to pre-paid expenses, and there may be special rules applicable to expenditure properly referable

to a subsequent year. Generally, where expenditure is incurred by a business and the services to which that expenditure relates are to be performed over more than a year, the deductions must be pro-rated. There are also anti-avoidance provisions designed to stop associates entering into schemes where deductions are allowed one year but income is not returned until the subsequent year.

Contact your solicitor if you would like information on contracts you are considering and their potential taxation implications. □

WARNING OF RISK

Would you have acted differently?

Most people genuinely believe that if given the option of doing something that might allow them to avoid an injury, they would do it. However, the courts have found that reliably this can only be determined by reference to 'objective factors', particularly a person's attitude and conduct at or about the time any failure to warn them of a risk occurred.

In one case, a woman argued that a failure on the part of a cinema to warn customers that the cinema seats retracted automatically was responsible for her injury.

The judge considered that evaluating what someone would have done if a warning sign had been displayed was a matter of hypothesis. It was considered relevant that the woman was distracted and preoccupied by a highly agitated child in her care, and therefore unlikely to take into account any message in a sign, which would only have

been seen fleetingly, if at all. Secondly, the person's movement in seating herself was not deliberate and conscious. As indicated by her imperfect attempt to gauge the presence and height of the seat behind her, it was a hurried, virtually instinctive move, unsurprising in the circumstances.

In medical treatments, a number of factors have been

identified as relevant when considering cause of an injury. These include the undisclosed degree of risk, the patient's desire for treatment (one example being a patient's enthusiasm for cosmetic surgery) and the need for treatment (including the prognosis without the treatment).

In a recent case, a judge noted as relevant factors: the serious-

ness of the person's need for corrective surgery, her evident willingness to undergo the risks of a general anaesthetic (risks with which she was familiar because of her medical background), her failure to ask specific questions about risk, and the fact that the possibility of injury, of which she said she should have been warned, was 'very slight'. □

SIMPLIFIED SUPER

Broad changes established

The Government has now released its plan to simplify superannuation. The new rules apply from 1 July 2007.

The most important change to superannuation is that most super benefits paid to over-60s, whether paid as a lump sum or a pension, will be tax-free.

For those under 60, the part not tax-exempt will be taxed at a maximum rate of 15 per cent for

those 55 or over, and 20 per cent for those under 55.

One reason for the complexity of the present system is that the law treats different types of pension differently. Under the proposed new rules all pensions will be taxed equally, provided they satisfy proposed new minimum annual payment amounts.

The new rules are not without hidden cost. From 1 July super funds will normally have to pay

out death benefits as a lump sum. If a lump sum is paid to someone who is not a dependant for tax purposes, it will be taxed at 15 per cent, which some categorise as a de facto death duty.

Tax dependants are spouses, or someone who had an interdependency relationship, or a person's children under 18, not usually the circumstances in the life cycle of a super fund, so benefits will face taxes. □

DANGER AT WORK

Directors' criminal liability for harm to employees

All company directors are in some way responsible for a company's safety standards and can be found criminally liable.

In a recent decision, the court stated that once an offence is proven against a corporation, the directors are considered guilty of the same offence, unless they make a successful defence.

In the case in question, an employee in a tank-washing facility was killed while attempting to remove residue resin from a tank using a highly volatile and flammable cleaning agent. The tank exploded, catapulting the

man seven metres through the air. A CEO was found liable.

The court rejected the CEO's first line of defence that he was not in a position to influence conduct in the company in relation to the safety issue and that his remoteness from the day-to-day activities of the company absolved him of liability. By virtue of their very position, most directors will have some influence in a company.

In relation to the second possible defence, that one had demonstrated all due diligence in attempting to prevent the breach, the question essentially becomes what is the required

due diligence for each director. The answer to this necessarily depends on the type of influence that the particular director has.

In this case the court rejected the director's argument that his obligations were discharged merely by reviewing OHS reports that kept him up-to-date on the company's safety concerns and making inquiries about safety when visiting sites, as he regularly did; and he was found guilty.

A CEO should ensure the presence of stringent reporting structures within a company to keep informed of all safety risks and the best ways of minimising them to avoid liability. □





BUSH PRESSURE

Complexity of land use and regulations

Rural industries are regularly the subject of prosecutions for environmental offences and not many realise how severe the penalties can be.

Regulation of virtually every aspect of agricultural use means that the average primary producer has to consider a myriad of rules and statutory obligations.

The movement of tree-changers with no interest in agricultural pursuits or traditional rural activities has developed a real potential for confrontation with primary producers, irrespective of the intensity of the latter's operations.

However, the intensification

of many operations, such as feed lots and the demands placed on modern growers to meet increasing quality standards, have creat-

ed a potential for adverse environmental impacts about which even other conventional land users, let alone the regulators,

complain.

In a recent case, a feed-lot owner was charged with maintaining over an extended period of time some 2,000 head of cattle more than permitted under the pollution control licence for the property.

In the case of a corporation, the penalty for contravention of a condition of a licence is \$1 million, with a further penalty of \$120,000 for each day the offence continues.

However, after taking into consideration such factors as an early guilty plea, cooperation with the authorities and the sincere expression of contrition, the penalty was assessed at \$80,000 plus costs of \$14,000. □

FINANCIAL DROUGHT

Tax relief and tax danger in defaulting loans

Communication with your bank is essential if you are in danger of defaulting on a loan.

Take the example of a farming couple who have just had a crop failure, and as a result are unable to meet their latest interest payment to the bank.

The couple trade as a partnership and their bank borrowings of \$500,000 are in their personal names.

Their farm is owned by the family company. They own all of the shares in the company, which has no debts.

The company acts as guarantor for the partnership debts and the guarantee is supported by a mortgage over the farm.

When the guarantee was entered into, the liability of the company was contingent on the couple defaulting.

However, as soon as the couple miss an interest payment they are in default under the terms of their loan agree-

ment, and the guarantee by the company becomes 'other than contingent'.

As the company has a distributable surplus, the loan of \$500,000 then becomes a deemed dividend to the couple.

In addition to missing their interest payment, they may now have to pay tax on the loan, assuming their farming losses

are not big enough to offset the dividend.

The Commissioner of Taxation has discretion not to treat the loan amount as a dividend if satisfied that the couple would suffer hardship because of the dividend and that when they entered into the loan with their bank they had the capacity to pay it.

However, what amounts

to hardship in the eyes of the Commissioner and the intended meaning of capacity to pay have not been the subject of judicial or tax office comment.

On a happier note, the tax office has announced that it can help those affected by the drought by giving them more time to lodge and pay income tax and activity statements. □

SMOKE ALARMS

Warning notice required on contracts for sale of land

A particularly worded warning notice about smoke alarms must now be attached to every contract for sale of land, or printed in the contract.

The warning of the requirements for the alarms must be legibly printed, in bold type, with

the words 'warning' and 'smoke alarms' in capital letters at least 3mm high. The rest of the notice must be printed in letters at least 1mm high. As well as pointing out that the owners of certain types of buildings and strata lots must have smoke alarms, and in certain cases heat alarms, the warning also states that it is an

offence to remove or interfere with a smoke or heat alarm.

All existing contracts were to be updated with the warning notice by 1 December 2006.

Failure to attach the notice gives a purchaser the right to rescind a contract. Contact your solicitor if you have concerns about contracts. □