CLIENT NEWSLETTER

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.

In this issue

LIQUOR LICENSING

Licence freeze extended, three-strikes rule now in force

If you own licensed premises, run one or are thinking of buying one, you'll need to be aware of licensing laws peculiar to NSW, particularly in the Sydney area.

Over a number of years, the NSW government has introduced new licensing laws to combat alcohol-fuelled violence and anti-social behaviour.
Recently, it extended the liquor licence freeze for parts of Sydney until 24 December 2012. The areas that continue to be affected are CBD South, Kings Cross and Oxford Street, Darlinghurst. This means new licences cannot be granted for hotels, clubs, nightclubs, bottle shops and wholesalers. Existing licence conditions cannot be relaxed and extensions of trading hours will not be authorised. Licences also will not be granted that allow restaurants to serve alcohol without a meal.

New laws have been introduced to set up a system by which repeat offenders breaking licensing laws could have their licences suspended or cancelled after three strikes.
A strike will remain on the licence for three years and runs from the date of the offence giving rise to the strike. A public register of strikes will be maintained by the Office of Liquor, Gaming and Racing.
Strikes are not merely personal to the licensee, so can continue to affect the licence, binding future licensees. This has the potential to limit the trading activities and reduce the capital value of both business and premises.
Strikes can be for selling alcohol to an intoxicated person, a minor, or outside hours, or permitting indecent, violent or quarrelsome conduct, or for the sale of drugs.
For the first strike, conditions can be imposed on the licence, including prohibiting the use of glass or requiring responsible service of alcohol officers to be employed at the venue.
At the second strike, authorities can order a winding back of trading hours to 11pm, patron lock outs at certain times, and prohibitions on the types of liquor sold or entertainment at the venue.
At the third strike, the licence will be cancelled or suspended, and penalties may be imposed on the licensee.

MOTOR ACCIDENTS

Obligations to take vehicle details

A recent court case has emphasised the importance of obtaining vehicle details when you are involved in a motor accident so you can establish a valid claim.

A pedestrian was crossing a busy street when he was hit by a car. After the driver stopped, got out of the car and spoke with him, the pedestrian left without taking down the details of the car or driver. He later made a police report and returned to the scene to find witnesses.
The court found that a reasonably informed member of the community could be expected to appreciate that it is important to obtain the registration number of the vehicle and, if possible, the details of the driver in order to pursue any claim for compensation.
The court found the pedestrian was not so injured that he was prevented from taking down the details of the other vehicle and overturned an earlier court decision to award him over $400,000 in compensation.

WARNING FOR DIRECTORS

Lessons from the James Hardie case

All seven judges of the High Court recently found that directors of James Hardie had breached their duties in approving a misleading announcement to the stock exchange on a corporate restructure.

The announcement said that a new foundation had sufficient funds to meet all legitimate compensation claims anticipated from asbestos products and that the establishment of a fully funded foundation provided certainty for both claimants and shareholders. The court found the directors had not discharged their duties with the degree of care and diligence a reasonable person in their position would have exercised.

The general message for directors is clear: “Don’t just sit there: do something!” Directors need to read all the board papers, ask questions if they are not sure and seek more information as required. They must be ready to explain their decisions, especially to regulators and shareholders, but also to the media and the public. They must not rubber stamp decisions, but rather independently judge and critically assess past and present information from management and any external advisers.

They should also control the agenda and the nature and extent of information they receive, examine assumptions in relevant papers and be wary of management which appears misguided, overzealous or hasty, or situations where they’ve had inadequate opportunity to reflect.

Among other things, directors should ensure all appropriate management have been involved in the relevant decision, and see if external expertise was required.

Continuous disclosure is one of the most important laws listed companies must comply with in Australia and needs to be taken very seriously. Generally, it’s safer to disclose than not to. The more market sensitive, the greater the need for directors to review. For example, an annual or half-year results release would always seem to require the approval of directors, whereas stock exchange notices confirming the vesting of previously disclosed share incentives could readily be left to the company secretary.

If a stock exchange announcement proves to be wrong, it should be corrected. There was no evidence that any of the James Hardie non-executive directors either objected to the final announcement or the relevant part of the draft minutes at the following board meeting, which the court relied on in finding them liable.

NEGLIGENCE

Company found liable for failure to have regular cleaning in place

A new High Court case has laid down the law on occupier responsibility when it comes to preventing slip and fall accidents in public places.

The court found Woolworths negligent for not having an adequate cleaning system in place in a busy pedestrian sales area outside one of its stores.

In the case, an amputee who walked with crutches fell when she slid on a greasy chip outside a Big W store. Woolworths had exclusive rights under its lease to conduct sales in that area, but it had no system of regular cleaning in place. Instead, staff were only trained in responding to spillages.

For occupiers, building managers and cleaners, the decision establishes a very rough rule of thumb that a cleaning contract should require areas with heavy pedestrian traffic (especially food courts) to be cleaned every 20 minutes. Building

managers and owners should be able to provide cleaning rosters, records and policies as evidence if a claim is made against them.
If you are making a claim, you will still need to establish all the necessary facts to succeed, though not specific evidence about when the actual spillage occurred, something almost impossible to prove in most cases.

AVOS

Increased efficiency for apprehended violence order applications

People involved in domestic and personal violence cases have new procedures to be aware of when applying for apprehended violence orders (AVOs).

The procedures for applying for AVOs have been streamlined, but some common issues arise, particularly if you do not use the services of a qualified lawyer.
People applying for an AVO will need to provide all written statements within two weeks, and the other party has a further two weeks to provide their reply. The case is then listed for a court date one week later to check that all statements have been provided.
If an applicant fails to provide their statement, the application may be struck out. If a reply has not been provided, the matter will proceed on the applicant's evidence alone.
Problems may arise because a common occurrence is for those defending an AVO to also be defending one or more criminal charges. They may face the real threat that anything they say in an AVO case may form the basis for future charges not yet laid by the police. For example, written replies in the AVO matter may amount to admitting to a criminal offence.
Contact your solicitor if you have questions about the new AVO requirements.

LEASE RENEWAL

Email with clear intention would suffice

The courts have found an email can be a valid way to exercise an option to renew a lease, but the notice must clearly state the tenant's intention to renew and not introduce any ambiguity.

In a recent case, the court held that an email satisfied a lease's requirement that the renewal notice be in writing. The court also found that the words "may be given or served" indicated there was no requirement for actual physical delivery of the notice.
With regard to the requirement for signing, the court held that the inclusion of the sender's name on the email amounted to signing. The purpose of signing was to identify the sender and authenticate communication, and this was sufficiently achieved in the email by setting out the sender's name together with the email address.

However, the court pointed out that its decision in this case rested on the particular wording in the lease, and did not mean that all options under all leases can be exercised by email.
The court also said that at a minimum, a notice to exercise an option must satisfy the requirements of the notice in the lease, be clear and not indicate any ambiguity.
In this case, the tenant's email wasn't completely clear because it mentioned the possibility of further negotiation, stating the tenant wished to have "at least another 20 years" and "tie in" leases of different premises, both of which would have involved alteration of the current lease.

SUPPRESSION ORDERS

Public interest outweighs private rights

Courts continue to require individuals to provide good reasons before granting suppression orders.

The recent high-profile case involving Gina Rinehart and the family's multi-billion dollar trust is a reminder that the principle of open justice will trump the private rights of parties to confidentiality agreements, especially where granting suppression orders would impede public scrutiny of the proper conduct of trustees.
The case revolved around three of Rinehart's four children applying to have her removed as trustee of the family trust. Gina and her youngest daughter, Ginia Rinehart, opposed the move. The case attracted a great deal of media attention and Gina and Ginia Rinehart applied for suppression orders to prevent publication of the details of the claim and dispute.
They argued that publication of information would attract more attention and increase the risk of kidnapping, extortion or assault, and also assist potential kidnappers or extortionists to target Gina Rinehart and members of her family.
The courts considered a new law which introduced additional grounds on which suppression orders can be granted, including to protect the safety of individuals, but continued to place importance on the principle of open justice. The courts said the law emphasised the primary objective of open justice and reinforced that orders should only be granted if necessary. It held that the Rineharts had failed to establish that the risks were sufficiently real. It said that the undesirable consequence of granting a suppression order on the basis the Rineharts applied for would be that any wealthy person involved in a court case ought to be entitled to one if the proceedings were likely to attract attention.
The High Court refused to hear an appeal, saying the court had regard to the important proposition that the proper conduct of trustees required close public scrutiny.

WORKPLACE

Out-of-hours conduct leads to dismissal

Employees should be aware that where out-of-work misconduct has an adverse effect on the workplace, it can constitute reasonable grounds for dismissal under the Small Business Fair Dismissal Code.

Employers need to realise that compliance with the code is more than a 'tick the box' exercise. They should have discussions with the employee, paying attention to their explanations and views.
In a recent case, owners of a small hairdressing business sacked an employee because they said there was risk of injury to a customer or employee from the person's erratic behaviour and drug use. The person had been using drugs for an extended period, and appeared at the owners' home one evening claiming he had been poisoned and that his apartment had been set on fire. He was then admitted to hospital and certified unfit for work for several days. Following this, his employment was terminated with immediate effect.
After an appeal, the courts found the termination was in line with the fair dismissal code. The relevant paragraph of the code allows immediate dismissal for serious misconduct, including theft, fraud, violence and serious breaches of occupational health and safety procedures.
The court emphasised that, generally, employers do not have the right to control or regulate an employee's out-of-hours conduct. However, where such conduct has a significant and adverse effect on the workplace, the consequences become of legitimate concern to the employer, as in this case, and the court accepted the immediate dismissal on reasonable grounds.

TRANS-TASMAN FAMILIES

New laws may help untangle assets on family breakdown

As more Kiwis move to Australia, differences in family law between the two countries become more important when relationships break up.

Complex issues can arise around applications for the division of property. Generally speaking, the choice of law is determined by the law of the country in which the couple live, except when it comes to real estate property.
In Australia, at least one member of a couple must be an Australian citizen, or present in Australia at the time of the application over real estate. But in New Zealand, there is no such requirement, though inherited property is treated as separate property and is generally protected from division.
Unlike Australia, the law in New Zealand provides that where a couple (whether married, de facto or same-sex) has been together for three years or more, there is a presumption that relationship property is divided equally – subject to some very limited exceptions. In nearly all New Zealand cases, the family home, irrespective of who initially owned it, would be divided after three years of a relationship.
Again, unlike Australia, a claimant's access to trust property in New Zealand is much more limited. Generally speaking, if property is owned by a trust, then it is excluded from consideration under New Zealand law, subject to a few exceptions.

This often leads to a position where substantial amounts of property are excluded from the equal sharing regime.
Binding financial agreements are another problem area. New Zealand agreements are not binding in Australia. And a binding child support agreement entered into in Australia is only treated as voluntary in New Zealand.
New laws in both countries are being introduced to simplify family law financial issues across the Tasman. Among other things, they will deal with the vexed issue of enforcing family court orders over New Zealand property.
Contact your solicitor if you need advice on family law issues or financial claims across the Tasman.

FAKED EVIDENCE

Photo forensics can trace the edits

You might be involved in an AVO defence, a claim against police or a family law matter where photos are being tendered. What can you do to ensure they haven't been tampered with?

Digital photos might be easy to edit, but there are many ways of detection, only some dealing with visible issues.
Classic signs of tampering are where light appears to illuminate a subject from several directions when clearly there could only have been one light source, or where anomalies of perspective are created from an inexpertly added object.
But even very professional edits can be discovered using quality software.
In the US, a recent lottery draw for over $640 million was world news when someone posted three photos of a 'winning ticket' on a social media website. The photos were believable visually,
but the context indicated they were probably fake, and an expert ultimately proved them to be so.
The first image was analysed to see if different areas of the image had been compressed at significantly different levels. All jpeg photos have some degree of compression. Even after multiple saves, there should be consistent degradation across an entire photo. This sort of analysis easily reveals whether something has been added to or removed from a photo – if an element has been copied and repeated from within the photo, other examination is required.
The next step is to consider whether tools like Photoshop have been used. These introduce distinct artefacts peculiar to the brand of software and, after processing, experts can visually identify the software used.
Another detectable anomaly is varying colour spaces, which was used to discover the lottery fake. Altered parts of the photo will be revealed by detecting changes in the colour values used in different parts of the photo.
You need not accept defeat in the face of a digitally altered photo. Ask your solicitor to call in the experts.