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newsletteroftheLaw

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One national consumer law

Thirteen different consumer protection laws will become one under a Bill introduced into the Australian Parliament on June 24.

The Trade Practices Amendment (Australian Consumer Law) Bill 2009 introduces a single national consumer law and starts the process of replacing consumer laws across Australia and the consumer protection provisions of the Commonwealth *Trade Practices Act 1974*.

The Bill will also introduce a national unfair contract terms law that will apply to standard form business-to-consumer contracts.

In relation to business-to-business contracts, the Government is reviewing both the unconscionable conduct provisions of the *Trade Practices Act* and also the *Franchising Code of Conduct*.

Since these reviews relate to business-to-business contracts, the Government will consider the issue of business-to-business standard form contracts when these reviews are complete.

The Government will refer the Bill to the Senate Economics Committee.

A second Bill, to be introduced in early 2010, will complete the Australian Consumer Law.

Once fully in place, the national consumer law will implement a national approach to product safety. Under the national approach to product safety, a state imposing an interim ban on a product will notify the Australian Government immediately. The Australian Government will then determine whether a permanent national ban should be made.

The states and territories will apply the entire Australian Consumer Law as part of their own laws by January 1, 2011.

Human rights Act

The Public Interest Law Clearing House (PILCH) says the elderly, people experiencing homelessness, refugees and other marginalised and disadvantaged groups will continue to experience significant human rights violations unless the Federal Government enacts a human rights Act.

PILCH acting executive director Mat Tinkler said PILCH had made a number of submissions to the National Human Rights Consultation, informed by its pro bono legal work advising disadvantaged clients.

"Clients routinely walk through our door with stories of violations to their basic human rights – people experiencing homelessness, the elderly, asylum seekers, people with a disability and racial and religious minorities are just some of the people that our present laws fail to protect adequately," Mr Tinkler said.

"Our submissions to the consultation have been informed by the experiences of these people, and their plights clearly demonstrate that Australia needs a human rights Act that enshrines fundamental civil, political, economic, social and cultural rights. Parliamentary accountability means little to someone who is about to be evicted into homelessness – a human rights Act will improve the practices of government and promote a 'fair go' for all Australians."

Triage approach to justice system

The justice system needs a hospital-like triage function that will help users navigate a "bewildering array of disparate institutions", the country's first legal officer said.

The right pathway to enter the justice system, including courts, tribunals, legal assistance service providers, alternative dispute resolution providers and ombudsmen, was not always clear, federal Attorney General Robert McClelland said. Rejecting any need to inject more money into the justice system, Mr McClelland said the Government believed in a more "strategic approach" to improved access to justice.

"Nor, for that matter, is it simply about providing more resources for people to conduct a knockdown, drag-out court case if other remedies are more effective and appropriate," he said. The Attorney compared an effective justice system to a hospital, where a triage function enables matters to be directed to the most appropriate destination for resolution.

McClelland urged the legal profession to take a role in helping people access the best pathway to resolution.

If you need advice on how best to resolve a legal dispute, contact **ABKJ Lawyers** on (07) **5532 3199**.

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Case in point: *Kennon v Spry*

The High Court recently passed a decision that resulted in a divorced woman receiving more than $2 million from her ex-husband who had excluded her from the family trust.

Late last year, the High Court decided in *Kennon v Spry* that a husband who tried to exclude his wife from the family trust would have to pay her more than $2 million.

Dr Ian Spry is a renowned expert on tax and equity. In 1968, he started a family trust, of whom the beneficiaries were the descendants of his father, together with their spouses.

In 1978, Dr Spry married. Dr Spry and his wife Helen had four daughters, who by the time of the court case were all adults. In 1983, Dr Spry, who was the sole trustee of the trust, excluded himself as trustee and appointed Helen as trustee. Dr Spry remained the person capable of appointing, and sacking, the trustee.

In 1988, when the marriage was in difficulty, Dr Spry varied the trust again to exclude both himself and Helen as capital beneficiaries.

In 2001, the parties separated. Within three months, Dr Spry divided the property of the trust in four, dividing it equally between the four trusts he had set up for each of their daughters. Both Dr Spry and each daughter respectively were responsible for the appointment and removal of trustees of each trust.

In 2003, the parties divorced. The effect of the divorce was that Mrs Spry was no longer a beneficiary of the trust.

Mrs Spry's claim

Mrs Spry sought to include the property of each of the trusts as property of the parties, capable of division between the parties. She sought to set aside the variation of the trust deed that prevented her and Dr Spry being capital beneficiaries, and the transfers from the trust to the daughters' trusts.

Earlier proceedings

The trial judge upheld Mrs Spry's claim. Dr Spry appealed. The Full Court dismissed his appeal.

Dr Spry appealed to the High Court, but the majority of the court dismissed the appeal.

Was the right to administer the trust "property"?

The majority held that it was.

Counsel for Mrs Spry submitted that, when the primary judge determined the proceedings, the assets of the trust were the property of a party to the marriage as Dr Spry was the only person entitled in possession to them. On that basis, the Family Court had the power to make the order it did.

No object in the trust had any fixed or vested entitlement. Dr Spry was not obliged to distribute to anyone. The default distribution (cl7) gave male beneficiaries other than Dr Spry no more than a contingent remainder. None had a vested interest subject to divestiture.

The application of s79 of the *Family Law Act 1975*, as a matter of construction, to the trust assets was said to be supported by a number of considerations. Among these was the "true character" of the trust as a vehicle for "Dr and Mrs Spry and their children".

In response, counsel for Dr Spry submitted that his legal title, absent any beneficial interest, did not justify treating the trust property as his own. A policy question was said to be raised. It would be "inappropriate" for the court to treat the assets of a trust as a trustee's property where the trustee had no interest under the trust.

The court was invited to consider the implications of Mrs Spry's submissions for the case of a trustee with no personal relationship to the beneficial objects of the trust. The Family Court, it was said, must take the property of a party to the marriage as it finds it. It cannot ignore the interests of third parties nor the existence of conditions or covenants limiting the rights of the party who owns the property.

The reference in s79 to "the parties to the marriage or either of them" includes a reference to a marriage terminated by divorce at a time before the court makes an order under that section. As the judges point out, the Family Court, when it is just and equitable to do so, can make orders in property settlement proceedings as if changes to property rights otherwise effected by the divorce had not occurred.

Was Mrs Spry's right to administer the trust "property"?

The High Court held that it was.

The rights to consideration and to due administration are in the nature of equitable choses in action. There has been considerable judicial discussion about the nature of a beneficiary's right to due administration in the case of the residuary legatee of an unadministered deceased estate and members of superannuation funds whose benefits have not vested.

Contact ***Murray Bruce*** *at* ***ABKJ Lawyers*** *for advice on recent changes to family law and how these might affect you.*

Supporting whistleblowers

A pivotal report showing how government departments can better protect whistleblowers was released on Wednesday, July 29, at the Australian Public Sector Anti-Corruption Conference.

It is the second and last major report of the groundbreaking *Whistling While They Work* project, spearheaded by Griffith University and supported by the Crime and Misconduct Commission (CMC), Commonwealth Ombudsman and other Australian integrity bodies.

The report offers more than 20 recommendations on what governments can and must do to better protect public servants who speak up about public interest wrongdoing.

The national research revealed that less than 2 percent of public interest whistleblowers receive organised support, even though their value to public integrity is widely acknowledged.

"With more than half of all public interest whistleblowers estimated as suffering a stressful experience, including around a quarter reporting reprisals or mistreatment, there is a huge gap to be filled in the more effective provision of support," Professor Brown said.

Recommendations in the report include the need for better tracking of disclosures, provision of internal support programs including counselling support, closer management oversight of how whistleblowers fare, stronger commitment from senior managers, and closer relations with external integrity agencies.

The new report provides the basis for a proposed new Australian standard for whistleblowing programs for organisations, in partnership with Standards Australia.

Professor Brown called on all governments to introduce legislative reforms to require government departments to implement the recommendations.

"Australia is awaiting the Rudd Government's response to a House of Representatives inquiry into how it should implement its commitments to protect whistleblowers," Professor Brown said.

Rights of public housing tenants

Heavy-handed government housing measures to clear public tenants from their homes could be fought on human rights grounds if Australia had a federal human rights Act, according to Australian Lawyers Alliance director Greg Barns.

Mr Barns was commenting on a situation in North Ryde and Eastwood where public housing tenants were being forced out of their homes to make way for medium-density developments.

"Australia is the only democratic country in the world without a formal, legal document protecting human rights," Mr Barns said. "Victoria and the ACT are the only states to have adopted their own protective documents, but a federal document would ensure universal protection for everyone in Australia.

"People have a right to live in the community they are familiar with and where they have their social connections. It is important for their health and wellbeing."

Mr Barns said that last year, in Victoria, a pregnant single mother with two children, who was living in community housing, was given an eviction notice which didn't provide any reasons for the eviction, nor allow her to address the landlord's concerns. The *Victorian Charter* was used (the rights to privacy and protection of families and children) to negotiate with her landlord to stop her eviction and prevent her family becoming homeless.

Compulsory acquisitions – know your rights

Compulsory acquisitions lawyer Tony Raunic says landowners should not feel they need to swallow the lot being offered to them by governments during the compulsory acquisition process.

"We hear all the time from land owners who see themselves as powerless victims in these cases," Mr Raunic said. "While we may not be able to stop an acquisition, we can certainly put together a strong argument for fair compensation, and we have done that for many clients in recent times in relation to various government projects.

"With the enormous infrastructure spend planned by governments and instrumentalities over the next few years, many people and businesses are going to have land and other interests acquired compulsorily. We already know that notices have been or are about to be sent for the Regional Rail Link – West of Werribee to Deer Park as well as the Outer Metropolitan Ring Road, but there are up to 50 major projects flagged by the Government for the next two to three years," Mr Raunic said.

"There are some important legal rights for land owners and other parties and claimants are often unaware that these rights go beyond being compensated merely for land value alone. We have clients all around Victoria who have benefited from our assistance when their land was acquired for roads and other infrastructure projects.

"It is critical that landowners don't just throw their arms in the air when they receive a notice of acquisition. In most cases, you cannot stop the acquisition itself, but, with assistance, you can obtain early advances of compensation while still maintaining your claim for compensation against the acquiring governments and authorities, and also obtain payment of your legal and valuation expenses."

Vocal response to employee share backdown

The Federal Opposition has highlighted a Government backdown on employee share schemes, which will see the reinstatement of tax deferral, an increase in the income threshold from $60,000 to $180,000 for the $1,000 tax exemption, and new provisions allowing tax deferral for up to $5,000 worth of shares acquired through salary-sacrificed arrangements.

Announcing the changes on July 1, Assistant Treasurer Nick Sherry said the Government has taken on board the concerns raised during the recent consultation period and examined the most efficient way of protecting the tax base and cutting down on potential avoidance and confusion at the higher end, and maintaining the current support for employee share ownership schemes, particularly for low and middle income workers.

According to Ai Group chief executive Heather Ridout, the changes "involve welcome progress and contain important further changes beyond the revised proposals announced in the discussion paper of early June".

However, Ms Ridout said there remained issues such as "a lack of clarity around the taxation of shares and of options at the point where they vest (and when there are no further restrictions on disposal) rather than when they are acquired".

However CPA Australia senior tax counsel Garry Addison said the changes "strike the right balance" – a comment echoed by the Institute of Chartered Accountants in Australia (ICAA).

Changes to copyright law in importing books

The Productivity Commission recently released a report on the restrictions which currently prevent booksellers from importing into Australia books that have been lawfully published in another country (parallel importation).

If the Government adopts proposed recommendations to repeal the restrictions in their entirety, there will be wide-ranging impact for the publishing industry, copyright lawyers and consumers, according to intellectual property specialist, Troy Gurnett.

The current restrictions, which are contained in the *Copyright Act 1968*, only apply to books that are first published in Australia, or first published overseas (in a member country of the Berne Convention) and then published in Australia within 30 days. Parallel importation of such books constitutes an infringement of the copyright subsisting in those books.

Booksellers are, however, entitled to engage in parallel importation if the copyright owner fails to supply books to the Australian market for a period of 90 days (the restriction begins to operate again as soon as the copyright owner is in a position to fulfil booksellers' orders), and in circumstances where the bookseller is seeking to fulfil a single customer order.

If you have any questions about developments in copyright law, contact **ABKJ Lawyers** on (07) **5532 3199**.

Risks for injured older workers

Older Australians injured in work and motor vehicle accidents can end up being disadvantaged by insurers when claiming for "economic loss", according to personal injuries lawyer Kylie Hughes.

With the global financial crisis forcing many people to work beyond the traditional retirement age of 65, and now with the retirement age lifting to 67, Ms Hughes said there were potential pitfalls for older people injured in accidents.

Ms Hughes said her client, a former Brisbane truck driver and courier, was 71 and had no plans to retire when he was injured in a motor vehicle accident during work hours on February 14, 2007.

The insurer originally offered Mervyn a nominal amount in compensation because economic loss was not taken into account in his claim as he was already over the traditional retirement age.

Mervyn received more than five times the original offer after the law firm successfully argued that he had intended to keep working for many years due to the current economic climate.

Moral hazard clauses in sport contracts

Moral hazard clauses that allow sponsors, sports bodies or clubs to tear up contracts because of a players off-field behaviour are set to become the norm, according to sports lawyer David Yates.

Mr Yates, who has advised both sponsors and sports bodies on contractual issues, said neither party was prepared to continue weathering the increasing negative publicity brought about by players behaving badly.

"Sponsors are saying they want their teams being covered on the back page of the paper rather than having players splashed across the front page for their latest indiscretion," Mr Yates said. "And in a tough financial climate, sporting bodies are no longer willing to risk millions of dollars in sponsorship because of bad publicity."

Moral hazard clauses in sponsorship agreements can allow sponsors to immediately withdraw or renegotiate their financial support if the clubs or sporting organisation they back are embroiled in a major scandal. Clubs meanwhile are drafting player agreements that allow them to terminate the contract of any player behaving badly to head off any such action by a sponsor. In the past, attempts to squeeze these situations into standard form termination clauses have at times met with difficulty. "For the sponsor, it protects its brand and reputation. But for a sporting club, it can offer them a way to read the riot act to misbehaving players and therefore act more effectively to keep them in line," Mr Yates said.

While such clauses have occasionally been used before, they are now likely to be prominent in any future sponsorship or player contract negotiation.

Record $200,000 fine for carwash owner

A Melbourne car wash and its director have been fined more than $200,000 for underpaying five staff a total of $4,511.

The Fair Work Ombudsman, who initiated the legal action, has welcomed the penalty.

"This sends a very clear message to unscrupulous employers that there's a high price to be paid for trying to rip off your workforce," FWO executive director Michael Campbell said.

Reiquin Pty Ltd, which runs the Royal Melbourne Car Wash at Camberwell, has been fined $184,800 and the company's owner and sole director Richard Timothy Reid, of Malvern, a further $23,100.

The $207,900 penalty is a Victorian record for an FWO prosecution for underpayment of workers.

The previous highest was a $183,400 fine delivered in May against Penang Kayu Nasi Kander Pty Ltd and businessman Poh Meng Hong for the underpayment of workers at their former Malaysian restaurant at Box Hill.

The Reiquin penalty was issued in Melbourne Magistrates Court after the company admitted underpaying five casual workers in 2006.

The individual underpayments were $212, $642, $781, $851 and $2025.

If you believe you have been underpaid, or for advice on employment law, contact **ABKJ Lawyers** on (07) **5532 3199**.

Cyclist injury claims on the rise

Claims from cyclists injured in accidents involving motor vehicles are rising dramatically as more people choose to use a bike to commute to work or ride for recreation.

Personal injuries lawyer Jaswant Sandhu said her firm had experienced a 50 percent rise in injury claims from cyclists in the past six months.

Ms Sandhu said the majority of those injured were adult males on their way to and from work.

"We have had claims from riders ranging in age from their late 20s to even a Cairns man in his 80s," she said.

"Most of the claimants are highly experienced riders, including one man who used to cycle more than 400km per week, including regular rides from his home on Brisbane's northside to the Sunshine Coast.

"But he was clipped by a truck on David Low Way on the Sunshine Coast and suffered major injuries which have resulted in him being no longer able to ride on the road."

Ms Sandhu said none of the claimant cyclists was found to be at fault in their accidents.

She said the growth in cycling accidents highlighted the need to improve safety for riders by building more bike paths and creating more dedicated bike lanes on the roads.

For more information about personal injuries law, contact our office - **ABKJ Lawyers** on (07) **5532 3199**.

Bakery fine for not keeping proper employment records

The federal workplace watchdog has launched a prosecution against a Newcastle bakery, alleging it failed to keep proper time-and-wages records for four former employees who claimed they had been underpaid.

Under workplace law, employers must maintain time-and-wages records relating to employees and former employees and provide the records to workplace inspectors on request.

In documents lodged in the Chief Industrial Magistrate's Court in Sydney, the Fair Work Ombudsman alleges that the bakery did not make or keep records with sufficient details to allow Fair Work inspectors to determine whether four former employees had been paid their full entitlements.

The prosecution documents also allege that the bakery failed to comply with a requirement to issue the former employees payslips containing basic information within one day of payment of their wages.

Mr Campbell says it is alleged that the bakery committed nine contraventions of workplace law.

The maximum potential penalty per contravention is $5,500. Fair Work Ombudsman executive director Michael Campbell says workplace inspectors requested the records of the four former employees after they complained they had been underpaid.

If you have concerns about your employment conditions or record keeping, please contact our office.

Home lending defies global doom

The Housing Industry Association (HIA) has announced that a lift in home lending in May points to a green shoot in home building.

HIA senior economist Ben Phillips said that the number of loans for new dwellings had risen for nine consecutive months and pointed to a modest recovery emerging for residential construction.

"New home lending figures are in contrast to the surprise negative building approvals figures for May and show that the housing sector continues to be buoyed by the first home buyers grant and low interest rates," Mr Phillips said.

The total number of seasonally adjusted loans for owner occupiers increased by 2.2 percent in the month of May 2009 to a level 23.5 percent higher than in May last year. There was an 8 percent increase in loans for construction while lending for established dwellings (net of refinancing) was up by 2.7 percent. The number of loans for the purchase of new dwellings grew by 2.9 percent.

"First home buyer activity continues to be a key feature of the strength in housing finance with the number of loans for first home buyers up by 102.5 percent in May compared to a year earlier," Mr Phillips said.