

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.

Family arrangements

Informal agreements pose hurdles when challenged

The trust that usually exists in family relationships often leads to arrangements between family members, even major financial ones, being made on an informal basis. This can cause problems when disagreements arise or one family member dies and the arrangement has to be proved in court.

An unfortunately clear message from the many recent court cases arising from disputed informal family arrangements is that the people involved are among those least likely to seek legal assistance to put important understandings in writing until it is too late.

In one case, a young farmer thought he had an arrangement with his father that he would be left a 10-acre farming block of land on the father's death. The father encouraged that belief by comments he made to others. The son relied on his assumption or expectation of inheriting the farm and made a major life and career choice to stay in the country as a farmer and continue to work the block of land. However, after the father's death, it was discovered that his will did not reflect the arrangement he had made with his son. The farm was not left to him and he had to go to court to pursue his claim that he had suffered detriment by



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reason of the expectation not being fulfilled in the father's will, because his career choices could not be redressed.

In another case, a young man and his wife-to-be were looking for a house to buy. This would be their marital home. The young man's father bought a house and said to them: "I've bought you a house. This is your house." The young couple moved in, paid all the outgoings and \$200 per week to the father.

They also spent significant money making improvements to the property in the expectation that their home was later to become legally theirs. However, the father reneged on the deal, later asserting that the couple had merely been renting the house. The young couple had to go to court to try to enforce the promise made by the father.

Other cases have involved relationships between in-laws, estranged spouses, siblings, aunts and uncles, and in one very high profile case, a deceased's one-time mistress.

Arrangements put in writing with proper legal advice can avoid disputes arising in the future. Consult your solicitor for advice. □

Time with grandkids

The special relationship of grandparents

In a recent case, a paternal grandmother asked the Family Court to order that she be permitted to spend time with her grandchildren.

The mother of the children opposed the application, alleging that it was a backdoor attempt to increase the amount of time the father could spend with the children. She also alleged that the grandmother was trying to undermine the mother's parenting, and that, if the grandmother was granted the order, it would cause the mother to suffer such anxiety that her parenting capacity would be badly affected.

The judge disagreed, saying he was satisfied that it was in the children's best interests that they have a special relationship with their grandmother different to that with their parents. That the children spent limited time with their father was not a reason, the judge said, to place limits or constraints on their relationship with the grandmother. □

Negotiating skills

Getting to 'yes' may need creative options

Dealing with a dispute and maintaining a good working commercial relationship need not be conflicting goals. In the 'interest-based' model of negotiations or dispute resolution, there are four key elements to success.

1 First, separate the people from the problem.

People should come to see themselves as working side by side, attacking the problem, not

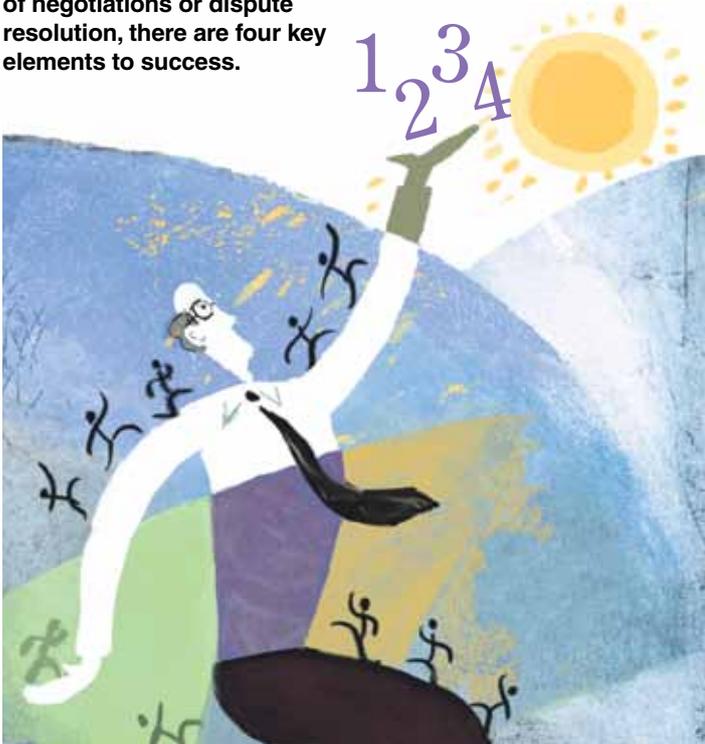
each other. A good conciliator has the ability to recognise and understand the emotions and needs of each party. They acknowledge such emotions as being legitimate and don't belittle them or ignore them. By allowing the venting of anger and frustration, a good conciliator knows that the negotiating parties are obtaining a psychological release that sets up a fertile environment for reaching a solution.

2 Another element of good negotiation is the ability to focus on interests, not positions – meaning generating a variety of possibilities before deciding what to do and insisting the result is based on some objective standard. The key for a good conciliator is to be able to look beyond each party's position and identify the shared and compatible interests, as well as conflicting ones. Solicitors often see people in negotiations who automatically assume that the other party's stated bargaining position is the

same as that party's interests. The truth is that a stated position rarely reflects the party's interests. Often, people think a dispute is simply about the payment of money, but quite often other interests are at play.

3 The third crucial element is the ability of negotiators and conciliators to invent options for mutual gain well in advance of reaching agreement. Rather than try to narrow the gap between stated bargaining positions, a good negotiator will try to broaden the options available for settlement.

4 The final element is to insist on the use of objective criteria as a reference point. This means that any agreement should be reached independently of the naked will of either party and be referenced to some objective standard, such as market value, expert opinion, precedent, scientific judgment, professional standards, efficiency, tradition or costs. □



Qantas GST headache

What is a taxable supply?

GST is only levied on "taxable supplies". The difficulty in determining what is a taxable supply is illustrated by a recent Qantas case.

The case involved \$26.5m in forfeited air fares over three years. GST on this amount was over \$7.6 million.

When people book and prepay for flights, they are often entitled to a refund of their advance payments if they don't actually make the flight. The essence of the dispute was whether Qantas, in taking prepayments, made a supply or whether it did not until it actually carried its passengers.

A taxable supply is defined as a supply made for consideration in the course or furtherance of an enterprise that is connected with Australia, made by people registered or required to be registered for GST purposes.

Qantas argued there could

be no taxable supply if someone to whom it sold a ticket did not actually travel.

The High Court, however, noted that Qantas's conditions did not provide an unconditional promise to carry a passenger on a particular flight. It only promised to use its best endeavours to carry the passengers. This was the "taxable supply" for which the fare had been paid. GST was payable on the issuing of a ticket, not on its usage.

The case may have more widespread significance. GST is a transaction tax and is not just levied on day-to-day transactions. It might be levied on sales of real estate, for example, or commercial and domestic settlements and financial transactions. The key to applying the GST is not to look at the commercial substance of a transaction but to its legal form. □

Sacked for sending porn

Employee loses appeal

An Australia Post employee who was sacked after sending pornographic emails from his work email address to a friend, had initially been reinstated, but finally the courts found his dismissal was justified.

It was explained to the courts that Australia Post had a number of policies relating to IT use, discipline, ethics, harassment and discrimination. Bulletins to staff, training programs and talks by management reinforced the messages. In addition, a pop-up box appeared whenever a computer was turned on, requiring the user to click 'accept' in order to access the IT system. The pop-up box said Australia Post could take disciplinary or legal action against anyone who didn't comply with its policies, or who misused its IT facilities, including email and

internet. Misuse was described as including "use, access or transmission of pornographic photos, animation, cartoons and images" and "sexually explicit, sexist, racist material".

Initially, the worker's dismissal was held to be disproportionate to the circumstances. It was found that he had a "naive disregard for the requirements of the Australia Post policies on email use", was genuinely remorseful, and that the conduct did not threaten Australia Post's reputation.

But on appeal the court found that an inappropriate email identified as being associated with Australia Post had the potential to cause damage to the organisation. Also, Australia Post's policy training and the pop-up box gave employees ample warning of the implications of such misconduct. □

Motor Accidents

Opening the door to CTP claims

A court has recently found that even though an injured person may have contributed to a motor accident, they will still be able to make a CTP claim, though the compensation may be reduced.

The case involved a 14-year-old who ran out from behind a school bus and into the path of a motor vehicle, giving the driver no chance to avoid colliding with her. She was seriously injured and brought a claim against the driver of the vehicle. It was accepted that there was no fault on the part of the driver.

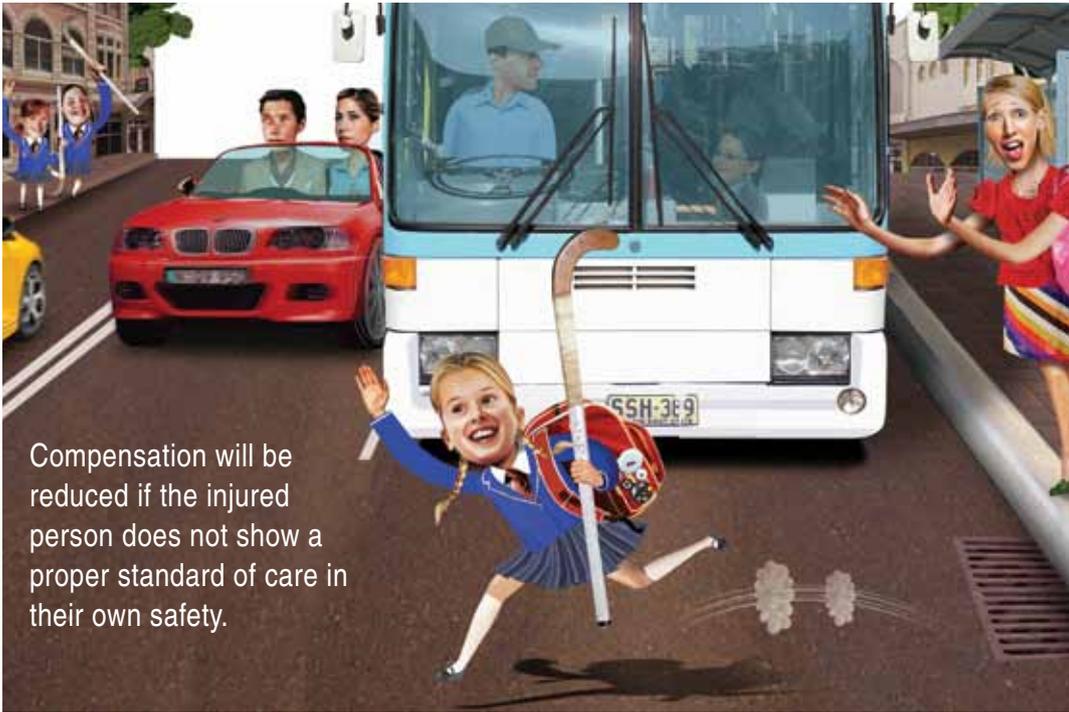
However, under the law, the driver could be deemed to be

at fault – known as a blameless accident – provided there was no other person at fault, allowing the injured person to claim under the CTP insurance. At issue in the case was whether fault by any other person included that of the injured person.

The court found that the injured person could not be a person at fault in such circumstances and thus could make a claim under the blameless accident provisions. However, the court said that the compensation should be reduced by the amount that the injured person departed from the standard of care she

was required to observe in the interests of her own safety. In this case, the court took into account the girl's age and the circumstances of the accident and reduced her compensation by 50 per cent.

If it had been a drunk adult pedestrian who ran in front of a car, the compensation could well have been reduced by 100 per cent. And as a result of this case, for children aged six and below, it's likely that they will now have complete no-fault entitlements under the motor accidents scheme due to the fact that they are not capable of being found to have contributed to the accident. □



Compensation will be reduced if the injured person does not show a proper standard of care in their own safety.

Recycling

When waste is not waste

Material being transported may not be defined as waste if wanted for another purpose.

In a decision that has implications for those in the recycling and resource recovery industries, a court has found that material that may be waste can be lawfully transported if it is intended for another purpose.

In the case before the court, a company had been hired by a couple to transport 680 tonnes

of fill material for use in constructing a road on their 20 hectare rural property. The fill material included crushed rock, broken bricks, tiles, concrete and other inert material from demolition or excavation works.

Under environmental laws, it is an offence to transport and deposit waste material at a place that is not a waste facility.

The court found that despite being the product of demolition, the material was specifically

wanted for the purpose of road construction and therefore was not waste. It said that the fact that the original party that discarded the material did not want it did not alone cause it to be waste.

Relevant to the court's consideration was the fact that the material had been separated from other material resulting from demolition, which had been treated as waste and transported to a waste facility. □

Preparing wills

A gift halved by company taxes

It's always wise to take legal advice when preparing a will to avoid the risk of your family losing much of the gift.

Take, for example, the case of a wife, Kate. She wants to leave everything to her husband Scott, except her share portfolio, which she wants to go to their daughter Sophie.

The complication is that the family company that owns the business assets, which are to be left to Scott, also owns some of the listed company shares Kate has funded and wishes to leave to her daughter. Husband and wife each own 50 per cent of the family company shares.

Tax laws may treat family members as business associates.

Under tax law, a private company is taken to pay a dividend to an associate of the shareholder if the company transfers property to that associate for less than full market value. The definition of associate is very wide and certainly includes father and daughter.

So if Kate leaves her shares in the family company to her husband, subject to the condition that he make the company transfer the listed shares to Sophie, and assuming income tax law stays the way it is till Kate's death – and Kate dies before her husband – Sophie's gift will come with a hefty tax bill. The amount of the dividend is the value of the shares at the time they are transferred, assuming the net assets of the company exceed its paid-up capital by at least the amount of that value.

The dividend cannot be franked. If Sophie is on the top rate of tax when her mother dies, tax of 46.5 per cent (including Medicare Levy of \$4,650 for every \$10,000 value) will potentially have to be paid by her. □

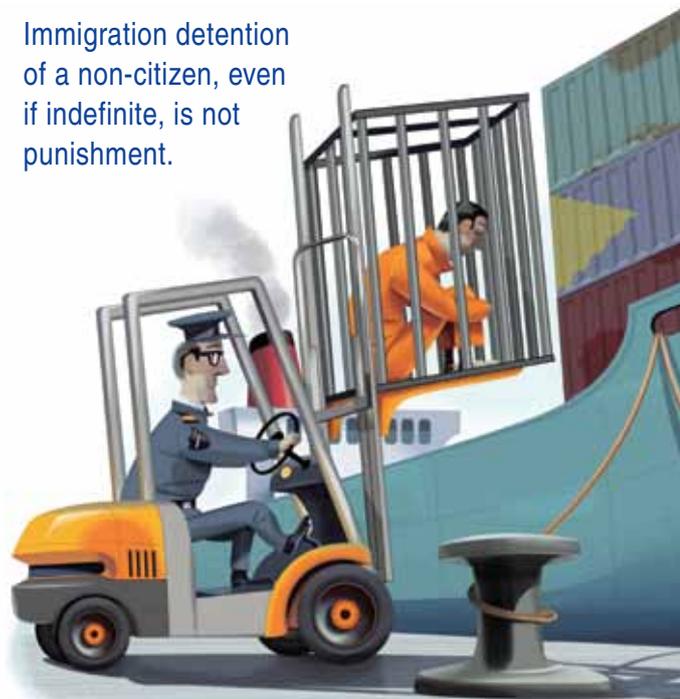
Immigration

Not only punishment to fear

Criminal law outcomes can have significant impacts on non-citizens.

Through the operation of Australia's immigration character provisions, a non-citizen who has been convicted of criminal conduct – even if they have served their sentence – may fail the character test. This means they could be sent to an immigration detention centre pending a merits review, or while the immigration department seeks to deport them.

Immigration detention of a non-citizen, even if indefinite, is not punishment.



Any criminal conviction potentially raises the possibility of visa refusal or cancellation. And a sentence of 12 months or more might mean automatic removal from Australia due to failure of the character test. A foreign sentence is also taken into account in the character test. This is despite the length of time which has passed, any evidence of reformation of character or rehabilitation.

A person may also fail the character test by having an association with someone, or with a group or organisation, which the government reasonably suspects has been or is involved in criminal conduct. Additionally, the immigration minister may form

a view that there is a significant risk of a person engaging in criminal conduct in Australia or becoming involved in activities that threaten harm to the Australian community, and that would also result in the person failing the character test.

Under Australian laws, immigration detention of a non-citizen, even if indefinite, is not punishment. A non-citizen can also be permanently excluded from Australia regardless of the length of time they have lived here or their ties with the

Australian community.

A non-citizen who has been charged should seek immigration advice early as their only opportunity to make submissions without being subject to mandatory immigration detention is prior to the department making a decision about their character. They must take responsibility for presenting evidence to dissuade the decision-maker from cancellation or refusal of their visa. The department will take into account what the criminal conduct reveals about the moral qualities of the person, the likelihood of future criminal conduct and compassionate reasons against cancellation. □

Superannuation

Make sure your death benefit nomination is valid

The deed establishing a superannuation fund usually provides for money to be paid on the death of a member of the fund. However, the death benefit does not form part of the member's estate, as it is usually understood.

The inheritance of a superannuation death benefit is not always determined by the member's will or, in the absence of the will, by the laws governing what happens when someone dies without leaving a will. Rather, the persons who receive the death benefit are governed by the deed establishing the superannuation fund. Commonly, the deed allows a member to decide the persons able to receive the death benefit by means of a nomination – provided those persons are a

dependant or the member's legal personal representative.

From an inheritance perspective, binding nominations provide the greatest certainty. But like a will, a binding nomination has to conform to legal requirements, and if there is a dispute about who should get the benefits, the court deciding the matter will look to see if procedures have been strictly complied with.

In one recent case, a mother's death benefit of over \$250,000 did not go equally to her two daughters as she had indicated in her nomination form because one of the two required witnesses had not properly signed the form before her death. The woman's husband challenged the faulty nomination and was successful. □

Cloud Computing

Managing disputes in the cloud

The issues of confidentiality, privacy and privilege should be part of an organisation's risk management plan when making the decision to store documents in the cloud.

Businesses are increasing their use of cloud storage solutions. For them, ensuring that a chosen cloud service is compatible not just with their operational and security policies but also with their approach to dispute management will be critical.

If and when a dispute occurs, the organisation will need to access cloud-stored documents, for example, in anticipation of legal proceedings. This is when control of documents becomes an issue, as data in the cloud may be spread across many jurisdictions, out of the direct possession of the organisation.

In such situations,

organisations will need to have good risk management processes in place to protect the confidentiality and integrity of sensitive information. Agreements with the cloud provider will need to provide for privacy, security, confidentiality, records management, audits, compensation for data loss or misuse, subcontractor obligations, intellectual property rights, limitations on liability, indemnity, service levels, termination rights and dispute resolution options.

Encryption and password protection protocols are an obvious requirement, as are methods to ensure certain types of data are not transmitted if the information is too sensitive.

Thinking of using cloud storage? Make sure a lawyer looks through your cloud storage agreement. □