In touch with the Law 2006 *issue* 2

KENNEDYS
LAW FIRM

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 feel free to contact David Kennedy on the above number.

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PYRAMID SELLING

When is it (legal) multi-level marketing?

A recent court case has set an important precedent in distinguishing illegal pyramid-selling from legal multi-level marketing.

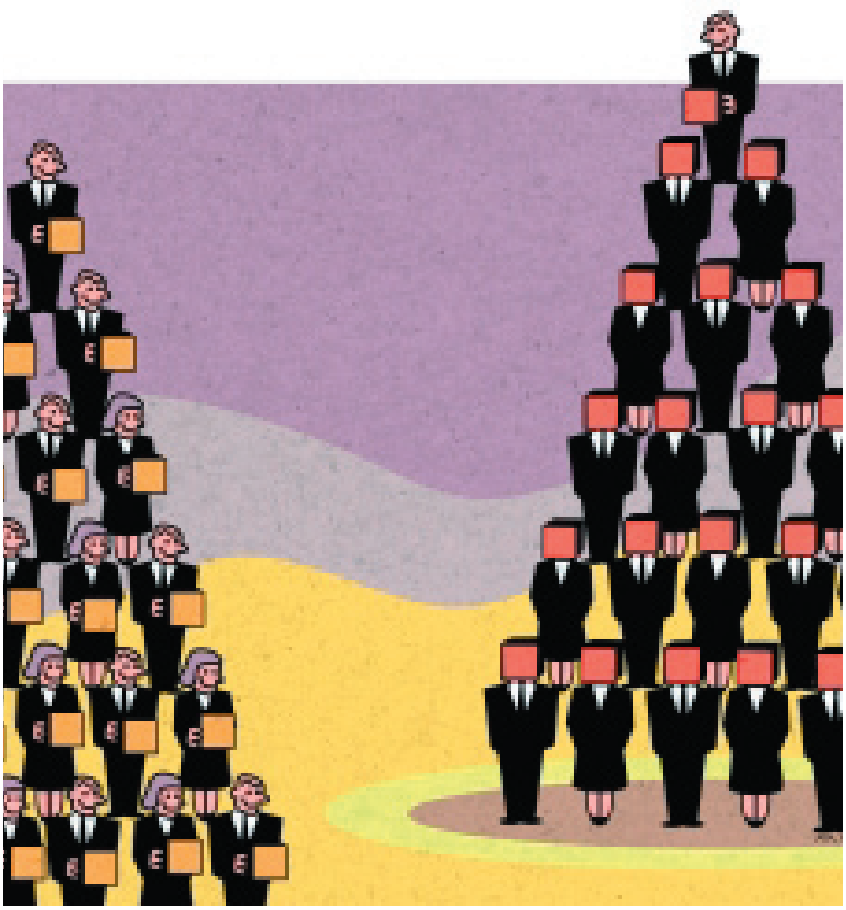
The difference between pyramid-selling and multi-level marketing schemes is that the latter involve rewards derived for genuine sales of goods or services.

Pyramid-selling, on the other hand, essentially involves payments when new participants are recruited into the scheme.

In the recent case, independent reps signed up customers for a telecommunications company. The company billed customers directly and paid the reps a commission on billings. To become appointed as a rep involved an initial payment and an annual renewal fee. It was accepted that these fees would meet most of the phone company's costs for such things as marketing brochures and customer service.

Independent reps introduced others, who all paid their fees to the phone company, not to the rep who had introduced them. There were complex commission arrangements, but no commission or other reward was earned simply by recruiting downstream reps.

The appeal court held that in this case the rewards were earned by the independent reps themselves and remuneration depended upon volume sales. It found that the real vice in pyramid-selling schemes is that rewards held out are substantially for the recruitment of others, who in turn get their rewards substantially for recruiting more members, and so on. Ultimately, the scheme collapses and many will have been induced to pay money for nothing.



TRUSTS

Avoid capital gains tax when you transfer assets

Can you avoid paying capital gains tax if you decide to set up a second discretionary family trust for your children in order to transfer assets?

John and Mary set up a standard discretionary trust to invest in the share market with themselves as trustees. John was the appointor and they, their two daughters and their grandchildren the primary beneficiaries.

After very successful share trading, John and Mary had about $2 million worth of shares in the trust, with an unrealised capital gain of $400,000. Their aim was to split the shares into two bundles, one for each of their daughters.

They decided to establish a new family discretionary trust and transfer half the shares into it, making their elder daughter the sole trustee. Apart from the standard $200 duty to establish the new trust, this can be done free of tax and stamp duty.

However, in order to gain the capital gains tax concession, "the beneficiaries and terms of both trusts" must be the same – that is, all the provisions of the trust, including the vesting date and the beneficiaries, must be the same as the initial trust.

To obtain the capital gains tax concession, the appointors of the old and new trust must be the same.

So John needs to be the appointor of the new trust. If the daughter for whose future benefit the trust is intended were made the appointor of the trust, capital gains tax would be payable on the shares transferred.

WORK CHOICES

New legislation on industrial relations

The new Work Choices legislation makes a number of significant changes to employment and industrial law across the country.

One of the most publicised aspects of the new legislation is the increased restriction on making a claim for unfair dismissal.

First, there can be no unfair dismissal claim if the employee was employed by an employer that employed 100 or fewer employees. 'Related bodies corporate' will be interpreted as one entity for the purpose of determining the number of employees, to ensure that corporate restructuring cannot be used to exploit the 100-employee threshold.

Second, a person will no longer be able to claim that they were unfairly dismissed if the reasons for dismissal include 'genuine operational reasons'.

Third, the qualifying period, which is currently three months, will be increased to six months, so that no employee engaged for less than six months will be able to make an unfair dismissal claim.

Lastly, seasonal employees will also be unable to claim that they have been unfairly dismissed.

It is likely that the number of claims through alternative channels, including unlawful termination claims, actions for breach of contract and claims based on anti-discrimination and trade practices law, will increase.

Another significant change is the introduction of a fair pay and conditions standard. This is a set of absolute guarantees of five minimum conditions that cannot be overridden. It includes basic rates of pay and casual loadings, a maximum of 38 ordinary hours per week plus 'reasonable additional hours', four weeks paid annual leave per year (plus an extra week for shift workers), ten days paid personal/carer's leave after 12 months of service, with a further two days of unpaid carer's leave if paid leave has been exhausted, and two days of compassionate leave for each 'permissible occasion', and 52 weeks unpaid parental leave at the time of birth or adoption of a child.

Awards will no longer be the safety net for workers, as the standard will outline minimum entitlements. And while certain terms in awards, relating to such things as annual leave and superannuation will be preserved, entitling employees to benefits they received previously where those benefits are more generous than the minimum conditions imposed by the standard, workplace agreements can override the operation of a preserved award term.

There are also a number of 'non-allowable matters' that can no longer be included in an award. These include provisions for automatic union representation in the dispute resolution process and restrictions on the engagement of independent contractors.

A range of provisions will make it harder for employees to engage in protected industrial action. To be protected, action must take place in a bargaining period, and be approved by a majority of employees voting in a secret ballot. No action will be permitted during the life of a workplace agreement, even if the action relates to issues that are not covered by the agreement.

A limited right to a day off on public holidays was added to the reforms. Employees may be asked to work on public holidays, but they can refuse if they have reasonable grounds for doing so.

The reasonableness of any refusal will be determined by a range of factors, including the nature of their job, the operational requirements of the employer, the amount of notice given, and whether the employee could have been expected to be requested to work on a public holiday.

Employers risk a fine of up to $33,000 if they dismiss or alter the employment of employees who have reasonably refused to work on a public holiday.

While the reforms have come into force, a constitutional challenge launched by the states may result in a lingering uncertainty over the legislation for some time.

CONTRACTS

What is an unjust contract?

An unjust contract is one that is unconscionable, harsh or oppressive.

The laws on unjust contracts apply in connection with land, goods, or services for personal use, but not if the contract was entered into in the course of a trade, business or profession.

For instance, an unjust contract could be one where a person has been tricked or pressured by another, or where a person has been encouraged to enter a contract by another party who was aware of the person's inability to understand the terms of the contract.

Some of the things a court will look at when deciding if a contract is unjust or harsh include unequal bargaining positions of the parties, conditions that are unreasonable or difficult to comply with, and the opportunity the parties had to obtain independent legal advice.

If you think you are the victim of an unjust or harsh contract, discuss the matter with your solicitor to find out if you have a case.

LICENSED PREMISES

What liability from too much to drink?

Recent licensing law changes that permit extended trading hours make timely a review of the principles governing the liability of hoteliers.

Hoteliers owe a definite duty of care to patrons, and there are four main circumstances in which they might be held liable for injury. These are when the injury is sustained:

- after excessive consumption of alcohol;
- because of the condition of the premises;
- as a result of the conduct of staff; or
- due to the conduct of other patrons.

Hoteliers should ensure they have policies and procedures in place to avoid such injuries to the best of their ability.

In one recent case, a hotel had to defend a claim that it was responsible for a woman's injury sustained in a road accident after she had consumed an estimated 16 standard drinks. The hotel's solicitors successfully argued that the hotel's precautions and level of care were adequate, as it had ceased to provide the woman with alcohol after it became apparent that she was severely intoxicated, and offered her the use of a courtesy bus and a taxi to return home.

Violent behaviour by intoxicated patrons is another risk area. Hoteliers are not always responsible for the criminal activity of patrons, particularly when there is no previous display of violence by a patron. However, hoteliers have the right to eject patrons for good cause, and have a duty to control unruly or disorderly patrons so that they are not a danger to others. Failure to turn out such patrons will leave a hotelier liable to compensate a person injured as a result.

DEFAMATION

A quick apology may be the best option

Defamation laws have been simplified. A model being adopted across all states and territories means that, for the first time, people who publish or broadcast will face just one defamation law, not eight.

Under new laws introduced in NSW in January, compensation has been capped at $250,000 unless the court awards aggravated damages, though historically very few awards reached anywhere near $250,000 for non-economic loss alone.

Action must be taken within one year of publication, but this can be increased to three if the court is satisfied that it was not reasonable for someone to have begun proceedings within a year.

A company's right to protect its reputation is now significantly reduced. Except for not-for-profit organisations and small companies with less than ten employees, companies cannot sue media outlets for misleading or deceptive conduct, unless the defamation is seen as injurious falsehood, which requires proving malice – a notoriously difficult task.

Publishers can lessen the compensation they may have to pay by printing or broadcasting an apology or correction before trial. An apology does not constitute an admission of liability.

Those with no control over the content, such as printers, libraries, newsagents and ISPs, have a defence of innocent dissemination, but only where they 'neither knew nor ought to have known' of the defamatory content. Where such a party is notified of such content and ignores it, such defence will no longer apply.

CERTIFICATION

New board to regulate building industry

New laws have introduced major changes to the regulation of those who provide building accreditation.

The four different bodies which administered building certification in NSW before these changes each had its own process of accreditation and complaint-handling.

Now the Building Professionals Board will conduct a consolidated complaints scheme and disciplinary process, and prepare an accreditation scheme and a code of conduct for certifiers.

While investigating complaints, the Board has the power to suspend a certifier's licence for up to eight weeks.

The punishments the Board can impose range from a caution or reprimand to an $11,000 fine. It can require the certifier to complete educational courses or report on their practice. The Board will also have the power to investigate local councils which act as certifying authorities.

The NSW government has signalled that a process will be developed to permit corporations to be appointed as certifying authorities.

BUYER BEWARE

Look at information 'for what it is worth'

It is not generally a valid defence to a claim of misleading conduct to say that the purchaser did not make adequate enquiries to protect his or her own interests.

Courts have made it clear that to deprive a person of a claim because of a failure to check the accuracy of information presented in effect says, 'You should not have believed me when I misled you'.

This principle applies in land transactions as it much as it does when buying goods, but it does not mean to say that all small print disclaimers are invalid, and that all information can be relied on fully without the need for independent verification and advice. This is particularly so with information from real estate agents and in agency brochures. If some aspect of a property is crucial to your decision to buy it, you should not simply rely on what you have been told. Instead, discuss it with your solicitor and have it included in the contract. A recent case illustrates the point.

A few years before selling their vineyard, a couple had a bore sunk on their property. They were told orally at the time that the output was 400 gallons per hour, but the contractor later mistakenly wrote 1,800 gallons per hour on the invoice. When the couple came to sell the land, the bore capacity was not included in the contract of sale, but the contractor's invoice was shown to the purchasers before they decided to buy.

The owners had also had a brochure prepared through a real estate agent to publicise the sale, claiming that 20 acres were under vines, when the real figure was only a little over 14 acres. The brochure contained, in significantly smaller print, the disclaimer that: 'Whilst every care has been taken in respect of the information contained herein, no warranty is given as to the accuracy and prospective purchasers should rely on their own enquiries'.

Not surprisingly, the property's shortcomings landed the matter in court, with the purchasers taking action against the contractor and the agent, as well as the vendors. The contractor and the agent, however, were eventually found not liable for the misleading bore capacity and vineyard area claims.

The contractor was only liable to the person to whom the information was initially given, though this would have been different if he had known that the opinion would be relied on by others.

The agent was held not to have independent expertise in relation to land area, as a purchaser would reasonably assume that this information had been supplied by another. If an agent does not claim independent expertise, and where it is apparent that the agent is not the author of information, the agent may 'pass on' information 'for what it is worth'.

SEXUAL HARASSMENT

Where does the workplace end?

A recent case which found an employer liable for acts of sexual harassment by one employee against another when both were off duty and in a location away from the actual workplace shows how far employer responsibility stretches.

The harassment occurred when both employees were living in staff accommodation provided by the employer as part of its hotel complex. One of the issues considered by the courts was whether there was sufficient connection between the acts of the harasser and his employment in order to make the employer liable.

An employee was asleep in her room. At about 3:00 a.m. another employee entered uninvited and woke her, talking to her for more than half an hour. Six days later the female employee found the same person lying uninvited on her bed.

The court found that she had been sexually harassed and that the degree of control exercised by the employer in relation to the staff accommodation and to staff behaviour on its property was a key part of the employment relationship.

It placed particular emphasis on the fact that failure to comply with these conditions had led to instant dismissal of the intruding employee.

The court dismissed an appeal by the employer on the basis that it was only by virtue of being staff that the two people were in the premises where the sexual harassment occurred.