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How Green is Your Office

REBECCA CASTLEY

It has been accepted for some time that commercial buildings make a significant impact on our carbon footprint. In fact, studies show that commercial buildings in Australia produce close to 10% of our greenhouse gas emissions.

The potential to make emissions savings from office buildings has been seized upon by the Federal Government by the passing of the *Building Energy Efficiency Disclosure Act 2010*. This Act prescribes that, from 1 November 2011, large office buildings will be subject to mandatory disclosure requirements regarding energy efficiency.

The objective is to encourage market-driven improvement in energy efficiency by requiring performance to be disclosed when the building is offered for sale or lease. Buyers and tenants will now be able to compare performance of office buildings with information that is consistent and meaningful. It is hoped this will also be an incentive for building owners to undertake upgrades to improve energy performance to attract buyers and tenants.

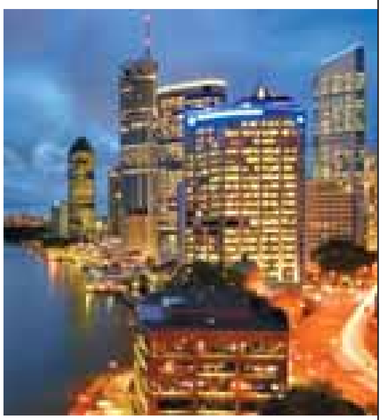
Under the changes, a building owner is obliged to disclose a building energy efficiency certificate ("BEEC") when offering or inviting offers to purchase or let the building. A tenant who is subleasing a tenancy is also bound to comply. This regime applies only where the office space being sold or leased has a net lettable area of 2,000m² or more.

For example, for an office building with a total net lettable area which is more than 2,000m², but which has multiple tenancies, all of which are under 2,000m², the building owner will only need to disclose a BEEC if it sells the building (not when leasing space less than 2,000m²).

The BEEC energy efficiency star rating for the building must also be included in any advertisement for sale or lease.

A BEEC includes the NABERS Energy base building rating and a tenancy lighting assessment. It remains valid for up to twelve months only. It must be obtained from an accredited assessor and be recorded on the online building energy efficiency register. At the time of writing this article, there are currently thirty-one registered BEEC's for office buildings throughout Queensland.

There are some exceptions. For example, the regime does not apply to buildings which are strata titled or where the total office space comprises less than 75% of the building (by area). Also, a new building is not required to comply until two years after a certificate of occupancy has issued. This is because energy data is needed for a period of at least twelve months before a BEEC can be issued.



The certification process can be time consuming. The assessor must review the building and obtain energy data and, once this information has been compiled, the application for the BEEC must be processed by the Department of Climate Change and Energy Efficiency. The key for building owners is to be prepared and to plan ahead.

The new disclosure obligations must be taken very seriously by building owners as the penalties are significant – fines of up to $110,000 for the first day and $11,000 for each subsequent day may be imposed.

Longer term, the Government is considering expanding the program to cover other types of buildings such as hospitals, hotels and shopping centres. It seems plain that, for the property industry, "green" is here to stay!

Contents

DESIGNING FOR NOISE	2
IN THE SIGHTS OF THE ATO - PART 2	2
CAPACITY TO MAKE A WILL	3
HR MANAGERS: PENALTIES AND ACCOUNTABILITY	3
BODUM NOT LEFT WITH A BITTER TASTE	4
EDITORIAL	4

Designing for Noise

ANTHONY O'DWYER

The rules have changed for property developments adjacent to noisy roads. Residential property developers would be aware that when undertaking development on land adjacent to State controlled roads it would not be unusual for the Department of Transport and Main Roads to impose conditions on the development. These conditions might require a registered covenant on the Title that deals with how the residence to be constructed on the property is to be designed. On some occasions single storey residences would be the extent of the development allowed. On other occasions design constraints would be included in the covenant to attempt to limit the effect of road noise for the enjoyment of future residents.

Those covenants will now be a thing of the past. The new regime for dealing with road noise is to designate a transport noise corridor which then calls up certain provisions of the Queensland Development Code to be complied with when undertaking development on properties within the transport noise corridor.

Both the Department of Transport and Main Roads and local governments have the power to designate transport noise corridors, in respect of roads under their control and the Department of Transport and Main Roads can also designate a transport road noise corridor for railway land. The transport noise corridors can be up to 250m wide on either side of a road.

There have already been a series of designations of transport noise corridors having the effect of making corridors of 100m on either side of all State controlled roads with a certain number of major roads having

corridors of up to 250m on either side of the road. One example of the larger width is along the Gateway Motorway.

It appears as though this widespread designation of the corridors bears no relationship to the actual impact of road noise on a particular property and will no doubt in particular instances impose obligations on landowners, which lacks justification. No account is taken in the widespread designations of topographical or other features which might result in a property within a transport noise corridor being completely unaffected by transport noise or affected to a much lesser extent than its proximity to the road might otherwise indicate.

Developers and landowners will have to make themselves aware of the impact of the designation of the transport noise corridors. There is the ability through the Department of Local Government and Planning's website to undertake a free search to see whether or not land is in a designated transport noise corridor.

In the sights of the ATO – Part 2

MARK MADSEN

We reported last year on some changes to the director penalty regime under which directors may be made personally liable for certain tax debts of their company if they do not meet those tax debts or otherwise place their company into external administration. There has been a continued push by the ATO to expand its powers in this regime.

The recently introduced *Tax Laws Amendment (2011 Measures No. 8) Bill 2011* seeks to introduce three key changes to the director penalty regime:

- In addition to the existing liability to pay PAYG withholding amounts, directors will be held personally liable for their company's superannuation guarantee amounts;
- Where a PAYG or superannuation amount remains unreported and unpaid for three months after the due date, the ATO will be able to immediately commence recovery proceedings against the directors without first issuing the current 21 day director penalty notice;
- Directors (and their associates) can be denied any entitlement to PAYG withholding credits where their company has failed to remit PAYG withholding amounts.

The aim of this proposed legislation was to further combat "phoenix" operators (directors who allow their companies to build up debt (and particularly tax debt)), become insolvent, essentially avoid payment of those debts through a liquidation process, but then continue the same business through a new company.

The Federal Government has struggled to find the balance in insolvent trading laws to ensure that dishonest phoenix operators are held liable but also ensure that honest directors who hold their company's and creditors' interests at heart are not unduly penalised. In a similar vein, the government is now struggling to find the balance in relation to the intended expansion to the director penalty regime.

The Bill, which was largely expected to have been passed by now, has been deferred, after referral to the House Economics Committee which tabled its report on 3 November 2011. In short, the Committee has stated that whilst it supports the proposed changes, it accepts that directors who act honestly and in good faith should have some comfort that they will be not caught up in the sights of the ATO "inadvertently". Accordingly, the Committee has recommended that the Government investigate whether there are ways in which the provisions can be specifically targeted at dishonest phoenix operators and whether any defences for honest directors should be expanded.

We will continue to monitor this Bill and report on the outcome in due course.

Capacity to Make a Will

CHRIS HERRALD

The number of people over the age of 80 years in Australia has increased dramatically. As people live longer, they have a greater opportunity to accumulate wealth. This often leads to estate litigation in the Courts on the grounds that at a time a person made their last Will, they did not have the testamentary capacity to do so.

The recent decision of *Frizzo & Anor v Frizzo & Ors* (2011) QCA 308 highlights this issue.

Mrs Frizzo, a wealthy 81-year-old widow with five children had a fall and broke her hip on 20 January 2006. She was subsequently admitted to hospital and at various times in the days after her admission she was incoherent and confused however, she improved significantly on 27 and 28 January 2006. She required surgery to fix her hip that, due to her age, carried a risk that she may not survive the surgery.

Mrs Frizzo had made a Will in 2003 that substantially favoured one of her children, Shane, who stood to inherit the lion's share of her Estate that was worth approximately $30 million.

Just prior to entering the theatre for surgery on 28 January 2006, Mrs Frizzo told the anaesthetist that she wanted to make a new Will. Mrs Frizzo then spent approximately half an hour dictating her Will to a doctor, who wrote down what she instructed on hospital progress notes. Those notes were then signed by her and witnessed by a different doctor and a nurse. Those notes were left in the hospital records. The dictated Will left her entire estate to her five children equally. The question before the Court was whether Mrs Frizzo, at the time she dictated and signed the 2006 Will, had the testamentary capacity to make her Will.

It was argued by Shane that she did not have testamentary capacity to make the 2006 Will because she was suffering from a form of delirium and further, that she did not fully appreciate the extent of her significant assets.

The trial judge found that at the time she made her 2006 Will, Mrs Frizzo did have testamentary capacity. The trial judge accepted the medical evidence that she was not suffering from delirium on 28 January 2006 and further that she understood in general terms the extent of her estate and that she had previously made a Will that favoured Shane over her other children.

The question before the Court was whether Mrs Frizzo, at the time she dictated and signed the 2006 Will, had the testamentary capacity to make her Will.

Shane appealed the decision of the trial judge however the Court of Appeal unanimously dismissed the appeal.

Mrs Frizzo's substantial estate will now be distributed equally amongst her five children.

The Will was made in an unorthodox manner but ultimately admitted to Probate. Obviously it is more appropriate to engage a competent lawyer to assist with the preparation of the Will who would obtain a medical report to support testamentary capacity if that is in doubt.

HR Managers: Penalties and Accountability

JONATHAN MAMARIL

Decision makers (and decision influencers) should be cautious in ensuring the Company they work for complies with workplace relations legislation and that they also personally comply with that legislation.

It is not unusual for managers, directors or partners (in a partnership) to be named individually as respondents in adverse action or discrimination claims by employees or where there are issues in regards to sham contracting arrangements or underpayment of wages.

The Fair Work Ombudsman (**FWO**) has made it clear recently that HR employees will also be held accountable and liable for workplace infringements.

The Federal Magistrate Court decision of *Fair Work Ombudsman v Centennial Financial Services* (2011) FMCA 459 (22 June 2011) is demonstrative. The Magistrate found a HR manager was liable for a company's decision to seek to unlawfully re-engage six employees as independent contractors. The actions by the HR manager and the company were held to be sham contracting arrangements.

His Honour found that the director and sole shareholder was the driving force behind the breach, His Honour also found that the HR manager was an accessory to the company's unlawful conduct even though the HR manager essentially was only "following instructions" and "just copied what he was told".

The penalty imposed on the manager personally was $3,750. Although he was only following orders, he had a responsibility to ensure that the company complied with applicable workplace relations legislation. This case should serve as a warning to all HR managers and HR employees.

The balancing act for HR managers can sometimes be difficult with pressure coming from their employers sometimes being at odds with the company's obligations under workplace law. Such employees owe their primary duty to their employer.

However, this primary duty is never a license to breach their overriding statutory obligations.

HR managers need to be aware that:

1. They can be held personally liable and fined for a company's non-compliance with workplace relations law;
2. They cannot rely upon the fact that they were following and carrying out instructions of the primary decision makers or upper management to avoid liability;
3. They should advise their company of all relevant legal obligations under workplace relations law including putting any concerns in writing;
4. If they are in doubt in relation to relevant workplace relations law and their obligations under legislation they should seek legal advice on their personal position.

Bodum not left with a bitter taste

ANDREW NICHOLSON

Internationally renowned brand "Bodum" had a recent victory (on appeal) in the Federal Court when it successfully argued that a rival trader had infringed its rights in the get up of its Chambord coffee plunger (*Bodum v DKSH Australia Pty Ltd (2011) FCAFC 98*).

Bodum was established in 1944 and has developed a valuable reputation in relation to the quality of its products. Bodum argued that its reputation extended to the shape and features of its product which are well recognised by consumers. However, as no application for design registration had ever been made, Bodum was left to argue that the rival product infringed its rights by engaging in misleading and deceptive conduct, or at common law for passing off, based on the reputation which it had developed in the design or get up (features of shape) of the product.

For some time the Courts have recognised that rights may be infringed in various ways. In *Cadbury Schweppes v Darrell Lea Chocolate Shops Pty Ltd (2007) FCAFC 70*, the Full Court said:

"*Trade indicia other than names and logos can become associated with a particular trader, such that use by another trader could give rise to misleading and deceptive conduct or passing off. If particular branding elements used by a trader have been identified... in the minds of the public, there may be misleading or deceptive conduct by reason of the appropriation of those particular branding elements by another trader*".

The cases also recognise that the features of a product can acquire a reputation independently of the trade names (or other features of branding) used in connection with the product. For example, in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd (2002) FCAFC 157* a substantially different name was used – LiveWire c.f. Red Bull – but the distinctive features of the get up or gestalt of the can, particularly as to shape and colour, had been copied.

Bodum was able to point to a number of facts in support of its position, including:

- Its packaging prominently displayed a photograph of the product.
- The product is often displayed outside of the packaging and examined or shop tested by consumers.
- The product has a distinctive shape.
- By reason of those matters, Bodum acquired a 'substantial and valuable reputation' in the features of the product, such that consumers will recognise a coffee plunger which has those features as a Bodum product.
- Bodum consistently applied its trademark to its product.
- The rival product (DKSH) reproduced the majority of the features of the Bodum and was described as "unlikely that one could be conceived without reference to the other".
- DKSH's product did not contain any distinguishing branding.

Accordingly, as Bodum was found to have established a secondary meaning or independent reputation and as DKSH had not taken sufficient steps to distinguish its product, the Court found that DKSH had engaged in misleading and deceptive conduct, as well as passing off at common law.

The Court indicated that DKSH should have taken additional steps to differentiate its product to avoid infringement. Not having taken those steps, the Court considered that the infringement had occurred. The Court has sent a clear message that it will not tolerate those who wish to sail too close to the wind.

Whilst the case makes clear that the circumstances of any alleged infringement must be closely examined in each case, it is equally clear that any products which are similar to well known articles must be positively distinguished by a prominent branding strategy in order to avoid a claim for infringement.

PAT MULLINS

EDITORIAL

No doubt the New Year will bring both opportunity and challenges for business. One area that businesses will need to carefully consider is the Personal Property Securities Act, which the Federal Government has confirmed will commence on 30 January 2012.

The Act will have an effect on most businesses and will apply to a wide range of transactions (not just security interests). The notion of "personal property" is very broad. Company charges (ASIC), hire purchase and lease arrangements, conditional contracts (where ownership does not pass until payment in full) and intellectual property rights, to name but a few, will all be caught.

Significant changes have been made to contracts and commercial law which will require businesses to immediately review their agreements and procedures. Businesses should be reviewing their commercial dealings and agreements to avoid getting caught out, as the law has changed.

The Act may have some alarming consequences. In some circumstances, other parties may grant rights in relation to property that take priority even over the rights of the owner.

2011 has been a difficult year for all in South East Queensland but already there are signs of a more prosperous 2012. The awarding of the Commonwealth Games 2018 to the Gold Coast is a very welcome boost.

Everyone at Mullins Lawyers wishes you a very happy Christmas. We trust you will enjoy the holiday period with family and friends, and return from the break with renewed energy and vigour for a very successful 2012.

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