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In Touch with the law

In this issue

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 us.

KENNEDYS LAW FIRM

Ph 02 9744 8315
Fax 02 9747 8091
Email david@kennedyslawfirm.com

GREEN WASH

ACCC targets misleading environmental claims

Businesses that offer consumers a green product or service can face criminal penalties up to $1.1 million, as well as negative publicity, if green claims don't stack up.

A largenumber of vigilant non-government organisations are constantly on the look-out for green claims that are misleading, and the Australian Consumer and Competition Commission apears to have made green claims an enforcement priority.

A notable series of investigations related to claims made by the Australian air-conditioning industry. One company claimed that its products were 'environmentally friendly', whereas one of the gases it used was actually a potent greenhouse gas, and another was ozone-depleting.

The ACCC took action for both the text and the images – of trees, the sea and the moon – used in the company's marketing materials. It considered that the images conveyed a strong environmental message to consumers.

Car manufacturers have been investigated for faulty claims about amounts of carbon emissions that would be offset by planting trees. The ACCC was concerned about V8 Supercars claims as part of its 'racing green program' that planting 10,000 native trees would offset the carbon emissions from the V8 championship series as well as all associated transport emissions of the racing teams travelling to events. The ACCC was concerned that consumers might think the trees would absorb the emissions in a short period of time, when in actual fact the emissions from one year of racing would only be absorbed by these trees over several decades.

An important principle for a business making a green claim is to consider the whole life cycle of the product. Don't make a claim without the scientific evidence to back it up. And make sure green statements are not too confusing for consumers – experience shows that some environmental benefits can be too complex to translate into a short sharp marketing message. The ACCC has produced several green marketing guides and we can advise on green marketing claims.

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DE FACTO BREAK-UPS

New laws give partners financial parity with marriages

New laws give de facto partners (in both opposite and same-sex couples) equal footing with marriage partners in financial settlements if the relationship breaks down. However, the new laws could potentially make financial agreements made before their introduction invalid.

The change only relates to relationship breakdowns occurring after the new laws commence on 1 March 2009. To be covered, a person must have been in the relationship for at least two years, unless the former couple has a child, or the person has made a substantial contribution to the relationship. An application for a court order must be made within two years of the breakdown.

The new laws state that the period or "total of the periods" of the relationship is "at least two years". For de facto relationships with a break in them, this means the aggregated periods will count as a single relationship rather than be considered separate relationships.

Contact us if you would like further information.

HOMEMADE WILLS

When the judge decides

A recent case was a clear example of a will prepared without legal advice failing to express the deceased's intentions . The courts had to interpret a homemade will for an estate with a gross value of about $3.6 million.

The deceased had died in 2006, aged 83. He had seven children, then aged between 34 and 57.

He had made at least 13 wills between 1987 and 2004, the last three in 1999, 2002 and 2004. The will of 2004 was typed by a business centre which offered word processing, typing and secretarial services. The document was signed in the presence of people employed in the business centre, who also witnessed it.

In February 2006, the man had again attended the business centre to have some handwritten changes he had made to the 2004 will incorporated into a new document. This new will, typed in February 2006, was said to be his last will and testament.

However, the will had not been checked by a lawyer and when, after the man's death, his executors came to carry out the terms of the document, a dispute arose about which of the beneficiaries would get income from the estate and which would get the capital. The matter went to court.

The judge found that the fact that the deceased had written his last will at the offices of the business centre and had told his doctor that he was aware of what he was doing did not mean that he appreciated what he was doing. By deleting one of the clauses of the previous will, the judge said the man had deleted "the critical clause disposing of the capital of the estate". But the judge decided there was clear proof that the deceased did not understand the effect of the deletion, and his previously expressed intention that capital be distributed in the same proportions as income should prevail.

To avoid the risk of creating a will that does not carry out your wishes, seek our advice on any document you create or change.

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LAND TAX

Where is the principal place of residence?

The most common area of dispute in land tax matters is a person's entitlement to the principal place of residence exemption, and people should know what sort of supporting evidence they will be expected to produce to claim the exemption.

In convincing the Tax Office of a person's actual residence, a great deal of emphasis is placed on formal documentation, such as rates and electricity notices, phone bills, driver and boating licences and place of electoral enrolment.

If the principal residence is being renovated, people may move temporarily to a cheaper residence. Some, particularly baby boomers, may own the temporary residence as an investment property. These people would like to continue to claim the exemption on the more expensive property being renovated, but not lived in, and pay land tax on the cheaper.

The appeal courts have found that this will not be possible. In a recent case the courts found that a couple living in their cheaper Coogee unit while their more expensive Point Piper residence was being renovated could not elect to transfer their principal place of residence exemption to the Point Piper property.

From time to time there are reports of people fortunate enough to be able to buy a neighbour's property to add to their own. They will then want to claim that both the old and the additional property are subject to the principal place of residence exemption.

In one case a judge found that adjacent blocks of land comprise a "parcel of residential land" only where they are undivided either physically or "in use, occupation and title".

In another the judge found that "undivided by physical separation" meant significantly or substantially undivided. The owner had demolished part of a fence separating two blocks of land to provide an opening. The courts found that "an opening sufficient to allow a car to pass through on a long, otherwise divided boundary" was insufficient.

In another case a judge found that the exemption would not apply "to independent dwellings on a parcel of land constituted by adjoining lots".

FIXTURES

What can I take from home?

All 'fixtures' are included in the sale of a property without having to be mentioned specifically.

A fixture is something attached to the land or building that cannot be either simply lifted up and taken away, or unscrewed and taken away without doing any damage. For example, most electric stoves are wired in, so they are fixtures, but most refrigerators are plugged in, so they are not fixtures.

For both buyer and seller, the safest course is to contact us to specifically include or exclude in the contract any items about which there can be room for doubt.

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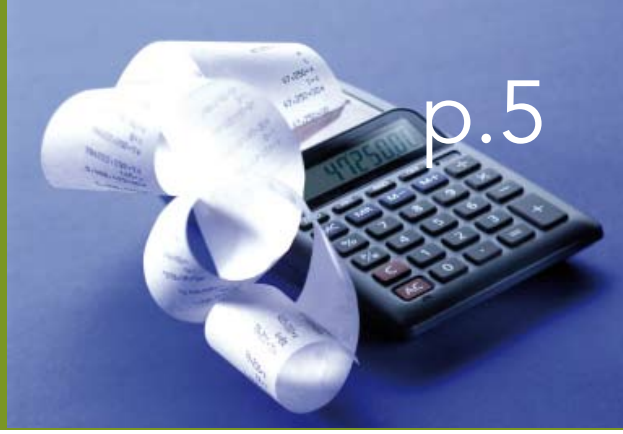
Email david@kennedyslawfirm.com

HARD TIMES

Tax consequences



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There is little in life – including marriage and death – without tax consequences. There are even tax consequences to recessionary times.

When rising asset prices were the norm, a standard path to wealth was negative gearing, the incurring of tax-deductible expenses in the expectation that they would be more than recouped by concessionally taxed capital gains on property.

Selling at loss

If a taxpayer sells an asset at a loss, unless the asset was held on revenue account, that loss can only be offset against same-year capital gains (and there might not be any) or carried forward. However, if the asset was held on revenue account, any such loss can be offset against ordinary income.

As a consequence, there may well be some taxpayers who want to forsake negative gearing and claim that they bought assets – which they have sold at a loss – for trading rather than passive investment purposes.

This allows them to offset the loss against their ordinary business or employment income.

Whether they will be successful in doing this is a question of fact – objective proof of intent is needed.

In fact, some taxpayers will not even have to sell assets to be able to claim a tax deduction where an asset goes down in value. They can do this by the trading stock provisions, valuing assets which have increased in value at cost, while valuing assets which have gone down in value at market. They can use these provisions if they carry on a business of dealing in those assets as trading stock. Again, this will be a question of fact but, for example, if a taxpayer has borrowed to purchase shares and holds more than a few parcels of them, they might be able to show that this is the case.

Bad debts

In a recession, bad debts will rise. If a debt has been returned as income but not collected, it can be written off as a bad debt, and a deduction can then be claimed for it, or if it is the uncollected proceeds of the sale of a capital asset, an adjustment can be made for any capital gain previously subjected to tax.

Loss carry forward

Taxpayers who incur tax losses will want to be able to offset those against future income. They might even want to allow some more profitable taxpayer to take advantage of those losses.

However, unless the taxpayer is just an individual, the tax law allowing tax losses to be carried forward can be complicated.

This is because the law is concerned to prevent loss-trafficking arrangements, that is, arrangements whereby the benefit of a loss is transferred from the person who effectively incurred or who will benefit from that loss to one who did not or will not.

So far as companies are concerned, the general rule is that they must satisfy either a continuity of ownership test or else a same-business test, and the rules become even more complex where a loss company joins a consolidated group. A discretionary trust will not be able to carry forward losses unless a family trust election has been made in respect of that trust, which means that if a distribution of either income or capital is made outside the nominated family the trustee will be subject to a penalty tax.

Trusts

A tax problem looms if mortgage trusts and the like freeze or even just restrict redemptions of capital and interest. A beneficiary must include in their assessable income that share of the net income to which they are 'presently entitled' at year-end. If, however, a beneficiary's right to be paid income from a trust is frozen or restricted, the trustee rather than the beneficiary will be assessed on that income, and savvy investors might insist that this is the case.

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ONLINE CONTRACTS

When is a click signature binding?

Clicking on an icon is the most common way to make an electronic signature in webpage contracts.

In the absence of fraud or other special circumstances, the electronic signature incorporates all the terms of a contract.

In a case which involved the online auction house eBay, the judge found that a contract was made when purchasers click-signed a webpage contract.

It is immaterial that the person clicking does not read the terms. Initially, courts were reluctant to hold that hyperlinks, without more information, gave sufficient notice of more detailed terms, but they have recently begun to accept they may be sufficient.

However, if the court decides that a person's assent has been procured by deceit, the person may not be bound by the electronic signature. In one case the court decided a website deceptively encouraged users to skip the terms of an agreement where the screen inviting visitors to the site to agree to the terms appeared before the screen displaying the terms, and it was possible to bypass the terms by simply clicking on the 'I agree' button. The site also gave visitors a second opportunity to bypass the terms.

A key special circumstance is if the signatory does not reasonably know that a webpage contains contractual terms. In one case the courts held that a visual invitation to download software for free did not have the appearance of an invitation to enter a contractual agreement.

It remains arguable that clicking with a mouse is not the equivalent of a written signature since a computer screen lacks the readability of paper, and it is all too easy to click on an icon without realising the legal consequences. These characteristics of webpage contracts are open to exploitation by online businesses. Contact us if you have concerns.

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RETAIL LEASING

Honesty in pre-lease claims vital

Claims made in an effort to promote the uptake of commercial leases have to be weighed up by both tenants and landlords to avoid business troubles and potentially complex drawn-out legal disputes. A recent case over a retail lease in a new shopping centre illustrates the point.

The tenant, a small furniture retailer specialising in Balinese-style furniture, took up a lease on premises in a big homewares centre after the centre's leasing agent falsely stated that one of the country's major furniture retailers, Harvey Norman, would also be setting up in the new facility.

Representations about an 'anchor' tenant such as Harvey Norman are significant and weigh heavily on the minds of tenants in deciding whether or not to enter into a lease.

However, Harvey Norman did not set up in the centre, and from the start the tenant's business did not go well.

The tenant made no formal protest about the anchor tenant misrepresentation, but neither did she pay any rent or outgoings throughout a year-long occupation of the premises.

The landlord eventually started proceedings against the tenant, but the first tribunal to hear the case decided in favour of the tenant's cross-claim of misrepresentation and unconscionable conduct, ordering that the landlord return the tenant's bond of over $40,000.

The tribunal concluded that the leasing agent made the claim about Harvey Norman knowing that it was false, and that the tenant relied upon it in deciding to enter into the lease.

This was a significant victory for the tenant, but she was to become involved in further legal proceedings.

The landlord appealed, and on this second decision the tables turned against the tenant, the landlord winning on the basis that the tenant had sat on her hands and took no action on the misrepresentation until the landlord commenced proceedings. The landlord now did not have to return the bond, and the tenant was ordered to pay damages of $225,000 to the landlord.

The dispute then entered a third and final stage, with the tenant taking the case to the Court of Appeal. Over four years had now passed since start of the original lease.

The outcome saw things turn back in the tenant's favour, and she was re-awarded the return of the bond.

It would not be hard to imagine that both tenant and landlord would have preferred to avoid such a long and draining experience.

For landlords it is clear that promotional activities undertaken on their behalf need to be carefully controlled.

Tenants should contact us for professional legal advice and fully disclose any claims made to them before signing a retail lease.

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Fax 02 9747 8091
Email david@kennedyslawfirm.com

TENDERS

Duty to treat all bidders fairly

In any contract process the authority calling the tenders has a duty to treat all bidders fairly and in good faith.

In one recent case a municipality cancelled a tender after three contractors who bid on the project all tendered a price which far exceeded the estimate and project budget.

Despite cancelling, the council entered into negotiations with the lowest priced tenderer in an attempt to negotiate an acceptable price. However, no significant acceptable cost savings could be negotiated.

Almost 12 months after the original call for tenders, the municipality issued another for the project, with substantially the same plans and specifications as before.

Four tenders were received, three from contractors which had participated in the original tender process. The lowest priced tenderer from this new round of bids – not one of the original tenderers – was awarded the contract.

The courts found that, whether it had intended to or not, the municipality had engaged in 'bid shopping'. Its tendering protocol, consisting of a written policy and a well-established practice, required that it work with low bidders in a situation where bids exceeded the original estimate.

The original lowest priced tenderer was awarded loss of profit.

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