No 3 of 2009

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.

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LANDHOLDER DUTY

Tax base expands

New state revenue laws create a new model for imposing duty on land.

Since 1987, NSW has had a tax system which imposes duty on the acquisition of interests in private companies and unit trusts that hold land in NSW.

Prior to 1 July, the rules applied where a "relevant acquisition" was made of a "land-rich" landholder. A private company or trust was considered land-rich if 60 per cent or more of its total assets comprised land or interests in land in all places, and $2 million worth of it or more, needed to be in NSW.

Under the new system, provided the entity holds land worth $2 million or more in NSW, it is irrelevant what proportion of its value is in land. This expands the tax base to acquisitions of many non land-focused entities, such as in the manufacturing and service sectors.

Duty at a top rate of 5.5 per cent must now be calculated not only on the unencumbered value of NSW land, but goods in NSW held by the entity as well. This represents an important and largely unheralded policy shift. Note that the definition of "goods" for these purposes does not include stock in trade, materials for use in manufacture or goods under manufacture, among other things.

As an example, Matwell, a listed company, wants to buy Bear Hunt, a children's toy manufacturer, for $2 million. Bear Hunt directly holds assets of $12 million, comprising land, buildings, stock, intellectual property, moveable plant and equipment and goodwill. Of this, plant and equipment is valued at $2 million and land, buildings and other fixtures at $2.2 million. It has liabilities of $10 million.

Under the new system, Matwell will pay duty of $216,490, approximately 5.5 per cent of the value of the land and plant and equipment (which are goods) of $4.2 million. The duty payable represents nearly 11 per cent of the purchase price or net value of the company. Unlike GST, this is an unrecoverable, hard cost.

Duty would not have been payable on this transaction prior to 1 July this year.

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FAMILY CARE

More leave entitlements in new employment system

National employment standards are an important feature of the new workplace relations system replacing Work Choices.

Ten minimum working conditions will apply to all employees under the federal system from the beginning of next year.

The standards include a number of entitlements to help workers better accommodate their family responsibilities.

They will include a right to 12 months unpaid parental leave, including birth-related and adoption-related leave. There will also be a right to paid and unpaid carer's leave and compassionate leave, and an obligation on employers to take an employee's family responsibilities into account when requiring them to work overtime.

There is also a right to request flexible working arrangements for the care of a child who is under school age or has a disability.

The standards recognise these rights for both men and women. Contact us for further information on work conditions.

LAW REFORM

Less Australia/New Zealand legal divide

The Australian and New Zealand governments have signed an agreement to make it easier to enforce certain judgments and sanctions between the two countries. It is also intended to streamline the process for resolving civil proceedings that cross the Tasman.

The direct result of this reform will be that parties in Australia or New Zealand with decisions not involving money that are captured by the trans-Tasman law reform will have more options for enforcement and a higher likelihood of success in enforcing when the defendant is in the other country or has property there.

The majority of civil proceedings will be able to be served in the other country without separately seeking permission from a local court, excluding such civil proceedings as dissolution of marriage, enforcement of maintenance obligations and enforcement of child support.

Also, courts in each country will be able to stop proceedings on the ground that a court across the Tasman is the more appropriate forum. Some non-money judgments will also now be enforceable trans-Tasman.

The reforms will expand the types of orders enforceable between Australian and New Zealand courts to include final non-money orders. This is one of the most significant reforms proposed in the agreement.

Also, the proposed reciprocal recognition of decisions in mutually agreed tribunals will mean there is no need for disputes to go to court again in the other jurisdiction. The law reform allows New Zealand and Australian courts to enforce non-money judgments which require defendants to do, or refrain from doing, something in the other sphere.

However, non-money judgments requiring a high level of supervision, such as administration of deceased estates and care of children, will not be able to be registered in the other country.

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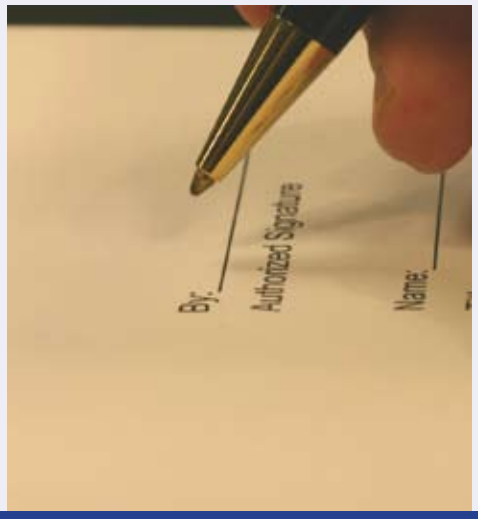
SEAL THE DEAL

Signing contract documents legally in the e-age

Often, not enough attention is given to the procedure for executing contractual documentation when finalising an agreement. This is increasingly an issue as the number of parties involved in transactions increase, parties often do not execute contracts in the same physical location, and frequently parties are required to execute signature pages and return them by email.



In a recent court case a tax consultancy operated a tax-avoidance scheme for some of its clients. The revenue authorities suspected that the scheme had been dishonestly implemented and sought warrants to search for documents at a number of client premises.

What they found was that the documentation through which the scheme had been implemented was invalid. Documents had been executed in draft form and signature pages from the drafts detached and stapled to final versions.

There are a number of lessons to learn from the case.

Avoid obtaining signatures on a draft for later appending to an amended final contract or deed. Provide executing parties with a complete copy of a deed or contract for execution rather than just the execution page. And do not obtain an original signature on one contract or deed and transfer that signature page to another subsequently amended contract or deed.

DE FACTO RELATIONSHIPS

Am I entitled to a property settlement?

If you were in a de facto relationship which has broken down since 1 March 2009, you can make a claim for a property adjustment under the Family Law Act. However, you usually need to show that you have lived together for at least two years.

If your relationship has lasted less than two years, you may claim if there is a child of the relationship; or you are caring for a child of the other party, and the failure to make an order would result in serious injustice to you; or you made substantial contributions (financial or personal) for which you will not receive adequate compensation if the court does not make a property order, and the failure to make an order would result in serious injustice to you.

If your relationship broke down before 1 March 2009, you may still be able to make an application under the Property (Relationships) Act of NSW.

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SUPER FUNDS

Maintaining a sole purpose

Superannuation funds may be looking for more novel ways of accumulating wealth.

People may want to accumulate wealth in a super fund by carrying on a business, but the tax office takes the view that this is not acceptable. An alternative is for the fund to acquire shares in a private company or units in a unit trust which carries on a business. The tax office, however, will most probably say that this does not assist a trustee in avoiding the sole-purpose test.

Trustees of a regulated fund, such as a standard self-managed super fund, must maintain the fund for the sole purpose of providing retirement and other accepted benefits to members, such as benefits on the termination of their employment or their ill-health.

Consequences of failing the sole-purpose test are severe. First, the fund will cease to be a complying fund. This means that it might receive a tax bill equal to 45 per cent of the total value of the assets of the fund. Second, a trustee who fails to maintain a fund for a sole purpose might be liable to a fine of up to $220,000 and imprisonment for up to five years.

TRUSTS

Blow the dust off that deed

Trust deeds can sit in safe custody for years without being looked at. But if you are planning to do something with a trust, it is important to check the trust deed first. You may be in for a shock if you find that the date when the trust will mature is coming up soon.

All discretionary trusts must come to an end within a specified period (80 years from the date of creation for modern trusts in NSW). Most discretionary trusts allow the trustee to nominate an earlier date.

Some discretionary trusts, especially those created in the 1960s and '70s, have what now seems an incredibly early vesting date. When the trust vests, the beneficial interest in trust assets passes to the beneficiaries, thus potentially triggering stamp duty and capital gains tax.

Speak to us for information on trusts.

Many clients are totally unaware of the limited life of trusts.

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CLASS ACTIONS

Things to know

There is some suspicion and confusion about class actions. Some people have an enduring belief that they must be taking on an unacceptable level of risk if they get involved. Equally, some may just have an aversion to continuing in a claim commenced without their express consent, despite the fact that it could benefit them financially to do so.

It is important to understand that, with the exception of certain public bodies and officials, a person does not need to consent to find themselves a group member in a class action. An action can begin in respect of a group without its consent.

A class action (or representative proceeding as it is known) must meet three requirements; seven or more people have claims against the same person, their claims are in respect of related circumstances, and their claims give rise to a substantial common issue of law or fact. One or more of those persons can commence proceedings, representing some or all of them.

Generally, it is more likely to be in a person's interest to remain in an action that is taking place and not return an opt-out notice. That way, they can share in the fruits of any judgment or settlement, free of any liability for costs, unless the court orders that a portion of the judgment be paid towards the applicant's legal expenses.

However, sometimes in a class action the group is limited to people who have consented to take part on certain terms, likely to include agreement on what part of the settlement is to be paid to any litigation funder involved.

Agreements can even entitle a funder to payment if a group member later decides to opt out and begin a separate action.

Where more than one action is afoot, you may have a choice about which group to join, in which case terms of funding agreements may be important points of comparison.

Speak to us for advice on whether to become a group member in an action, where there is some choice in the matter, or if you should 'opt out' when given an opportunity to do so.

In the current economic climate it is not surprising that investor class actions are receiving increased attention.

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MARK UP FULL PRICE

New rules on advertising goods and services

There are new laws regulating the way businesses advertise the price of goods and services with possible fines of up to $1.1 million for a corporation and $220,000 for an individual failing to specify the full price.

Businesses are now required to specify as a single figure the full price of goods or services "of a kind ordinarily acquired for personal, domestic or household use or consumption".

This means the GST and all other taxes, duties and levies must be included in the cost price of the goods, and the single figure must be displayed in a prominent way in advertising. This includes newspaper advertisements, promotional brochures, price lists on websites, and even when providing prices verbally.

Businesses will not be required to specify charges for delivering goods to a customer as part of the single figure, though they will have to specify the minimum amount of any delivery charge which will be incurred by the customer.

The single price should be shown in the same or larger lettering than any component of it by using such devices as bold type or underlining. A further implication is that the use of asterisks may no longer be permitted as, by using an asterisk, the single price is not as prominent as the component prices if it is positioned at the bottom of the advertisement.

Business may prefer to prepare both GST-inclusive and -exclusive price lists depending on the nature of the goods sold, if ordinarily selling commercial products as well as those ordinarily acquired for personal use, or if companies deal with incorporated and unincorporated business customers. But it may be more prudent for such businesses to simply use GST-inclusive price lists for all their goods and services and customers to avoid potential problems.

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GUARANTEES

Security for lenders

In a recent case, the court of appeal considered a case where a mortgage was varied, lengthening the term, increasing the principal and raising the interest rate, after the guarantors had resigned as directors of the company which had taken out the mortgage. The lender, who suffered a shortfall on the sale of the security, sought to recover from the guarantors.

The court concluded that the variations altered the nature of the guarantors' obligations. By reason of the increase, the guarantors would have been exposed to a potentially greater risk of being called upon to meet a default by the company of its obligations under the mortgage, "even if their liability was limited to the original sum lent to the company ($240,000) plus interest".

The increased borrowing by the company may have made it more likely that the company would default and that the guarantors would be required to meet any shortfall, even if only up to a limit of $240,000.

The lender failed to recover from the guarantors – a salutary lesson that gaurantees must be tightly drafted to ensure they are not affected by later variations. We can advise you on the appropriate wording for such guarantees. companies deal with incorporated and unincorporated business customers. But it may be more prudent for such businesses to simply use GST-inclusive price lists for all their goods and services and customers to avoid potential problems.

WORKS OF ART

Not an artistic free-for-all

In an industry where references to other fashion looks is rife, the courts have upheld an appeal by a company that another had copied its T-shirt designs.

Initially, a judge found that the second company had created a different design by making changes to the colours and numbers in the original. However, on appeal the courts found that the ideas and concepts of a design had to be taken into account and that the company had reproduced a substantial part of the original.

Changes to colours or graphic elements of a design may not be enough to escape a conviction for copyright infringement. Designers need to take care – if they reproduce a substantial part of a design they will breach copyright rules.

The court found that the T-shirt designs were original artistic works and the case was referred back to the original judge to determine how much compensation the copiers would have to pay.

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