

In Touch with the law

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.



In this issue

- Rising Seas: Protecting the beach house P2
- Wills: Can I change my mind? P3
- Early guilty plea: How are sentencing discounts decided? P4
- Paying tax on employee shares: Clearing up the rules P5
- Tenders pitfall: Beware of creating risk of claims P6
- Safety slip: Compensation could be harder to win P7
- Maintenance: Do I have to pay to support my children or spouse? P8
- Landlord and tenant: Renting laws have been rewritten P9
- Breaking the contract: When employee can't just walk away P10

RISING SEAS

Protecting the Beach House

New laws from January 2011 may help resolve some of the problems arising from property damage due to rising seas, but the strict conditions applying to protection works will make it very difficult for landholders in emergency conditions.

Coastal erosion has been a longstanding problem for many beachfront properties right across the NSW coastline. It is even more of a concern now that climate change is predicted to result in rising sea levels and increased frequency and ferocity of storms.

The emphasis in the new coastal management laws in NSW is on planning, and local councils will now have to develop plans which deal with the impacts of rising seas, the maintenance of any protection works, and their impact – such as increased beach erosion elsewhere.

Consent will only be given for coastal protection works that do not unreasonably limit public access to a beach or headland and when adequate funding is in place to ensure the works can be restored and maintained.

Previously, most protection works, even in an emergency, required development consent. Under the new laws, emergency protection works will now only require a certificate from the local council for protection such as sand bags – but not rocks or concrete – to be used to lessen the effects of wave erosion.

The works can only be carried out to protect a building used for residential, commercial or community purposes, and the distance between the building and the erosion escarpment must be less than 10 metres, as certified by a surveyor or authorised officer.

Dune restoration areas must not be disturbed unless written approval is obtained from the relevant authority, and there are other very detailed requirements for protection of vegetation and specifying the materials that are permitted.

In summary, not only must the detailed technical and locational criteria be met and a certificate obtained, but a property owner may also need to obtain written approval from relevant public authorities, engage a surveyor to prepare a survey, and an engineer to prepare a certificate.

If you have legal concerns about the security of your coastal property, consult us about how best to go about protecting it.



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WILLS

Can I change my mind?

You are free to alter your will at any time. If your circumstances change, you can and should consider changing your will. If you marry it is very important that you make a new will.

However, you cannot simply make an alteration by, for instance, crossing something out in the original will and writing in your new wishes.

If the alterations are minor, we can help you make a codicil (a separate document in which you change a provision in your will), but it is usually better to make an entirely new will unless the change is very simple. A codicil must be signed in the presence of two witnesses, in the same way as the original will.



EARLY GUILTY PLEA

How are sentencing discounts decided?

In 2000, courts gave guidelines that the sentencing discount for a guilty plea should fall in the range of 10 to 25 per cent, considering the time the plea is entered, its usefulness and the complexity of the issues.

Some eight years after this guideline, new laws were passed following concern about the trend of late guilty pleas in criminal trials. The new laws clearly set out the discount for pleas. If a plea of guilty is entered before an offender is committed for trial, a discount of 25 per cent should ordinarily be imposed. If entered after committal, the discount should ordinarily be up to 12.5 per cent.

An offender may also be given a discount for cooperation with authorities.

One offender, Ellis, who had committed a number of armed robberies on post offices and commercial premises, confessed to a minister of religion, decided to contact a solicitor and then confessed to police.

In Ellis's case, the courts began by noting the leniency that should be given to someone entering a plea of guilty and then explained that where conviction follows a voluntary disclosure of guilt, a greater degree of leniency enters into the sentencing decision.

The court decided that the leniency to be shown to a person who discloses their responsibility for a crime

would vary according to how likely it was that the police would eventually discover their guilt, and also the likelihood of their being able to prove it.

An 'Ellis discount', as it has become known, may in some cases be enough to result in a sentence other than full-time imprisonment, where such a sentence might otherwise be inevitable.

While it is understandable that a decision to go to police and confess involvement in a serious criminal matter would require some reflection, too much delay can result in the chance to obtain an Ellis discount being missed, or else seeing the potential discount being reduced.

It is better to make a confession as soon as possible, to ensure that the matter is brought before a court before the opportunity evaporates.

The courts have suggested that the total discount, whether for a plea of guilty, assistance to authorities, or an Ellis discount, should not exceed 50 per cent of what would otherwise be the appropriate penalty.



PAYING TAX ON EMPLOYEE SHARES

Clearing up the rules

The law on the taxation of employee share schemes changed in 2009, but some still find it confusing.

The general rule is that if an employee is given a share or a right to acquire a share, either gratis or at a discount, the value of the share or discount is included within the employee's assessable income.

The new rules still contain an alternative between being taxed upfront or at some future time, but they are more restrictive. For most people, the major difference lies in three significant changes.

First, and most controversial, are the 'real risk of loss' rules. Deferment is not allowed under the new rules unless the employee has a real risk of losing the share or right other than by disposing of it. A Tax Office guideline says that the meaning of "real" is "something more than a mere possibility". The Tax Office will accept performance hurdles or a minimum term of employment. It says that there is no real risk of forfeiture under a scheme which simply includes a condition which restricts an employee from disposing of an interest for a specified time, allows the employee to forfeit the interest, or provides for forfeiture if there is fraud or gross misconduct.

The second significant change is the replacement of the "cessation time" rules with "deferred taxing point rules". The deferral point is the first of seven years after the employer acquired the share or right, the date the employee ceases employment with the employer, or where there is no longer any restriction on disposal.

Third, unlike the old law, whether a share or right is subject to taxation upfront or is deferred depends upon the structure of the scheme and is not a decision made by the employee.

Tax-planning opportunities are generally quite limited. The challenge is to identify an acceptable risk to the employee which would also be acceptable for tax purposes.

Speak to us if you would like further advice on arrangements on any employee share scheme you may be considering.

69,250	13,814	10,396	14,085	12,676	72,400	72,500	14,714	11,284	15,079	13,564	75,000
69,300	13,826	10,396	14,085	12,689	72,450	72,550	14,726	11,296	15,093	13,576	75,000
69,350	13,839	10,409	14,099	12,701	72,500	72,600	14,739	11,309	15,107	13,589	75,000
69,400	13,851	10,421	14,113	12,714	72,550	72,650	14,751	11,321	15,121	13,601	75,000
69,450	13,864	10,434	14,127	12,726	72,600	72,700	14,764	11,334	15,135	13,614	75,000
69,500	13,876	10,446	14,141	12,739	72,650	72,750	14,776	11,346	15,149	13,626	75,000
69,550	13,889	10,459	14,155	12,751	72,700	72,800	14,789	11,359	15,163	13,639	75,000
69,600	13,901	10,471	14,169	12,764	72,750	72,850	14,801	11,371	15,177	13,651	75,000
69,650	13,914	10,484	14,183	12,776	72,800	72,900	14,814	11,384	15,191	13,664	75,000
69,700	13,926	10,496	14,197	12,789	72,850	72,950	14,826	11,396	15,205	13,676	75,000
69,750	13,939	10,509	14,211	12,801	72,900	73,000	14,839	11,409	15,219	13,689	75,000
69,800	13,951	10,521	14,225	12,814	72,950	73,050	14,851	11,421	15,233	13,701	75,000
69,850	13,964	10,534	14,239	12,826	73,000	73,100	14,864	11,434	15,247	13,714	75,000
69,900	13,976	10,546	14,253	12,839	73,050	73,150	14,876	11,446	15,261	13,726	75,000
69,950	13,989	10,559	14,267	12,851	73,100	73,200	14,889	11,459	15,275	13,739	75,000
70,000	14,001	10,571	14,281	12,864	73,150	73,250	14,901	11,471	15,289	13,751	75,000
70,050	14,014	10,584	14,295	12,876	73,200	73,300	14,914	11,484	15,303	13,764	75,000
70,100	14,026	10,596	14,309	12,889	73,250	73,350	14,926	11,496	15,317	13,776	75,000
70,150	14,039	10,609	14,323	12,901	73,300	73,400	14,939	11,509	15,331	13,789	75,000
70,200	14,051	10,621	14,337	12,914	73,350	73,450	14,951	11,521	15,345	13,801	75,000
70,250	14,064	10,634	14,351	12,926	73,400	73,500	14,964	11,534	15,359	13,814	75,000
70,300	14,076	10,646	14,365	12,939	73,450	73,550	14,976	11,546	15,373	13,826	75,000
70,350	14,089	10,659	14,379	12,951	73,500	73,600	14,989	11,559	15,387	13,839	75,000
70,400	14,101	10,671	14,393	12,964	73,550	73,650	15,001	11,571	15,401	13,851	75,000
70,450	14,113	10,684	14,407	12,976	73,600	73,700	15,014	11,584	15,415	13,864	75,000
70,500	14,127	10,696	14,421	12,989	73,650	73,750	15,026	11,596	15,429	13,876	75,000
70,550	14,141	10,709	14,435	12,801	73,700	73,800	15,039	11,609	15,443	13,889	75,000
70,600	14,155	10,721	14,449	12,814	73,750	73,850	15,051	11,621	15,457	13,901	75,000
70,650	14,169	10,734	14,463	12,826	73,800	73,900	15,064	11,634	15,471	13,914	75,000
70,700	14,183	10,746	14,477	12,839	73,850	73,950	15,076	11,646	15,485	13,926	75,000
70,750	14,197	10,759	14,491	12,851	73,900	74,000	15,089	11,659	15,499	13,939	75,000
70,800	14,211	10,771	14,505	12,864	73,950	74,050	15,101	11,671	15,513	13,951	75,000
70,850	14,225	10,784	14,519	12,876	74,000	74,100	15,114	11,684	15,527	13,964	75,000
70,900	14,239	10,796	14,533	12,889	74,050	74,150	15,126	11,696	15,541	13,976	75,000
70,950	14,253	10,809	14,547	12,901	74,100	74,200	15,139	11,709	15,555	13,989	75,000
71,000	14,267	10,821	14,561	12,914	74,150	74,250	15,151	11,721	15,569	14,001	75,000
71,050	14,281	10,834	14,575	12,926	74,200	74,300	15,164	11,734	15,583	14,014	75,000
71,100	14,295	10,846	14,589	12,939	74,250	74,350	15,176	11,746	15,597	14,026	75,000
71,150	14,309	10,859	14,603	12,951	74,300	74,400	15,189	11,759	15,611	14,039	75,000
71,200	14,323	10,871	14,617	12,964	74,350	74,450	15,201	11,771	15,625	14,051	75,000
71,250	14,337	10,884	14,631	12,976	74,400	74,500	15,214	11,784	15,639	14,064	75,000
71,300	14,351	10,896	14,645	12,989	74,450	74,550	15,226	11,796	15,653	14,076	75,000
71,350	14,365	10,909	14,659	12,801	74,500	74,600	15,239	11,809	15,667	14,089	75,000
71,400	14,379	10,921	14,673	12,814	74,550	74,650	15,251	11,821	15,681	14,101	75,000
71,450	14,393	10,934	14,687	12,826	74,600	74,700	15,264	11,834	15,695	14,113	75,000
71,500	14,407	10,946	14,701	12,839	74,650	74,750	15,276	11,846	15,709	14,127	75,000
71,550	14,421	10,959	14,715	12,851	74,700	74,800	15,289	11,859	15,723	14,141	75,000
71,600	14,435	10,971	14,729	12,864	74,750	74,850	15,301	11,871	15,737	14,155	75,000
71,650	14,449	10,984	14,743	12,876	74,800	74,900	15,314	11,884	15,751	14,169	75,000
71,700	14,463	10,996	14,757	12,889	74,850	74,950	15,326	11,896	15,765	14,183	75,000
71,750	14,477	11,009	14,771	12,901	74,900	75,000	15,339	11,909	15,779	14,197	75,000
71,800	14,491	11,021	14,785	12,914	74,950	75,050	15,351	11,921	15,793	14,211	75,000
71,850	14,505	11,034	14,799	12,926	75,000	75,100	15,364	11,934	15,807	14,225	75,000
71,900	14,519	11,046	14,813	12,939	75,050	75,150	15,376	11,946	15,821	14,239	75,000
71,950	14,533	11,059	14,827	12,951	75,100	75,200	15,389	11,959	15,835	14,253	75,000
72,000	14,547	11,071	14,841	12,964	75,150	75,250	15,401	11,971	15,849	14,267	75,000
72,050	14,561	11,084	14,855	12,976	75,200	75,300	15,414	11,984	15,863	14,281	75,000
72,100	14,575	11,096	14,869	12,989	75,250	75,350	15,426	11,996	15,877	14,295	75,000
72,150	14,589	11,109	14,883	12,801	75,300	75,400	15,439	12,009	15,891	14,309	75,000
72,200	14,603	11,121	14,897	12,814	75,350	75,450	15,451	12,021	15,905	14,323	75,000
72,250	14,617	11,134	14,911	12,826	75,400	75,500	15,464	12,034	15,919	14,337	75,000
72,300	14,631	11,146	14,925	12,839	75,450	75,550	15,476	12,046	15,933	14,351	75,000
72,350	14,645	11,159	14,939	12,851	75,500	75,600	15,489	12,059	15,947	14,365	75,000
72,400	14,659	11,171	14,953	12,864	75,550	75,650	15,501	12,071	15,961	14,379	75,000
72,450	14,673	11,184	14,967	12,876	75,600	75,700	15,514	12,084	15,975	14,393	75,000
72,500	14,687	11,196	14,981	12,889	75,650	75,750	15,526	12,096	15,989	14,407	75,000
72,550	14,701	11,209	14,995	12,901	75,700	75,800	15,539	12,109	16,003	14,421	75,000
72,600	14,714	11,221	15,009	12,914	75,750	75,850	15,551	12,121	16,017	14,435	75,000
72,650	14,726	11,234	15,023	12,926	75,800	75,900	15,564	12,134	16,031	14,449	75,000
72,700	14,739	11,246	15,037	12,939	75,850	75,950	15,576	12,146	16,045	14,463	75,000
72,750	14,751	11,259	15,051	12,951	75,900	76,000	15,589	12,159	16,059	14,477	75,000
72,800	14,764	11,271	15,065	12,964	75,950	76,050	15,601	12,171	16,073	14,491	75,000
72,850	14,776	11,284	15,079	12,976	76,000	76,100	15,614	12,184	16,087	14,505	75,000
72,900	14,789	11,296	15,093	12,989	76,050	76,150	15,626	12,196	16,101	14,519	75,000
72,950	14,801	11,309	15,107	12,801	76,100	76,200	15,639	12,209	16,115	14,533	75,000
73,000	14,814	11,321	15,121	12,814	76,150	76,250	15,651	12,221	16,129	14,547	75,000
73,050	14,826	11,334	15,135	12,826	76,200	76,300	15,664	12,234	16,143	14,561	75,000
73,100	14,839	11,346	15,149	12,839	76,250	76,350	15,676	12,246	16,157	14,575	75,000
73,150	14,851	11,359	15,163	12,851	76,300	76,400	15,689	12,259	16,171	14,589	75,000
73,200	14,864	11,371	15,177	12,864	76,350	76,450	15,701	12,271	16,185	14,603	75,000
73,250	14,876	11,384	15,191	12,876	76,400	76,500	15,714	12,284	16,199	14,617	75,000
73,300	14,889	11,396	15,205	12,889	76,450	76,550	15,726	12,296	16,213	14,631	75,000
73,350	14,901										

Beware of creating risk of claims

The process of tendering can give rise to contractual rights and obligations before any final deal is signed. It is important for personnel on both sides of the process to understand there are risks involved, for example over statements that might give rise to claims..

A recent case which emphasises the importance of this principle involved the Victorian Parliament, which had issued a request for tender for system integration services to implement a new desktop standard operating environment for the Parliament.

The company which submitted the lowest tender, but failed to win the bid, objected to losing the job and took the matter to court, saying it should have been awarded the contract.

The company argued that it had taken a minimalist approach in its tender, which focused on cost, as it had relied on what a parliamentary employee had told the company – that “cost, cost, cost” would be the major determinant.

However, it was an express condition of the request for tender that tenderers ought not to rely on any other information – including that provided by employees, agents and consultants of Parliament – unless it was expressly set out in the request for tender or advised in writing.

Accordingly, the court decided that if the company had misunderstood the selection criteria, it was not due to any fault of the Parliament or as a result of anything contained in its request for tender documentation.

The court also said that the obligation to assess tenders on the basis of value for money does not compel the selection of the cheapest tender and that there was no obligation to inform the tenderers of the actual weightings to be applied in making the final assessment.



SAFETY SLIP

Compensation could be harder to win

It may now be difficult to prove responsibility for injury when someone slips and hurts themselves at a time and place you would usually expect spillages to occur, even if there is no system of cleaning and inspection in place.

In a recent case, a person slipped on a chip, or grease from one, in a shopping mall, just outside a large retail store and quite close to a food court.

In an initial trial, the retail store was found guilty of negligence, because it owed a duty of care to anyone in the sidewalk sales area, but did not have an adequate cleaning system in place to detect a spillage such as the chip and have it removed.

However, the appeal court found that even if periodical inspections and cleaning had been carried out with the minimum frequency required for the occupier to be taking reasonable care, the possibility arose that the chip had fallen between the last such probable inspection and the arrival of the person who slipped on it.

The court emphasised that the slip was not one equally likely to occur throughout the day. The person had slipped at lunchtime, and the court said that there was no basis for concluding that the chip had been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system.



MAINTENANCE

Do I have to pay to support my children or spouse?

Both parents are responsible for the financial support of their children until the child reaches the age of 18 or until completion of the school year in which the child turns 18.

Child support can be paid as parents agree, or it can be assessed by the Child Support Agency, which uses formulas it has developed for the purpose.

The child support laws are complex. If you want to know what amount is payable, contact the Child Support Agency or speak to us.

In relation to maintenance, each spouse or former de facto partner is expected to try to support himself or herself after separation. However, maintenance may be payable if a spouse or partner is unable to meet their own needs. Common examples are where a spouse or partner has the care of young children or is unable to work because of a disability.



Renting laws have been rewritten

New laws to deal with issues in the rental market and reduce the level of disputes started on 31 January 2011. Among other things, the new laws recognise longer-term tenancies, the rights of cotenants, water conservation practices and the impact of domestic violence on rental agreements.

Tenants who have been in premises beyond the term of the original lease will now have more time to move out, with the notice period increased to 90 days in cases where the landlord wants them to move out without specific reasons. The notice period has increased to 30 days in cases where notice is given just before the end of a lease.

Landlords in turn have more certainty because, unless the notice is retaliatory in nature, the NSW tenancy tribunal must end the lease and return the property to the landlord if the tenant does not move out after being given a 'no grounds' notice to vacate. However, tenants should not be evicted simply for asserting their rights.

Landlords will be able to reduce the eviction process by two weeks if they apply for orders from the tenancy tribunal at the same time as giving notice to the tenant.

Co-tenants now have room to move in the new laws, with some types of dispute in shared households able to be taken to the tenancy tribunal. By giving 21 days notice to end their contract with the landlord once a fixed-term lease ends, a co-tenant can end their liability for future rent or damage. This will help avoid the situation where co-tenants remained on a lease even long after leaving.

Written permission from the landlord is now required if a tenant wants to bring in an extra co-tenant, but landlords cannot be unreasonable in making their decisions. A refusal based on potential overcrowding of the premises or the new person's name being on a tenancy database would not be considered unreasonable.

Victims of domestic violence living in rented property now have a right to change the locks and seek to take over a lease, even if they are not officially a tenant or co-tenant.

If water usage of the property is separately metered for payment by the tenant, the law now requires that the premises be water efficient.

Tenants who want to make a minor change to premises will still need written approval, but there is now an obligation for landlords to be reasonable, which may be important in cases such as the installation of child safety locks on windows.

Every tenant in NSW must now be given at least one way to pay their rent that does not involve a fee being charged, but if a cheque bounces or a direct debit is dishonoured, the tenant will have to pay any costs involved for the landlord.

A termination based on failure to pay rent will now be cancelled if a tenant catches up on overdue rent or follows an agreed repayment plan, but not if they are shown to have frequently failed to pay their rent on time.

A landlord can apply directly to the tenancy tribunal for possession of the premises without giving notice, if a tenant or a guest deliberately or recklessly causes serious damage to the premises, or if they have injured or are likely to injure the landlord, agent or neighbours.

Tenants now have a right to know, before they sign a lease, if a contract to sell the property has been drawn up, or if a bank has taken legal steps to foreclose on the landlord.

When rented premises are put up for sale, only two inspection periods each week will be allowed, and agents have to make reasonable efforts to agree with tenants on inspection times, but can negotiate if more access is required.

BREAKING THE CONTRACT

When an employee can't just walk away

An employee can't automatically terminate an employment contract by simply rejecting it and walking away from the job – and there can be costly consequences for them if they do.

In a recent case, a highly successful finance broker entered an employment contract for a two-year term. Some months later, in breach of the contract, he began working for a competing company.

His employer successfully obtained a court order to stop him from working for the opposition and then placed him on paid leave while they tried to sort things out. In doing so, the employer elected to continue the finance broker's employment in accordance with the terms of his contract.

Shortly before the court order expired, the employer directed the employee to return to work. When he didn't do so, the employer treated this as a final failure to observe the terms of the employment contract and took the case to court seeking compensation.

The employer's claim was based on a clause in the contract which provided a way the amount of compensation could be calculated if the contract was terminated by the employee's repudiation of it

In finding that the employment contract was still in place, and the employer was ready, willing and able to perform its part of the bargain, the court upheld the employer's claim and ordered the former employee to pay a sum of over \$500,000 in addition to the legal costs which had been incurred by the employer in pursuing the case.

