

In touch with the law

No. 1, 2006

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 your solicitor.

SHOP LEASES

New protections and obligations for retailers and landlords

New laws on shop leases came into effect at the beginning of 2006, bringing some significant new protections for retailers who lease premises, and a 30 March 2006 deadline for landlords to comply with a new bond obligation.

A new security bond scheme affects the collection and management of cash bonds paid by tenants. Cash bonds now need to be lodged with the Rental Bonds Board within 20 business days after they are paid.

Any cash bond held for existing retail shop leases (which previously should have been held in an interest-bearing deposit), must be withdrawn by 30 March 2006, and, together with the interest earned, be lodged with the Rental Bonds Board. It is a criminal offence not to comply with this requirement, and it applies to all existing retail shop letting where the landlord holds a cash security bond (whether invested or not).

The new laws apply to all premises used for a list of 150 or so types of businesses – not just those which look like shops. There is no general rule for the type of premise covered, but it is a safe bet that if premises are let to a business which sells goods, the lease must comply with the new law. This applies to houses and factories (or parts of them)

as well as premises that are obviously built as shops.

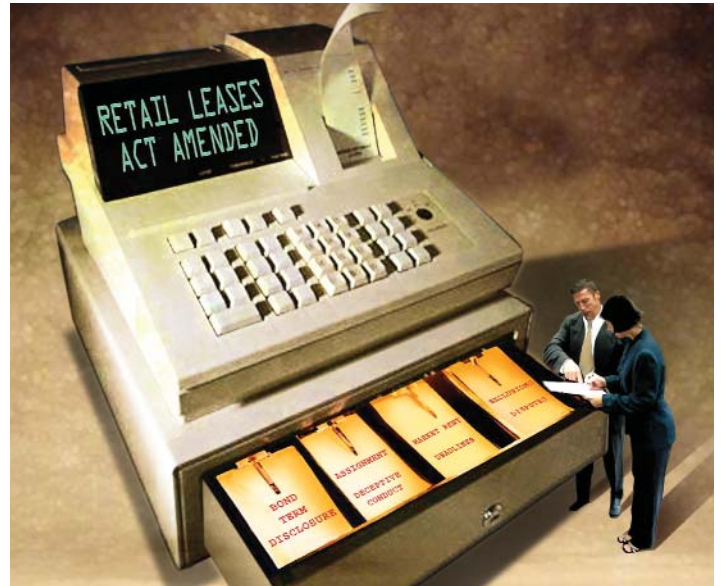
At the pre-lease stage, the laws now make it clear that landlords in shopping centres have to disclose a range of information about sales, traffic count and turnover that may be important to a tenant's decision to take up a lease. Shopping centres will also have to clearly indicate whether they can assure a tenant that the current mix of outlets will not be altered by introducing a competitor to the tenant during the course of the lease.

Other changes to the law should provide greater clarity about expenses and outgoings the landlord can claim from the tenant.

For instance, the definition of outgoings now makes it clear that such expenses are to be directly and reasonably attributable to the operation, maintenance, and repair of the building. Advertising and promotion expenditure by shopping centres must now be properly accounted for, and tenants have a right to withhold payment of the outgoings until there is a proper accounting.

Landlords have new obligations on fit-out costs, disturbances to a tenancy, and relocation costs payable to a retailer

Where a lease contains an option to renew at current market rent, the tenant can request a



determination of rent up to six months before the lease finishes. Where a landlord and tenant cannot agree what the current market rent is, the process by which they can apply to have the rent determined by a specialist retail valuer has been streamlined, at equal cost to both.

The process for transferring a lease to another operator has been changed. The landlord must now make up his mind within 28 days of receipt from the tenant of a statement disclosing key facts about the person proposed to take over the lease.

This statement is prepared by the current tenant and signed by the tenant and the proposed new tenant. Once this statement is received, if the

landlord does not reply in 28 days, the transfer is deemed to have been agreed to. If the procedure is followed, current tenants can be protected from paying the landlord amounts payable by the new tenant.

Another of the changes could have the result that, if the requirements of the new laws are not complied with, a written lease for a year is automatically extended to five years. It could also mean that an informal or unwritten lease for a short period is extended to five years.

If you are a landlord with commercial lettings, now may be a good time for a consultation with your solicitor to ensure that you comply with the new retail lease laws. □

RETURN OF DEPOSITS

Can you get your money back?

At the end of every failed contract the question whether a defaulting purchaser is entitled to the return of their deposit will be raised. The conduct of the parties, circumstances which brought about the termination and forfeiture, and the amount at stake will all help determine if a purchaser who doesn't proceed can retrieve their deposit.

The deposit represents not only part of the purchase price but also, and more importantly, a pledge to bind the bargain.

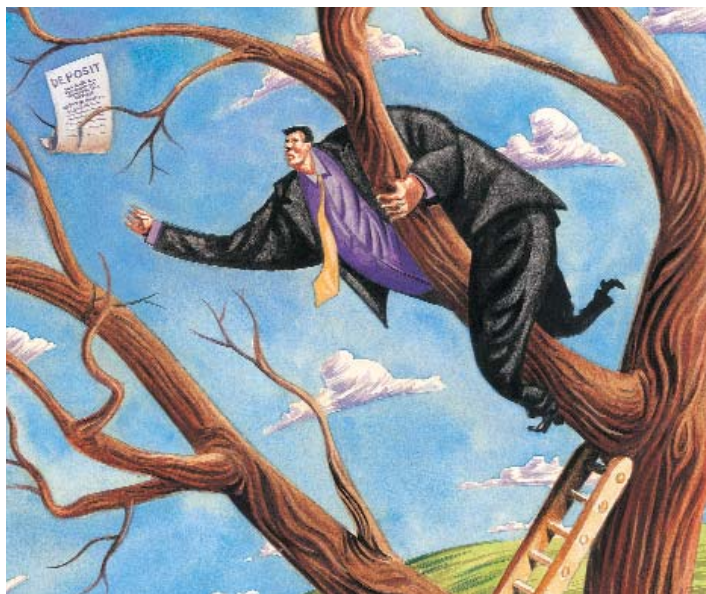
The question of deposits was recently discussed in a NSW appeal case in which the purchaser argued that the vendor had misrepresented the size of certain apartments in a block of flats. The purchaser sought to rescind the contract.

The judge had ordered an inquiry into the damages suffered by the vendor, but also ordered the return of the purchaser's deposit. From that decision, an appeal and cross-appeal followed.

The question of damages and the return of the deposit are interrelated, since a vendor who seeks damages must give credit

for a forfeited deposit. However, there is no rule which requires a vendor's claim for damages to be determined before an application for the return of a deposit. In this instance the court upheld the purchaser's contention that the vendor had engaged in misleading and deceptive conduct, and ordered the return of the deposit.

In other recent cases, purchasers have not been so successful. These cases make it clear that the opportunities for recovering a deposit are narrow. They emphasise the deposit's contractual importance, both as a part-payment and a pledge to seal the bargain. □



SUPER

Splitting the nest egg

Following a recent court case, the value of superannuation should go into a separate asset pool when considering the property of a marriage.

The court's decision viewed super as a separate sort of asset in considering the division of property when a couple broke

up. Such a two-pool approach allows due deliberation to be given to super. It could very well give rise to a separate ratio in the split of superannuation to that of the split for the other assets of the marriage.

The issue of comparing superannuation against so-called 'real assets' only arises when the superannuation interest is not split.

The process of splitting avoids the need to compare superannuation with other assets. It has the further advantage of sharing the unique nature of the superannuation taxation and preservation aspects between the parties.

Consult your solicitor if you would like advice on property settlement issues. □

SAVING TAX

Financial planning after a marriage breakdown

There are two important tax planning objectives after a marriage breakdown: first, to share the assets for minimal or no tax cost, and second, to maintain pre-divorce tax planning arrangements or instigate new ones. There are also complexities and benefits if a company or trust is involved.

In some circumstances, no capital gains tax may be levied on transferring an asset after a marriage breakdown. However, the receiving spouse may be subject to capital gains tax when selling

if the asset has achieved a profit.

As a consequence, a capital gains tax liability may be transferred from one spouse to the other without the latter realising it. The value of the transferred asset may thus be much less than might have seemed to be the case. This is a problem with assets such as investments, which should be valued on a net of tax rather than gross basis.

Maintenance payments to a former spouse may also be exempt from tax. However, they will not be if the person making the payments disposed of income-producing assets or diverted in-

come from themselves in order to make the payments. A cost-conscious taxpayer with a high marginal rate should try to divert assessable income into the recipient's hands by, for example, selling non-income producing assets.

If there is a private company or family trust, it could make payments directly to the person entitled to receive them, provided there is no family trust distribution tax issue.

Former spouses can still benefit from fringe benefit tax advantages of a company or trust. For example, if one spouse has an obligation to provide the

other with a car, the family company should provide it instead of the spouse doing so; if the provision of that car forms part of the remuneration of the first spouse, the cost of providing the car will be deductible to the company.

Also, if parties controlling a family company remain amicable after divorce, both spouses might remain its employees. Even if one performs nominal duties, the company may be entitled to a tax deduction up to the amount of the 'age-based limit' for contributions it makes to a superannuation fund for the benefit of that spouse. □

TAX FRAUD

It can mean going to jail

Recently, three proprietors of a fashion group were each sentenced to eight and a half years' imprisonment after being found guilty on two charges of conspiracy to defraud the revenue.

Other sentences imposed last year include 12 months' imprisonment for a mechanic who failed to declare income of over \$160,000, two-and-a-half years' imprisonment for a man who committed goods and services tax fraud to-

talling \$278,000 and six-and-a-half years' imprisonment for a man who committed income tax identity fraud of \$120,000.

If a person fails to lodge a tax return or Business Activity Statement when required, on commission of a third or subsequent offence that person can be imprisoned for up to 12 months. If someone lodges a false return, they may also be fined. In addition, they can expect to pay 'culpability penalties' of up to 75 per cent of the tax avoided plus interest.

There are many reasons the Tax Office may decide to audit a taxpayer. These include someone being 'dobb'd in', which can be done by way of a special Tax Office phone number.

Last year, the Tax Office announced continuing concern at the level of non-compliance with the capital gains tax, including taxpayers not declaring gains on holiday homes and rental properties, inaccurate goods and services tax refund claims and understatement of rental income and overstate-

ment of related expenses.

Solicitors are normally intimately involved in transactions which might have capital gains tax implications and are in a particularly good position to advise on them.

The Tax Office will not automatically refer all instances of tax fraud to the Director of Public Prosecutions. The key to avoiding prosecution is voluntary admittance and genuine contribution. Speak to your solicitor if you have concerns about tax issues. □

VOLUNTEERS

When is a person liable for damages?

Civil liability legislation has gone a long way to protect volunteers from the dangers of personal liability, but some uncertainties remain.

A recent case confirmed the potential legal liability of volunteers.

A volunteer who was injured on a working bee organised by the president of an unincorporated club sued the club president.

The court confirmed that one volunteer can owe a duty of care to another and that the president owed a duty of care, not because he was a member of the club or a member of its committee, but because he organised the working bee.

However, the court found there was no breach of duty, because there was no evidence of what the president should have done to prevent the injury.

The law does not assist a volunteer where a club or association is unincorporated. It also makes a volunteer immune from personal civil liability for any act or omission made by them in good faith when doing community work organised by a 'community organisation'. This is not confined to personal injury cases, and applies to civil liability of any kind other than defamation.

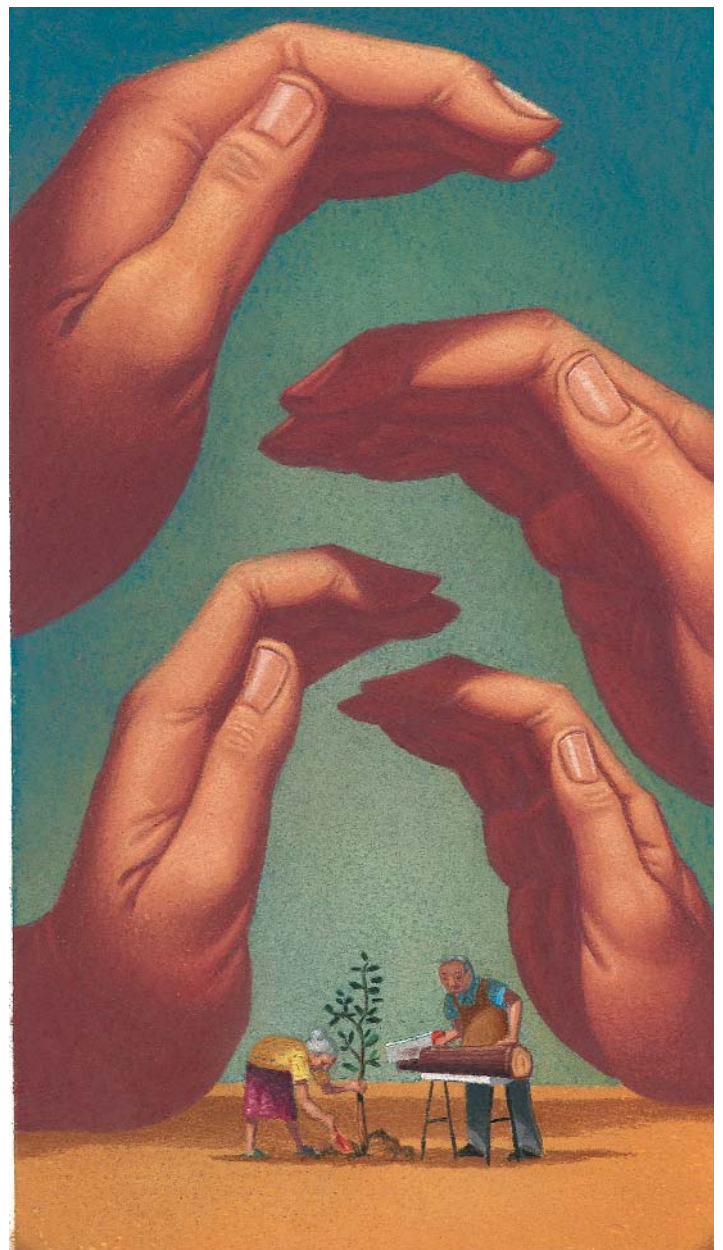
Good Samaritans are also protected by the law – those

who, in good faith and without expectation of reward, come to the assistance of someone who is apparently injured or at risk of being injured.

Community organisations include bodies corporate, church or other religious organisations or a state authority which organises volunteers to do community work. People wishing to become involved in community work would be well advised to make sure they come under the umbrella of one of these entities, or that the organisation is legally incorporated.

Immunity does not apply where insurance is legally required, such as when a volunteer drives a car, or if a volunteer is drunk, or criminal acts are involved. A volunteer is also liable if acting outside the scope of the activities authorised by the community organisation concerned, or contrary to its instructions.

Negligence very often involves people acting outside the instructions given by a community organisation. For example, a junior cricket club might instruct umpires to make sure that all batsmen are wearing helmets. By allowing a player to bat without a helmet, the umpire is acting outside the instructions given and arguably does not have immunity. □



PROPERTY DISPUTES

Are there differences for same-sex couples?

Same-sex relationships have begun to be seen as more 'marriage-like' by the courts, in the sense of being intimate, committed and financially interdependent. But property disputes in relationship breakdowns may have distinct features from heterosexual cases.

It appears very common for same-sex couples to have a property in only one partner's name, even when sharing mortgage payments. This is because until 1999 couples in NSW could not amend the title to include a partner's name without becoming liable for stamp duty on the value of the property. Even now many couples do not realise that the law has changed to allow a transfer of title to or from a partner without incurring stamp duty.

It is also likely that a number of same-sex cases will be raised late, as former partners will often not be fully aware of their rights and only seek legal assistance a long time after separating.

Lesbian couples often have children born during the relationship using assisted conception. If, on separation, any children remain living with the birth mother, she will not be able to use child support legislation to gain child support from her former partner. Some lateral thinking about other av-



enues for child support is needed here. It is worth considering proactive measures for the future, such as putting child

support agreements in place through domestic relationship agreements. Your solicitor can draft one of these agreements

for you and your partner.

If your case goes to court, your solicitor will also work hard to ensure the court is made aware that same-sex couples are not always identically situated to heterosexual couples. In one case the court held it against the credit of a gay man that he was not prepared to answer in open court whether his former partner had died of AIDS, and that in filling out an official form he had not disclosed that he met his present partner through an escort agency. In such situations the courts may need to be helped to understand that a gay person could expose himself to considerable risk of discrimination by responding truthfully, and that a lack of candour might be reasonable. □

GET THE PRICE RIGHT

'Slash reductions' claimed must be real savings

Companies need to ensure that when they offer price savings, they are savings on the usual selling price of the article, unless clearly stated otherwise.

A national bedding and furniture retailer is going to correct its use of comparative pricing after losing a recent court case.

The retailer regularly discounted goods in its store, and

in one of its sale catalogues consumers were told they could save "up to \$1,000" by comparing the "normal ticketed price" with the discounted price.

However, since the products were usually sold at less than the ticketed price, the advertising could have misled customers about the amount of the saving they would actually make.

The Australian Competition and Consumer Commission said

that a very fine print disclaimer in the catalogue was not prominent enough to qualify this impression. It viewed misleading two-price comparative advertising very seriously.

The company has agreed to only advertise price reductions based on the usual selling prices for products in its stores, unless there is a clear and prominent explanation stating otherwise. □