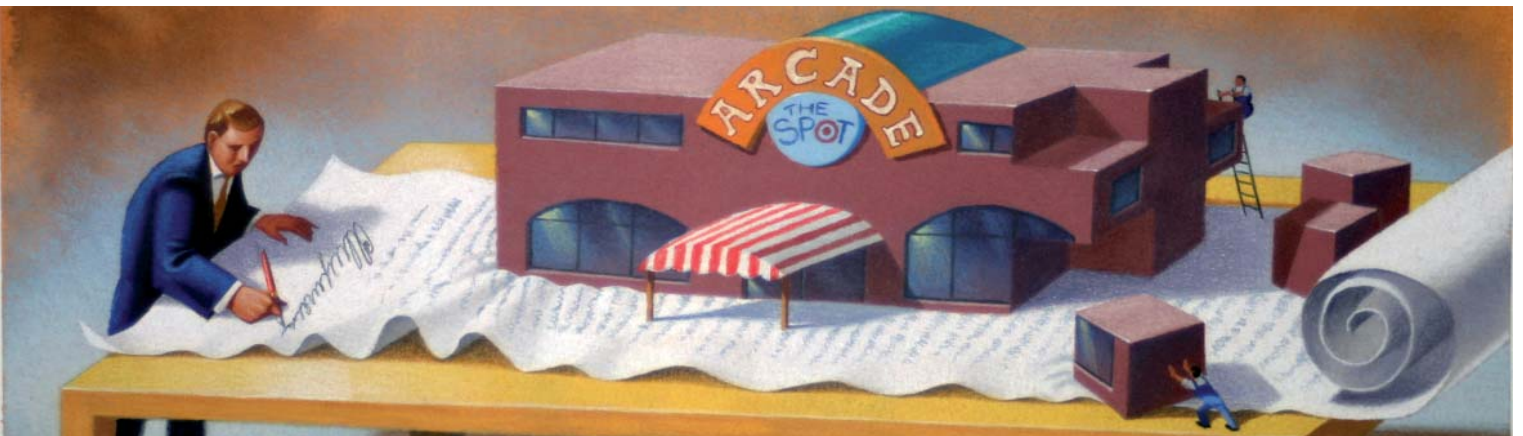


# In touch with the law

*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 your Solicitor.*

## RETAIL LEASES

Be careful what you write



**The very common practice of making clear, written offers of lease, or re-lease, may have surprising and unexpectedly binding consequences.**

A recent case found that a lease for the minimum five-year term arose out of a 'letter of offer' which most observers would have assumed to be clear enough to ensure that no binding lease automatically resulted.

The letter stated: "Acceptance of this offer by the lessor will not in any circumstances create a legally enforceable lease between the parties ... no agreement will be legally enforceable unless acceptable and executed by both parties". The letter also referred to itself as "this application to lease".

The letter of offer went into substantial detail on the new

space, the rent, the term and option, guarantees, insurance, lessee's fit out, and period of unoccupancy during construction. It also called for the payment of a \$5,000 deposit, to be credited to the rental account if the lease went ahead, and to be refunded if the lessee did not proceed. One of the applicants

signed the letter and handed over a cheque for \$5,000.

Other prospective occupants withdrew, and the lessor decided not to proceed. The deposit was returned and the lessor eventually served a notice to quit.

However, the applicant

claimed there was a lease.

The tribunal which considered the case found that commencement of a lease by virtue of entry into possession or payment of rent may occur even though no formal deed or agreement of lease is executed, so long as the parties have reached 'consensus' on the terms of the

**"Entry into possession or payment of rent may begin a lease even though there's no formal deed or lease agreement."**

lease. It is not necessary for the parties to reach agreement on all the terms of the right of occupation to do this.

The evidence of consensus was the detailed letter and its acceptance evidenced by signature. (The payment appears not

to have been relevant.) It may well follow from the decision – at least where there is a tenant holding over – that a verbal acceptance of such a written offer would also establish consensus.

In relation to tenants who occupy in accordance with a holding over provision, a landlord's agent would be well advised to not make or originate any written offer at all, and to commence every face-to-face negotiation with clear indications that the only offer of lease which will be made will be contained in a draft lease to be sent by solicitors acting for the lessor.

There would appear to be no reason why similar reasoning would not apply to prospective tenants who tender the first month's rent with an indication of acceptance in response to a letter containing details of a proposed lease. □

# BUSINESS IDENTITY

## Dot the 'i's and cross the 't's

**A business name is a name or title under which a person or business trades. A trademark is a letter, word, phrase, sound, smell, shape, logo, picture, aspect of packaging or a combination of these.**

A company is a separate legal entity and it must be registered under the national corporations law. If a company wishes to trade using a name other than its own, it is necessary to register that trading name as a business name.

Many people think that registration of a company and its business name protects one's rights in a trademark. However, that is not the case. Trademarks have also to be registered. Registration gives the owner the right to exclusively use or control the use of the mark.

Always check the proposed name of your business with the

Department of Fair Trading, Australian Securities and Investment Commission and the Trade Marks Office of IP Australia.

Not all trademarks can be registered. A trademark is not registrable if it is not capable of distinguishing your goods or services from similar goods of other traders. Trademarks which conflict with an earlier one, or which would mislead the public about the nature of the goods and services are also difficult to register. Searches can be made for free on the IP Australia website.

Once your business name is registered, it must be on public display outside every place of business, appear as registered on every letter, invoice or other document used by the business, and the certificate of registration must be displayed prominently at the location you have described as the principal place of business. □



## TICKING CLOCK

### What's the time limit for making a discrimination claim?

**When does the clock start ticking if making a claim of unlawful discrimination?**

Complaints of discrimination have to be made in the first instance to the Human Rights Commission. It is not possible to bypass it and go directly to court. There is no strict time limit for bringing a case, but the Commission President has discretion to terminate a complaint if it is lodged more than 12 months after the alleged event.

However, this would not prevent someone from then bringing an application to court,

within 28 days, or such further time as the court concerned allows.

Statutes of limitation in the states do not necessarily apply. In one case, the judge concluded that the clock starts ticking at the time when an act of discrimination takes place, and a person needed to commence proceedings in court within six years.

In others, the judges have noted that the trigger for the court's jurisdiction is the termination of a complaint by the Commission.

Contact your solicitor for further information. □

## FUTURE SAVINGS

### Succession planning for the small business

**If a taxpayer sells shares in a business, or bequeaths them on death, normal capital gains tax rules apply. However, if it is shares in one's own business, or the business itself, which is being disposed of, small business relief may be available.**

If small business relief is available, in addition to the normal 50 per cent capital gains tax discount, a taxpayer might be entitled to a further 50 per cent 'active asset' discount, a further retirement exemption, and rollover relief where the proceeds of sale of the asset are used to acquire other active assets.

Small business relief is avail-

able where a taxpayer, or related entities or persons, owns \$5 million or less of business assets, and the asset being disposed of is an 'active asset'.

If the asset is a share of a company, a person must have a controlling interest – that is, broadly speaking, own 50 per cent or more of the shares in that company – before it will be deemed an active asset.

There is also a 15-year ownership exemption from capital gains tax if the asset has been owned by the taxpayer for at least 15 years, the taxpayer is over 55, and the disposal happens as a consequence of their retirement or death. Contact your solicitor if you would like further information on tax planning your business future. □

# BUSINESS DEAL?

## Beware hidden traps in contracts when buying or selling

**A contract is initially rarely 'tax perfect', mainly because tax law often has little to do with commercial logic.**

Contact your solicitor if you are drafting a contract. As a minimum, before entering into any contract, purchasers should understand how a business handles its tax accounting. What is the availability of carry-forward losses? Is the business being tax audited, or are there any un-terminated objections between it and the Tax Office?

It is sometimes advisable to seek a Tax Office ruling on a matter before signing a contract, if delays do not make this impractical. A ruling would be useful, for example, when a vendor and purchaser want a sale to

be exempt from GST under the going-concern exemption, but it is unclear whether an exemption would be allowed.

In such a situation any GST liability will be the vendor's responsibility. It is all very well for a purchaser to warrant to make good any subsequently levied GST, but vendors are often, understandably, reluctant to rely on warranties.

There are two main problems with warranties. A warranty is only as good as the person giving it – with both credit and enforcement risks. Second, the warranty might have insufficient scope.

A warranty which simply says that a company's tax liabilities are 'as disclosed' is unlikely to be good enough (assuming that

shares in a company are being purchased, rather than the business itself). One of the reasons that purchases of companies, rather than their assets, are so unpopular is because the purchaser is taking on any liabilities which attach to the company.

Warranties should cover all GST, PAYG, stamp duty, fringe benefits tax and superannuation guarantee levy liabilities. They should also cover any interest and penalties which might be levied because of past inadequate tax payments.

If a vendor gives a tax warranty, the vendor should never surrender rights to control tax disputes which might result in it incurring a liability. Rather, a sale agreement should contain a clause which states that if there

is a dispute over a company's tax liability prior to the point of sale, the vendor has the right to dispute the assessment and cause the company to take whatever action is necessary, including court action, to dispute it. The agreement should say that the vendor should bear the costs of such a dispute.

Dividend-stripping provisions in the tax legislation mean that if a person sells a company, and the purchaser subsequently strips it of its profits, the vendor, rather than the purchaser, might be assessed on the amount of profit taken out. So a vendor who proposes to sell a company which is rich with accumulated profits should require the purchaser to provide an indemnity against this. □

# FAMILY HOME

## Fight for it has entered whole new era

**Recent legal decisions, along with reforms of bankruptcy and family law, mean that spouses of bankrupts will have to at least consider whether they need to call on the powers of the Family Court to protect their share of the family home.**

Through a recent case, the courts have rewritten the law on bankruptcy for the modern age.

Mrs X bought a property in the '70s with her husband for \$31,000. In 1987 Mr X's half-share was transferred to his wife. In 2000 he became a bankrupt.

Eventually, Mrs X was ordered to transfer her husband's half-share back to the trustees in bankruptcy, in accordance with the Bankruptcy Act. Mrs X argued that because she had contributed 76.3 per cent of the purchase price of the property, she should only have to remit the remaining 23.7 per cent to the trustees.

Courts had previously pre-

sumed that parties who contributed unequal shares of the purchase price of a property would hold the property in those same shares. In the recent case, the court said: "It may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them".

Consider the case of someone who put property in their partner's name some decades before because their occupation put them at more risk. Assume that several decades later the person becomes bankrupt as a result of recent significant gambling losses.

Under the Bankruptcy Act, the bankruptcy trustee had no claim against the property. Payments towards the purchase and the mortgage were not made with intent to defeat creditors. The payments were not an undervalued transaction, as the bankrupt was solvent at the time the mortgage payments were made, and in any event they are well



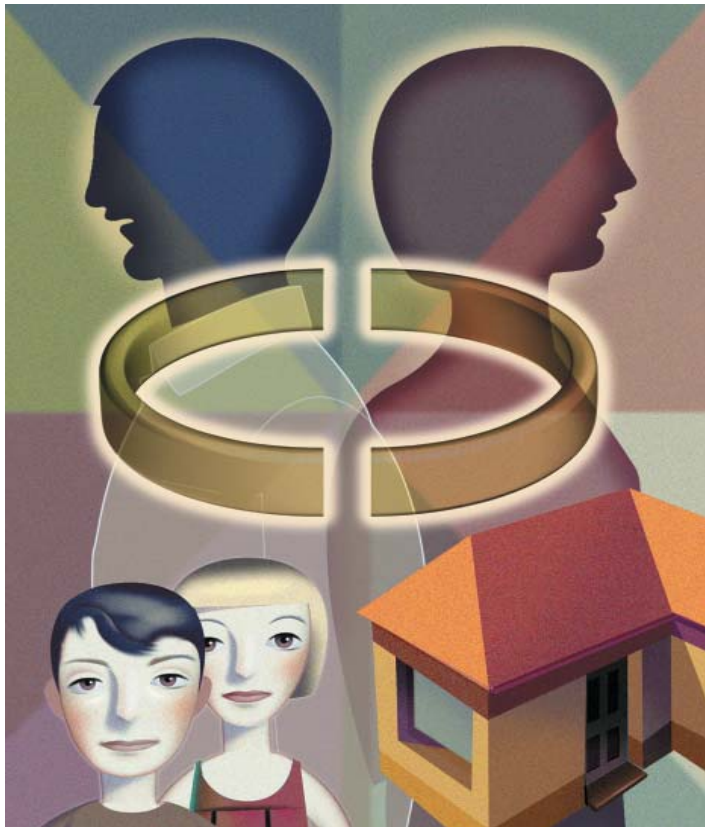
outside the statutory time limits. Even under the most recent reforms to the Bankruptcy Act, the trustee would be limited to a potential claim in respect of amounts paid during the past four years.

Nevertheless, a bankrupt's wife will now be presumed to

hold the whole of the matrimonial property in trust for herself and her husband with each having an equal share. The trustee in bankruptcy will be able to recover one half of the value of the matrimonial property which may, over the decades, have risen to a considerable sum. □

# SHARED PARENTING

## Who will the children live with?



**When parents separate, they should try to agree on parenting orders or a parenting plan for their children.**

From July this year Family Relationships Centres are opening throughout Australia offering information to separating couples. Agreement can best be reached using negotiation, counselling, mediation or conciliation. However, if you and your spouse cannot agree who the children will live with, you will need legal advice.

In determining what is in the best interests of a child, the two primary considerations are the benefits of a meaningful relationship with both parents and the need to protect the child from physical or psychological harm. Additional considerations are the age, sex and maturity of the child, the child's views, the relationship to each parent and other relatives, the likely effect of separation for the child, the willingness and ability of each parent to facilitate a continuing relationship between the child and the

other parent, distance and travel difficulties, the capacity of the carer, the culture, background and lifestyle of the child and carers, their attitude to the child and to the responsibilities of parenthood, and any family violence involving the child.

Parents must now consider if it is reasonably practicable and in the best interests of the child for the child to spend equal time with each parent, or substantial and significant time with each parent or other relative. Parents should also make joint decisions in consultation with each other on matters such as education, religious and cultural upbringing, the child's health, the child's name and changes to the child's living arrangements.

If the children do not live with you, you should discuss arrangements for them to spend time and have communication with you.

Your solicitor can advise you on your rights regarding children, maintenance and property, check any agreement you have made and tell you how it can be changed or enforced. □

## PRICE OF POLLUTING

### Drastic increase in environmental penalties

**Directors and company managers now face a greater risk of being prosecuted personally for pollution offences committed by their companies. Punishments have also greatly increased.**

Directors face up to seven years imprisonment and a bill for \$1 million for an offence of environmental pollution committed wilfully. Companies can pay up to \$5 million, up from \$1 million – the maximum penalty for individuals has been raised from \$250,000.

The maximum penalty for

individuals who have committed an offence negligently is now a fine of \$500,000 and four years' imprisonment.

Directors will no longer be able to argue as a defence that they didn't know polluting was taking place. They can still make the defence that they were not in a position to prevent it, or that they had used due diligence to prevent it.

Odour pollution and land pollution have been made offences, in addition to harmful disposal of waste, to overcome the defence argument which was being made that a pollutant was not 'waste'. □

## TAX RELIEF

### Changes to land tax

**The NSW government in this year's budget announced changes to the way family unit trusts are to be assessed to land tax. The changes will allow family and other unit trusts to claim the land-tax-free threshold, saving about \$6,000 a year in land tax at current rates.**

The government has allowed landowners a 12-month period in which to restructure their unit trusts to take advantage of these proposed changes. The tax relief is intended to apply to family unit trusts and other trusts which have previously been taxed as fixed trusts, provided they restructure their holdings into

fixed trusts within 12 months.

According to the recent budget speech, a family unit trust is a unit trust which holds land with a taxable value up to \$1 million, which has previously been taxed as a fixed trust and in which at least 95 per cent of the units are owned by family members.

Further relief will be available from other state taxes such as stamp duty.

However, prior to restructuring their affairs, landowners need to consider the wider legal and tax consequences, particularly whether the overall tax cost will exceed the land tax and stamp duty saved.

Contact your solicitor for further information. □