

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.

SECURITY DEPOSITS

If a sale goes bung, will you pay tax on the deposit?

When is a deposit treated as an instalment payment, or part payment, and when is a forfeited deposit subject to GST?

The Tax Office has recently released public rulings on these matters, which are particularly pertinent for any vendor who has had a projected sale collapse.

Recently, a GST-registered vendor sold land to a purchaser as a taxable supply under a standard contract for sale in Victoria. The purchaser defaulted in paying the purchase price. When the purchaser did not rectify the default within the required timeframe, the seller rescinded the contract and kept the forfeited deposit.

In that case, which had gone to tribunal, the vendor was held liable for GST on the forfeited deposit, and has appealed.

A range of suggestions have been put forward for dealing with GST on forfeited deposits, including increasing the deposit to 11 per cent of the purchase price.

The suggested solutions have their problems. For example, if the deposit is set at 11 per cent, it may be treated as an instalment payment (because it exceeds 10

per cent of the purchase price), and hence become liable for GST.

Until the GST treatment of forfeited deposits has been judicially determined, GST-registered vendors should be aware of the risk that they may lose a portion of any forfeited deposit as GST (including deposits paid under contracts involving GST-free or input-taxed supplies). Contact your solicitor if you would like further information. □



FELLED

Court fines company which cleared bushland

A company contracted to undertake tree clearing and excavation on a development site was fined \$52,000 for removing indigenous bushland, shrubs, sandstone rocks and trees, including two Red Bloodwood trees, whose retention was a condition of development consent.

The company appealed, not against the penalty for removal of

the two trees, which was \$15,000, but against the sentence for clearing the rest of the native vegetation – the western corner of the site, it admitted, was effectively a ‘flat, level, gravel ground’, by the time it had finished.

The maximum penalty for such offences is over \$1 million. The judge on appeal would have liked to double the penalty, noting the seriousness of the offence, that the company was an experienced

contractor, it knew the bushland needed to be retained, and had removed it because it made it easier for it to turn its trucks. General deterrence as well as material environmental damage was relevant in sentencing.

However, to be able to increase the sentence, the court would have had to warn the company that might be going to happen, and give it the opportunity to withdraw its appeal. □

PURPLE HAZE

Is it misleading to use a rival's signature product colour?

In a recent case, Cadbury argued that it had 'substantial, exclusive and valuable' goodwill in its chocolate confectionery business, which it promoted by a particular shade of purple, and that another chocolate business, Darrell Lea, should not be able to promote its business using the same colour.

For many years Cadbury has used the name Cadbury in a cursive script, adopted from the signature of its founder. It has used purple wrapping for its flagship brand Dairy Milk products since 1920, except during World War II.

Cadbury holds over 70 per cent by value of the Australian market for block chocolate. In 2002, Darrell Lea's share of the confectionery market was 2.5 per cent.

A small number of Darrell Lea products had been sold in other outlets in 2001 to 2003, but since then Darrell Lea had sold only through company-operated stores, licensed stores and free-standing units in other shops such as newsagents and phar-

macies. About 70 per cent of its products were sold through its own shops. It did not produce moulded chocolate blocks.

Between 2002 and 2004 Darrell Lea used purple in a shade like that used by Cadbury in various products, and Cadbury took its rival to court, claiming it misled the public who would think that Darrell Lea or its products had some association with Cadbury.

The court found the two companies distributed via quite different outlets and had different products. A customer seeing a chocolate in a Darrell Lea label was unlikely to think it a Cadbury chocolate just because it had a purple wrapping. The court thought this was an important test: colour was a part of marketing but it did not determine product recognition.

Cadbury had surveyed consumers and found purple was a particularly valuable promotional colour for chocolate products, but the products in the survey were unbranded, and for this reason the court rejected that the survey showed any likelihood of brand confusion. □



CHILDREN'S LAWYERS

New role for child's advocate in family court

Recent laws have clarified the role and duties of an 'independent children's lawyer' to represent a child's interests in family law proceedings. The Family Court may now appoint one if it thinks a child's interests require it, though generally the appointment will be reliant on the availability of legal aid funding.

The new laws follow the spirit of the United Nations Convention on the Rights of the Child, which states that in all matters which affect children, the best interests of the child are a primary consideration, and that children have

the right to express their views.

There are a range of circumstances where the Family Court should normally appoint a children's lawyer: where there are allegations of abuse, intractable conflict between parents, alienation of the child from one parent, cultural or religious issues affecting the child, proposals to separate siblings, or if neither parent seems to be a suitable custodian.

A lawyer may also be appointed if the child is of mature years and expresses strong views about changing long-standing residence arrangements or denying contact to one parent.

The lawyer is not the child's representative and does not have

to act on the child's instructions. Their role is to form an independent view, based on available evidence, of what is in the best interests of the child, and advocate for those interests in proceedings (regardless of the views of the child).

There is now a two-tiered test for best interests, with a range of primary and additional considerations. Primary considerations are the benefit to the child of a relationship with both parents, and protection of the child from physical or psychological harm resulting from abuse, neglect or family violence. The child's views are an important additional consideration, and the court will adjust the

weight it gives them in the light of such factors as the child's maturity and level of understanding. Additional considerations can outweigh primary ones.

The independent children's lawyer needs to find out the child's views, possibly via several visits to establish trust, in a non-intimidating environment, free from the influence of others, and must inform the court of the views expressed. The child cannot be required to express views on something, though the lawyer can try to ascertain them.

The children's lawyer should also interpret reports to the court and minimise trauma to the child of the proceedings. □

WORK CHOICES

Industrial action main concern of employers

Emerging trends from decisions of the Australian Industrial Relations Commission give some indication of the post-Work Choices world.

The vast majority of applications to the Commission have been about industrial action – applications by employees for secret ballot orders to authorise taking industrial action, and applications by employers for orders to stop or prevent industrial action.

While uncertainty remains over decisions by the Commission on the former, those in relation to applications for orders to stop or prevent industrial action have been relatively straightforward.

Industrial relations legislation has always granted the Commission power to order that unlawful industrial action cease, but the Commission in the past only used this power in a discretionary way – where the industrial action was “unprotected” and deemed to be

“illegitimate”. The subjectivity of exercising this discretion led to a high level of unpredictability whether an order would be made.

The new legislation removes the Commission’s discretion – it is now mandatory for it to make an order where unlawful industrial action is threatened, being organised or happening.

It is also required to hear and determine applications within 48 hours, providing applicants with quicker access to remedies.

Employers have rushed to take advantage of the new provisions. A dozen applications were brought in the first two months of the new legislation.

Examining applications made

so far suggests the amended provision has been successful in curbing unlawful industrial disruption. The Commission has only adjourned or dismissed applications where employees and the union undertake not to engage in industrial action. Consult your solicitor for further information on workplace relations issues. □

GST TRAP

Selling disused residential premises

Relying on the GST exemption for residential premises, without making allowances for the potential risks involved, could land you with a whopping tax bill.

Consider a situation where a construction company has owned a residential property for some years before deciding to sell rather than develop. The

property is vacant when sold, but has most recently been let for residential purposes, so the company does not include an amount for GST in the purchase price.

The GST Act defines residential premises as “land or a building that is occupied as a residence or is intended to be occupied and is capable of being occupied as a residence”.

However, the courts have recently found that where a buyer has no intention to use a property for residential accommodation but to demolish it, and when it was not occupied as a residence at the time of settlement, the sale is a taxable supply.

In this case, the selling company is faced with the task of recovering the GST from the buyer. □

LITIGATION FUNDING

Underwriting your day in court

A recent decision in the High Court has legitimised the litigation funding industry.

Litigation funding is the funding of legal costs by a person not a party to the case and who has no direct interest in its outcome.

The seminal case concerned claims for the recovery of amounts paid by tobacco retailers to tobacco wholesalers.

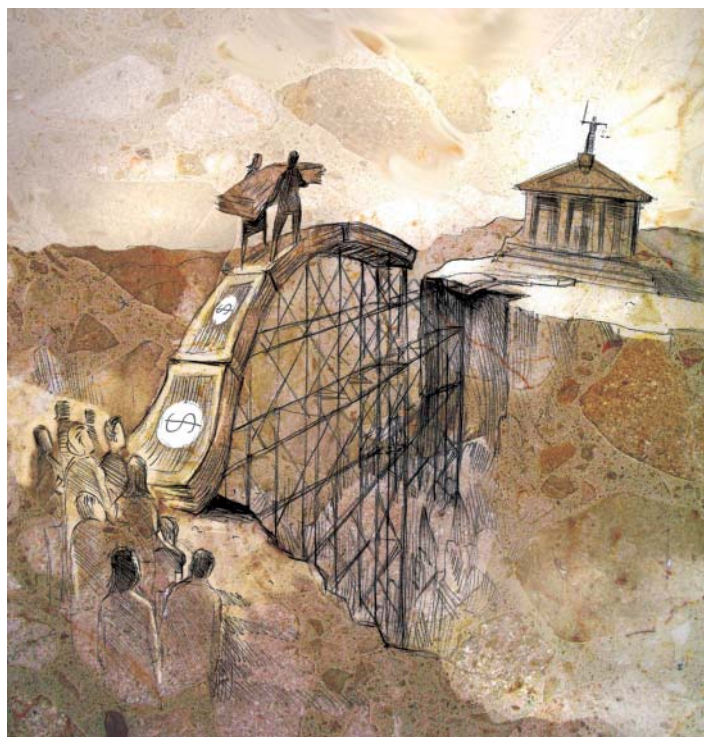
The proceedings were instigated by a litigation funder who was prepared to underwrite the litigation (and meet any costs order against those bringing the case) in exchange for one-third of any amount recovered, plus the benefit of any costs order.

There were a number of different proceedings, but in each

case individual retailers made a claim against a wholesaler.

However, the summons filed in each proceeding said that the proceeding was brought on behalf of other tobacco retailers who had purchased tobacco from the wholesaler during the relevant period, had not recovered any licence fees and had decided to opt-in to the proceedings by accepting the litigation funder’s terms.

Funders are now emerging who support general commercial litigation with no interest other than the potential for a commercial return on investment. They usually agree to fund an action in exchange for a proportion of any amount recovered plus any costs order. A whole new industry is emerging. □



FIRST HOME BUYERS

Beware the requirements to benefit from grants

The NSW government offers first home buyers grants and concessions. But to qualify, there are restrictions.

First home buyers in NSW are offered a grant of up to \$7,000 under the First Home Owner Grant Scheme and/or an exemption/concession from transfer duty of up to \$17,990, and mortgage duty up to \$2,341, under the First Home Plus Scheme.

To qualify for these benefits, first home buyers must, among other things, occupy the home as their principal place of residence for a continuous period of six months, commencing within 12 months of completion of the agreement for purchase or construction of the home, as the case may be.

To satisfy this residence requirement, the person must actually reside at the home, it is not enough for them to merely store their personal possessions there, and the home must actually be their main residence – that is, the person cannot mainly reside elsewhere, in rented accommodation, for example.

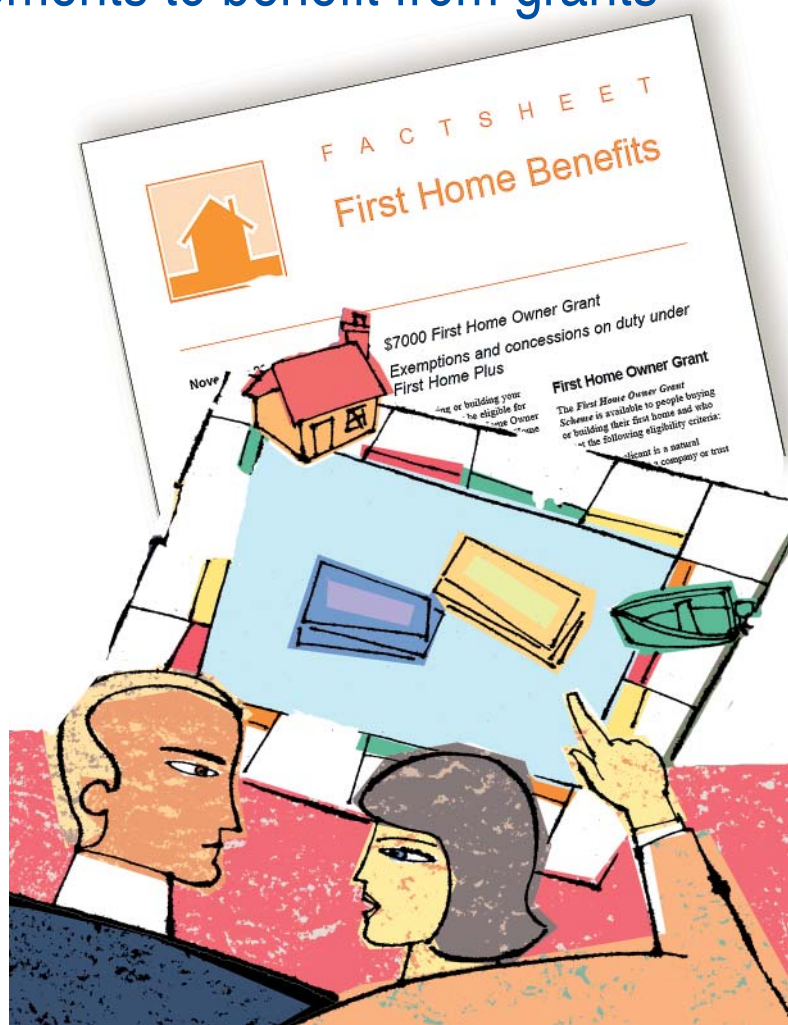
Despite the residence requirement being well-entrenched in the law for some time now, it seems that some applicants for the benefits are still falling foul of it.

First home buyers also need to be mindful of key differences between the two schemes, including eligibility thresholds, previous ownership of land, application for vacant land, occupancy requirements and non-commercial arrangements.

The consequences of failing to comply with the eligibility criteria under either scheme are severe, with a liability to repay not just the amount of the grant or exemption, but also penalties of up to 100 per cent of the amount of the grant or exemption and interest in excess of 13 per cent per annum on the unpaid amount.

Following changes to the law, those dissatisfied with a decision as to whether they have satisfied the residence requirement under the First Home Plus Scheme can now seek to have the decision reviewed.

Contact your solicitor if you would like further advice. □



REGISTER THE DEEDS

Losing original deeds can be costly

Original trust deeds are very important documents, evidence of the existence of a trust which has the potential to be around for 80 years. Registering deeds with the Department of Lands could be a very good investment. In the absence of evidence that original trust deeds were stamped with duty, you could find yourself with a hefty bill to pay.

Consider the case of a couple who set up a trust which was established before it owned any property, other than the settlement sum of \$10. The deed was

sent to the Office of State Revenue and it was stamped with duty of \$200.

When the couple were refinancing the trust's loans some years later, their new bank required a certified copy of the original deed. By then the trust owned property with a market value of \$1,000,000 and listed shares with a market value of \$500,000. However, the original trust deeds could not be found and no certified copy had been made.

In the absence of evidence confirming that the original trust deed was stamped, stamp duty of \$40,490 will have to be paid on the \$1 million worth of real

estate in the trust. The property will also have to be valued. (Fortunately, as listed shares are now exempt, duty will not have to be paid on the value of the shares owned by the trust.)

If the original trust deed had been registered with the Department of Lands after it was signed and stamped, a copy of the deed could have been obtained from Land and Property Information. This would be as good as having the original and would have avoided the problem.

During the life of a trust, it is probable that the family members controlling the trust and the trust's accountant, lawyer

and banker will all change, possibly more than once. Any one of these changes could result in an original trust deed being misplaced. The document could also be destroyed by fire or flood.

The only disadvantages of registration are that the document becomes a document on the public record and that it costs money to register the deed. The cost and disadvantages of not registering can be significant if the original is ever lost or destroyed.

As well as the stamp duty consequences, there can also be unwanted tax consequences. Contact your solicitor for further information. □