

# 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.*

## SUB-DIVISIONS

When what you see is not what you get

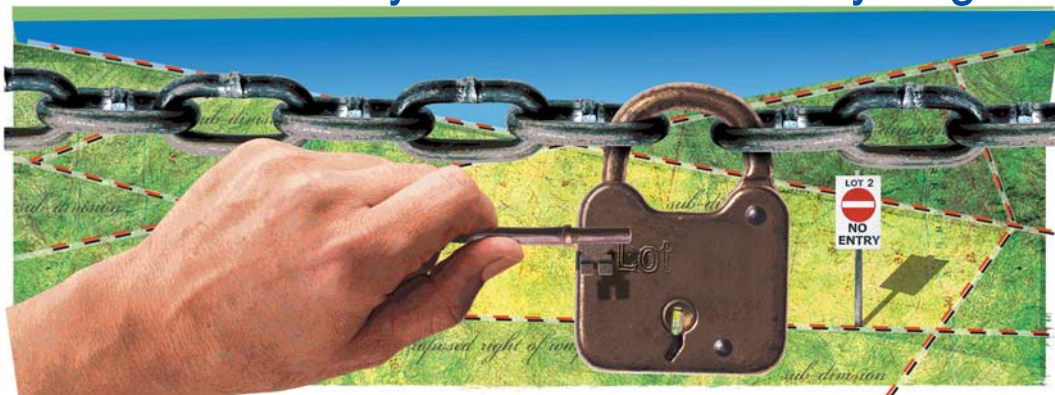
**A recent court decision has highlighted the need for careful searches of local council records before entering into a contract for the purchase of land.**

In the case, the owner of a piece of land had subdivided it into two lots. A condition of the subdivision imposed by the local council was that a right of way had to be created over lot 2 for the benefit of lot 1.

No right of way was actually created at the time, but the registered plan of the sub-division referred to a proposed right of way, and diagrams on the certificates of title issued for the two lots referred to it, even though they did not show its existence.

Lot 2 was later further subdivided, but the registered plan of the new subdivision did not refer to the proposed right of way, nor did the the certificates of title to the new lots.

When the company that owned the land came to sell, it was not obliged to disclose the existence of the proposed right of way to the purchaser. This is because the regulations governing the sale of land require disclosure of restrictions only on the use of land as set out in "deeds, dealings and other instruments lodged or registered in the Land Titles Office that are shown on the relevant property certificate".



So the new owners had land affected by a right of way they had been unaware of, and a dispute arose.

In its final decision, the Court of Appeal found that the council's consent to the original sub-division created a right, which could be relied on by all later transferees of the lot, and that this right took precedence over the system

of registration of titles. The owners of lot 1 were entitled to insist on their right of way.

The case highlights the need for careful professional legal advice when considering a contract for the sale of land. Searches need to cover not only the development consent by which a lot being purchased was created, but also any earlier sub-divisions of

which the lot once formed a part.

Your solicitor can advise you on steps to help ensure that you buy the land you'd intended. One option your solicitor might consider is insertion of a special condition in a contract to allow revoking the contract if, prior to settlement, a search discloses a condition of consent which had not been complied with. □

## COMPANY STRUCTURES

Consider the tax implications

**When structuring a corporate group, you may want to ensure, for tax purposes, that companies in the group can consolidate. However, there are other considerations which may make this less desirable, such as asset protection.**

With changes in company tax provisions in July, groups of com-

panies now have to consolidate if they want to transfer losses from one company in a group to another, or transfer assets from one entity in the group to another without paying capital gains tax.

Consolidation has been available since July 2001 and applies to wholly-owned corporate groups. A parent company and its wholly-owned subsidiary (which could be a partnership or fixed trust

rather than a company) can consolidate. But there must be a 'head company' – if an individual or a trust owns the whole of the shares in two companies, rather than first owning a holding company, those two companies could not consolidate. Discretionary trusts cannot be part of a consolidated group. If you require advice on structuring a corporate group contact your solicitor. □

# DEBT

## What should I do with a legal letter of demand?

### DON'T IGNORE IT.

A solicitor has written the letter on behalf of someone (the creditor) who claims you owe him or her money. The letter will usually state that unless you pay the amount claimed within a specified time (often 14 days), the solicitor has been instructed to begin legal proceedings against you.

If you do owe the money you should pay the debt as soon as possible to avoid having to pay extras such as court costs and interest on the money.

If you can't pay the whole amount at once, you can offer to pay by instalments. Try to reach agreement with the person to

whom you owe the money – your creditor. He or she is mainly interested in getting the money back and will usually only take legal proceedings if there is no other way of achieving this.

If you do not owe the money you can refuse to pay. If there is a clear reason (such as the money is for goods or services you didn't receive), tell the solicitor. It may prevent court proceedings being started. However, if you're not sure whether you owe the money, you should get legal advice.

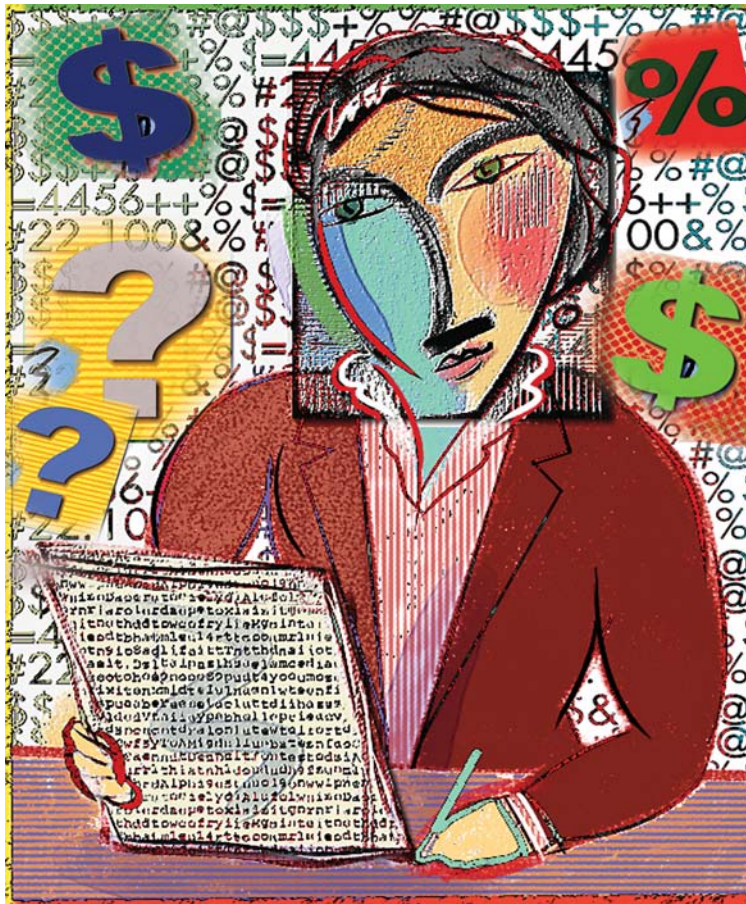
Remember, legal advice can always help. Even if you owe the money, a solicitor may be able to make better arrangements for you to repay it. □

## What if legal proceedings are begun against me?

**In situations where someone claims you owe them money, you will know if legal proceedings have begun against you because you will be served with a statement of claim.**

Your creditor's solicitor will have already filed this document with a court. Don't ignore it.

If you do owe the money it is still not too late to negotiate terms of agreement with the creditor. You can admit the debt and offer to pay by instalments through the court office. But if you do this and the creditor objects to the terms you have offered within 14 days, the matter will be decided by the court registrar.



If you feel that you do not owe the money, you can choose to defend the claim. You can lodge the defence yourself or have your solicitor assist you to prepare and lodge it with the court. A defence sets out your reasons for believing you do not owe the money.

You may also want to make a counter claim against the credi-

tor – for example you may have been sold defective goods by your creditor. If you want to defend the claim, the court will set a date for the hearing.

If you are served with a statement of claim and do nothing about it for 28 days, your creditor is then entitled to apply to the registrar of the court for judgment against you. □

# NEGLIGENCE

## New standards of professional responsibility

**In the wake of new personal injury laws which affirm that people are largely responsible for their own safety, some quiet changes have been made to the law on professional negligence.**

The central element of the test for professional negligence is that a person is not liable if they acted in a manner that was widely accepted. However, widely accepted practice is limited to "competent

professional practice". It is not a defence to say that inadequate behaviour was widely accepted. And the court can impose its own view if it considers widely accepted, competent, peer professional opinion to be "irrational".

Quite what irrational will mean as a legal concept remains to be seen in the courts, but ultimately this ensures that professions are subject to the scrutiny of the court and cannot simply set their own standards.

Changes in personal injury law do not change a professional's duty to warn of risk. People cannot take too much comfort in the possibility of defending a claim by suggesting that a risk was obvious. It is much safer to provide comprehensive advice in the first place, and to be able to demonstrate that the advice was actually given. Hence it is usually suggested to give written advice.

An apology no longer constitutes an express or implied ad-

mission of fault. In the past, many professionals have hesitated to apologise for fear that the apology might be interpreted by a court as an admission of liability.

If national professional standards are introduced, compulsory professional indemnity insurance will be linked with high-level caps on the extent of professional liability, and professionals will be required to hold professional indemnity insurance at a level to cover consumer claims. □

# PSYCHIATRIC INJURY

## Employers held liable for employees' mental wellbeing

**It is now established that employers are required to consider risks in the workplace to employees' psychological as well as physical safety, and to take reasonable steps to ensure that the risks are minimised.**

A bank teller in a major bank was involved in a hold up and had a gun pointed to her head. The bank had just received a delivery of money.

Bank procedure was that the guards placed bags of cash on the counter. A teller would lift them onto the floor then put them in the safe. This was done in full view of the public using

the bank.

After the incident, the bank teller suffered a disabling depression, which ultimately led to her dismissal. She sued, claiming that her injuries resulted from the bank's negligence in failing to provide a safer system of work.

On appeal, it was found that a bank has a duty to take reasonable care of its employees, including protecting them should a robbery be attempted, and that a bank should expect that robberies may be attempted from time to time. At the least the bank should have provided the protection of a security guard while the teller had possession

of the cash, prior to it being deposited in the vault. The bank was ordered to pay damages.

In another case, a senior worker brought an action against his employers after having to return to work during a bitter waterfront dispute.

The company had locked out and subsequently dismissed a number of its employees, predominantly union members. In the middle of the dispute, a vessel was expected to berth and Mr V. was informed that, along with other employees, he would have to return to work.

The court found that a major confrontation with union members was inevitable and that if

workers were brought onto the site they would be at risk of suffering physical or psychological harm. In the event, the workers were brought in for several days on a terrifying bus journey, through a barrage of abuse and thrown objects. Whenever the bus stopped it was shaken and men jumped on the roof, hitting it with baseball bats. Threats were also made to Mr V. and his family.

The court found that if the company had had due regard for the safety of its employees, it would never have requested them to go to work in these circumstances. It had not fulfilled its duty of care and Mr V. was awarded damages. □

# WORKPLACE RELATIONS

## When are drink and drug tests legal?

**Is it legal for an employer to make an employee submit to a drug or alcohol test? If you perform work which is 'safety sensitive', such as operating heavy equipment or driving for long hours, employers can argue that drug tests are necessary to prevent injury at work and fulfil their duty to ensure the health, safety and welfare of employees.**

Many companies have drug and alcohol policies which seek to prohibit drug use during work or immediately prior to commencement. As with any other workplace policy, companies have to ensure that the policy and testing procedures are applied fairly and equitably.

If there is a random testing policy, the company should have non-discriminatory guidelines in place which set out how the company will determine who is to be tested.

Employers must ensure that staff know about the relevant details of the policy by informing them of it and training them in its application.

Policies must be applied consistently so that employees know what to expect if they are in violation.

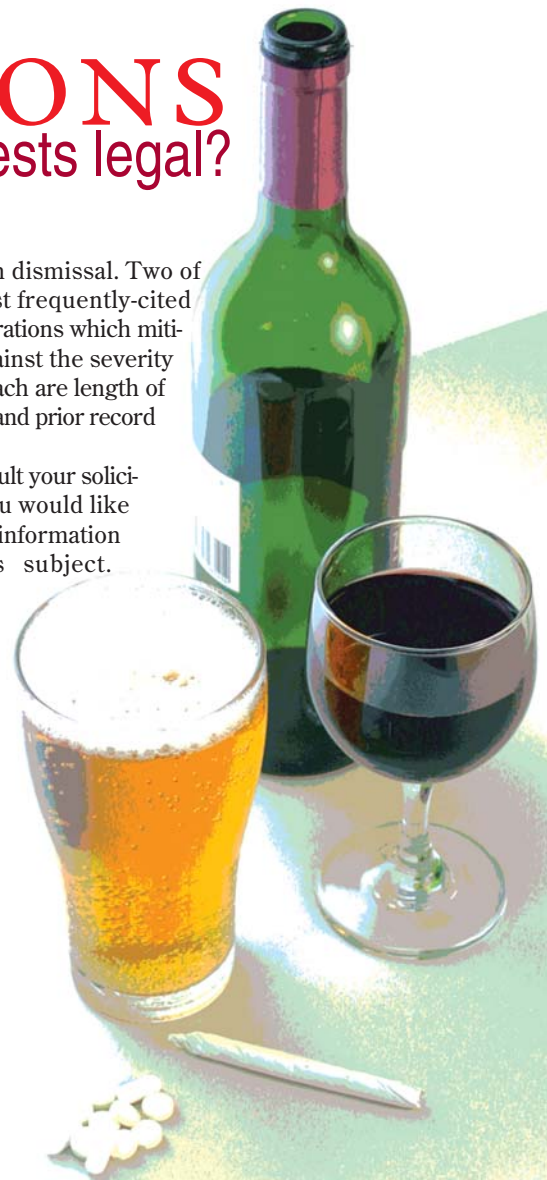
In one case where four employees were dismissed for drinking alcohol during their lunchbreak in contravention of the company's alcohol policy, one of the reasons the terminations were found to be harsh was that the men had not received any prior warnings. Most prior infringements of the policy had only resulted in warnings, and only on one occasion had the company dismissed an employee for contravening the policy. In that case, the employee had a history of warnings about the consumption of alcohol at work.

A breach of policy, no matter how serious, will not automatically

result in dismissal. Two of the most frequently-cited considerations which mitigate against the severity of a breach are length of service and prior record at work.

Consult your solicitor if you would like further information on this subject.

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# BANKRUPTCY

## Tightening up the law

**Recent changes to the law have made it harder to use bankruptcy as a way of ending financial obligations.**

The changes aim to encourage greater use of debt agreements as an alternative to bankruptcy by middle-income earners. This is part of a drive to toughen up on debtors' using voluntary bankruptcy as a means of avoiding debts rather than as a genuine last resort.

This will present a problem for anyone for whom the line between bankruptcy and solvency is not clear, and who may take the step of petitioning for bankruptcy earlier than absolutely necessary as a matter of prudence. It is now

very important that petitioners clearly set out, or are at least able to articulate, how it is that they are unable, as opposed to merely unwilling, to pay.

In the ordinary course of events, a bankrupt is discharged from bankruptcy after three years. However, under the old laws, bankrupts had been able to apply for early discharge after only six months. This has now been abolished.

The authorities now have greater powers to object to discharge of bankruptcy, even after the three-year period, if a bankrupt has been uncooperative, and can now extend the period of bankruptcy to five or even eight years. □

# INSURANCE

## What do you need to disclose to your insurer?

**In a recent insurance case that went before the High Court, a company appealed against its insurer's refusal to cover a claim, which occurred during a one-month goodwill extension of the policy, because the insurer had not been invited to renew.**

The company's broker had negotiated the one-month extension to the policy when it was experiencing difficulty in placing the cover with other underwriters.

The broker had not told the insurer that it would not be invited to be a renewal insurer after the extension period.

When the company notified the insurer of a major claim during the extension period, the insurer declined to indemnify on the basis that it would have refused to grant an extension to the policy if it had been disclosed that it was not going to be invited to be a renewal insurer.

According to the *Insurance Contracts Act*, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that the insured knows, or a reasonable person could be expected to know, to be relevant to the decision of the insurer

whether to accept the risk.

The company initially unsuccessfully argued that this was a commercial matter, and not relevant to the decision of the insurer whether to accept the risk.

However, the High Court found that the information was not relevant and that the counter-

argument would allow the Act to be used as a "charter for avoidance of claims by insurers".

Further complex debate is likely about the definitions of 'commercial' and 'accepting the risk'. Contact your solicitor if you would like to discuss these matters. □

# SHAREHOLDER RIGHTS

## Calling directors to account

**In light of recent company failures, regulators have introduced proposals to make directors and senior executives more accountable to companies and their shareholders.**

The Australian Stock Exchange has issued recommendations for listed companies to make directors and senior executives more accountable to companies and shareholders. Under

these proposals, nomination committees would be established, with responsibilities which include assessing the competency of current directors, and shareholders would be entitled to a range of information on proposed directors, such as biographical details, including the competency and qualifications of directors submitted for election.

These proposals aside, directors already have a legal duty of care. The 'business judgment

rule' protects directors from liability if they make an honest mistake in the conduct of their duties, so long as they can show that their decision was made in good faith and in the best interests of the corporation, and that they obtained all appropriate information beforehand. It seems to be clear that this rule will not prevent directors from incurring liability if they fail to exercise due care in making significant decisions. □

