

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.

SMALL BUSINESS

Big landlords lose lease disputes

Small food court tenants have successfully taken on major shopping centre operators over lease deals in two recent cases – one leading to a \$130,000 payout.

The owner of a Thai food outlet in a Sydney complex took landlord Coles Myer to court after rival retailers started competing with him by selling laksa soup. The Thai outlet owner argued a special condition in the contract stated Coles Myer did not intend to allow more than one Thai-Malay food seller. The tenant said he had paid higher rent for exclusive trading.

When the Thai outlet's takings suffered, the component of rent calculated on turnover fell. Coles Myer placed the food seller under covert surveillance in a bid to challenge the trading

figures.

Even though exclusive trading rights were not stated in the contract, the Retail Leases Division of the Administrative Decisions Tribunal found in favour of the tenant. It also criticised Coles Myer for putting the Thai outlet under surveillance.

The case is now on appeal.

In the second case, also in Sydney, a verbal promise of exclusive retail rights as a trade-off for a poor location in the food court was upheld by the court. Nothing in the lease suggested the deal existed; however, the tribunal found that the outlet's owners would not have signed up for a shop in such a location "in their wildest dreams ... without having that exclusivity in their menu as an essential part of their commercial negotiations." □



EQUAL OPPORTUNITY How flexible must employers be?

Anti-discrimination protections for employees with carer roles outside the workplace have left many businesses wondering how far they must bend to accommodate workers' needs.

In a recent case an employer successfully challenged an employee's compensation claim for

breaches of equal opportunity laws. The worker had a sick son and wanted to work from home two days a week.

The employer argued that while a lot of the worker's computer-based tasks could be done from home, the job required attendance at the office. Close interaction between staff was necessary and junior staff needed

direct supervision. Other staff would also bear the imposition of an increased workload by their colleague's absence. The court agreed that it was not unreasonable for the employer to fail to provide more flexible working arrangements.

The court decided that it was not the intention of equal opportunity laws to place unreason-

able burdens on businesses or to deny employers the right to impose lawful and reasonable contracts of employment.

However, employers should still try to accommodate employees with carer responsibilities insofar as they can within the bounds of reason. So make sure you know your rights and your obligations. □

SNIFFER DOGS

New law to cover searches by police drug sniffer dogs



A new act, *The Police Powers (Drug Detection Dogs) Act 2001*, changes the circumstances under which the police can legally use sniffer dogs.

specific authority to carry out "general drug detection" in specified areas. The police can conduct searches of individuals without a reasonable suspicion that the individual is committing an offence.

This can be done when a person is at, or seeking to enter or leave, any part of premises being used for the consumption of liquor sold at the premises (other than any part of premises being used primarily as a restaurant or other dining place). Also when someone is at, or seeking to enter or leave, a public place at which a sporting event, concert or other artistic perfor-

mance, dance party, parade or other entertainment is being held; and when a person is on, or seeking to enter or leave, public transport, or at a station, platform or other public transport stopping place.

The Act also gives the police power to conduct "general drug detection", that is random searches under a warrant.

These warrants can be issued by an authorised justice on the application of the police who have reasonable grounds for believing that people in some public place may include people who are committing drug offences. □

The introduction of the new Act will stop random searches of people by sniffer dogs except in specific circumstances. They will not be able to use sniffer dogs in main suburban shopping centres as they have in the past.

However, they'll still be able to use them on railway stations and outside nightclubs.

A police officer may use a dog to search a person for drugs if the police officer is authorised to search the person for the purpose of detecting a drug offence but must have the requisite authority before using a sniffer dog.

However, the Act gives police

TAXATION

Getting the paperwork right

Lawyers are not usually as intimately involved in tax affairs as accountants. However, the way documents have been prepared can make all the difference when a taxpayer is audited.

For example, paperwork relating to transactions, particularly by trusts, needs to be correctly drafted to prove a taxpayer's right to make a claim. The burden of proof is on the taxpayer if the Taxation Office disputes a claim, and as tax law is a very technical area, the particular wording of every document used to prove a claim is extremely important.

So consult a solicitor as well as your accountant to make sure your paperwork is set up correctly. □

IMPOSTOR VENDORS

Hold onto your deposits

A recent allegedly fraudulent attempt to sell a property has highlighted the need for vigilance by purchasers when buying a property, especially over the release of deposits to the vendor.

A Sydney solicitor was contacted from Brisbane with instructions to act in the sale of a Sydney property. Twenty-four hours before settlement was due, the registered proprietor of the property to be sold contacted the solicitor to

tell him that she knew nothing about it. The owner had been alerted to the pending sale by a letter from the mortgagee, that the imposter had not managed to divert, regarding the discharge of the mortgage. Thankfully, no deposit

money had been released and the sale was stopped. Criminal charges have been laid.

Make sure your solicitor knows the details of any deals with vendors and has the opportunity to verify their status for you. □

WORKPLACE SAFETY

New laws with large penalties

All businesses need to understand, and act on, their new obligations under occupational health and safety (OHS) laws. Criminal liabilities and heavy fines may now be imposed on businesses who have failed to ensure the safety of workers.

Also, OHS inspectors have the power to issue stop-work notices while an investigation of a possible offence takes place.

The major reforms make risk-management practices and consultation with workers on OHS issues mandatory. Workers must also be given all relevant information.

It is a criminal offence not to consult with employees and not enable them to contribute to decisions affecting their health, safety and welfare at work.

What amounts to appropriate consultation is spelt out and must be adhered to.

The maximum penalties for breaches of this law are \$27,500 for an individual employer and

\$550,000 for a company.

To implement their statutory duty of care, employers will need to undertake ongoing assessment of possible hazards, risks posed by potential hazards, and procedures for the elimination or control of those risks.

Failure to identify a potential hazard or to assess its risk is punishable by a fine of up to \$27,500.

While the provisions will affect every workplace differently, all business owners, even those engaging independent contractors rather than employing staff, are legally responsible for OHS. The new Act and Regulations replace all previous OHS rules in the State.

Some of the obligations have been deferred for one to two years to allow businesses to implement the required procedures.

While it is not mandatory to do so, it may be wise for employers to properly document their risk-management practices so that they can prove compliance if a legal issue arises. □



THE GST TAX STING

Covering your GST back when selling property

When you are selling land you may find it wise to discuss with your solicitor whether you need to register for GST.

Imagine the situation where you are selling some vacant land you purchased a few years ago. You are not registered for GST and think it unnecessary because you don't do anything else in your own name.

The sale price for your land is \$500,000 and your contract

says the sale is not a taxable supply. This is because you know that you are not required to register for GST to sell capital assets and unless you are registered for GST or required to be registered, the sale cannot be a taxable supply.

However, if you have bought the land specifically for the purposes of resale at a profit, its sale is not that of a capital asset.

The GST Act includes in the definition of "enterprise" an activity in the form of an adventure

or concern in the nature of trade.

An enterprise may consist of an isolated transaction or a dealing with a single asset.

For example, an enterprise may consist solely of the acquisition and refurbishment of a suburban shop for resale at a profit.

So if you acquire a single asset for resale at a profit, the activity will be an enterprise because it is an activity in the form of an adventure in the nature of trade.

The disposal of that single asset is not the transfer of a capi-

tal asset. Consequently, that supply is not excluded from projected annual turnover.

This means that you will have to pay \$45,400 GST on the sale of your land.

You will be even more unhappy to learn that the buyer, if registered, and intending to use the property for business purposes, will receive a windfall of the same amount.

So make sure you discuss details of proposed sales with your solicitor. □

RETAIL LEASES

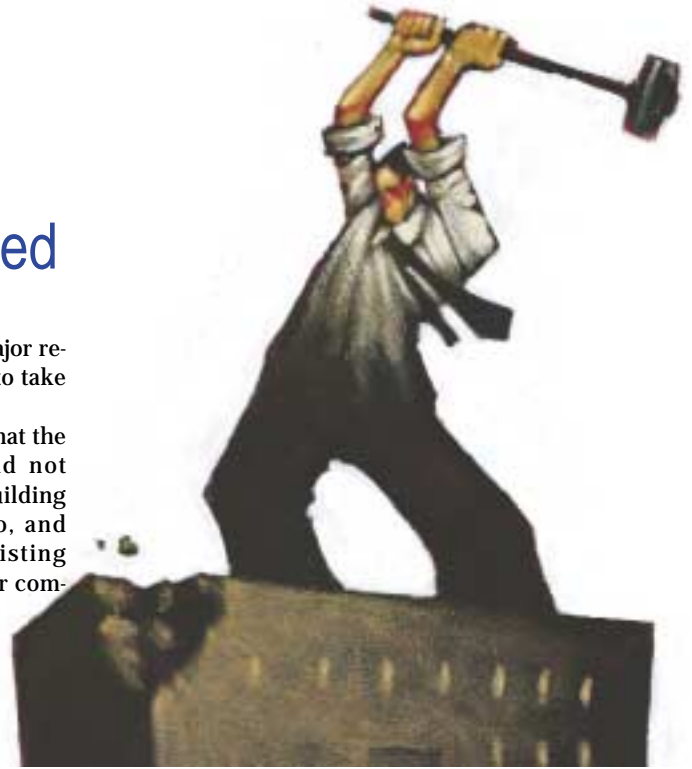
Shop tenancies protected

In another recent case of retail tenants' rights being upheld against large shopping centre owners, the Administrative Decisions Tribunal protected two retailers from the termination of their leases.

The shopping centre owner wanted to make room for a 'preferable' tenant and tried to use a demolition clause in existing leases to evict two retailers

on the grounds that a major refurbishment was going to take place.

The Tribunal found that the shopping centre could not make changes to the building whenever it wanted to, and could not replace existing lease-holding tenants for commercial advantage. Demolition clauses only allowed building works related to the condition of the building, it said. □



PERSONAL INJURY

Road accident witness compensated

A truck driver has been awarded \$154,000, plus costs, for post-traumatic stress following his involvement in a fatal road accident.

The crash occurred when a woman made a sudden right-hand turn in front of the truck. The truck driver rang '000' and held the

woman's hand as she died. He then covered her body with a blanket and clothing.

He has since suffered nervous shock and feels ongoing guilt for his role in the accident, despite no accusations ever being made against him and a finding by the Coroner which exonerated him of any blame.

As the crash was found

to have been caused solely by the negligence of the deceased, the truck driver made a claim against her insurer.

The insurer initially denied the claim, and the driver had to go to court to uphold his right.

The court found that even though the car's driver was deceased, she still

owed a duty of care (for which she was insured) to the truck driver.

The man's direct involvement in the accident and his reaction, which was "foreseeable" under the circumstances, were considered important by the court. He was not a "mere bystander" who was traumatised. □

LAND TAX

New procedures to identify new land tax payers

The NSW Office of State Revenue (OSR) has announced new systems to identify taxpayers as soon as they become liable for land tax. The system will be in effect for the 2002 land tax year.

Land owners may become liable for land tax in 2002 for the first time for one of two reasons – either because they acquire ad-

ditional taxable land or the value of their land increases.

Land tax thresholds have increased for 2002 from \$205,000 to \$220,000 for land tax on investment properties and from \$1.319 million to \$1.414 million for the premium property tax.

The OSR will be using information provided by Land and Property Information NSW on changes in ownership of land to identify newly liable taxpayers.

The due date for the lodgement of initial land tax returns will be extended by two months to 30 April 2002 to allow additional time for the OSR to identify new land tax clients and advise them by letter of their land values and potential land tax liabilities.

New taxpayers who receive an OSR letter do not need to do anything if the information in the letter about their ownership of land is correct. An assessment

will be issued automatically after the initial letter. If the information is incorrect, they must advise the OSR within 30 days.

The onus to account for land tax rests with the taxpayer so the non-issue of an OSR letter does not relieve you of the obligation, if you are aware of a new liability for land tax, to lodge an initial return. See your solicitor if you are unsure about your position on land tax. □