

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.

DIRECTORS' LIABILITIES

Each can be liable for totality of unpaid PAYG tax

The tax ignorance of many directors is surprising, given that tax might amount to 30 per cent of a company's before-tax profits and the penalties for directors making a tax mistake can be very large.

As a general rule, a director is not liable for a tax debt assessed on a company, although under the Corporations Act directors might be liable for one assessed on a company while it is insolvent, or for one which causes it to become insolvent.

On the other hand, tax law is quite unequivocal about the penalties it places on directors when a company has failed to make and remit pay-as-you-go (PAYG) tax instalments.

If PAYG is unpaid and the directors fail to cause the company to enter into a payment arrangement with the tax office, or an administrator to be appointed, or the company to be wound up, then the directors might each be liable for the totality of the unpaid PAYG.

Also, director might be penalised as a consequence of a company committing a tax offence – that is, apart from any penalty to which they might be personally liable, for example as a result of making a false state-



ment. They may also be liable to criminal penalty if, for example, they are party to some scheme to defraud the revenue, even though they might not personally benefit.

Apart from their responsibilities to a company, directors should realise that there are instances where they might be personally liable for a company's federal or state tax mistakes. It

is unlikely that they can always rely on the Corporation Law's defence that the company's responsibilities for its tax liabilities were properly delegated to management. □

FIRST HOME BUYER RELIEF

Trustee parent seen as guardian

A parent concerned to provide a permanent residence for an adult child suffering from a mental illness has been able to use the first home buyer's entitlement and stamp duty relief.

The child had not previously held any interest in real estate and the purchase price was below the stamp duty threshold. The trustee parent was held to be a guardian for the purposes of the grant. □

BUILDERS NOT PAID

Can they claim your home as security?

A builder made a number of claims for payment to an owner which were unpaid. Following further non-payment, the contractor ceased work on the property, resuming work only after the owner agreed to give the contractor the right to register a claim over the property.

Contractors concerned about non-payment will often try to protect their position by seeking agreement from the owner to officially register a document, known as a caveat, that operates to warn people about the contractors' assertion of certain rights over the property. A caveat can prevent registration of a sale or other dealings with the land while it remains in force.

In this case a caveat was lodged over the property on which the house was being built, but the owner later attempted to have it removed from the property title, claiming it was invalid.

Under the Home Building Act a contractor is prohibited from lodging a caveat over a residential property except in exceptional circumstances. The



exception states that a charge, created to secure the payment of money owed by another party to the contract, can only be made if a court or tribunal has made an order or judgment that such payment be made.

The courts found that the law's intention was to prevent contractors from abusing contract provisions by claiming interests in property on which they were working, and concluded that the right to lodge a caveat was not given by

the court; rather, it was given by agreement of the parties.

Even if the parties agree that a caveat can be lodged, the court can strike down the caveat. Contact your solicitor for information on payments. □

LOSS OF PROFITS

Holding subcontractors responsible

A subcontractor's faulty workmanship led to fires in five properties after it failed to properly box some downlights prior to installing insulation. The lead contractor sought, but failed to win, damages from its subcontractor for loss of profits of a potentially lucrative contract.

The subcontractor was working for a company contracted by the Commonwealth of Australia to replace wool insulation in residential properties as part of the

Sydney Aircraft Noise Insulation Program.

The work to be carried out on each property was its own discrete contract, and while it was expected, due to past experience and other factors, that the government would enter into a number of such contracts with the contractor, this was not a certainty.

Following a quality audit after the fires, the Commonwealth terminated the contract with the contractor for faulty workmanship. The contractor then sued the subcontractor for loss of prof-

its from the contract and also the potential profits in the expected large number of future, now lost, contracts.

On appeal, the court found that the subcontractor was not liable for the loss of the potential lucrative contracts, focusing on the disparity between the price payable to the subcontractor for the work and the very large and disproportionate claim for damages for lost profits.

One solution to the potential problem of recovering damages following a breach of a contract by a subcontractor is the inclu-

sion of an express clause in the contract. This could clearly allocate risk in the event of a breach occurring, identifying possible damages that might flow and responsibility for that damage.

Of course, parties are often unwilling to clearly identify and allocate all potential risks, particularly higher value risks, at the start of a project, as this may lead to difficult risk discussions or agreement not being reached, but it should be considered. Contact your solicitor if you would like further information. □

SUPER'S MAGIC PUDDING

A plus for baby boomers

Once money is put into super the general rule is that it must stay there until the person entitled to it reaches 'preservation age'.

There are some exceptions to this rule – for example, you might be able to access money before then if permanently incapacitated or suffering severe financial hardship.

The preservation age for a person's super depends on when they were born. If you were born before 1 July 1960, it is 55. However, it increases incrementally through the next four years to the preservation age of 60 for those born after 30 June 1964.

This makes super often less attractive to younger people, who may be more interested in paying off a mortgage. However, by lowering the deductible contribution limit to a standard \$50,000 per annum after 1 July 2007, the government wants to encourage people to save for super sooner rather than later.

There is now no age at which you have to remove your super – you can keep your entitlements in super funds indefinitely, although this might cause

them to be subject to a de facto death duty if, say, the funds revert to adult children. But if someone stops being an Australian resident, a departing-Australia superannuation payment must be paid as a lump sum to them.

The transition-to-retirement rules allow a person, provided they have reached the preservation age, to take a pension out of a fund before they actually retire.

The main attraction of this

rule will be to people over 60. They will be able to withdraw tax-free pensions from their fund and use the money withdrawn to make additional tax-deductible contributions to the fund (thus getting 'free' tax deductions).

Further, once the fund goes into pension mode, no tax, including capital gains tax, will be payable on income derived from assets allocated to the pension fund – a magic pudding if

ever there was one.

As for paying out a pension, the starting point to consider is not tax, it is whether the rules of the fund allow payment of the sort of pension required – and some, particularly of older funds, might not. Once someone becomes entitled to a pension from a concessional tax fund, there is a minimum amount, based on one's age, that must be taken out each year. □

WORKPLACE

Vicarious liability of employer extends to rape

An employer has been held vicariously liable for a rape by an employee.

Over a period of several months, a civilian admin officer at a naval base was harassed by a naval officer. He repeatedly asked her for sex, intimidated her with offensive comments and made attempts to grope her. After she demanded that these activities cease, he stopped harassing her for about two weeks.

At this time they both attended an after-work dinner party at the home of two colleagues also employed by the Defence Force. The woman became intoxicated and passed out. She awoke to find herself in the officer's house and he was raping her.

The courts found that the dinner itself would not have occurred but for the collusion of the officer with his naval colleagues. This was significant to its conclusion that the rape

occurred in connection with the woman's employment and, accordingly, that the Commonwealth was vicariously liable.

The broad operation of the phrase 'in connection with the employment of the employee' in the Sex Discrimination Act means that employers need to be vigilant in preventing and policing such conduct wherever it has the potential to arise. Contact your solicitor if you would like further information. □

LIQUOR LICENCE

Red light on applications that fail to disclose traffic offences

A person's fitness to hold a liquor licence could depend, at least in part, on their traffic record.

In a recent hearing before the Licensing Court an applicant for a liquor licence was found to have provided false and misleading information, having failed to disclose a number of traffic infringements. The licensee had believed that traffic matters did not need to be disclosed.

The relevant court form requires a yes or no response to the question: 'Have you ever,

whether in Australia or overseas, been found guilty of an offence (irrespective of whether a conviction was subsequently recorded) or paid the penalty applicable to an infringement notice?'

If the answer is yes, the person is required to list all offences (unless spent convictions as stated in the Criminal Records Act), together with the date of offence, court, date if applicable, and result of proceedings or notice.

An incorrect answer makes the affidavit false and misleading and the applicant liable to be prosecuted for an offence. □



WHEN A SALE IS A LOAN

Avoiding a taxable dividend

If shareholders in a family company decide to sell company property to reduce bank debt, as are many farmers tackling financial difficulties due to the drought, the sale should be treated as a loan in order to avoid it being viewed as a taxable dividend.

In one case a couple decided to sell part of the property owned by the family company. A neighbour agreed to buy for \$350,000.

The couple owed the debt to the bank. Once the sale was complete, the full sale proceeds were handed over to the bank in exchange for a discharge of mortgage.

However, to the extent that they are part of its distributable surplus, payments by a com-

pany on behalf of shareholders are considered a taxable dividend under tax law. The family company has therefore paid the couple an unfranked taxable dividend of \$350,000.

To avoid this, if it is not possible to liquidate the company, repayment of the bank debt needs to be treated as a loan to the couple, documented in a way that meets tax law requirements. The appropriate interest rate needs to be charged and terms of repayment specified. (For an unsecured loan, the term must not exceed seven years. If the loan is sufficiently secured, the term can be up to 25 years.)

Of course, the payment by a company is only a deemed dividend if there is a distributable surplus. Given difficult financial circumstances, there may well be no such surplus. □



DISAPPOINTED VENDORS

Two contractual options for claims

How do the different options available to a vendor operate if a purchaser fails to complete a contract? When does the vendor need to choose between potential claim routes? The decision could be significant, as the process pursued will have an impact on the amount recovered.

The standard terms of the contract for sale of land give a disappointed vendor two options in claiming for the loss they suffer when a purchaser fails to complete.

After termination the vendor may keep or recover the deposit, keep certain funds paid under the contract for security and sue the purchaser through one of two options. If the vendor has resold the property under a contract made within 12 months after termination, they may recover the

deficiency on resale, with credit for any of the deposit kept or recovered and after allowance for certain taxes recovered and the reasonable costs and expenses arising out of the purchaser's failure to complete. The alternative is that the vendor may sue to recover damages for breach of contract.

Thus a disappointed vendor may claim either liquidated damages, or damages in accordance with common law.

A claim for liquidated damages would only arise at the date of the resale, while a claim for common law damages arises at the date of the breach. These would include consequential damages such as wasted auction and advertising fees and rent and removal expenses. Further, a claim for common law damages also attracts the operation of the rule where the failure to complete was likely to lead to

some special loss of which the purchaser was aware, in which case the difference in damages may well be substantial.

The possible practical out-

comes should be considered closely and the advice of a solicitor, including expert evidence on the property market, may be needed in preparing a claim. □

SEPARATION

When the marriage is over but you can't afford to live apart

It is possible for you and your spouse to live separately and apart under the same roof during the separation period.

If you intend to live separately in the same home, you should consult a solicitor first, because living in the same home complicates a divorce. Someone who knows you and

your spouse may have to tell the Court that you have lived separate lives while still under the same roof.

You and your spouse should not sleep together or socialise together, and domestic chores should only be done for the other if it is understood and acknowledged that such help is given for the sake of practicality or convenience. □