

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.

PRE-N UP RULED INVALID Financial agreements under scrutiny

Some of the financial arrangements which couples have entered into since binding financial agreements – sometimes referred to as ‘pre-nups’ – became available under Australia’s family laws are under a cloud following recent court decisions.

While the intention of the law was to allow people to organise their affairs as they saw fit, the courts are concerned that the effect of a binding financial agreement can be to oust the court’s power to make overriding property adjustment orders. The Family Court has therefore taken a very strict approach in interpreting the requirements to make such agreements.

Both parties will need to receive independent legal advice with a certificate attesting to that, and both must sign a financial agreement for it to be binding.

Documenting the agreement has to follow strict rules. In a case last year, the judge said that there has to be one original, signed by both parties, and a copy. To have two copies, each signed by one party and exchanged, did not comply with the law. In this case the agreement was found to be invalid and could not be enforced.

Make sure you obtain written advice from a solicitor in advance of signing a family law financial agreement. The body of the agreement must contain a statement about the advice given.

And don’t make last-minute handwritten amendments. It is better to incorporate changes into the document and then have everyone sign. Any handwritten amendments can lead to the suggestion that the agreement has been altered after the legal advice has been given.

Contact your solicitor for further help. □



WILLS Who can inspect them?

New laws have come into force on who has the right to see a will.

Anyone who has possession or control of a will of someone who died after 1 March 2008 must now allow a number of people to

inspect the will, or receive copies of it at their own expense.

They include anyone named or referred to in the will, whether a beneficiary or not, or anyone named or referred to in an earlier will as a beneficiary of the deceased person.

The surviving spouse, de facto partner (whether of the same or opposite sex) and children of a deceased person all have the right to see the will, as has anyone who would have been entitled to a share of the estate of the deceased person had the person died without leaving a will.

Any parent or guardian of a minor referred to in the will or

who would be entitled to a share of the estate of the testator if the testator had died without leaving a will; any person, including a creditor, who has or may have a claim at law or in equity against the estate of the deceased person; and an attorney under an enduring power of attorney made by the deceased person are all included. □

LIFETIME CARE

No-fault scheme for catastrophically injured

The new scheme for victims of car accidents who suffer catastrophic injuries has recently been extended to include adults. The scheme provides benefits which were previously unattainable if the person had been at fault, or partially at fault, for their own injury.

The Lifetime Care And Support Scheme became operative in October 2006 for children under 16, and was extended to adults in October 2007. It provides treatment and care for those catastrophically injured as a result of a motor car accident in NSW. There is no entitlement for anyone injured before those dates to access the scheme, which it is estimated will cover between 120 and 200 accident victims per year suffering serious spinal cord or traumatic brain injuries, multiple amputations, severe burns or legal blindness.

Effectively, those eligible will have no choice but to be part of the scheme, even if they can prove someone else was at fault in the accident, as insurers can nominate an injured person for inclusion without their consent.

This may mean that some accident victims will be adversely affected, because they may have been financially

better off pursuing a claim for lump-sum compensation. Such victims will also be precluded from obtaining compensation for voluntary domestic assistance. The argument is that the scheme will cover all care needs on a paid basis, so no voluntary domestic assistance should be required.

In reality, many families will choose to continue to provide some care on an unpaid basis, which could be seen as their subsidising the scheme. The scheme may be amenable to carers being paid, subject to suitable training, which could mean carers being formally employed and receiving work benefits, such as superannuation and cover for workers compensation. However, many families may not want a formal arrangement involving taxable income.

The scheme has provision to modify existing property but none for funding the capital costs involved in purchasing a suitable house, car or computer equipment.

Nothing in the new scheme will affect the rights of accident victims who can establish fault to recover general damages, loss of earnings or other items of lump-sum compensation that are not covered by the scheme. □

MOVING IN EARLY

Occupying a home before you settle

Sometimes it suits both the seller and the buyer for the buyer to take possession of a property before settlement.

The situation is like a very short lease, and the conditions governing it are set out in a clause in the contract. Particular arrangements can be made by letters between the solicitors for the buyer and seller, or included in the contract. Normally, the seller requires an occupation

fee based on a market rental for the property, and the fee is paid on settlement in addition to the balance of the purchase money. Occasionally, it is paid weekly to the agent. The contract requires rates to be adjusted from the date of possession, unless the parties agree otherwise.

A buyer occupying a property before settlement must insure the property from the date of possession, and not make any structural changes. □



TAX SHELTERS

Primary production schemes not a haven

At this time of year many taxpayers turn their minds to ways to minimise tax.

At its simplest, tax planning involves either the alienation of income, perhaps through personal service entities, salary sacrificing or even more elusive offshore arrangements, or the maximising of deductions.

By this point in the year it is normally too late to implement an alienation-of-income arrangement because taxpayers will normally have derived most of their income for the financial year. Exceptions might be expected bonuses and potential capital gains.

One class of deductions some taxpayers consider is primary production tax shelters – as often as not, for some reason, originating in WA.

These sort of shelters have involved almost every imaginable type of primary production activity, including timber, grapes, olives, macadamia nuts, blueberries, cattle, crayfish, exotic plants and cherries.

A feature of the schemes is that tax deductions are claimed

for upfront management fees and for what normally would be non-deductible capital expenditure.

However, many of these schemes have been successfully attacked by the Tax Office.

One reason the schemes have not had the desired result is that often the financing of the arrangements involved round robins and non-recourse financing. This has caused the courts to find that they were entered into predominately to generate tax deductions and not for genuine commercial reasons.

Nowadays most schemes are not marketed in the absence of a binding Tax Office 'product ruling'. The question then becomes 'what reliance can be placed on such a ruling?'

Rulings are normally qualified. In the case of one current scheme, the Tax Office qualified its ruling by stating that it referred to specified parts of the tax law, types of taxpayer, and, most importantly, did not apply if the scheme as implemented was materially different from that set out in the ruling. □

GST PENALTY TRAP

Come clean on shortfalls, and promptly

The Tax Office appears to be taking a punitive approach to GST shortfall amounts at the same time as placing increasing emphasis on corporate governance and tax risk management. This means more of an onus, particularly on directors and senior management, to have a genuine awareness of their GST compliance.

A taxpayer is liable to a penalty if they have a GST shortfall as a result of a statement which is “false or misleading in a material

particular”. A shortfall amount is the amount by which the relevant liability, payment or credit, is less or more than it should be.

Base penalties extend from 75 per cent of the shortfall amount for intentional disregard of a tax law to 25 per cent of the shortfall for failing to take reasonable care to comply with a tax law. Once a penalty is levied, the burden of proof shifts to the taxpayer.

There are certain aggravating factors which allow the Commissioner of Taxation to increase the base

penalty by 20 per cent. These include taking steps to prevent or obstruct the Commissioner from finding out about the shortfall, and failing to give notice of the shortfall amount within a reasonable time of becoming aware of it.

Thankfully, legislation also allows for the reduction of penalties. The base penalty may be reduced by 20 per cent – or 80 per cent in certain circumstances – if the taxpayer voluntarily discloses the shortfall to the Commissioner.

The GST perils of property transactions are high. In terms

of risk, the GST challenges posed by property dealings extend from the intricacies of the margin scheme and the GST-free supply of a going-concern concession, all the way to the reporting of GST obligations.

Taxpayers seem to be becoming more combative when faced with penalties, but the Tax Office’s very high success rate in GST penalty cases serves as a warning that the area of law is a very complex one and that taxpayers must be on solid legal grounds if they decide to challenge a decision. □

EVIDENCE FAILS THE TEST

When a search warrant loses its power

The law doesn’t allow a search warrant to be suspended and then resumed. Any evidence seized following an unlawful suspension and resumption of a search warrant can be challenged in court.

A common-or-garden search warrant – that is, not a phone or crime-scene warrant – will expire within a specified time (usually 72 hours after the time of issue) or once it is executed, whichever comes first.

By ‘executed’ is meant the moment investigating police

officers physically exit the relevant premises. To suspend a search warrant and then resume it again later is not allowed.

In a recent case, five officers arrived at a woman’s home with a warrant to search for prohibited drugs. One officer entered and found a glass water pipe and a glass plate containing what police referred to in their statements as a “green vegetable tobacco mix”.

The police asked questions about ownership of the material without placing the woman under arrest and cautioning her. Once the woman confirmed the items

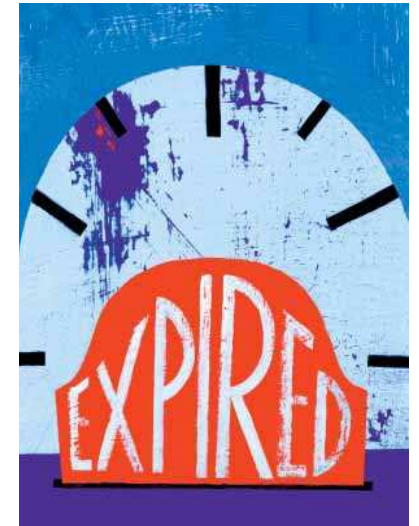
belonged to her and contained cannabis which she said she intended to smoke, the officers ceased searching the premises and two of them took her to the police station to be cautioned.

After this, she was returned to her home and the search was resumed, with the police reporting that more green matter was found, along with notepads with names and amounts of money written beside them, mobile phones and various amounts of cash.

However, in court the magistrate stated that the law simply does not allow for the

suspension of search warrants and it could not be clearer on this issue. The reason for and length of the suspension are immaterial.

Even though the actions of the police officers seemed motivated not by malice but by a genuine concern to ensure the person was treated according to the law, the magistrate held that in suspending and resuming the search warrant, police had obtained evidence in contravention of the law. None of the evidence obtained after the search warrant was suspended was allowed. □



SEEDS OF CONFLICT

Potential problems with genetically modified crops

Both farmers growing genetically modified and standard crops may find themselves facing legal action if GM crops contaminate neighbouring farmers' fields.

Genetically modified crops have had their DNA altered by genetic engineering. This is usually done to promote higher yields, faster growth times or better resistance to drought or disease.

The moratorium on the commercial planting of GM crops in NSW and Victoria has now lapsed, giving rise to a number of potential legal issues for farmers. The commercial planting of GM canola may be the first of many GM crops to come.

The need to consider liability issues arises because of concern in some quarters that GM crops may cause environmental damage through a loss of biodiversity, personal injury (through allergic reactions) and economic loss to GM-free farmers whose crops become contaminated with the GM product.

It is foreseeable that should such contamination occur, and farmers seek to take action, they may do so not only against the specific farm responsible (if it can be proved), but, potentially, against the manufacturer or distributor of the seed, or the harvesters who move from farm to farm with their equipment and who may be the source of contamination.

On the flip side, there is the issue that GM-free farmers might inadvertently grow GM crops from the spread of seed from nearby GM crops, and then be open to liability to the patent owner of the GM crop, as a Canadian farmer recently found.

Ironically, although the courts held in that case that the farmer had infringed the company's patent, and that the company was entitled to an account of profits, it didn't receive it, as it could not demonstrate that the GM crop



had increased profits for the farmer.

A number of insurance issues may arise. If a GM farm contaminates another property, would the farmer's public liability policy cover this, or some other cover? And, if so,

under what conditions?

This would depend on the wording of each farmer's policy, which should be considered by farmers and their advisors.

It is unclear whether an unaffected farmer would have a valid claim under a business-

interruption policy if no longer able to sell a GM-free crop to its intended market. It is also unclear whether a harvester's policy would cover it for such damage to a client's farm if it inadvertently transported GM seed to a GM-free farm. □

FAMILY LAW

No pressure to mediate with a violent partner

Under the new family law regime, attendance at a family dispute resolution meeting is mandatory. Since July last year, no court proceedings can begin without a certificate issued by the family dispute resolution practitioner who facilitated the meeting.

However, where there has been violence in a relationship, the requirement to attempt family dispute resolution before starting proceedings does not apply, as family violence is one of a number of exceptions under the new laws.

A partner who does not wish to mediate because of domestic violence can seek the approval of the court to forego family dispute resolution. This involves an affidavit being sworn, setting out the history

of the violence.

Where one or both of the partners in a parenting matter are receiving legal aid, a grant may be provided for an early-intervention conference – a type of dispute resolution procedure – if the matter fulfils the means-and-merit test.

In the event of past violence, a legal-aid conference will only be held where an Apprehended Violence Order (AVO) permits, and both parties wish to proceed with the conference. A woman has only to advise her lawyer or the intake/ screening officer that she does not wish to be involved in a conference because of domestic violence and the matter does not proceed.

Conferences can also be conducted by phone or as a 'shuttle', where someone will shuttle between the parties conveying proposals or offers to

avoid direct communication if a party feels intimidated, even if there is no AVO.

Regaining power

A feature of violent relationships can be the loss of control over many aspects of a person's life, and once they have left the relationship there are aspects of their lives they may need to regain power over, such as parenting, living arrangements, and property. These are things that can be achieved with the help of negotiation.

As a hopeful first step, participation in a negotiation with the help and experience of their solicitor may begin the long process of empowering and restoring confidence to face a future away from a previous intimidating or controlling former partner. □