

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.

RISING SEAS

Protecting the beachhouse

New laws from January 2011 may help resolve some of the problems arising from property damage due to rising seas, but the strict conditions applying to protection works will make it very difficult for landholders in emergency conditions.

Coastal erosion has been a longstanding problem for many beachfront properties right across the NSW coastline. It is even more of a concern now that climate change is predicted to result in rising sea levels and increased frequency and ferocity of storms.

The emphasis in the new coastal management laws in NSW is on planning, and local councils will now have to develop plans which deal with the impacts of rising seas, the maintenance of any protection works, and their impact – such as increased beach erosion elsewhere.

Consent will only be given for coastal protection works that do not unreasonably limit public access to a beach or headland and when adequate funding is in place to ensure the works can be restored and maintained.

Previously, most protection works, even in an emergency, required development consent. Under the new laws, emergency

protection works will now only require a certificate from the local council for protection such as sand bags – but not rocks or concrete – to be used to lessen the effects of wave erosion.

The works can only be carried out to protect a building used for residential, commercial or community purposes, and the distance between the building and the erosion escarpment must be less than 10 metres, as certified by a surveyor or authorised officer.

Dune restoration areas must not be disturbed unless written approval is obtained from the relevant authority, and there are other very detailed requirements for protection of vegetation and specifying the materials that are permitted.

In summary, not only must the detailed technical and locational criteria be met and a certificate obtained, but a property owner may also need



to obtain written approval from relevant public authorities, engage a surveyor to prepare a survey, and an engineer to prepare a certificate.

If you have legal concerns about the security of your coastal property, consult your solicitor about how best to go about protecting it. □

WILLS Can I change my mind?

You are free to alter your will at any time. If your circumstances change, you can and should consider changing your will. If you marry it is very important that you make a new will.

However, you cannot simply make an alteration by, for instance, crossing something out in the original will and writing in your new wishes.

If the alterations are minor, your can help you make a codicil (a separate document in

which you change a provision in your will), but it is usually better to make an entirely new will unless the change is very simple. A codicil must be signed in the presence of two witnesses, in the same way as the original will. □

EARLY GUILTY PLEA

How are sentencing discounts decided?

In 2000, courts gave guidelines that the sentencing discount for a guilty plea should fall in the range of 10 to 25 per cent, considering the time the plea is entered, its usefulness and the complexity of the issues.

Some eight years after this guideline, new laws were passed following concern about the trend of late guilty pleas in criminal trials. The new laws clearly set out the discount for pleas. If a plea of guilty is entered before an offender is committed for trial, a discount of 25 per cent should ordinarily be imposed. If entered after committal, the discount should ordinarily be up to 12.5 per cent.

An offender may also be given a discount for cooperation with authorities.

One offender, Ellis, who had committed a number of armed robberies on post offices and commercial premises, confessed to a minister of religion, decided to contact a solicitor and then confessed to police.

In Ellis's case, the courts began by noting the leniency that should be given to someone entering a plea of guilty and then explained that where



conviction follows a voluntary disclosure of guilt, a greater degree of leniency enters into the sentencing decision.

The court decided that the leniency to be shown to a person who discloses their responsibility for a crime would vary according to how likely it was that the police would eventually discover their guilt, and also the likelihood of their being able to prove it.

An 'Ellis discount', as it has

become known, may in some cases be enough to result in a sentence other than full-time imprisonment, where such a sentence might otherwise be inevitable.

While it is understandable that a decision to go to police and confess involvement in a serious criminal matter would require some reflection, too much delay can result in the chance to obtain an Ellis discount being missed, or else

seeing the potential discount being reduced.

It is better to make a confession as soon as possible, to ensure that the matter is brought before a court before the opportunity evaporates.

The courts have suggested that the total discount, whether for a plea of guilty, assistance to authorities, or an Ellis discount, should not exceed 50 per cent of what would otherwise be the appropriate penalty. □

PAYING TAX ON EMPLOYEE SHARES

Clearing up the rules

The law on the taxation of employee share schemes changed in 2009, but some still find it confusing.

The general rule is that if an employee is given a share or a right to acquire a share, either gratis or at a discount, the value of the share or discount is included within the employee's assessable income.

The new rules still contain an alternative between being taxed upfront or at some future time, but they are more restrictive. For most people, the major difference lies in

three significant changes.

First, and most controversial, are the 'real risk of loss' rules. Deferment is not allowed under the new rules unless the employee has a real risk of losing the share or right other than by disposing of it. A Tax Office guideline says that the meaning of "real" is "something more than a mere possibility". The Tax Office will accept performance hurdles or a minimum term of employment. It says that there is no real risk of forfeiture under a scheme which simply includes a condition which

restricts an employee from disposing of an interest for a specified time, allows the employee to forfeit the interest, or provides for forfeiture if there is fraud or gross misconduct.

The second significant change is the replacement of the "cessation time" rules with "deferred taxing point rules". The deferral point is the first of seven years after the employer acquired the share or right, the date the employee ceases employment with the employer, or where there is no longer any restriction on disposal.

Third, unlike the old law, whether a share or right is subject to taxation upfront or is deferred depends upon the structure of the scheme and is not an decision made by the employee.

Tax-planning opportunities are generally quite limited. The challenge is to identify an acceptable risk to the employee which would also be acceptable for tax purposes.

Speak to your solicitor if you would like further advice on arrangements on any employee share scheme you may be considering. □

TENDERS PITFALL

Beware of creating risk of claims

The process of tendering can give rise to contractual rights and obligations before any final deal is signed. It is important for personnel on both sides of the process to understand there are risks involved, for example over statements that might give rise to claims.

A recent case which emphasises the importance of this principle involved the Victorian Parliament, which

had issued a request for tender for system integration services to implement a new desktop standard operating environment for the Parliament.

The company which submitted the lowest tender, but failed to win the bid, objected to losing the job and took the matter to court, saying it should have been awarded the contract.

The company argued that it had taken a minimalist approach in its tender, which focused on cost, as it had

relied on what a parliamentary employee had told the company – that “cost, cost, cost” would be the major determinant.

However, it was an express condition of the request for tender that tenderers ought not to rely on any other information – including that provided by employees, agents and consultants of Parliament – unless it was expressly set out in the request for tender or advised in writing.

Accordingly, the court decided that if the company

had misunderstood the selection criteria, it was not due to any fault of the Parliament or as a result of anything contained in its request for tender documentation.

The court also said that the obligation to assess tenders on the basis of value for money does not compel the selection of the cheapest tender and that there was no obligation to inform the tenderers of the actual weightings to be applied in making the final assessment. □

SAFETY SLIP

Compensation could be harder to win

It may now be difficult to prove responsibility for injury when someone slips and hurts themselves at a time and place you would usually expect spillages to occur, even if there is no system of cleaning and inspection in place.

In a recent case, a person slipped on a chip, or grease from one, in a shopping mall, just outside a large retail store and quite close to a food court.

In an initial trial, the retail store was found guilty of negligence, because it owed a duty of care to anyone in the sidewalk sales area, but did not have an adequate cleaning system in place to detect a spillage such as the chip and have it removed.

However, the appeal court found that even if periodical inspections and cleaning had been carried out with the minimum frequency required for the occupier to be taking

reasonable care, the possibility arose that the chip had fallen between the last such probable inspection and the arrival of the person who slipped on it.

The court emphasised that the slip was not one equally likely to occur throughout the

day. The person had slipped at lunchtime, and the court said that there was no basis for concluding that the chip had been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system. □

MAINTENANCE

Do I have to pay to support my children or spouse?

Both parents are responsible for the financial support of their children until the child reaches the age of 18 or until completion of the school year in which the child turns 18.

Child support can be paid as parents agree, or it can be assessed by the Child Support Agency, which uses formulas it has developed for the purpose.

The child support laws are complex. If you want to know

what amount is payable, contact the Child Support Agency or speak to your solicitor.

In relation to maintenance, each spouse or former de facto partner is expected to try to support himself or herself after separation. However, maintenance may be payable if a spouse or partner is unable to meet their own needs. Common examples are where a spouse or partner has the care of young children or is unable to work because of a disability. □



LANDLORD AND TENANT

Renting laws have been rewritten

New laws to deal with issues in the rental market and reduce the level of disputes started on 31 January 2011. Among other things, the new laws recognise longer-term tenancies, the rights of cotenants, water conservation practices and the impact of domestic violence on rental agreements.

Tenants who have been in premises beyond the term of the original lease will now have more time to move out, with the notice period increased to 90 days in cases where the landlord wants them to move out without specific reasons. The notice period has increased to 30 days in cases where notice is given just before the end of a lease.

Landlords in turn have more certainty because, unless the notice is retaliatory in nature, the NSW tenancy tribunal must end the lease and return the property to the landlord if the tenant does not move out after being given a 'no grounds' notice to vacate. However, tenants should not be evicted simply for asserting their rights.

Landlords will be able to reduce the eviction process by two weeks if they apply for orders from the tenancy tribunal at the same time as giving notice to the tenant.

Cotenants now have room to move in the new laws, with some types of dispute in shared households able to be taken to the tenancy tribunal. By giving 21 days notice to end their contract with the landlord once a fixed-term lease ends, a cotenant can end their liability for future rent or damage. This will help avoid the situation where cotenants remained on a lease even long after leaving.

Written permission from the landlord is now required if a tenant wants to bring in an extra cotenant, but landlords cannot be unreasonable in making their decisions. A refusal based

on potential overcrowding of the premises or the new person's name being on a tenancy database would not be considered unreasonable.

Victims of domestic violence living in rented property now have a right to change the locks and seek to take over a lease, even if they are not officially a tenant or cotenant.

If water usage of the property is separately metered for payment by the tenant, the law now requires that the premises be water efficient.

Tenants who want to make a minor change to premises will still need written approval, but there is now an obligation for landlords to be reasonable, which may be important in cases such as the installation of child safety locks on windows.

Every tenant in NSW must now be given at least one way to pay their rent that does not involve a fee being charged, but if a cheque bounces or a direct debit is dishonoured, the tenant will have to pay any costs involved for the landlord.

A termination based on failure to pay rent will now be cancelled if a tenant catches up on overdue rent or follows



an agreed repayment plan, but not if they are shown to have frequently failed to pay their rent on time.

A landlord can apply directly to the tenancy tribunal for possession of the premises without giving notice, if a tenant or a guest deliberately or recklessly causes serious damage to the premises, or if they have injured or are likely to injure the landlord, agent or neighbours.

Tenants now have a right to know, before they sign a lease, if a contract to sell the property has been drawn up, or if a bank has taken legal steps to foreclose on the landlord.

When rented premises are put up for sale, only two inspection periods each week will be allowed, and agents have to make reasonable efforts to agree with tenants on inspection times, but can negotiate if more access is required. □

BREAKING THE CONTRACT

When employee can't just walk away

An employee can't automatically terminate an employment contract by simply rejecting it and walking away from the job – and there can be costly consequences for them if they do.

In a recent case, a highly successful finance broker entered an employment contract for a two-year term. Some months later, in breach of the contract, he began working for a competing company.

His employer successfully obtained a court order to stop

him from working for the opposition and then placed him on paid leave while they tried to sort things out. In doing so, the employer elected to continue the finance broker's employment in accordance with the terms of his contract.

Shortly before the court order expired, the employer directed the employee to return to work. When he didn't do so, the employer treated this as a final failure to observe the terms of the employment contract and took the case to court seeking compensation. The employer's claim was

based on a clause in the contract which provided a way the amount of compensation could be calculated if the contract was terminated by the employee's repudiation of it.

In finding that the employment contract was still in place, and the employer was ready, willing and able to perform its part of the bargain, the court upheld the employer's claim and ordered the former employee to pay a sum of over \$500,000 in addition to the legal costs which had been incurred by the employer in pursuing the case. □