

In touch with the law

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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.

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CONSUMER PROTECTION

Tougher laws now regulate warranties against defects

Businesses need to come to grips with new consumer laws to provide warranties against defects with their products.

From 1 January 2012, new consumer regulations require all manufacturers, importers and retailers to provide warranties against defects to consumers. Penalties can reach a maximum \$1.1 million for corporations and \$220,000 for individuals.

The new laws require a warranty document to:

- be transparent - it must be expressed in reasonably plain language and clearly presented;

- concisely state what the person who gives the warranty must do so the warranty will be honoured and what the consumer must do to claim;
- prominently state the name, business address, phone number and email address of the business providing the warranty;
- provide a period within which a defect must appear if the consumer is to be entitled to claim the warranty;
- provide a procedure for claiming;
- state who will bear the expense of claiming;
- state that the benefits to the consumer given by the warranty are in addition to other rights and remedies under the law in relation to goods and services; and
- include the following text: "Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure".

Manufacturers, importers and retailers must:

- check every warranty against defects documents being provided to customers with any of the goods they are selling to make sure it complies with the new regulations;
- direct salespeople not to make any representations to customers about the warranties against defects provided with any of the goods being sold;
- check the warranty documents for goods where they believe consumers are more likely to ask warranty questions; and
- provide retail staff with training about what to say to consumers about warranties against defects.

WORKPLACE RELATIONS

Agreeing on individual flexibility

A recent court decision has highlighted the importance of complying with the requirements of the law when introducing individual flexibility agreements.

A company tried to introduce individual flexibility agreements into its workplace but when some employees refused to sign, they were threatened with dismissal and lost shifts.

The court found the employer had breached the law when it applied illegitimate pressure on employees to sign the agreements and issued fines totalling \$30,000.

The law requires agreements to be made without coercion or duress and to only deal with matters such as arrangements for when work is performed, overtime and penalty rates, allowances, and leave loading. They must also clearly state each term of the

award to be varied and detail how the employee will be better off overall in relation to their terms and conditions of employment.

MORTGAGE SALES

New mortgagee duties to take reasonable care

Lenders and their agents need to comply with new obligations to take reasonable care when exercising their power of sale.

New laws which started on 1 November 2011 require lenders to take reasonable care when exercising their power of sale to ensure land is sold for not less than its market value or for the best price that can reasonably be obtained in the circumstances.

The duty applies to mortgage sales arising as a consequence of a default after 1 November 2011, even if the mortgage was created before then.

The obligation is imposed on lenders, agents of the mortgagee or chargee appointed to sell the land, as well as real estate agents, consultant or others appointed by the lender.

Mortgagees should take the following steps:

- obtain a professional independent valuation of the land;
- advertise the property, including details about the mortgaged property, to the largest possible group of potential purchasers;
- leave the property on the market for a reasonable period of time. This usually involves allowing time to advertise adequately and provide sale information to a reasonable number of prospective purchasers and allow inspection and assessment of the property; and
- where available, conduct an auction of the property - it's the best way to test the market.

If the duty is breached, a person can sue. But it is not a ground to challenge the purchaser's title.

ONLINE ADVERTISING

Consumer law catches up with keywords

When buying online advertising, businesses should be careful in selecting search terms, particularly when they involve names and trade marks of competitors.

A Federal Court judge has confirmed that Google's practice of displaying 'organic' search results along with 'sponsored links' does not mislead or deceive consumers

because it is sufficiently clear that the two types of results are of a different nature, but an advertiser was liable because it had paid for the search terms and prepared the advertisements.

The advertiser bought certain keywords, known as Google AdWords, that can be used to generate sponsored links from the search engine when a user looks for a particular term. The purchased AdWords meant that their sponsored links related to a competitor of the product or service actually searched for, which the Australian consumer authority argued could mislead users. It also said that the search results falsely asserted there was an affiliation between the two.

The judge held that since the advertiser had paid for the AdWords, it had made the misleading presentations. Google merely made available the technical facility for the advertiser and other businesses to purchase those terms, which resulted in their appearing as sponsored links when a search was performed.

Importantly, the technical facility did not necessarily result in Google endorsing or approving the content of the associated advertisements, it only communicated them. The outcome may be different if Google 'maximisers' suggested the search terms to advertisers, meaning that it was more involved in the selection of AdWords.

The case is going to an appeal court this year but advertisers would be well warned to take care when purchasing keywords or Google AdWords so they do not infringe any third-party rights or falsely represent that they are affiliated with other brand owners when they are not.

In particular, using the domain names of competitors in search results appears more likely to be misleading or deceptive because users clicking on a hyperlink that contains a competitor's website are more likely to think they are being directed to that URL.

As a brand owner, you need to be diligent in protecting your brand and cannot rely on third-party search engines to do so. Given the importance of online searching now, this is another reason to consider registering business names, brand names and product names as trade marks to improve their protection online.

FINANCIAL PLANNING

Reform of financial advice industry under way

New laws are being drafted to tighten up on the duties and payment arrangements of financial planners following a series of high-profile corporate collapses such as Storm Financial and the devastating result for clients.

Under the proposed changes, financial planners would be required by law to act in the best interests of the client and prioritise the client's interests in case of conflict with the adviser's interests.

Advisers would have to assess whether the client's objectives and needs could be better met by means other than acquiring financial products, and if they propose to recommend a new product, they would have to weigh up the advantages and disadvantages of the product compared to any existing product the client may have.

Under a proposed "opt-in" requirement, providers of financial product advice that have ongoing fee arrangements would be required to provide all clients with an annual fee disclosure statement and to send a renewal notice to their clients every two years, giving the client the option to opt in to the ongoing fee arrangement. This would apply to consumers who become clients after 1 July 2012, not to existing clients.

The government is also planning to ban what it calls "conflicted remuneration", removing payments to financial planners such as trailing commissions, which increase the incentive to sell certain products.

PENSION ISSUES

The implications of loans, gifts and property transfers

It is common practice for older parents to use the equity in their homes to help their children out financially, but you need to be aware of potential pension issues when entering into such transactions.

All too often, age pensioners use the equity in their home to help their adult children financially without getting adequate legal advice or considering the risks involved in doing so.

Apart from the risk of losing your home, you also risk incurring a significant reduction to or loss of your pension entitlements.

Misunderstandings often arise around the family home because the principal home is an exempt asset and excluded from the social security assets tests. But that doesn't mean you can do anything you like with it without affecting your pension.

If you transfer legal title of the family home to your children, even if you continue to live in it, it is no longer exempted as a principal home.

Under social security laws, you can gift \$10,000 a year (\$30,000 over five years) without it affecting your pension. Any amount over is assessed as an asset for five years after they were gifted. They are known as "deprived assets".

If you sell the property so it does not fall under the gifting rules, the money paid for the property will be treated as an asset and will affect your pension rate. But as you spend the money, you reduce your assets and may be entitled to a higher rate of pension.

You may transfer your property in return for a “granny flat interest” - that is, a right to live in a property for life - and Centrelink will accept there has not been any gifting. Be careful not to give more than the reasonable value or the extra amount is assessed as a deprived asset for the next five years.

Your pension will also be affected if you use your family home as security for your children’s loan, or if you act as guarantor on a loan. Even if the intention is that your children repay the mortgage, the loan will be an assessable asset until it is repaid or considered irrecoverable.

If the child defaults and the house is sold, Centrelink will usually regard the proceeds from the sale of the house as a deprived asset and the pension will be reduced accordingly.

If you mortgage the home to purchase a new property, the full value of the new property will be assessable.

Pensioners are obliged to notify Centrelink of any changes to their circumstances that may affect their pension entitlements.

If Centrelink discovers a transfer, gift or loan, your pension entitlement will be recalculated from the date of the transaction. You may then have to repay the debt and your future payments may be reduced or cancelled.

FAMILY DISPUTES

Couples must try to reconcile or mediate before the court steps in

When you are separating, it is important to obtain independent legal advice about your rights.

Your solicitor will tell you about the family dispute resolution methods available to you before going to court. They include negotiation, family dispute resolution, mediation, arbitration, collaborative law and child-inclusive processes. If there is a high level of emotional conflict or hostility, a power imbalance or domestic violence, some of these methods may be inappropriate.

Family Relationship Centres have opened in many places where people can have three hours of free advice and assistance about their separation issues. You may be referred for reconciliation or separation counselling or for mediation. In most cases, it will be necessary for both parties to attend at family dispute resolution or mediation with a registered family dispute resolution practitioner before they can start proceedings for parenting orders.

Often it is useful to reach a short-term or interim agreement on matters such as occupation of the home, where the children will live, how much time children will spend with the other parent and child support.

Separation or reconciliation counselling can help at this time. Once matters settle down and both parties accept that the separation will be permanent, it may be much easier to resolve the outstanding issues.

Your solicitor can help you by advising you of your legal rights, tell you which method of primary dispute resolution may be best for your case, and assist you to negotiate parenting orders or refer you to a counsellor or mediator.

If you must apply to the court, your solicitor will prepare documents in support of your application to establish that it is in the best interests of the children for the court to make the orders you seek, present your case or engage a barrister to represent you in court if it must go to a hearing, and help you to enforce or consider a variation of your parenting orders.

GUARANTORS' RELIEF

Court lets elderly parents off the hook on guarantee

A recent court case is a warning to lenders to give more careful consideration to the financial and other circumstances of guarantors.

Lenders may now need to satisfy themselves that people are aware of the significance of the risk they are exposing themselves to when agreeing to be a guarantor, particularly where the risk is high.

A son had asked his elderly Serbian parents to guarantee a loan for him by mortgaging their home. His parents were retired and on the pension. They spoke little English, and were not highly educated. They were advised by a Serbian-speaking solicitor.

But the court found the parents did not understand the significance of how high the loan's interest rate was, or their son's financial position. They obtained no benefit and bore all the risk. The judge also found that there was a real and significant risk of the son defaulting and no basis for the lender to believe the parents fully appreciated the risk they were exposing themselves to.

In looking at all the circumstances of the case, the court held that the lender's lack of knowledge of the financial circumstances of the guarantors was a product of its own failure to enquire about those circumstances.

STRATA SCHEMES

Defining who is responsible for what

A memorandum defining who is responsible for the repair, replacement or maintenance of an item or area in a strata scheme has been produced by the NSW Strata Industry Working Group to provide more certainty for strata owners and owners corporations in dealing with items of common concern.

In a recent bulletin, the group reported that uncertainty in dealing with the maintenance or repair of items in a strata scheme has created confusion and expense for owners and owners corporations, as no specific details on who is responsible for maintenance or repairs are found in any of the relevant strata laws. The group also points out that trawling through the history of cases that have already been decided by the courts and that might give some guidance can take time and may not uncover the latest decisions.

The group's memorandum is now available for use by both new and existing strata schemes and you should consult your solicitor if you believe it could help in your development.

For existing strata schemes, a change of by-law would have to be lodged with the appropriate government agency. For new schemes, the memorandum can be adopted by the developer early in the preparation of the strata plan documentation.