

Property reforms have arrived

STUART LOWE SPECIAL COUNSEL



FOR MANY YEARS, THE PROPERTY industry has complained about the over-technical requirements of the *Property Agents and Motor Dealers Act 2000* (PAMDA). At last, PAMDA has been repealed and replaced with a simpler, more streamlined regime. The new *Property Occupations Act 2014* (the POA) commenced on 1 December

2014. Two areas of significant change are the formation of residential sale contracts and the appointment of real estate agents.

Residential sale contracts

No more warning statement or information sheet: The requirement to attach a prescribed warning statement and information sheet to the front of the contract has gone, along with the seller's obligation to direct the buyer's attention to these forms. Instead, the contract now needs to include a prescribed paragraph about the buyer's cooling-off rights and recommending that the buyer obtain an independent property valuation and independent legal advice.

No right of termination for seller's failure: Under PAMDA, if a seller failed to comply with the warning statement/information sheet requirements, the buyer could terminate for up to 90 days and before settlement occurs. Under the POA, non-compliance with the prescribed paragraph requirement referred to above does not give the buyer a right to terminate. However, significant financial penalties apply.

More exemptions: The scope of exemptions from key provisions (such as the prescribed paragraph requirement and cooling off period) has been expanded. For example, in addition to contracts formed on a sale by auction, the exemptions now also include contracts entered into with a registered bidder for an auction, by 5.00 pm on the second clear business day after the property was passed in.



Appointing agents

The appointment of real estate agents has also been streamlined. Categories of agents have been rationalised and reduced from nine to three and the various prescribed forms for appointing agents have been consolidated into one form.

One potentially controversial change is the deregulation of agents' commissions (with the previous cap for residential property sales abolished). It has been suggested that this may in fact reduce commissions through increased competition – time will tell.

Agents purchasing from their client may now retain a commission, providing they have made disclosure to their client and this has been acknowledged by their client.

For unit complexes, the legislation no longer prevents resident letting agents from managing more than one building or requires them to live on-site.

Verdict

While originally intended as a form of consumer protection, the prescriptive and technical aspects of PAMDA led to a great deal of expensive and time consuming litigation, often based on minor and inadvertent infringements. Generally speaking, then, PAMDA's replacement with simpler legislation is good news.

Contents

COVERING YOUR TRACKS – ERASING YOUR DIGITAL FOOTPRINT

BANKRUPTCY - WHAT DOES IT REALLY MEAN?

AGREEMENTS FOR MUTUAL WILLS - WILL THEY PROTECT YOUR CHILDREN?

A FATAL CHRISTMAS PARTY INCIDENT PROVED NOT COMPENSABLE

HAVE YOURSELF A SAFE NIGHT OUT

EDITORIAL



Covering your tracks – erasing your digital footprint

ANDREW NICHOLSON PARTNER



A CLIENT RECENTLY TOLD ME THAT I HAD a “good Google profile”, which the computer savvy would call a “digital footprint”. Whilst I have resisted the temptation to check, I am told that others regularly do this to see what sort of image they generate or whether their reputation is enhanced by their online presence.

Even if your personal online activity is low, you can have a prominent digital presence due to others. For example, by being quoted in the media, having your photograph tagged by others or having material published by a third party will all be linked to your digital profile.

For some time now we have been warned to be careful about what we publish electronically. We have been told that our online presence is difficult to erase. Whilst this is still good advice (similar to behaving as though your grandmother were watching), recent developments indicate our digital history may not be as concrete as once thought. Leading the charge are the Courts of the European Union (EU) which, earlier this year, found that individuals have “a right to be forgotten” and that, in certain circumstances, individuals have the right to ask search engines to remove links containing their personal information.

The case involved a Spanish citizen who lodged a complaint against a print copy newspaper and Google Spain. Google had published an auction notice of the individual’s repossessed home on their search engine, which he asserted infringed his privacy rights because the repossession proceedings had been resolved a number of years earlier. Accordingly, he argued the reference was no longer relevant.

One Court agreed that he had the “right to be forgotten” and have his personal data removed from the search engine. In reaching its decision, the Court found that the right to have data erased wasn’t absolute and would only be considered where the data is inaccurate, inadequate, irrelevant or excessive. The Court made it clear that Google (and other search engine providers) are obligated to assess an individual’s request on a case by case basis.

It is interesting to see how other countries are tackling the issue. Argentina has taken steps to follow the EU, whereas the United States considers the decision “clearly inconsistent with US law”, given their first amendment right to freedom of speech.

For some time now we have been warned to be careful about what we publish electronically. We have been told that our online presence is difficult to erase.

In Australia, the *Privacy Act* and the Australian Privacy Principles (APP), which were awarded earlier this year, provide that an entity collecting personal information must make sure that it remains accurate, up-to-date and complete. The revised APP also gives individuals the right to access and correct their personal information, including where the information held is inaccurate, out of date, incomplete, irrelevant or misleading (similar to the EU position).

Although the position has not yet been tested in Australia, we should continue to watch this space.

Bankruptcy – what does it really mean?

MARK MADSEN PARTNER



MOST OF US CRINGE AT THE THOUGHT of bankruptcy and rightly so, for it is a serious matter. However, many people don’t really understand its purpose, what it entails and whether there are any alternatives.

Here are some key factors of bankruptcy:

Your assets may be sold: whilst you may keep ordinary household goods, and tools of trade and a vehicle up to limited values, your other assets will be controlled and can be sold by your trustee in bankruptcy. Attempts to dispose of or hide assets may result in criminal prosecution.

Your income may be affected: if after-tax income exceeds certain thresholds (approximately \$53,000 with no dependants and rising from there with dependants), contributions need to be made to the bankrupt estate.

Your working life: an undischarged bankrupt cannot be a director of nor manage a company. Some professional bodies or licensing bodies may restrict your involvement in a trade or profession. If you trade under a business name different to your own, you must advise those with whom you deal that you are bankrupt.

Ability to obtain credit: particularly in the current economic climate, a bankrupt will find it more difficult to borrow money or buy things on credit. Landlords or utility providers may be less likely to supply to you without a bond. A bankrupt must advise a supplier if the bankrupt is seeking to obtain credit above \$5,360.

Overseas travel is affected: your trustee may ask you to surrender your passport. You cannot travel overseas without the permission of your trustee.

National personal insolvency index: your name will appear on this index forever. It is a searchable, public register. Credit reference organisations will keep a record of your bankruptcy for at least five years.

Not all debts are discharged: these include Court imposed penalties and fines, some prescribed debts (such as student assistance loans), unliquidated damages (other than those arising from a contract, promise or breach of trust) and debts incurred after the bankruptcy commenced. Maintenance debts (including child support) are not released, nor are debts incurred by fraud. Debts associated with infringements of state traffic laws will need to be paid if a driver’s licence and motor vehicle registration are to be maintained.

Period of bankruptcy: generally, a bankruptcy ends three years after the bankrupt lodges his or her statement of affairs. If the trustee objects to your being discharged, the bankruptcy can be extended to five or eight years. This may happen if there has been a failure to provide information, assist the trustee, disclose all income, reveal all assets or explain how money was spent. Even after a bankrupt is discharged, the administration of the bankrupt estate (or ongoing obligations to creditors) may continue until the trustee has finalised matters.

Bankruptcy is a daunting and serious topic but it is sometimes the best alternative to obtain a fresh start. There are other alternatives (both formal and informal) with less serious consequences. However, those are topics for another day.

Agreements for mutual wills - will they protect your children?

KRYSTAL BELLAMY ASSOCIATE



PRESERVING THE INTERESTS OF CHILDREN from a previous relationship is a natural desire for any parent; particularly one who has since entered into a new relationship, perhaps with someone who has their own children to consider. In such a situation, an agreement to make mutual wills may appear to be the perfect solution to avoiding any future uncertainty. Such agreements may be

written or verbal. In some instances, the parties may not even be aware that they have made an agreement for mutual wills.

An agreement for mutual wills arises where two people agree to make wills in certain terms and agree not to alter those wills. If both parties honour the agreement, the first to die will leave a will which accords with the terms of the agreement and the survivor will also leave a will which, on their death, will deal with the assets that are caught by the agreement in the manner envisaged by the parties.

In theory, an agreement for mutual wills not only allows the survivor to enjoy the assets left by the first to die but, on the survivor's death, ensures that the children of the first to die will be provided for. However, is this always the case?

An agreement for mutual wills does not prevent the survivor from exercising his or her testamentary freedom and, over their lifetime, making several new wills.

However, if the survivor deals with the assets that are caught by the agreement (either during their lifetime or by their last valid will) in a way that is contrary to the agreement or designed to defeat it, a beneficiary that has lost out as a result of this

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may be able to seek a remedy from the Court by way of a declaration that the affected assets are held on trust for the benefit of that beneficiary.

The difficulty lies in proving the agreement, the heavy onus of which is borne by the person alleging its existence. The Court requires clear and satisfactory evidence that the last to die bound himself or herself to dispose of their estate in a particular way.

Even if the agreement can be proved, and assuming that the last to die has not squandered the assets in question or lost them through bankruptcy, it will not prevent a spouse, child or dependant of the last to die from claiming further provision from his or her estate and, where successful, depleting the assets caught by the agreement.

Agreements to make mutual wills should only be used sparingly. In all instances, parties should first obtain legal advice and explore alternative measures to protect their children's interests, such as the use of trusts which preserve capital for their benefit.

A fatal Christmas party incident proved not compensable

TONY ROSENTHAL PARTNER



WITH THE CHRISTMAS SEASON UPON US, employers need to be aware of their responsibilities when hosting parties at out of office locations.

When employees attend a work function, there is an expectation that their employer is responsible should an accident occur. However, this case study proves this is not always the case.

In this case, an employee attended a Christmas party at a park near the Noosa River which was organised by her employer through their Social Club. The management group for the employer had sanctioned this Christmas function.

During the function, the employee decided to take a swim in the Noosa River with another worker and ran towards the river, diving in head first. In doing so, she tragically sustained a fatal injury.

Although there was "inducement or encouragement" for the employee to attend the function, on 31 March 2013, it was held by the Queensland Industrial Relations Commission (QIRC) that the activity organised by the employer was not "the diving into the Noosa River".

In cases of this kind, employment needs to be a significant contributing factor causing the injury. It must be a real or effective cause of the injury not merely the setting in which it occurs.

An employer is not liable where the employee has acted outside the scope of his/her employment or has engaged in a frolic of his/her own accord.

In an appeal brought by the employer, the QIRC found that the employee was not induced or encouraged either implicitly or explicitly to undertake the activity which led to her death. It is for this reason that the appeal by the employer was successful.



Have yourself a **safe night out**

CURT SCHATZ PARTNER



YOU MAY HAVE READ IN THE PRESS THAT THE GOVERNMENT has spent a considerable amount of time investigating patron conditions and behaviour in late night trading venues (meaning venues that trade to 3.00 am or later). These investigations aim to concentrate resources on safety in the Safe Night Precincts (SNPs) in Queensland. Currently, the SNPs in Queensland are Airlie Beach, Brisbane CBD, Broadbeach CBD, Bundaberg CBD, Cairns CBS, Fortitude Valley, Gladstone CBD, Inner West Brisbane, Ipswich CBD, Mackay CBD, Rockhampton CBD, Sunshine Coast, Surfers Paradise CBD, Toowoomba CBD and Townsville CBD.

The government has increased requirements and other measures to elevate venue safety, including introducing ID scanners, communication between venues regarding banned patrons, metal detectors and an increased security presence.

The introduction of ID scanners is a key aspect of the SNPs. Their main purpose is to identify anyone who has police and/or Court bans and prevent them from entering the venue. The networked system of ID scanners is expected to be fully operational from July 2015 in venues trading after midnight in SNPs.

These increased security measures intend to encourage patrons to be more accountable for their behaviour, prompt behavioural change and make late night venues and precincts even safer.

The Office of Liquor, Gaming and Racing (OLGR) continues to encourage the introduction of liquor accords within SNPs. Each liquor accord is designed by its members to resolve local issues within a local area. Accords are made up of strategies to deal with the misuse of alcohol, support harmonisation and responsible service principles, and ensure safety in the local community. The licenses inform the OLGR on how venues within the accord trade, including processes put in place to ensure patron safety. Accordingly, the police and the OLGR investigators can be satisfied that each venue within the accord is self-regulating and runs in accordance with the same set of rules. These accords allow investigators and police to focus on the SNPs.

However, when a liquor accord (or relevant legislative requirement) is not complied with, investigators' powers are extensive. Under the Safe Night Out legislation they have the power to stop and search vehicles, enter a venue to search, inspect, take extracts from and make copies of any documents, ask the occupier (or any person in the venue) to give the investigator reasonable assistance, or apply for a warrant to a venue if they believe statutory requirements have not been complied with. In addition, if the investigator knows or suspects that liquor is being sold, consumed or possessed in breach of the legislation, they can seize the liquor.

It is important that licensees are aware of the measures implemented by the Safe Night Out legislation, as well as the benefits that can coincide with membership of local liquor accords. However, at the same time, licensees should be aware that investigators' powers are wide-reaching under the legislation and there can be serious consequences for non-compliance.



JOHN MULLINS
EDITORIAL

As 2014 winds down for most there is the excitement of Christmas and the opportunity of some sort of holiday, long or short, and the optimism for a fresh start in 2015. Closure and new beginnings inevitably provides the opportunity for reflection.

2014 has in many respects been for most people a year of highs and lows and a reminder that no matter how hard we might try, how hard we might work, how much we might plan and seek to control our destiny, the reality of our human existence is that we can only control certain aspects of our life and our existence is impacted upon by other people, forces and circumstances.

We have seen the recent deaths of Gough Whitlam, Wayne Goss and Phil Hughes, three men at very different stages of their lives. Their demise brought about by vastly different circumstances reminds us that life is fragile and we never know if our life will be long or short but we should strive to do our best each day.

It has been fascinating to observe the reaction of the people to the passing of three high profile Australians and how they have been eulogised.

Carpe Diem.

On behalf of all the firm I would like to wish you all a very happy Christmas and prosperous new year.

This publication has a number of seasonal articles, as well as interesting articles on contemporary issues such as digital footprints, reforms to property laws and practice in Queensland and the somewhat curly issue of mutual wills.

The changes to property laws are particularly important.

Our firm will celebrate its 35th Birthday on 31st March next year and we look forward to this celebration and continuing to maintain and develop the very valuable and important relationships that we have with our friends and clients.

Happy Christmas!

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