

Macrossan & Amiet Solicitors

news update

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S O L I C I T O R S

Shining some light on consumer rights

By Stephen Willis

We are familiar with the fact that consumers are the key to a strong economy, but just how familiar are we with our rights and obligations with respect to the products that we buy. What do you expect to obtain when you enter into a transaction and how well informed are you in relation to your rights when a product fails to achieve your expectations.

The Consumer Affairs Advisory Council ("CAAC") is currently at the discussion stage of an investigation into the adequacy of implied terms, at both the state and commonwealth levels. The CAAC is particularly concerned with the level of protection that is provided by the current legislation.

Among the issues being discussed are:-

- 1) Do consumers have adequate access to understandable information regarding implied terms;
- 2) Are the implied terms adequate.

As a brief overview, the three types of warranties a consumer



Stephen Willis

can rely on for protection are the manufacturer's voluntary warranty, an extended warranty and a statutory warranty.

Manufactures voluntary warranty

These are the terms and conditions under which a manufacturer agrees to repair, replace the product or to refund the purchase price. As the name suggests, the warranty is "voluntary" and will usually set out time limits and other conditions. The warranty will form part of the agreement and if not honoured, the consumer will have the right to take legal action.

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Selling Investment Property

By Sarah Robertson

Sarah
Robertson



In our July Newsletter, one of our trainee solicitors, Heather Smith, gave you a brief overview of some of the changes to the laws regarding residential tenancies brought in by the new *Residential Tenancies and Rooming Accommodation Act 2008*. This month we advise in a bit more detail how some particular sections in the new Act may affect you if you wish to sell your investment property.

Selling a tenanted residential property to a buyer who also wishes to purchase the property as an investment property does not, as a matter of course, give rise to difficulties. But what happens if a buyer or potential buyer wishes to purchase your investment property and use it as their own residence and the Contract therefore requires you to provide vacant possession? What steps do you have to take in order to have the tenant move out by settlement?

There are various requirements provided in the new Act in relation to giving a tenant Notice to Leave the property. These vary depending on whether the tenancy is a periodic tenancy or is for a fixed term.

In relation to a periodic tenancy, after you enter into a contract to sell the property you may issue the tenant with a Notice to Leave giving them four weeks notice. You would obviously need to ensure the contract did not settle before the expiry of this four weeks. However, if you have not

yet entered into a contract but are wanting to sell the property free of the tenancy (i.e. provide vacant possession), you are required to give the tenant two months notice to leave. Whether you decide to give notice before or after entering into a contract depends on your own particular circumstances. Some sellers may not wish to give notice until they have an unconditional contract and are more certain that settlement of a sale will go through, whereas other sellers may wish to give the tenant notice in advance so as to attract more attention from owner-occupier buyers.

In relation to a fixed term tenancy, the position is more strict. You cannot end a fixed term tenancy and require a tenant to vacate the property before the end date of the tenancy's term without agreement from the tenant. Assuming you do not have agreement from the tenant to terminate the tenancy early, you must give the tenant two months notice before requiring them to hand over the property and this notice cannot, of course, require handover before the end date of the tenancy.

If the tenancy is due to expire around the time you wish to sell the property you have a couple of options. You could give the tenant Notice to Leave (no less than two months and not before the expiry date) and the property may then be vacant either by settlement of a sale or shortly thereafter. Alternatively, you could enter the contract subject to the tenancy

with a condition that following satisfaction of finance, building and pest inspection reports and any other relevant conditions, you will issue the tenant with the Notice to Leave (giving them at least two months notice and not before the expiry date). Again, you would need to ensure the contract did not require settlement before the tenant was required to vacate the property. Either way, particular consideration must be given to how the contract is drafted.

Of course, if the buyer does not require vacant possession on settlement, you would not be required to give the tenant any notice and would simply list the tenancy in the contract and the buyer would take the property subject to it and become the new landlord.

It is important in all circumstances to note that the standard conditions of sale for a residential property place an obligation on a seller not to do anything to significantly alter any tenancies disclosed in the contract. Therefore if a tenancy is disclosed in the contract and you intend to give a Notice to Leave to terminate that tenancy in order to either provide vacant possession or enable the buyer to have vacant possession shortly after settlement, you should ensure a special condition is included in the contract stipulating this.

Separate consideration should be given to where a buyer wishes to purchase your property as an investment property on the basis

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feature

Joe Bartolo

By Kylie Davies

Being the football fanatic that I am I'm surprised that I never realised that our friendly neighbourhood Mortgage Broker, Joe Bartolo had played in the big league.

I first got to know Joe after dealing with him regularly as the Manager of the Mortgage Choice Franchise in Cannonvale however it was not until a conversation at a Tourism Whitsunday Networking function over a cold beer that I discovered Joe's history. Joe was born and raised in Mackay and attended Saint Patrick's College. Joe did not play much football at high school because his parents thought league was too tough and encouraged him to play basketball instead. Joe left Mackay at the age of seventeen and went to live with family and friends in Parramatta and he took advantage of a connection to the Parramatta Eels to arrange a trial match. Joe played two years in the under twenty-one competition and made his first grade debut in 1990 for the Parramatta Eels.

On the night of Joe's debut the Parramatta Eels were playing the Canberra Raiders who had won the ARL premiership the year before and were a team of superstars. The Eels were not

expected to win that game however with Joe scoring the winning try on debut the Eels won seventeen points to eight.

Another highlight of Joe's career was being involved in the Club when the British team toured Australia. Although Joe was injured for this game, Parramatta Eels were the only ARL team to topple the English national side.

After a further six years in the ARL, Joe retired at the age of twenty-six. He moved back to Mackay and bought into a small business in Mackay then decided to see the world. Joe went travelling through Europe, Africa and a number of other countries on a two year hiatus. Joe's best memory is spending the turn of the century in front of the pyramids in Cairo, which is something that he will never forget.

Through a rugby league connection, Joe was offered the opportunity to work for Mortgage Choice in Mackay. Joe started as a Loans Consultant but was then offered the opportunity to Manage Mortgage Choice in Airlie Beach and he jumped at the opportunity.

Joe said that the change in the financial market has definitely



Joe Bartolo

made Joe's life more difficult. Joe says "the banks are not lending as easily as they used to and it becomes more of a reward when you secure the right loan for a client, especially these days".

Joe's drive and determination that aided him so well in his ARL career has certainly helped him overcome the hurdles of lending and fighting for the best deals for his clients.

Though these days Joe's lifestyle is a bit more laid back with his wife and two young children, he certainly enjoys watching every game of NRL on the weekend from Friday night footy to Monday night footy and every game in between. Though these days his involvement with football is limited to his armchair in front of the telly, you can still definitely see the passion Joe has for the game whenever the subject comes up.

Selling Investment Property

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of the tenancy you currently have in place. If the tenancy commenced two months or less before you begin advertising the property for sale or showing it to prospective buyers and you did not give notice of your intention to sell the property to the tenant at

the time of entering into the tenancy agreement, the tenant may have a right to terminate the tenancy with two weeks notice.

It is clear from the above discussion that there are serious considerations to be taken into account when selling or

considering to sell an investment property. We recommend that in such cases you seek legal assistance in drafting the contract and we invite you to contact our office if you have any queries in this regard.

Insolvency Issues

By Greg Smart

It's been called a crisis, a slow down and a recession. However you describe it, the impact of the current economic climate has not passed unnoticed in the Mackay & Whitsunday region.

The first sign was a downturn in business, followed by increased unemployment in the region. The next stage of the crisis has arrived, however, and it is marked by the failure of businesses in the region.

Though most business people have heard the expressions "bankruptcy" and "liquidation", few understand the complexities of the law surrounding insolvency. At the bare minimum, it is important to understand the basics, as many businesses in the region will have an encounter with insolvency in the coming months - whether it is their business that is insolvent or that of one of their debtors.

Our experience to date indicates that property developers and those in the building industry appear to be most at risk of insolvency. However any business can find itself in dire straits, often with little warning. One major concern in the current environment is the domino effect. Once one business collapses, all the other businesses that are owed money suddenly have a large hole in their cash flow. This can lead those businesses into insolvency and, in turn, those

businesses to which it owes money and on again in turn.

What is insolvency and how to recognise it

Both individuals and companies can be insolvent, though the test is basically similar for both types of entities.

A person or a company is solvent when the person or company can pay its debts as and when they fall due. A person or company that is not solvent is "insolvent".

The Courts have taken a reasonably liberal view of the definition of insolvency over time and have regard for the ability of a debtor to realise assets promptly or to secure further lending on commercial terms on short notice.

Classic indicators of insolvency include:

- Continuing losses
- Liquidity ratio below 1
- Money owing to the ATO
- Poor relationship with current bank, including the inability to borrow further
- No access to alternative finance
- Inability to raise further equity capital
- Suppliers demanding cash on delivery or payment arrangements prior to recommencing supply
- Creditors remaining unpaid outside of trading terms
- Issuing post-dated cheques



Greg Smart

- Bouncing cheques
- Special arrangements with selected creditors
- Solicitors letters, court proceedings, judgments or warrants issued against the business
- Payments to creditors in round sums, not attributable to any particular invoice
- Inability to produce timely and accurate financial information to display the business trading performance and financial position.

It is important to monitor these indicators both in your own business, but also in your debtors. Do you have a debtor who continually writes cheques dated a week later? Or one who tells you that they are just waiting on so-and-so to pay them so they can pay you? Is the cheque always in the mail?

The many faces of insolvency

As mentioned, both individuals and companies may be insolvent. Both involve different processes that have many similarities and many striking differences. It is beyond the scope of this article to discuss those differences in detail.

Whilst there are a number of options for a bankrupt individual, by far the most common in real life is bankruptcy.

By contrast, there are three common insolvency arrangements for companies:

- **Receivership:** A secured creditor, usually a bank, may appoint a receiver to conduct the business of the company with a view to realising assets and paying the secured creditor. The receiver can be appointed over the whole of the business or over particular assets. While it is not strictly speaking true to say that a company in receivership is insolvent, it is our experience that it is the death knell and the company is normally unlikely to survive for any lengthy period of time. The reason for this is that secured creditors are normally reluctant to appoint receivers and so the appointment is normally indicative of substantial arrears or defaults.
- **Administration:** the company normally appoints an administrator when it believes that it is, or is about to become, insolvent. The administrator's job is to assess the company and if possible trade the company out of its insolvency or place the company into liquidation. This may involve selling assets or even parts of the business.
- **Liquidation:** A company may be placed into liquidation voluntarily or by the court on the application of a creditor. Once in liquidation, the company is at the point of no return. The liquidator's job is to gather in the assets of the company and pay creditors. Unsecured creditors will be paid a dividend, so many cents for each dollar they are owed, if there are any funds left after the payment of secured creditors and the

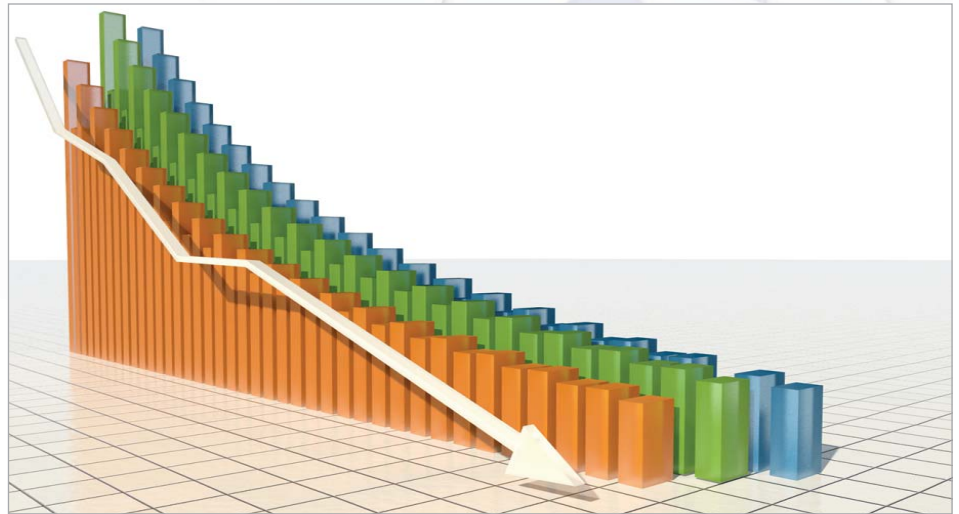
costs of the liquidation. Once the liquidator's job is done, the company is deregistered.

Sometimes a receiver and an administrator or liquidator will be appointed. The receiver takes priority over the administrator/liquidator. In practice, the receiver will take what is necessary to satisfy the secured creditor and then hand over what is left to the administrator or liquidator.

to have your say in the conduct of the insolvency.

What if I think I'm insolvent?

The most important thing to remember if you think your business may be insolvent is to act early. It may be possible to trade out of your difficulties or use one of the technical alternatives to bankruptcy or insolvency.



I am owed money, is there anything I can do?

Once a debtor is insolvent, there are limited options available to recover your money. The sad truth of insolvency is that most creditors will normally wear a loss and the only real question is the size of the loss. It is important to avoid throwing good money after bad in these circumstances.

However, depending on your particular circumstances, you may have a claim that takes priority over other creditors or you may be able to realise the funds another way. You should contact either of our offices for debt recovery advice specific to your circumstances.

Also, a number of our solicitors work closely with trustees in bankruptcy and liquidators and can advise you on the best way

Our experience is that many creditors are willing to work with debtors provided that the debtor communicates openly with them from an early stage.

Further, if your business is conducted by a company, continuing to trade whilst insolvent can be an offence and can expose the directors to personal liability for the debts incurred by the company.

Our close ties with insolvency practitioners mean we can put you in contact with an expert in the field, who are generally able to meet with you on short notice.

If you believe that your business is, or is about to become, insolvent, you should contact our office immediately for an appointment to discuss your options.

profile

Trainee Solicitor - Melanie Badenhorst

As much as I have enjoyed a certain degree of anonymity as a newcomer to Mackay I gladly welcome the opportunity to introduce myself to the wider Macrossan & Amiet community.

I grew up in Knysna in the Western Cape Province, South Africa, which is approximately 250km from Port Elizabeth where I completed my LLB degree at the Nelson Mandela Metropolitan University in 2004.

From there I made application to the Port Elizabeth Society of Advocates and was accepted to complete my pupillage. I successfully completed same and was admitted to practice as an Advocate of the High Court of South Africa in 2005.

I practiced as an Advocate until June 2009; my practice consisted mainly of Commercial Litigation, Family Law, Criminal Law and motion-based proceedings.

My partner and I had decided in April of 2008 to start the exciting journey to Australia. It was and still is, a decision largely based on the quality of life Australia offers to its people in general.

Based on job opportunities available to us we relocated to Mackay in July of 2009.

Much to my delight I was accepted at Macrossan & Amiet to start as a trainee solicitor in August 2009, while I complete the required courses to allow me to practice as a Solicitor in Queensland.

The working environment here is *fundamentally* different - for the better. I have genuinely felt

welcomed as a member of the team but also as a person living here. The partners have been great offering help and input in many respects. It is sincerely appreciated. I am of the opinion that I have found in Macrossan & Amiet not just a profession in which I can grow but more importantly, people from whom I would like to learn.

It seems like a place where honesty and integrity is still valued and people work hard because that is what they do and unapologetically so. I would be remiss if I did not mention that I am blown away by the efficiency and professionalism of all the support staff that seem to know everything all the time. The girls are great!

I have in principle been assigned to the Family Law and Commercial sections in the Mackay branch of Macrossan & Amiet.

Within the firm I find that there are always people willing to help and that no job is too big or too small, with particular attention paid to the former and the latter. From my interaction with clients I surmise that there is great wealth of local knowledge in the firm, which stands us in particular good stead as far as property transactions are concerned.

What sticks in my mind the most so far?

Amongst the many saying that I have learnt in Australia, it is the phrase coined by our Mr. Damian Carroll who states that people aren't perfect that is why pencils have rubbers! So well put I thought in a family law setting.



Melanie Badenhorst

Mackay itself has stirred within me a sense of patriotism or belonging, which I have not felt for a long time. Possibility fills the air and I am keen to get involved in my local community - especially the Auxiliary Fire Fighters as we are heading towards a record summer.

In reading what I have wrote I have no doubt that there are select cynics who find it hard to believe, but is true. I am also not so naïve not to anticipate that, as anywhere else, some days will not be as successful as others. My view is that this will be the exception and not the rule - Mackay and the people I have met are wonderful and we consider ourselves lucky to have relocated here.

I recall the look I got at Medibank while applying for medical insurance and asking if I will be covered in the event I got shot *alternatively* stabbed. The look of honest surprise is refreshing!

I am an avid motorcycle enthusiast and I love the sound of the Harleys going down Gordon Street. I often poke my head out the window only to hear one opening its pipes or a V8 Ute laying down a little extra rubber!

I hope that I will fit in here - should anyone disagree please keep it to yourselves!

Shining some light on consumer rights

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Extended warranty

An extended warranty simply provides conditions under which a manufacturer will repair or replace a product over a period of time that extends beyond the manufacturer's voluntary warranty.

As with the manufacturer's warranty, the organisation providing the extended warranty has discretion as to what conditions will be imposed.

Statutory warranty

Many consumers believe that the manufacturer's warranty is the only protection they have in relation to a faulty product. This is certainly not the case. There are certain rights and obligations that are imposed on all consumer contracts pursuant to the *Trade Practices Act*, the *Fair Trading Act* and the *Sale of Goods Act*. They are generally referred to as implied terms and apply irrespective of any manufacturer or extended warranty.

There are some consumers that believe that they have a right to a refund if they change their mind. Although many stores do offer this policy it is not a right the consumer has.

On the flip side, there are stores that state that no refunds will be offered at all. This can be misleading for the consumer as he or she will still have the protection provided under the legislation if the product turns out to be defective. For example the



legislation provides that the goods must be fit for their purpose, and must meet a level of quality and performance that would be reasonable to expect, given their price and description.

Businesses should not be leading consumers to believe that their statutory rights are limited. If they do, then they may be engaging in misleading or deceptive conduct or providing misleading representations. Technically speaking, a sign stating "no refunds after 30 days" can be misleading because a consumer will continue to have statutory rights, limited only by what is a reasonable time.

Lemon Laws

In its discussion paper, the CAAC also considers the introduction of what is referred to as lemon laws. This type of law presents interesting concepts and is designed to provide protection to a consumer who has purchased a good which repeatedly fails to perform.

The laws may potentially take the shape of two different forms. Firstly the laws may impose obligations on a

manufacturer to disclose known defects in their products. Or secondly it may require manufacturers to replace or repair products that fit the definition of what is a lemon.

The discussion paper particularly points out the potential place of lemon laws in the motor vehicle market. The idea is that these types of laws may restore the information balance between consumers and the suppliers to ensure that consumers are aware of the quality of the product they buy. Another point made is that although consumers have the protection of statutory rights, these may not be sufficient to protect the consumer in the event that the product repeatedly fails to meet performance or quality expectations.

In these tough times the importance of consumer protection can not be overstated and it will pay for people to become more aware of just what rights they do have. A copy of the discussion paper can be downloaded online from the Commonwealth Government Treasury website.

last word



Kylie Davies

Contact us

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“What’s the difference between a lawyer and an accountant?”

The accountants know they’re boring.”

We all know that people love to make lawyers the butt of their jokes. So we thought we would start sharing a few of our own favourite lawyer or law-related jokes to prove once and for all that lawyers do have a sense of humour and that we don’t take

ourselves too seriously (*although we do harbour hopes that the jokes are told more out of chummy affection than genuine aversion for our breed!*). So get ready to be treated to a chuckle at our expense with every newsletter.

A young lawyer starting up his private practice was very anxious to impress potential clients. When he saw the first visitor to his office come through the door he immediately picked up his phone and spoke into it,

“I’m sorry, but my caseload is so tremendous that I’m not going to be able to look into your problem for at least a month. I’ll have to get back to you then.”

He then turned to the man who had just walked in and said,

“Now, what can I do for you?”

“Nothing,” replied the man. *“I’m here to hook up your phone.”*

If you have any queries about any of the articles in this newsletter, please feel free to [email mac@macamiet.com.au](mailto:mac@macamiet.com.au) or [phone 4944 0333 \(Mackay\)](tel:0749440333) or [4948 4500 \(Whitsundays\)](tel:0749484500) to speak directly with the author of the article.