



*Changing Your Will... Client Confidentiality...
Electronic Signatures and more!*

*With the law constantly changing our newsletters
keep you up to date with the latest.*

*If you are in any doubt about these or any other
aspects of the law, please call us on 4731 5899*

RISING SEAS

Protecting the beach house

Recent new laws 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 us 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, we 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 us if you would like further advice on arrangements on any employee share scheme you may be considering. □

EVIDENCE

Signatures, squiggles and electronic signatures

If it is a symbol, a squiggle or in electronic form, can a signature still authenticate a document or piece of writing as that of the signatory?

Traditional manual, hard-copy signatures still endure, while electronic commerce continues to revolutionise how life is lived and how business is done.

A signature is a person's name or mark made to authenticate a document or writing. It can be in any form or symbol. If in doubt, there must be evidence that the signatory had the intention to sign. Beyond that, there is no law prescribing the form that a signature must take. It can be any version of the signatory's name so long as it has been adopted by the signatory with the purpose of authenticating a document. It can be a printed signature, a rubber stamp or computer-produced. It can be the appearance of the name of the signatory. It need not be



made manually.

An electronic signature is no more than an electronic means of performing the functions of a signature – authentication and intention to be bound.

The law has quickly adapted to electronic commerce with, for example, the e-administration of the law and the legal process,

the computerisation of land title and conveyancing, the recognition of the formation of contracts electronically – offer and acceptance by email or by fax – and the imposing of liability for breaches in electronic format of duties of care.

The common law accepts an

electronic signature in paperless transactions to authenticate a document and indicate intention to be bound.

The law takes electronic signatures at their face value, and does not yet require the use of action to authenticate or identify them. However, a document's integrity (unaltered content), authenticity (sender's identity), and confidentiality (of the signatory's identity or document's contents) are not ensured merely because an electronic signature is provided.

Electronic commerce in Australia has been helped by a special law that ensures electronic transactions are equivalent to a hard-copy version, and that there is technological neutrality. This law has replaced the thousands of instances where there was the need for notice in "writing" or that a document be "signed". □

NEIGHBOURS

Building good fences may take negotiation

There is no requirement to have a fence if you and your neighbour don't want one. But if you want a fence and your neighbour doesn't, you should get a quote for one to be built and discuss it with the neighbour.

If you don't reach agreement, you can give the neighbour a written notice specifying the fencing work proposed. If after serving the notice you and your neighbour still cannot agree, either of you may ask the Local Court to make an order about the fencing work required.

If a fence is to be built, you and your neighbour usually, though not always, will have to share the cost.

Usually, you will both share equally the cost of repairs to any fence between your properties. However, if the fence was damaged because either of you was careless (for instance, by a fire or by trees or structures in poor condition) then the responsible party must pay for repairs. If agreement cannot be reached about who is responsible for the repair work, a court can be asked to make an order before the work is carried out. □

NO CLIENT CONFIDENTIALITY

Employer's right to view lawyer's email

A recent US case noted that an email sent by an employee to her lawyer from her work computer was not a 'confidential communication between a client and a lawyer'.

The employee had acknowledged her workplace rule that communications are not private and may be monitored. The court likened this to claiming privilege when consulting her attorney in a workplace conference room in a loud voice with the door open.

The court found that there was no waiver of privilege since there was no privilege in the first place.

The privilege legislation requires that the communication be transmitted by a means which "disclosed the information to no third persons other than those who are present to further the interest of the client in the consultation".

Client privilege is not affected by the general fact that third parties assist in the delivery of email. □

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?

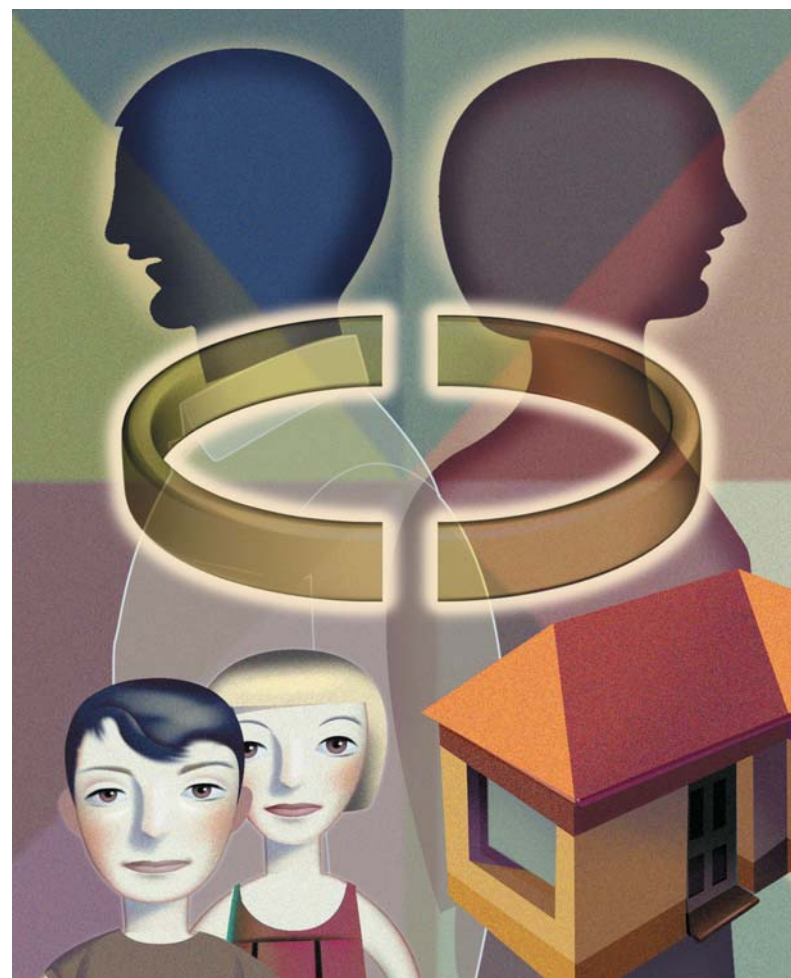
Both parents are responsible for the financial support of their children until the child reaches the age of 18 or until completion of the school year in which the child turns 18.

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. □



EASIER SUPPRESSION ORDERS

Protecting people living with HIV

The ability to make suppression orders is an extremely important power of the court to protect the confidentiality of people, for example, those living with HIV who are often discriminated against or victimised.

A new law introduced late last year makes it more straightforward for parties to get suppression orders, though the courts have always had powers to make them.

The law confers powers on NSW courts to impose suppression orders and non-publication orders on certain defined grounds. Non-disclosure

orders – by publication or otherwise – allow courts to order pseudonyms to be used instead of parties' names, and for matters to be heard in closed court, under certain conditions.

It does not dilute protections in existing laws that already protect the identities of those with HIV.

Importantly, the courts maintain their discretionary power to weigh relevant interests in the particular case before them. This means balancing the public interest in having open courts against protecting confidential medical information and HIV-positive individuals from further discrimination and detriment as

a result of the disclosure of their condition.

Without a way to protect their confidentiality, people living with HIV would, in many instances, be extremely reluctant to proceed with complaints.

This has to be balanced against the public interest of having open courts where information, including a person's HIV status, may be raised and widely circulated to members of the public and the media. □

SUB-CONTRACTORS

Gain new right to earmark funds owed to contractor

Under recent changes to the law, subcontractors can now claim against principal contractors for payments due to them from contractors.

If you are a subcontractor, the changes effectively enable you to earmark money owed to a contractor from the principal contractor to secure the former's liability for progress payments to you. It minimises the risk of non-payment due to a contractor's insolvency.

You must first lodge an adjudication application and then serve on the principal a "payment withholding request".

On receiving this, the principal contractor must hold back from any money owed to the contractor an amount equal to that specified in the request, pending a court decision. This obligation extends to owners.

The result is that a principal contractor who does not comply with a request becomes liable (together with the contractor)

for the debt owed to you. The obligation to withhold payment also operates as a defence for the principal contractor against claims for recovery of the money it owes to the contractor.

The principal contractor's obligation to withhold an amount equal to that specified in the request remains in force only until:

- the adjudication application is withdrawn;
- the contractor pays you the amount;
- you serve a notice of claim and debt certificate on the principal contractor; or
- a period of 20 days elapses after the principal contractor has been served with the adjudication determination; whichever occurs first.

A payment withholding request allows you, in effect, to use money owed to the contractor by the principal contractor as security for your entitlements to progress your payments under the subcontract. □



FINANCIAL REPORTS

Company officer shares liability for failure to lodge

The company secretary of a business listed on the Australian Stock Exchange was placed on a good behaviour bond for six months and ordered to pay court costs earlier this year after failing to meet the reporting requirements that are part of the laws governing corporations. His company was fined and also ordered to pay costs.

The government investigators found that the company had failed to:

- hold an annual general meeting within five months of the end of its financial year;
- lodge a half-yearly financial report within 75 days of the

end of a particular period;

- provide its financial report, directors' report and auditor's report to its members within four months of the end of a financial year; and
- lodge its annual report within three months of the end of a financial year.

Under the law, company secretaries can be held responsible for the failure of companies to lodge their financial reports.

If you are a company officer and suspect that your business may not be able to meet its financial reporting and AGM requirements, see us about what options may be available to seek an extension of time. □

NOT YOUR ALTER EGO

Private companies are tax identities

The failure to recognise that a private company has a separate identity, and that dealings between one and its shareholders and directors have tax implications, is a misconception which causes taxpayers a steady stream of problems.

The fact that companies and individuals have different tax rates creates tax complexity, allowing for deliberate – or sometimes accidental – tax planning.

It makes tax sense for shareholders and directors to

use company profits, say by way of loans or use of assets owned by the company, instead of the company paying taxable dividends to them.

Not surprisingly, the tax law tries to prevent this. A payment or loan by a private company to its shareholders might be taxed as an unfranked 'deemed dividend'. It used to be possible to avoid this by the company giving a shareholder *use* of an asset instead of giving them the asset but since an amendment to the law in mid-2009, 'payment' has included provision of an asset for a

shareholder's use.

Not all loans count. One area of contention is whether an 'unpaid present entitlement' is a loan. Last October, the Tax Office announced that if the accounts of a trust or company have incorrectly classified an unpaid present entitlement, they have until 31 December 2011 to self-correct.

The restrictions only apply insofar as the company has a distributable surplus. In a recent case a company had made non-tax deductible payments to an offshore entity which the Tax Office claimed should be

assessed to the taxpayer as deemed dividends. The taxpayer argued that the company did not have a distributable surplus, claiming the amount of the company's net assets should be reduced by the amount of the payments, the additional tax payable as a consequence of the non-allowance of tax deductions for them and the interest on the additional tax, and the court agreed. There could be far-reaching implications for other cases.

Contact John Bateman if you would like to discuss your company's tax issues. □

OUR SERVICES



Our aim is to provide practical and realistic solutions for your business and personal legal problems. We can assist you and your family in the areas listed below:

Property Transactions

- Buying and selling your house, unit or land.
- Property development and planning matters.
- Building contracts and disputes.
- Leasing, selling and purchase of industrial, retail and commercial premises.
- Problems relating to easements and covenants.
- Advice on GST, capital gains tax, and stamp duty issues.
- Retirement village matters.



Estates and Wills

- Preparation of wills and estate planning.
- Probate and administration of estates.
- Challenging a Will.
- Powers of Attorney & Enduring Guardianships.
- Notary Public services.



Insurance and Negligence Claims

- Disputes with Insurance Companies.
- Damage Claims.
- Claims for negligent advice.
- OH & S disputes.
- Superannuation TPD Claims.



Family & Defacto Relations

- Property settlements and divorces.
- Child custody and access issues.
- Defacto relationships agreements and disputes.
- Pre-nuptial agreements.



Serving the Business Community

- Buying and selling businesses or companies
- Business contracts and disputes.
- Franchising matters.
- Business succession planning.
- Employment disputes and workplace relations.
- Negotiating leases of business premises.



Court Appearances & Traffic Offences

- Traffic matters including drink driving, speeding offences and licence appeals.
- Defence of criminal charges in all courts.
- Disputes with councils and government departments.
- Apprehended violence orders.
- Debt recovery.
- Commercial disputes.



Visit our Website – www.batemanbattersby.com.au

For more information about our firm, the services we offer and how we may be able to assist you, please visit our website. The site contains legal guides and answers to frequently asked questions about legal matters. You can also subscribe to our free client newsletter.