

Client Newsletter

Biddulph & Salenger **Lawyers**

Issue 12, March 2008

Biddulph & Salenger has maintained its focus on providing personalized services for its many loyal clients and has welcomed new clients, many of whom are referred. Clients are reassured by continuity and stability.

The managing partners, **Maryanne Ofner** and **Amanda Blackman** seek any feedback you would like to offer to assist them to provide you with the services you require. They thank you for all your support.

Warwick Dunn our senior lawyer continues to look after many of his clients on a part-time basis.

There have been some changes of personnel. Long serving Sally Klem has left us and Sydney to live in Newcastle with her family for a few years. Sally Bradfield has left after 2 years to have her first babies, being twins. Edyta Zurawski, who was a law student and paralegal with us for many years, now continues in our practice as solicitor, having completed her degree with honours. Julie Koerner provides solid and dependable assistance in all conveyancing matters. Matthew Paull has joined us to look after all our book keeping and administrative requirements. Madeleine Livesey is a law student whom you will find on reception and assisting as a paralegal.

The team and a few rings can be found on the following link enjoying their Christmas party:

<http://www.youtube.com/v/FDAsV9cVT7s>

THANK YOU

We send thanks again to all of you for your continued support and to those of you who have made referrals, which are highly valued and always appreciated!

HELP WITH LAW

Do call us if you have a query. There is no charge for a quick phone advice and if we can't help we may be able to identify someone who can.

CHANGES IN THE LAW

Wills and Estates

Succession law was imported into the Australian colonies from English law with each state adopting different rules. For over 10 years there has been an attempt to rationalize the differences. The first changes have been made in the Succession Act which comes into effect is effective from March 2008.

Once the Act comes into effect the Court will have the power to make or revoke a Will for a person who lacks testamentary capacity. Normally, a testator must know and understand the nature of what they are doing, understand the extent of the property they are dealing with and be able to comprehend and appreciate the claims to which they ought to give effect. A person who lacks capacity may never have had the capacity or may have lost capacity due to injury or disease. Currently, when a person dies without a Will, the property is distributed according to the intestacy rules which may not be appropriate.

Under the Succession Act, an applicant, usually the person's spouse, family member or guardian, can seek leave from the Court to apply for an order for a Court-authorized Will. The Court will require considerable information and there will be an opportunity for persons with an interest in the proceedings to be heard. Once leave is granted then the Court can determine the actual application.

There are also new rules about who is entitled to see the Will of a deceased person. To date, as a general principle only named beneficiaries have a right to see the Will. Now, all persons with a proper interest can see the contents of a Will prior to a grant of Probate. This includes possible beneficiaries or other claimants against the deceased's estate such as a person entitled to make a Family Provision Act application.

You do not have to remake your Will as a result of the Succession Act. However, you may wish to make a Will or review your existing Will. At the same time you may wish to consider making an enduring Power of Attorney and an Appointment of Guardian.

Family Law

Binding Financial Agreements (BFA's)

Binding Financial Agreements (BFA's) are often referred to by the American term "pre-nuptial agreement". They can be entered into by couples who intend to marry, are married or have been married. BFA's usually set out the division of assets in the event of a relationship break down. The agreement often attaches an asset schedule which lists the respective assets of the parties.

If properly drawn up, with independent advice for both parties, BFA's can prevent a couple from going to Court for a property settlement in the event of marital break down.

A similar arrangement exists for defacto and same sex couples living together who are not married and do not intend to get married. These are called Cohabitation Agreements and became legally binding in 1984.

It is important that such documents are properly drawn up to ensure they are enforceable.

Relocation

Australia has a very mobile population . Issues arise when parties are estranged and one party wishes to move with children. The parenting reforms of 2006, which placed a greater emphasis on shared parenting, now mean that parents have to think very seriously as to whether a relocation is in the best interests of the children. The Court has to ensure that children have a meaningful relationship with both parents. Concurrently with changes in legislation there has been an escalation of counselling and mediation services to assist parties resolve matters without redress to the Courts. While the Courts do their best as a last resort, a decision reached by parties is likely to be more palatable and flexible. Judges ultimately can only do their best when all else fails. "The same body of evidence may produce opposite but nevertheless reasonable conclusions from different judges.Predictions, perceptions, assumptions and even intuition and guesswork can all play a part in search of the best interests solution" (Carmody J)

Maryanne Ofner has been an Accredited Family Law Solicitor for many years. She is a skilled negotiator and also trained in Collaborative Law. She is able to provide sensible practical advice on all family matters .

Property Law

Stamp duty Update

Commercial and Retail leases entered into after 1 January, 2008 are no longer liable for stamp duty. This is a significant saving for our lessee clients.

Loan Documentation

We strongly advise all our clients to enter into properly documented loan agreements when lending money, even to family members. Such agreements need to specify the amount lent, the term of the loan and the interest rate, if any.

It is also recommended that, if practicable , in order to protect themselves further, clients who lend money enter into a mortgage agreement with the borrower as a condition of the loan. A mortgage gives the lender (mortgagee) an interest in real estate owned by the borrower (mortgagor). Once a mortgage is in place and stamp duty paid the mortgage can be registered on the title to the land. This gives the mortgagee a legal interest in the mortgagor's land and security for the loan. If, however, there is already a first mortgage to a bank or other lender registered on the title to the land then the consent of that first mortgagee is required to enable the registration of the second mortgage. If such consent is not given then a caveat can be registered which notifies the Registrar-General of the second mortgagee's interest. A caveat will stop the registration of any further dealings affecting the land whilst the caveat remains in place. Only interests in land can be protected by the use of a caveat and the existence of a loan agreement alone does not create such an interest.

Access to Neighbour's Land

Do you have a difficult neighbour who refuses to allow you access to his land in order to carry out inspections, repairs, maintenance, renovations or to ascertain whether problem trees need to be treated or removed, etc?

Under the 'Access to Neighbouring Land Act 2000' clients can apply to the Local Court for an order to have access to a neighbour's land for a specific purpose if, after a reasonable request, that neighbour refuses to grant such access. We can assist you with your Court application and appear on your behalf to obtain an access order.

DISCLAIMER

This newsletter is for the benefit of clients. The information is of a general nature only. You should not act solely on the basis of material contained in this newsletter.