

# News

**March 2007**

## Property Newsletter

### Land Tax Changes in 2007

Land tax is a tax levied on the owners of land in New South Wales as at midnight on 31 December each year. There are two main exemptions from land tax comprising your principal place of residence and land used for primary production purposes. Any other land that you own or have an interest in may be subject to land tax.

The amount of land tax payable depends upon the aggregate value of any taxable land that you own that is above the threshold. The land tax rate for 2007 is \$100.00 plus 1.7 per cent of the combined land value in excess of the threshold.

For the 2007 tax year the method by which the taxable value of your land is calculated has changed. The taxable value of each parcel of land that you own is now determined by adding the land value of the current tax year and the land values for the two preceding tax years and then calculating the average. The theory is that by calculating the average value any large fluctuations in land values will be smoothed out over time.

The method for calculating the land tax threshold has also changed. In previous years, the threshold has been a fixed amount determined by the Valuer General indexed each year for inflation. The land tax threshold will now also be averaged over three years however, if the average figure is less than the previous years threshold then the previous threshold will continue to apply. For the 2007 year the threshold remains at \$352,000.00.

### Proposed Changes to the *Retirement Villages Act 1999*

The New South Wales Government has tabled in Parliament the *Retirement Villages Amendment Bill 2006* which, if passed, will significantly change the *Retirement Villages Act 1999*. The changes will not only require operators to alter some management practices in relation to retirement villages, but will also involve a significant overhaul to all future licence agreements and leases for self-care units.



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# News

**March 2007**

Some of the changes outlined in the *Retirement Villages Amendment Bill 2006* are as follows:

- (a) Operators will be required to hold annual general meetings and to provide certain information at those meetings.
- (b) Provision will need to be made for both capital maintenance and replacement in respect of property within a retirement village.
- (c) Circumstances will be specified in which the operator may vary the recurrent charges that are payable under a licence agreement or lease without the consent of the residents.
- (d) Circumstances in which residents may elect not to have an annual budget prepared or receive copies of the audited annual accounts will also be established.
- (e) The operator may be required to make good any deficit in the accounts of a retirement village and may not be permitted to carry forward any such deficit or to seek a special levy from the residents to make good any such deficit.
- (f) The operator will be required to ensure that the village is generally safe and that emergency and home care services have vehicular access to residential premises within the village.
- (g) The period that a former occupant is required to pay recurrent charges after permanently vacating their premises will be limited.
- (h) Interest will be payable in relation to certain payments that are not paid on time.
- (i) A settling in period will be provided during which a resident may terminate a contract.
- (j) A process will be provided by which a right to receive a refund of an ingoing contribution paid under a licence agreement or lease may be enforced.

Our inquiries with the Office of Fair Trading have not shed any light as to when this Bill may be passed, but we envisage that it will be sometime in the second half of 2007.

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# News

March 2007

## Leasing Update – Some Recent Cases

There have been two recent court decisions on leasing matters which we bring to your attention.

The **first decision** relates to the often encountered issue as to when there is a binding agreement for lease. This is an issue of equal importance to both lessors and lessees. The decision in this case confirmed the principle that, except in limited circumstances as referred to below, there is no binding agreement for lease until execution of formal documents. The case reaffirms the importance of having written agreements executed by both parties before either party attempts to rely on perceived oral agreements to, for example, carry out works or allow a party into occupation of premises.

In this case, the lessee, who had not executed a lease which had been submitted to it, was held to be in occupation as a monthly tenant only and the tenancy could be validly terminated by one month's notice by either party.

It was noted that in a leasing transaction of this type, the normal expectation of parties is that documents evidencing the transaction will be prepared and there will be no binding agreement between the parties until formal execution (and exchange of counterparts of the documents). Where it is intended that an informal agreement (that is where documents have not been executed) is to be immediately binding, these three elements must be satisfied:

- The parties must have arrived at a consensus as to the terms of the agreement.
- The terms must be sufficiently clear and certain to be capable of forming a binding contract.
- The parties by their words and conduct taken in the context of the surrounding circumstances must show a common intention that the consensus at which they arrived should constitute an immediately binding agreement.

In this case, the presiding judge was satisfied that the first and second of the elements had been proved but not the third.

(*Viva Plastic Pty Limited v Stoermer* [2006] NSWSC 948 (29 August 2006))

The **second decision** deals with whether a lessee is liable for a sublessee's excessive use of premises. This is an important issue due in part to the large number of subleases entered into. In this case, there was a dispute between the

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LAWYERS

# News

**March 2007**

head lessor and the sublessor regarding damage to the surface of certain bitumen areas caused by the sublessee's use of the premises which the head lessor claimed to be the sublessor's legal responsibility.

The issue for determination by the Court was whether the sublessor was liable to the head lessor for the damage caused by the sublessee. In this matter, the Court held that the sublessor was not so liable to the head lessor for damage caused by the sublessee.

The head lease did not impose any obligations on the sublessor to repair or be responsible for damage which may be caused by sublessees. Accordingly, the head lessor could not be compensated for damage to the surface of the bitumen areas which was caused by the sublessee's use of forklifts to move heavy equipment.

This decision emphasises that it is essential that a lease be drafted to adequately cover potential damage caused by sublessees and ensure that under the terms of the headlease a sublessor is responsible for damage caused by sublessees. This is a matter which can also be dealt with at the time of consenting to a sublease but this may depend on what criteria are inserted into the lease as being relevant for the purpose of determining consent to a sublease.

*(Alamdo Holdings Pty Limited v Australian Window Furnishings (NSW) Pty Ltd & Anor [2006] NSWCA 224 (14 August 2006))*

## Unit Trusts and Land Tax

As a result of a High Court decision, certain fixed trusts, which until recently had enjoyed the threshold when assessed for Land Tax, will now be treated as special trusts where no threshold amount is allowed in calculating Land Tax.

As a result of this decision, amendments to the *Land Tax Management Act* have been made allowing taxpayers to regain the threshold amount if either of the following criteria is satisfied:

- (a) the Trust Deed must specifically provide that:
  - the beneficiaries are presently entitled to the income of the Trust (subject only to payment of any proper expenses) as well as to the capital of the Trust;

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LAWYERS

# News

**March 2007**

- the beneficiaries may require the Trustee to wind up the Trust, distribute the Trust property or its net proceeds; and
  - these entitlements cannot be removed, restricted, or otherwise affected by the exercise of any discretion or failure to exercise any discretion conferred upon any person by the Trust Deed; or
- (b) the Trust satisfies the following criteria as at 31 December 2005 for its classification as a family unit trust:
- the Trust holds taxable land not exceeding \$1 million;
  - the unit holders have fixed entitlements to capital and income distributions; and
  - the units are "family-owned".

There is a definition of "family-owned" which basically requires at least 95% of the units to be owned by either one person who is not a trustee or by a "family trustee" comprising members of the same family.

A "family trustee" is a person who owns a unit in a Unit Trust as Trustee of another trust which has either only one beneficiary who is a natural person or has two or more beneficiaries who are all natural persons and members of the same family.

The Office of State Revenue requires all taxpayers involving unit trusts to respond by completing a unit trust declaration form which may also entail amending the Trust Deed prior to 1 January 2008 if necessary.

The criteria must be satisfied each year to enable the Trust to be classed as a fixed trust and obtain the threshold for calculating Land Tax.

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# News

**March 2007**

## **Assistance**

If we are able to assist you in any of these areas, or other property matters, please contact one of our Property & Construction Practice Group Team:

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## **Disclaimer**

This newsletter is a non-comprehensive general outline of the law as at 13 March 2007. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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