

NEWSLETTER

Dear Client

We are pleased to advise you that we are replacing our general newsletter with a number of specialised newsletters with a new look and format.

What is the benefit of the new form?

It is our desire to ensure that clients are able to receive the information that most interests them in a timely manner. We believe that the new specialised newsletters will achieve this.

It is a free service that we provide to our valued clients.

Which newsletter do you require?

We hope that each of our clients will advise us whether they are interested in receiving one or more of the specialised newsletters that we will issue. Please feel free to request all of the newsletters if you wish. The categories or subject areas in which newsletters will be published are:

1. Corporate & Commercial
2. Finance
3. Property & Construction
4. Intellectual Property & Ecommerce
5. Litigation
6. Charity & Community
7. Private Client Interests

If you know of anyone who would like to receive one of our newsletters, we would be glad to add them to the list of recipients. Just let us know their details in the manner specified below.

How can we best deliver the newsletters to you?

In addition, for ease and convenience, we intend to ultimately forward all our newsletters to our

clients via email.

If you have an email address and prefer to receive our newsletters and bulletins via email, please contact Suzanne Lyndon, our Practice Manager, or your usual Partner contact at our firm and provide us with your email address. Alternatively visit our web site located at:

www.makdap.com.au

and complete the registration form on the subscriptions page. We thank you for your past support and we feel confident that the new format and structure will be of even greater value and service to you.

DEADLINE FOR ASSISTANCE TO HIH POLICY HOLDERS

The Australian Government has announced that the HIH Claims Support Scheme will close to new applications on 27 February 2004. If you were an HIH policyholder and are aware of a possible claim under that policy, you may be eligible for assistance and should contact HIH Claims Support Limited as soon as possible for further information.

Closure of the scheme to new applications will not affect the management of existing claims or the processing of applications already lodged with HIH Claims Support Limited.

For further information, contact us or the HIH assistance toll-free number: 1800 055 455 or visit their website:

www.hihsupport.com.au

NEW AUCTION LAWS

With auctions of residential properties becoming more popular with vendors, the New South Wales Government has taken steps to bring greater fairness and transparency to auctions.

The recently passed *Property Stock and Business Agents Act* has created a number of changes to the auction process.

One of the more substantial changes introduced by the Act relates to the recording and identification of bidders at auctions. Under the Act, an auctioneer of residential or rural property will not be allowed to take a bid from a person unless:

- The "relevant details" of the bidder (name, address, details of principal if bidding on behalf of another and other proof of identity) are entered into a bidders' record in the auctioneer's possession before the bid is taken; and
- The bidder is identified at the auction by displaying an allocated identifying number.

Interestingly, the taking of a bid in contravention of these processes will not affect the validity of a bid. In other words, if an agent has failed to enter a bidder's name in the bidders' record that bidder will still be able to make a binding bid.

The Act also addresses the issue of dummy bidding ie. where the vendor, someone associated with the vendor or the auctioneer makes bids which are not authentic in an attempt to bolster the sale price.

Whilst this process has not been outlawed entirely, the Act now limits the number of vendor bids at an auction to 1. This right to make one bid must be notified on the conditions of sale and the auctioneer must clearly state that the relevant bid is a bid by the vendor or someone on the vendor's behalf at the time that it is taken.

The Act provides for increased penalties for agents and/or auctioneers who breach the Act and also provides for compulsory

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accreditation for agents acting as auctioneers.

Our standard form of Contract for Sale has been amended to take into account these new procedures.

In the United States there is a strong move towards on-line auctions of properties. It will be interesting to see whether the new Act will have to be amended again to take into account the possibility of dubious on-line practices.

LADY INJURED IN A THEATRE NO DAMAGES FOR FORESEEABLE RISK

A lady attended the theatre at the University of Wollongong. The seating in the theatre automatically retracted when there was no one sitting on it. The lady attempted to resume her seat in the dark but failed to pull the seat down. She fell and struck a part of the seat fracturing her coccyx.

There was no signage in the theatre indicating the seating was retractable. The lady sued the Wollongong University in negligence alleging she should have been warned that the seats retracted when patrons stood up.

The NSW Court of Appeal found that some dangers are so glaringly obvious that there is no need to warn against them. In relation to the injured lady, the Court held that she should have been aware of the need to push the seat down before sitting, particularly as she frequently visited the Opera House which had similar seating. The Court also held that as she entered the theatre she would have seen seats in the upright position and would have been aware that the seats retracted.

Accordingly, the injured lady was awarded no compensation for her injuries.

MOULD

There has been a huge increase in insurance claims and litigation about mould (also known as mildew and fungi) in the USA. In 1996, less than 100 claims were lodged concerning mould in the USA whilst in 2002, the figure exceeded 10,000. The litigation

epidemic has affected building owners, builders, building managers, insurance companies, architects, construction companies etc.

Mould claims typically involve either personal injuries or property damage. Not all mould is potentially hazardous to human health. Certainly, mould can affect allergies, asthma and restrict airways. What is open to debate is whether mould can affect the immune system, cause cognitive impairment, cause central nervous system damage, lead to neuro toxicity etc.

Mould can arise from water penetration as a result of any number of circumstances:

- Poor construction;
- A cyclone or hailstorm smashing windows;
- Fire sprinkler systems activating (eg. after 9/11);
- Internal plumbing leaks etc.

Many financial lenders have been sensitised to the mould issue and require borrowers to make some or all of the following representations and warranties:

- the subject premises currently display no evidence of water infiltration, water damage or mould;
- there have been no complaints (leaks, odours etc) by tenants at the premises;
- the subject premises comply with the applicable building code.

Financial lenders have also imposed operation and maintenance requirements on borrowers as conditions for loans such as:

- mould management through training of maintenance personnel;
- preparation of manuals for mould prevention and response;
- routine inspections;
- identification and remediation of mould.

Some insurance companies in the USA are inserting mould specific exclusions in their policies or capping payments for mould claims.

There have been some highly publicised verdicts and settlements

on mould claims in the United States including the *Ballard* case in Texas (\$32 million bad faith verdict against the insurer reduced to \$4 million on appeal); the "*Ed McMahon*" case in California (\$7.2 million settlement against insurers and contractors); and a \$1 million plus personal injury verdict for two Delaware apartment residents

CHARITIES DEFINITION

In late July 2003, the Federal Treasurer released an exposure draft of legislation defining the expression "charity" for the purposes of all Commonwealth legislation.

The stated intention of the Government was to codify the existing common law meaning of a charity and expand it to encompass certain child care organisations, self-help bodies and closed or contemplative religious orders.

It is expected that the new legislation will take effect on and from 1 July 2004.

We have assisted with the lodgment of a number of submissions which have been made by our clients in respect of the proposed legislation and have concerns about certain aspects of the definition, if it were to be adopted. These concerns have been made known to the Board of Taxation.

It is expected that the Board of Taxation will consider views put forward and provide its recommendations in a report to the Government by 1 December 2003.

Should you wish to be advised of developments on this issue please do not hesitate to contact Richard d'Apice or Bill d'Apice of our office or register to receive email updates from our web site.