

In

Check



NEWSLETTER OF THE LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Settlement Undertakings

We have seen cases where acting as unpaid agent is fraught with risk. A recent settlement undertaking shown to the LPLC had some worrying aspects.

The document required the solicitor acting for the purchaser to undertake to act as unpaid agent for his client's financier and amongst other things undertake to:

- Perform a **satisfactory final search** prior to settlement;
- Complete settlement as scheduled **without delay**;
- Provide the financier with all relevant security documents relating to the security property at the earliest opportunity, and **no later than 24 hours post-settlement**; and
- **Be responsible for rectifying any requisitions.**

All of these undertakings may well be outside the control of the practitioner. The undertaking in the first bullet point is unclear as to what constituted a 'satisfactory final search'.

Practitioners should appreciate that if they act as unpaid agents and a claim arises, they will be liable for a double excess for acting for more than one party. While in an ideal world it would appear that the purchaser and the financier's interests are the same that is not always the case and conflict situations can arise. LPLC recommends that practitioners refuse to act as unpaid agent for mortgagees and refuse to sign such undertakings.

Can your landlord client get flood insurance?

The recent flooding in Victoria and Queensland has brought to everyone's attention various issues relating to flood insurance, and most particularly to differences in cover that can arise from one insurance policy to the next. A practitioner has pointed out a potential issue with the wording of the landlord's obligations regarding building insurance in the LIV standard lease of real estate (May 2009).

Under clause 6.2 of the standard lease the landlord is obliged to take out policies of insurance for any specified risks, with provision for the tenant to reimburse premiums paid. Flood, storm and tempest and internal flood water are among the **standard** specified risks in Item 11 of the Schedule to the standard lease. While it is contemplated that the standard form will be tailored to the particular circumstances of the transaction (either by the addition or subtraction of risks), sometimes this is left unchanged without due consideration as to whether Item 11 of the Schedule is appropriate.

Practitioners acting for landlords and using the standard form lease should expressly draw insurance requirements to their client's attention. They should suggest that the landlord consult with their insurance broker to confirm that their policy covers the specified risks in Item 11 of the Schedule. The Schedule should be amended to exclude any risks for which the landlord does not wish to, or is unable to, insure against.

More insight into *Duties Act* lease provisions

In Issue No. 46 of *In Check* in April last year we referred to a State Revenue Office Ruling DA-050 which discussed the types of payments that may qualify as payments of 'rent reserved' in the context of s.7(1)(b)(v) and (va) of the *Duties Act* 2000 (Vic). The State Revenue Office has released a further ruling in November 2010, DA-053, in relation to the meaning of the term 'consideration' under the same sections.

The ruling provides that the provision of non-monetary consideration can include covenants given by a lessee to a lessor, either under the terms of a lease or in a separate agreement. For example, covenants that positively require the lessee to fit out or make improvements on the lease property, which at the end of the lease become the property of the lessor, may be regarded as consideration which the ATO will take into account in assessing duty.

The ruling sets out the factors the Commissioner will take into account and gives six specific examples. Practitioners practising in this area are encouraged to read this ruling. It can be found at the State Revenue Office's website www.sro.vic.gov.au, under the tab 'Legislation & Rulings'.



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Risk Management Seminars for 2011

LPLC will be running its **Country Risk Management** programme in May 2011. Brochures will be sent to country practitioners at the end of March and will be available on the website at the same time. The dates are as follows:

- **Albury/Wodonga**, Thursday 5 May 2011
- **Shepparton**, Friday 6 May 2011
- **Bendigo**, Monday 9 May 2011
- **Mt Eliza**, Friday 13 May 2011
- **Warrnambool**, Tuesday 17 May 2011
- **Ballarat**, Wednesday 18 May 2011
- **Traralgon**, Tuesday 24 May 2011
- **Mildura**, Thursday 26 May 2011

The **2011 Risk Management Intensive** will be held in Melbourne on the following dates:

- Wednesday 27 July
- Tuesday 9 August
- Wednesday 17 August 2011

Brochures for the city intensive will be sent out in June 2011 and will be available on the website at the same time.

This year we have introduced online registration and credit card payment for our seminars.

Personal property security regime – 1 October 2011 deadline

The start date for the personal property security regime has been moved from 1 May 2011 to **1 October 2011**. This reform will fundamentally change the way many chattels and personal property are treated in Australia. Practitioners are encouraged to make themselves familiar with how it will operate and affect the legal work they do. We anticipate that it will have an impact on many areas of practice including:

- buying and selling of small businesses and land;
- leasing;
- family law;
- commercial litigation;
- wills and estates; and
- banking and finance.

LPLC will be publishing several bulletins over the coming months.

Certify or certifiable?

The changes to the *Superannuation Industry (Supervision) Act 1993 (SIS Act)* has allowed self-managed superannuation funds (**SMSFs**) to take out loans of a limited recourse nature for the purposes of purchasing real estate.

In addition to security being provided by way of a mortgage over the property being purchased, some financiers have also required guarantees from the directors of the SMSF trustees. Practitioners acting in relation to the purchase of the property have been asked to provide solicitor's certificates in relation to explanations given to the guarantors. In one instance the certificate looked like the LIV / ABA approved form of solicitor's certificate but it contained an annexure listing the documents provided and then stated at the bottom:

'In addition to the explanations mentioned below I explained the relevant requirements of the Superannuation Industry (Supervision) Act 1993 (Cth), in particular the requirements for a superannuation fund and the consequences of the Superannuation Fund not being or ceasing to be a complying superannuation fund.'

In another example the guarantor was required to sign a certificate which included a statement that the guarantor had received legal advice regarding:

'...the loan and security documents referred to in paragraph 2, the duties as director of the trustee of the superannuation fund regulated under the Superannuation Industry (Supervision) Act 1993 (Cth) and related legislation and compliance with the legislation of the investment and borrowing transactions.'

The advice required to satisfy these certifications is very broad and extensive and in some instances not possible to properly fulfil, particularly for the standard remuneration practitioners usually receive.

We recommend that the broad statements referred to above be deleted from the certificate before it is signed.

INSURANCE RENEWAL FORMS

We expect that the insurance renewal forms will be posted to practitioners in early April and will be due to be paid and returned by 13 May 2011.

LEGAL PRACTITIONERS' LIABILITY COMMITTEE

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