

Energy efficiency disclosure for commercial and residential buildings

In issue 48 of In Check published last year we reminded practitioners that there were new obligations in relation to energy efficiency disclosure for certain **commercial buildings**. Those requirements commenced on 1 November 2010 with a transitional period of 12 months. As of 1 November 2011 the *Building Energy Efficiency Disclosure Act 2010* (Cth) makes it an offence, with a civil penalty of 1000 penalty units, to sell or lease office space with a net lettable area of at least 2,000 square metres without first providing the buyer or tenant with a building energy efficiency certificate (BEEC).

More information can be obtained at www.cbd.gov.au.

These requirements are not to be confused with the proposal to introduce mandatory disclosure of energy efficiency for **residential buildings**. A Consultation Regulatory Impact Statement has been prepared on behalf of the Commonwealth, States and Territories. Submissions were due by 12 September 2011. There appears to be no timeline for when these changes may be implemented.

Personal Property Security Reform delayed start

The Personal Property Security Reform will not start on 31 October 2011 as earlier announced by the Commonwealth Attorney General. The start date is yet to be finalised at the time of publishing this newsletter. However, unless there is an amendment to the legislation, the latest start date will be 1 February 2012. (See section 306 of the *Personal Property Securities Act 2009* (Cth)).

Practitioners are still encouraged to ensure that they equip themselves with a full understanding of the reforms as soon as possible. LPLC's first bulletin on the background and key concepts is available on our website at www.lplc.com.au and a further bulletin will be published shortly.

Conveyancing reminder – building permits are important

A recent claim involved a bold assertion in the vendor's statement that:

"The vendor will not be required to produce any building permit, building approval, final inspection, occupancy certificate or any other permits, approvals or inspections relating to the said land or improvements thereon."

The section 32 statement did not contain a building permit for the new house and garage on the property. It did however contain a certificate of occupancy for the house and garage.

The practitioner who received this contract did not obtain a building approvals certificate.

It transpired that there was a free-standing large pergola on the property that had been built by the vendor without building permission. The pergola breached many requirements and in fact the local council had issued a building notice four months before the sale of the property, which the vendor had ignored.

With the benefit of hindsight it is easy to say that the assertion in the vendor's statement should have put the purchaser's solicitor on notice that there may be an issue with building permission. Cost pressures were cited as the reason why a building approvals certificate was not obtained. The existence of the certificate of occupancy in the section 32 statement clearly reassured the practitioner that all was in order.

Best practice would have been to obtain a building approval certificate, which would have shown that a building notice had been issued in relation to the pergola. If you are not going to do that, then you need to explain the risks to the client of not obtaining the certificate and at least ask the client if there are any other structures on the property that may have required a building permit.

The vendor should also be reminded that they are in breach of section 32 of the *Sale of Land Act 1962* if they fail to produce particulars of building permits as well as any notices or orders of a public authority or government department. Section 32(8) specifically provides that parties cannot contract out of any provision of section 32. Purchaser's solicitors should insist on the appropriate information being provided.

Practitioners are encouraged to tell us if they see vendor statements which contain the above bold assertions.

More Common GST Hotline queries

Here are some more common GST Hotline queries. Practitioners are also reminded that we still have our GST Q & A on our website, now organised in practice areas making it easier to find the right answer.

Q: If the vendor is registered for GST because they run a business such as a car wash but are selling vacant residential land, would this be considered "in the furtherance of an enterprise"?

A: If the land was not acquired for the purpose of resale or for use in connection with the business (e.g. for expansion of the car wash) but was only ever intended to be used for private or domestic use (e.g. the land was bought with the intention of building a home on it but for various reasons the owners changed their minds and decided to sell it) that would not be in the course or furtherance of an enterprise.

When considering whether a supply is in the course or furtherance of an enterprise, it is important not to assume that, if a person has a car wash business (as an example), only supplies related to that business will be considered to be in the course or furtherance of the person's enterprise. An entity can only have one enterprise and only one GST registration (if you exclude trustee activities) and all business activities will be considered to be connected to that enterprise and activities could include dealings with land and any other business activities that are not input taxed (such as financial supplies or residential lettings).

Q: Is it the case that if a tenant of commercial property is purchasing the commercial property from the landlord in its own name it cannot claim the benefit of the GST going concern exemption?

A: The purchase by a tenant of the commercial premises, which it occupies, will not be accepted as the supply of a going concern.

However, the supply of leased commercial premises to a related entity of the tenant will be treated as the supply of a going concern, if the arrangements appear to be genuine commercial arrangements, and the usual requirements of s.38-325 are satisfied. It is not unusual for related entities to be landlord and tenant and there can be commercial advantages in this kind of arrangement.

It is not only important that the lease be on foot at settlement – it is absolutely critical and, more than that, it must remain on foot on a commercial basis so as not to create an impression that the related third party purchaser was introduced merely to get the sale across the line as a going concern.

The contract must contain the statement of agreement that the supply is of a going concern and, if there are any supply or maintenance agreements between the vendor and third parties that might be considered necessary to the vendor's letting enterprise, they should be transferred or novated in favour of the purchaser. Both vendor and purchaser must be registered for GST.

Risk Management DVD

For those of you who attended our Risk Management Intensive this year and would like a complimentary copy of the DVD for the sessions that you attended, don't forget to send in your request form if you have not already given it to us. The DVD's will be posted out to those who asked for it by the end of September.

The DVD will also be available for sale for those who did not attend the Risk Management Intensive. The DVD of the whole day may be purchased from our website using a credit card or ordered from our website and paid for by sending in a cheque. The DVDs will be available for sale at the end of September on the website and will cost \$150.

Watching the DVD will count as private study under rule 4.4 of the *LIV Continuing Professional Development Rules 2008*. Practitioners should note that they are only entitled to claim a total of 5 CPD points for private study for any one year.

Off-the-plan contract amendments postponed

The proposed changes to s.9AA of the *Sale of Land Act 1962 (Vic)*, which required the addition of various notices on the front page of off-the-plan sales contracts, have been postponed. The *Consumer Acts Amendment Act 2011 (Vic)* moved the start date for those amendments to 30 June 2012.

WHY RISK MANAGEMENT?

Minimising your risk is the best way to contain the cost of your insurance.

LEGAL PRACTITIONERS' LIABILITY COMMITTEE

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