

## Pre-litigation requirements in Victoria

Practitioners are reminded that on 30 March 2011 the *Civil Procedure and Legal Profession Amendment Act 2011 (Vic)* repealed both Chapter 3 (before a civil proceeding commences) and section 43 of the *Civil Procedure Act 2010 (Vic)*.

This removed the mandatory obligation for parties to undertake pre-litigation requirements. Instead the courts have been given the power to make rules in relation to pre-litigation requirements (s.70(1)(c)).

### Pre-litigation requirements Federally

However, some pre-litigation requirements will be required in the Federal arena soon. On 12 April this year the *Civil Dispute Resolution Act 2010 (Cth)* was passed and the bulk of the provisions will come into operation in October unless proclaimed earlier. The Act applies to civil proceedings instituted in the Federal Court and the Federal Magistrates' Court (excluding some proceedings set out in Part 4). It will require parties instituting proceedings in those courts to file a '**genuine steps statement**' at the time of commencing proceedings. The genuine steps statement must set out the steps taken by the parties to resolve the dispute or to narrow the issues in dispute or the reasons why no such steps were taken. Genuine steps to resolve a dispute are described in section 4 to be steps taken by a person in relation to the dispute which 'constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute'. There are also several examples of what may constitute 'genuine steps' included in section 4.

Lawyers have been given a positive duty in section 9 to advise their clients of the requirements of the Act and to assist them to comply with the Act.

Practitioners practising in this jurisdiction should familiarise themselves with this new legislation (which is not very long).

Practitioners should also note that there are substantial changes proposed to the Federal Court Rule, scheduled to start on 1 August 2011. The new rules are available on the Federal Court website. See the 'what's new' section of the Court's website [www.fedcourt.gov.au](http://www.fedcourt.gov.au).

## Hot off the press! Personal Property Securities Bulletin

A bulletin about the key concepts of the new personal properties securities reform has recently been sent by email to all of our insured firms in Victoria for whom we have email addresses.

Firms are encouraged to distribute this bulletin to all practitioners. The *Personal Properties Securities Act 2009 (Cth)* comes into operation in October this year and brings with it a huge change in the way we think about and need to deal with personal property. Practitioners must understand the way in which this legislation changes the legal framework surrounding personal property securities.

Take the time to read it now!

If you did not receive a copy by email please contact Kelly Cooper at [kellyc@lplc.com.au](mailto:kellyc@lplc.com.au). The bulletin is also available on our website at [http://www.lplc.com.au/risk\\_management/bulletins/](http://www.lplc.com.au/risk_management/bulletins/).

## Releasing trust money

Releasing trust money without authority is a mistake we regularly see at the LPLC. Practitioners who make this mistake often have lost sight of the entity for whom they are holding the money or have failed to properly clarify the basis on which the money is to be held and, more importantly, released. The LIV has published on its website guidelines for releasing money on trust which provides practitioners with six practical examples of when money on trust can and can't be released. It is a useful reminder for all practitioners. The Guidelines can be found at <http://www.liv.asn.au/PDF/Practising/Ethics/ReleasingMoneyTrustGuidelines> under the Practising in Victoria tab.

## Common GST Hotline queries

Our GST hotline still receives regular use from practitioners wanting clarification of GST obligations for their client's specific circumstances. While many of the queries are unique, there are some common themes which we will highlight in In Check from time to time. 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.

New Q & A recently added were:

**Q: Is the adjustment of rent for the sale of tenanted commercial premises done on a GST exclusive or inclusive basis?**

A: The adjustment between the vendor and purchaser of tenanted premises is done on a GST exclusive basis. The vendor of the land has to account for the GST for the whole of the month in which settlement occurs even though settlement may occur on the second day of the rental period.

**Q: Is the adjustment of rent for the sale of a business conducted from tenanted premises done on a GST exclusive or inclusive basis?**

A: The adjustment between the vendor tenant and the purchaser tenant is done on a GST exclusive basis. The vendor tenant is entitled to claim the GST for the whole of the month as an input tax credit even though it may only be the tenant for the first day of the month - there is only one tax invoice for the month and the vendor will have and retain that.

Other common questions we have had include:

**Q: Will the sale of an individual serviced apartment attract GST?**

A: It is important to characterise the premises correctly to determine whether they are commercial residential premises, or merely residential premises.

An individual serviced apartment is treated by the ATO as 'residential premises' other than 'commercial residential premises' (see paragraphs 51 to 55 of GSTR 2000/20). Consequently, if the sale is the first sale since construction (or subsequent 'substantial renovation'), the sale will attract GST as the supply of 'new residential premises'; if it is not, the supply will be input taxed under section 40-65.

Notwithstanding that the apartment is let, the going concern exemption should not be applied as the first payment of rent after the date of supply would trigger an increasing adjustment equal to full GST on the sale.

**Q: Will the sale of residential premises with a current planning permit for development of the land attached to the section 32 statement attract GST?**

A: If the vendor is registered or required to be registered for GST then the GST outcome will be determined by the nature of the premises themselves. If they have been sold previously since construction or any subsequent 'substantial renovation', they will be treated as existing rather than 'new' residential premises and supply will be input taxed.

If, however, this is the first sale, they will be new residential premises and supply will be taxable.

The current position is that the ATO does not look at the intention of the purchaser in determining whether s.40-65 (input taxed treatment) applies, considering instead that whether premises are 'residential premises to be used predominantly for residential accommodation' will be determined by the physical characteristics of the premises themselves: that is, whether they possess the usual amenities for sleeping, eating and bathing, and not by the subjective intention of the purchaser; that view is in line with the current state of the authorities (see *Sunchen Pty Ltd v Commissioner of Taxation* [2010] FCA 21).

## Insurance issues for solicitors who are also registered tax agents

A number of solicitors are also registered tax agents under the *Tax Agent Services Act 2009*, and will have received a notice in May from the Tax Practitioners Board (TPB) advising of the TPB's mandated requirement for professional indemnity insurance cover (PII) to be in place for all registered tax agents as from 1 July 2011.

Practitioners who are registered tax agents are reminded of the need to comply with all of the TPB's minimum insurance requirements as detailed in the notice.

The LPLC policy **does** cover the provision of tax agent services by a practitioner who is also a registered tax agent if those services are provided as part of a legal practice. Tax agent services provided as part of a separate business (i.e. not a legal practice) are not covered by the LPLC policy.

The TPB have confirmed that LPLC is a recognised insurance provider for the purposes of meeting one of the TPB's minimum PII requirements.

The TPB has issued this confirmation at our request once we realised that the three categories of approved insurers shown on page 5 of the TPB Notice overlooked statutory insurers such as LPLC.

LPLC does not issue policy numbers. Accordingly, when completing the on-line TPB registration form tax agents insured with LPLC should enter 'LPLC' in the policy number field.

### WHY RISK MANAGEMENT?

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

### LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Level 31, 570 Bourke Street, Melbourne, VIC 3000  
Telephone (03) 9672 3800 Facsimile (03) 9670 5538  
[www.lplc.com.au](http://www.lplc.com.au)