

# In touch with the law

No 4 of 2012

The law is constantly changing and this newsletter describes developments which may be relevant to you. If you are in any doubt about these or any other aspects of the law, please make an appointment to see your solicitor.

---

## In this issue

- **New technologies:** Crowd funding - innovation or shortcut to the hot-seat?
  - **Financial agreements:** Obstacles in setting aside a property settlement
  - **Moral rights:** Intellectual property rights in building designs
  - **When a house is not a home:** How you could lose your input tax credit
  - **Mortgages:** Lender loses priority to Tax Office
  - **Negotiations:** Failure to bargain may jeopardise your interests
  - **Planning ahead:** What is a power of attorney?
  - **Defective works:** No duty of care decision for residential building
  - **Buying or selling a home:** Online guides now available
  - **Drug testing and privacy:** Saliva checking a better test at work
- 

## NEW TECHNOLOGIES

### Crowd funding - innovation or shortcut to the hot-seat?

Crowd funding represents an untapped source of finance for projects and businesses trying to get off the ground, but regulatory traps lurk for the unwary.

Crowd funding, via websites like Kickstarter, Crowdcube, iPledg and Pozible, involves harnessing the power of the internet and social media to fund projects and business ideas. Online 'friends' contribute money

towards a project, and in return receive a reward once the project is funded and completed. For example, a musician who gains funding to record a CD gives a signed copy of the CD once it's launched.

So far, it has mostly been used for artistic projects, but an emerging trend is for entrepreneurs to use it to side-step bank lending and venture capital to raise funds for profit-making initiatives, promising funders shares and ownership stakes. In Australia, such activities may be subject to heavy penalties if they do not comply with certain legal requirements.

For example, if a promoter offers shares in a start-up, the crowd funding platform could be seen to be dealing in a financial product, and require an Australian Financial Services Licence and be subject to a rigorous disclosure regime.

Similarly, if a promoter offers stakes in a project, it might be seen as fundraising and they will be required to lodge a prospectus and comply with other requirements, as well as be exposed to liability.

If sales proceeds are offered, then it could be considered a managed investment scheme and may, among other things, need to be registered, have a scheme constitution and compliance plan.

Promoters also need to take care not to run foul of misleading or deceptive conduct laws.

Participants need to carefully read the platform's terms and conditions to understand their rights and obligations. Funders should independently assess the project and contact promoters directly before committing any funds. Promoters should be careful and clear in their pitch about what they are seeking and what funders will receive.

Thinking of catching the crowd funding wave? Speak to a lawyer first.

---

## FINANCIAL AGREEMENTS

### Interpreting new law is complex

**Despite changes to the law in 2010, intended to make financial agreements binding in the face of technical flaws in their construction, it continues to be a complex and ambiguous area of family law.**

Financial agreements were intended to provide certainty in sorting out property and spousal maintenance disputes should a couple separate. But almost 12 years since their introduction, the law relating to making them, enforcing them and setting them aside remains uncertain.

In cases since the 2010 changes, judges have taken different approaches in interpreting whether errors in drawing up agreements can be rectified or if the agreements are no longer binding.

Due to such ambiguity, it may be more prudent to avoid financial agreements altogether and, where possible, obtain court orders instead. Make sure you consult a solicitor when you are entering into any contracts or agreements.

---

## FAMILY LAW

### Obstacles in setting aside a property settlement

**There are significant obstacles involved in setting aside an original property settlement when parenting arrangements change.**

Parenting arrangements may be changed by a court at a later time if circumstances justify it, but setting aside a property settlement is not easy, as a recent case as shown.

The law has been designed to overturn a property settlement only in the most extreme cases and not in every instance where there has been a change in parenting arrangements.

There are three issues that you should consider before applying to the court to set aside a property settlement.

1. Are the changes to parenting arrangements of an exceptional nature? Courts have found that a mere change in parenting arrangements is not exceptional. Exceptional circumstances include the children changing their own primary residence, Department of Community Services' intervention and custodial arrangements that change within a short period after the property settlement. In addition, the courts have shown a reluctance to interfere with original property orders as the period of time between the making of the orders and change of parenting arrangements increase.

2. Will you or the child suffer serious hardship if the court does not vary the property orders? The fact that you now have the financial burden of caring for your children, which was not reflected in the original property settlement, is not, by itself, serious hardship. You must show that the hardship is so significant that the court must take action, and that it is not capable of being remedied in some other way, for example, by applying for an increase in child support.

3. Can you persuade the court to exercise its discretion? The court will likely balance all the competing arguments that have been made and make a subjective assessment on whether it should set aside property orders.

Contact a solicitor if you are thinking of changing parenting arrangements or altering an existing property settlement.

---

## MORAL RIGHTS

### Intellectual property rights in building designs

**Building owners thinking of major renovations or demolition may need to consult the original building designers to ensure their moral rights are not infringed.**

As more older-style buildings are renovated or knocked down, building owners need to consider the moral rights of the original building designers (authors). Moral rights include the author's right to attribution and integrity of authorship, and both are protected by copyright laws.

A building owner should follow the consultation process set out below once they have identified the authors:

- Provide the authors with written notice stating the intention to change, relocate or demolish the building.
- The written notice should give the authors three weeks to seek access to the building, either to make a record of the work, or for the purpose of consulting in good faith with the owner about the change.
- Building owners will need to give the authors a reasonable opportunity within a further three-week period to have access to the building and to consult in good faith.

Where the issue is a change or relocation, the author may notify the building owner that they require the removal of their identification from the building.

If the building owner intends to make further changes after initial consultations, it would be prudent to consult the authors again.

Owners or developers of new buildings might want to contract out of moral rights provisions to prevent future issues. Contracts need to contain express provisions which comprehensively address moral rights issues and be in writing from each author.

---

## WHEN A HOUSE IS NOT A HOME

### How you could lose your input tax credit

**If property developers bought a suburban commercial office for a GST-inclusive price of \$1 million, intending to demolish the building and use the land for a residential unit development, they might expect to gain an input tax credit of \$100,000 for the purchase. But what if the office had originally been built as a residence?**

The Tax Office draft ruling on residential premises has undergone several revisions and is still not final.

It points to two definitions of residential premises in the GST laws - land or a building that is occupied, or intended and capable of being occupied, as a residence or residential accommodation.

In the draft ruling, the Tax Office gives contrasting examples of part-conversions.

In one of the examples, a doctor who created a surgery out of part of her house by significant physical modifications, found the modified part ceased to lie within the definition of residential premises.

In another, a solicitor who created a commercial office out of part of her unit by replacing furniture with office equipment and putting up signage, did not.

It appears that premises built for use as a residence retain that classification, regardless of later use, unless, and to the extent that, the building is later modified in a structural way to make it incapable of occupation as a residence.

---

## MORTGAGES

### Lender loses priority to Tax Office

**The decision of a bank to permit the owner to sell their property meant that it was left short-changed by the amount of the owner's unpaid tax bill.**

There were two mortgages on a property and the total amount owed on them exceeded the purchase price. The owner was permitted to sell the property and then pay the proceeds to the lenders.

Between the time the contract of sale was signed and settlement, the Tax Office served a notice on the purchasers requiring them to pay money from the purchase to the Tax Office to repay the vendor's tax debt, and to pay it in priority to any other payment. This would leave the second lender short.

The court found that the purchasers did not owe any money to the lenders but only to the owner as vendor. The lenders only had an interest in the money once it reached the owner's hands. As the Tax Office's notice operated on the purchase money held in the hands of the purchaser, as soon as it became owing to the vendor, the notice could 'intercept' the sum before it could reach the lender.

If the lenders had instead sold the property as part of a mortgagee sale, the Tax Office would not have succeeded, and the purchase money would have been payable directly to the lenders.

---

## NEGOTIATIONS

### Failure to bargain may jeopardise your interests

**A scene from the Monty Python movie *Life of Brian*, once voted the funniest movie of all time, has been formally referred to in the Federal Court, where the judge said it illustrated the process of bargaining or haggling.**

The judge drew attention to the 1979 movie's haggle scene, in which Brian purchases a disguise from Harry the Haggler but pays the 20 shekels first asked without any attempt to bargain. It is left to the merchant to coach Brian on how to haggle properly by making counter offers.

Australia's Fair Work laws do not require haggling, but they do make it necessary to bargain in good faith. Attending negotiation meetings and responding to submissions may seem to fulfil the requirements of the Fair Work laws, but the essence of bargaining requires more than lip service.

The case in question dealt with failed negotiations over an enterprise agreement, which the company had openly said that it did not want with its workforce. However, it complied with the required process. It sent representatives to attend many meetings and respectfully responded to every idea raised by the employees' association with which it was negotiating. But it neither made any proposals nor said what it might accept in an enterprise agreement, which Fair Work Australia had ordered it to do.

With no negotiated terms for an enterprise agreement and no compromise terms on the table, the company left itself open to a decision being made by Fair Work Australia that did not address its needs at all.

---

## PLANNING AHEAD

### What is a power of attorney?

**A power of attorney is a document you can sign to appoint another person (your attorney) to act for you in relation to financial affairs.**

The document says what the attorney is authorised to do, and this can be as narrow and specific, or as general, as you wish. Any lawful action taken by the attorney under the power of attorney is binding on you, so it is important to appoint someone you can trust.

When the power of attorney is signed, the document can be given to the attorney, or you can hold onto it until the need arises. Even though you have appointed an attorney, you can still personally carry out any

transactions, such as banking and the sale of property, while you retain the ability to do so.

A power of attorney continues as long as you want it to, and it can be cancelled at any time while you have the capacity to make the decision. It can also last for a set period of time, for example, while you are ill or overseas. By law, a power of attorney ceases to operate if you lose the ability to make decisions or when you die.

If, at the time of giving the power of attorney, you want the authority you give the attorney to continue even if you lose the capacity to make your own decisions, you need to sign a document called an 'enduring power of attorney'.

An attorney cannot give away your money or property unless the power of attorney form specifically allows them to do so. As with gifts, an attorney cannot use your money for their own benefit, or the benefit of any other person, unless the power of attorney form specifically allows the attorney to do so.

Your solicitor can tell you more about how a power of attorney can be used to help organise your financial and personal affairs and arrange the necessary signatures and certificates.

---

## DEFECTIVE WORKS

### No duty of care decision for residential building

**Recent changes to home building laws have seen warranties against defective works reduced considerably. Remedies for home owners may have shrunk still further now a court has held that no duty of care arises in the common law.**

In recent years, it has been a common, if not universal, practice for claims by owners corporations of residential strata schemes against builders and property developers over defective building works to be brought on two key grounds: first, on the warranties established by law, and second, in claims of negligence.

Perhaps more than any other reason, claims of negligence have been made because the period covered by the home building warranty has expired or is about to expire, leaving owners without insurance cover.

For residential construction contracts entered into after 1 February 2012, the period for commencing proceedings for breach of the warranties in the law have been shortened from seven to two years for non-structural defects and six years for structural defects.

Now, a judge has decided that no duty of care was owed by either a builder or a developer to an owners corporation in respect of defective works, so a negligence claim against them could not proceed. Because

the law had provided home building warranties, it was not the court's place, the judge said, to add the extra burden of a duty of care -- that should be for parliament to consider.

The changing landscape in this area of law - including the court's recent decision - may well change further following the NSW government's current review of the home building laws. In the meantime, purchasers will need careful legal advice on any contract they are about to enter into and professional advice on the building they intend buying so that they are fully aware of the risks they are exposed to.

---

## BUYING OR SELLING A HOME

### Online guides now available

**Two free guides on buying and selling a residential property are now available online from your solicitor through their professional association, the Law Society.**

Your home is usually your most important asset. Making a mistake or misunderstanding your legal obligations when you are buying or selling could have a significant impact on your finances and lifestyle. Your solicitor has the education and expertise that will help make sure the transaction goes the way you intend.

For sellers

[www.lawsociety.com.au/SellingaHome](http://www.lawsociety.com.au/SellingaHome)

Once an offer is made, it's likely that any buyer will want to negotiate terms and conditions before they agree to buy. When that happens, it is important you have someone advising you on what is in your best interests.

The new online property guide for selling a home will answer common questions about the process. It includes important topics like preparing the contract for sale, what laws you'll need to comply with and agents' fees.

For buyers

[www.lawsociety.com.au/BuyingaHome](http://www.lawsociety.com.au/BuyingaHome)

Not every contract is straightforward, and there may be conditions that are unfair to a buyer. Anyone intending to buy a residential property should obtain a copy of the contract and talk to their solicitor before signing or paying a deposit.

The new online guide for buying a home will take you through each step of the process and explain what your solicitor will be doing on your

behalf. It covers buying at auction, buying a strata title property, inspections, the mortgage and other important topics.

## DRUG TESTING AND PRIVACY

### Saliva checking a better test at work

**While employers and employees may agree it is suitable for employers to carry out random drug and alcohol testing, it is a sensitive workplace issue.**

Employers want to meet their obligation to ensure, as far as reasonably practicable, the health and safety of workers by screening out employees who are impaired by drug use. Employees are concerned with any unjustified intrusions into their private lives.

In a recent case, a dispute between an employer and unions about the method of testing for a new drug-and-alcohol policy went to Fair Work Australia for arbitration. The unions had objected to urine testing for drug use. The employer lost its case that urine testing was a just and reasonable method, in view of the availability of saliva testing.

Fair Work Australia found the urine testing unjust and unreasonable, because oral testing was available, and was able to identify whether there had been recent consumption of drugs. FWA focused on the capacities of the different forms of testing to detect cannabis, the most widely used drug in Australian workplaces.

Urine testing can yield a positive result even when consumption of drugs occurred several days earlier, creating a risk of employees being made to account for drugs taken outside of the employment context.