

## Issue 7—August 2005

### Inside

New Act will change rules for smoking in licensed premises	.....	2
Restrictive Covenants	.....	3
State Taxation Acts (General Amendment) Act 2005	.....	3
Setting your affairs in order—Does your Will reflect your current situation?	.....	5

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## Changes afoot

A number of legislative changes and proposals and interpretative decisions may impact on property owners, both for better and for worse.

This issue of our Update briefly examines the latest changes to regulation of smoking in licensed premises, various property taxes—including the frightening proposals regarding assessment of land tax on trusts, and an interesting decision in relation to restrictive covenants.

We also provide a timely reminder regarding ensuring your Will is in order.

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## New Act will change smoking in licensed premises

The *Tobacco (Amendment) Act 2005* ('Act') has been passed as law and specifically targets passive smoking in premises such as bars and restaurants.

One of the key reforms in the new Act is the extension of smoking bans in enclosed licensed premises. Most provisions of the new Act will commence on **1 March 2006**, but a number of provisions which further limit smoking on licensed premises will begin on **1 July 2007**. Following is a summary of the existing situation and the proposed changes.

### Current law

Under the *Tobacco Act 1987*, the following limitations apply in relation to smoking in licensed venues:

- Licensed premises are allowed to operate within a smoking environment. However, they are required to have a room designated for non-smokers if the premises have two or more rooms in operation.
  - Smoking is prohibited in enclosed dining areas, restaurants, cafés, shopping centres and bingo areas. Smoking is not prohibited under the current legislation in outdoor dining or drinking areas.
- There are separate provisions in respect of gaming machine areas.
- There are no restrictions in place under the current legislation that separately govern workplace smoking environments other than those described above for enclosed premises.

### Proposed legislative amendments to apply from 1 March 2006

- The definition for 'enclosed' has been varied to now refer to a room that is 'substantially enclosed'.
- The new Act introduces a concept of enclosed workplaces and bans smoking in an enclosed workplace. Licensed premises remain exempt from this requirement until 1 July 2007.
- Occupiers of licensed premises will also be required to display designated no smoking signs in a dining area. It is an offence if the signs are not displayed or are not in an area which ensures that a person is reasonably likely to see the signs.
- If smoking does occur in a dining area (but not an outdoor dining area), then an offence is committed by both the smoker and the owner/occupier. There is a defence for the

owner/occupier if they prove they did not encourage or facilitate the breach.

In addition, the owner/occupier must be able to demonstrate either that they were not aware that an offence was being committed or, if they were aware, they requested the person to stop smoking and informed the person that he/she was committing an offence.

- There will be an exemption to the new workplace smoking bans for declared smoking areas in casinos whereby the Minister declares an area in a casino to be a 'high roller room'.

### Proposed legislative amendments to apply from 1 July 2007

- From 1 July 2007, the new legislation will repeal definitions of 'designated non-smoking room' and 'dining area' that currently apply to licensed venues and make it an offence for a person to smoke in an outdoor dining or drinking area. (Note: smoking in the indoor area is already banned).

This ban will apply if 'the area has a room and walls in place and the total actual area of the wall surfaces exceeds 75% of the total notional wall area'. The total notional wall area is a defined requirement.

- The Act will impose a new offence of smoking in an enclosed workplace in licensed venues.
- Outdoor dining and drinking areas may be exempted from this requirement, but will be subject to the specific requirements regarding 'total notional wall area' set out above.
- If a smoker and/or occupier are found to have breached the workplace smoking bans, a fine will apply.

Again, there is some protection for owner/occupiers provided by the Act, the same as noted above.

Acceptable no smoking signs and the placement of those signs as referred to earlier will also be required in outdoor dining and drinking areas.

It appears that the new legislation effectively targets arrangements in all licensed venues in an attempt to eradicate passive smoking. All licensed venues except 'high roller rooms' will be subject to the new laws from 1 July 2007.

Contact Tim Kelly, [tkelly@rigbycooke.com.au](mailto:tkelly@rigbycooke.com.au) for further advice regarding smoking in licensed and non-licensed premises.

## Restrictive Covenants - Supreme Court's power to discharge or modify under *Property Law Act 1958* Section 84

The prospects of success in modifying a restrictive covenant using a Supreme Court application have been considerably improved by a recent decision.

The Court route had been regarded as limited and not as likely to result in success as the alternative processes available under the *Planning and Environment Act 1987*, eg. by obtaining a planning scheme amendment to modify a restrictive covenant to allow a development to proceed.

A Court application involves satisfying the Court either that:

- the restrictive covenant ought be deemed obsolete; or
- the restrictive covenant would impede the reasonable use of the land without securing practical benefits to other persons; or
- the restrictive covenant would unless modified impede the reasonable user of the land without securing practical benefits to other persons; or
- the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction.

In the past, there has been a narrow approach towards deemed obsolescence and the concept of reasonable use of the land.

The recent decision examined the traditional approach of Courts and took the view that in the past the Courts had not had sufficient regard to benefits which might have some justification by reference to public interest, particularly in a planning context.

The Court examined all the limiting wording of the requirements in the *Property Law Act* and gave a more favourable interpretation to the wording if a covenant was to be varied or removed.

Further, the availability of compensation assists in broadening the circumstances where covenants may be removed or modified.

The Court held that the single dwelling covenant in this case impeded the reasonable use of the land, notwithstanding that a reasonable use of the land is the continued use of the land as a single detached dwelling. The Court further held that a reasonable use of the subject land was to accommodate more than one dwelling and the accommodation of two or three dwellings in the absence of the covenant would be a reasonable use of the land.

The discretion of the Court to discharge or modify the covenant is enhanced if it can also be said that the single dwelling restriction does not secure 'practical benefits' to other persons.

This case is likely to lead to a reconsideration of the Supreme Court route for varying restrictive covenants to allow developments to proceed.

Such a course is likely to involve planning evidence (and possibly valuation evidence) if the application is disputed.

Further advice on restrictive covenants is available from Tom Callander at Rigby Cooke Lawyers, [tcallander@rigbycooke.com.au](mailto:tcallander@rigbycooke.com.au)

## *State Taxation Acts (General Amendment) Act 2005*

This Act has amended various taxation Acts. Following is a summary of some of the amendments with respect to property matters.

### ***Duties Act – from 28 June 2005***

The previous nomination requirements and exemptions following on a nomination under a contract for sale of land have been repealed. New legislation is in place governing nominations and sub-sales.

The law now looks at additional payment (cash or otherwise), development of the land since the date of the contract (taken in a wide sense to include an application for a permit) and option agreements.

For contracts dated from 28 June 2005, the new legislation requires a specific form of statutory

declaration. There is provision to make an election for the new Act to apply for contracts entered into prior to 28 June 2005.

### ***Land Tax Act***

The legislation now exempts caravan parks from land tax. The exemption is for a 'registered' caravan park.

To qualify for the exemption, the Act requires the caravan park to be registered in accordance with the regulations made under the Residential Tenancies Act. If for any reason a park was not registered or the registration had expired, the land tax exemption would not be available. The exemption is deemed to have commenced on 1 January 2005.

## State Taxation Acts (General Amendment) Act 2005 cont

Other exemptions apply for residential care facilities and rooming houses. Further, the new land tax rates and rebates announced in the budget for the current year now have legislative affect.

If you own land in a trust arrangement, whether a family or unit trust, the *Land Tax Act* is proposed to be amended from 1 January 2006 to introduce special land tax rates on land owned by trusts (unless an exemption applies).

The threshold exemption for the land value prior to the land becoming taxable has been reduced from \$199,999 to \$19,999. The rates for special tax are generally much higher than the standard rates, and in some cases border on the extreme.

The table below shows the differences in the assessment of land tax for trusts and non-trusts under the proposed legislation.

### Sale of Land Act

The *Sale of Land Act* had previously outlawed Vendor's bids at auctions, except for bids made and announced by the selling auctioneer. This has now been relaxed to allow a co-owner or co-owners to make a bid on the auction of a property owned in co-ownership, provided the disclosure requirements as set out in the *Sale of Land Act* are followed.

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Unimproved Value of Property	2006 Non-trust Land Tax Rates	2006 Special Trusts Land Tax Rate	Difference
\$50,000	Nil	\$500	\$500
\$100,000	Nil	\$1000	\$1000
\$250,000	\$300	\$2500	\$2200
\$500,000	\$800	\$5000	\$4200
\$750,000	\$1930	\$7500	\$5570
\$1,000,000	\$3680	\$10,000	\$6,320
\$2,000,000	\$20,580	\$26,900	\$6,320



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## Setting your affairs in order—Does your Will reflect your current situation?

A Will is your last opportunity to choose the beneficiaries who will receive the assets you own at the date of your death.

Careful consideration needs to be given to what you can dispose of by your Will. For instance, in relation to trusts, the ownership of the shares in the trustee company and the ability to nominate the future Appointor may be the only way you can influence future control of the trust assets by your Will.

Significant tax advantages can also be gained from a properly drawn Will, such as the capital gains effect if there are specific gifts to charities, the direction of the proceeds of superannuation entitlements to a particular beneficiary and the creation of testamentary trusts, especially for infants.

Since the law provides that an estate will be distributed to the statutory next of kin for those who die without a will, you can avoid surprising and unwanted results from this completely arbitrary system by preparing a Will which takes your specific circumstances into account. This includes providing for a current spouse and/or domestic partner and/or children from multiple relationships, as well as any other potentially complex domestic relationships.

A thoughtfully prepared Will can reduce the possibility of legal action that could substantially deplete an estate, particularly since amendments to the *Administration & Probate Act* in 1997 removed the restrictions on who could bring a claim against a Will or intestate estate under Part IV of the Act. This allows persons who believe they have not received

adequate provision from a deceased estate, in circumstances where the deceased had a moral duty to make such provision, to make a legal claim.

The strongest claims are those from spouses, domestic partners or children of the deceased, but we are now seeing an increasing number of successful Part IV claims being brought by step-children and others. Unless these claims are vexatious or frivolous, the costs are usually paid out of the estate.

These and other possible complications have to be considered when making or altering a Will. Our experience in making and advising on Wills, estate planning and administration of deceased estates allows us to provide effective advice. We also conduct litigation on the validity and interpretation of Wills and Part IV litigation.

In addition to our expertise in all aspects of Wills, we can prepare all forms of Enduring Powers of Attorney to cover medical, financial and/or guardianship situations.

For information or advice to suit your specific circumstances, contact:

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