

Newsletter

Advance Health Directives

In one of our previous Newsletters we wrote about the wisdom of having an Enduring Power of Attorney (EPOA) document which allows you to give a person or persons the power to make decisions for you about financial and/or health matters. This person is called an attorney.

An attorney who makes financial decisions for you must act in your best interest. Your financial attorney can perform any financial task that you can do for yourself on a daily basis, including banking, paying bills and buying and selling property. Your financial attorney can commence to act for you immediately the EPOA is signed by you and the attorney, or on a specific occasion or when you are physically or mentally unable to make decisions and act for yourself. This power continues even if you lose capacity.

Your health attorney can only make decisions for you once you have become incapacitated. Your incapacity must be determined by a doctor. A health attorney can make decisions about where you live, your daily needs, and health matters, and, if the situation arises, turn off your life support.

An Advance Health Directive (AHD) document is different from an EPOA. An AHD is sometimes referred to as a living Will. The development of the concept of patient's rights has shifted the focus from the medical practitioner making all medical decisions to patients now being able to make informed decisions of their rights to accept or refuse treatments. An AHD allows you to state what your wishes are regarding specific medical conditions and treatment options. The AHD only ever comes into effect when you are unable to make decisions on your own behalf.

As AHD covers various medical conditions and procedures, you will need to consult your doctor when completing the form. This will give you an opportunity to discuss any medical terms or procedures in the form which are not familiar to you, so that you are able to make an informed decision as to whether you wish to consent to or refuse certain treatments.

Various medical conditions, terminal illness, serious injuries and permanent unconsciousness are some of



the matters which you will need to consider in making decisions regarding the type of treatment you wish to be given.

Making an AHD allows you to give specific directions about the type of treatment you might want or not want. Therefore, you will need to make decisions regarding treatments that could prolong your life. In doing so, you will also need to give consideration to your quality of life and at what stage does your quality of life become unacceptable to you.

The AHD document also includes a section which allows you to appoint an attorney to make decisions regarding your health matters. If you have already appointed a health attorney under an EPOA you can confirm their appointment in the AHD or change the appointment.

You cannot appoint a financial attorney under an AHD. If you wish to appoint an attorney to make decisions regarding your financial matters then you must make an EPOA as well.

Like an EPOA you must sign the document before an eligible witness (JP, Com Dec. or lawyer). As the document must be completed in consultation with a medical practitioner, that person must also complete and sign a certificate within the document.

There is no requirement to register the AHD but it is a good idea to notify your doctor or hospital that you have completed an AHD.

If you would like to know more about making an AHD then contact Judy Smith or Juliet Hall at Smith & Stanton.



Real Estate Contracts (Part 2)

This article continues the series on real estate contracts which was started in Volume 1 2009. This article deals with details of the parties to a contract and property descriptions.

How particular do you have to be in describing a buyer's details in a real estate contract?

When purchasing real estate for investment purposes, you should carefully choose who or what will be named as buyer on the contract.

If, after signing a contract, you receive advice that you have nominated the wrong person or entity as buyer, the cost of rectifying the mistake can be substantial. There are usually additional bank and legal fees, and you could also have to pay double stamp duty on the transfer of the property, as it effectively is required to be transferred twice – once to the incorrect person or entity, and again to rectify the mistake.

Never be pressured into signing a contract for an investment property. You may be told by the selling agent that you can "nominate" a different (substitute) buyer after the contract is signed, but this is not usually possible.

You should always seek legal and accounting advice before you sign a contract to purchase an investment property. Our experience has been that many buyers, in the rush to sign a contract for an investment property, pay little or no regard to inserting the correct name into the contract.

How important is it to fully describe the property you are buying?

It is important to ensure that a contract clearly describes the property being sold. In addition to the technical (Lot on Plan) description and residential address being accurate, you should also ensure that any chattels or fixtures that are to be included in the sale price are described in sufficient detail, so that there is no dispute at settlement about what was included in the price.

Equally important are full and accurate details of any items physically attached to the property that are not to be included in the sale. These are described in the Standard Land Contract as "Reserved Items".

The Standard Land Contract describes the subject matter of a sale as "Land", "Improvements", and "Included Chattels". "Improvements" are described as fixed structures, such as stoves, hot water systems, fixed carpets, curtains, blinds and their fittings, clotheslines, satellite dishes, TV antennae and in ground plants.

Unless specifically excluded, normally, any items that are physically attached to the property are automatically included in the sale. This often includes dishwashers, built in cupboards and bookshelves. It is always better to be safe than sorry, so if you are buying or selling and want there to be no doubt that a particular item is or is not included in the sale, you should make sure it is written into the contract. Never rely upon a verbal arrangement.

If your purchase includes any mechanical equipment, e.g. pool cleaning equipment or a ride on mower, you should include a condition in the contract that the equipment must be in working order at the time of completion of the sale. You might also consider adding a condition that you be taught how to operate the equipment.

Other conditions that are often overlooked relate to "encumbrances" (i.e. rights given to others) over the property, or building covenants that have to be passed on to a buyer.

If you are selling a property that is subject to an easement, e.g. a drainage easement in favour of the Local Council or the benefit of an access easement over a neighbour's property, these rights must be written into the contract.

If an encumbrance is not recorded in the contract, it is sometimes possible for a buyer to terminate the contract for this failure to disclose, and you may be liable for the buyer's legal fees.

If you own land which is subject to building covenants, even if you have built a house upon the land, you may still have to disclose those building covenants to a buyer. If you fail to do so, you could find yourself being the subject of an expensive Court claim if the buyer unwittingly breaches the covenants.



Tenants Obligations To Reinstate Premises

Commercial Leases are contracts, no more, no less. The Landlord promises to give a Tenant space in a building (premises) for a fee (rent) for a period of time (term). Like all contracts, there are conditions which the Landlord and the Tenant have to fulfil. One of the conditions that frequently involves conflict is the “make good” or “reinstatement” provision.

At the end of a commercial Lease, a Landlord can expect the premises to be returned in good repair, so that the premises can be easily re-let. Generally, a Landlord can expect to receive the premises in the same condition that they were provided to the Tenant, due allowance being made for fair wear and tear and any natural or other occurrence beyond the control of the Tenant.

All commercial Leases impose an obligation upon the Tenant to keep the premises in repair, and to maintain the premises during the term. Clearly, there is a link between this obligation and the obligation to make good at the end of the Lease. A Tenant who complies with the first of these conditions (keeping in repair) would ordinarily be able to satisfy the second condition (make good).

It is important for Tenant to understand that the full extent of their obligations to maintain and repair the premises and to reinstate them at the end of the Lease is governed by the wording in the Lease. Most Landlords require strict adherence to the wording. Therefore, it is possible for a Tenant to be obliged to reinstate the premises at the end of a Lease to a better condition than the premises were in at the start of the Lease.

To avoid conflicts between Landlord and Tenant at the end of the Lease, it is advisable for both parties to record the condition of the premises at the commencement of the Lease, and at the end. Photographs are the best evidence.

It is also in a Tenant’s best interest to take legal advice on the terms of the Lease, especially the reinstatement provisions, which often slip under a Tenant’s radar when reading the terms.

Most commercial Landlords are requiring Tenants to place bank guarantees or bonds when entering into a Lease – similar to rental tenancy bonds held on residential premises – to cover tenancy defaults. The holding of the bank guarantee or deposit gives the Landlord a cash pool to use if – in the Landlord’s opinion – the premises are not properly reinstated at the end of the term.

Tenants should always be mindful about fitting out leased premises as, at the end of a Lease, it may prove an expensive exercise to reinstate the premises to their original condition. Practical problems which Landlords and Tenants are often confronted with are –

- anchor bolts in concrete floors,
- pallet racking anchor bolts in walls,
- air conditioning installations,
- data cabling within walls,
- built in cupboards and work stations,
- worn carpet or vinyl,
- non maintained fire extinguishers, air conditioning plant, roller door motors and security systems,
- signage not removed,
- dents and penetrations in exterior sheeting,
- pot holes in car parks,
- overgrown gardens,
- graffiti.

When entering a commercial lease it is just as important to review the end provisions as the start up terms. There could be a “sting” in the tail.



*“people you
can talk to”*

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Smith & Stanton News

Thankfully office renovations are nearing completion. We expect to be fully operational by mid May, with a new reception, 2 new interview rooms and new workstations on the ground floor. Thank you to both clients and staff who have had to endure construction and disruption over the last 6 weeks. We are all looking forward to the outcome which will offer greater privacy and comfort to both clients and staff. Naomi will be particularly happy as she will no longer have to meet and greet clients (almost) on the footpath. Our thanks also go to one of our clients Richard Lonn of RAL Architects who has again demonstrated resourcefulness, flair and skill in fulfilling a difficult brief.



Leslie Wood

We are delighted to welcome to the firm Leslie Wood and Brook McGrath. Leslie Wood joined our practice as a lawyer on 5 May 2009. She has been practising for over 25 years. During that time Leslie has practised extensively in the areas of business and company acquisitions and restructuring, commercial

leasing, contract negotiations and complex legal drafting, estate administration and succession planning and all levels of residential and commercial and property developments. Leslie is an excellent fit with the firm's practice, culture and hard work ethic. Leslie's attributes include a strong ability to identify legal issues and to communicate complex matters in a straightforward concise and commercial manner. Twenty five years of practice has given Leslie both the depth of professional knowledge and the width of commercial experience which our clients have come to expect from this firm.

Brook McGrath joins our conveyancing team. She is committed to continue the excellent service which our clients have come to expect from Smith & Stanton in this area of the practice.

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Moveable Soccer Goal Posts

The use of moveable or unsecured, soccer goal posts in Queensland is now regulated by a mandatory safety standard introduced early this year. The mandatory safety standards apply to traders, manufacturers and importers selling moveable soccer goal posts in Queensland. Industry, soccer clubs and coaches must be aware of the types of moveable soccer goal posts covered by the new standards, manufacturing requirements and mandatory warning labels.

Moveable soccer goal posts are designed to be moved into position and relocated following a game or training. Many moveable soccer goal posts are made of steel tubing and can weigh up to 200kg.

Queensland introduced the new safety standard following a series of deaths and injuries in Australia caused by moveable goal posts. Typically, injuries and deaths occur when a child swings on the cross bar causing the moveable goals to topple over and trap them. Fines of up to \$40,000 for an individual or \$202,500 for a corporation may apply to traders who supply goods that do not comply with the mandatory safety standard. Although the mandatory safety standard does not apply to goal posts that are currently in use or supplied prior to January 1 2008, soccer clubs need to be aware of the dangers of unsecured goal posts and are encouraged to secure their existing posts to minimise the risk of injury.

Clubs need to have a risk management plan in place to cover all equipment but especially moveable goal posts.

