

CLIENT NEWS

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THE WRD ON NEW ROAD RULES



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Before planning your family's summer road trip and booking your car in for its pre-holiday service, you should be aware of new road laws that came into effect on 9 November.

Victorian Roads and Ports Minister Tim Pallas announced various changes to the Road Safety Rules "to improve our road network, reduce the road toll and provide important safety benefits for Victorian families".

The changes apply to all road users including motorcyclists, cyclists, skateboarders and roller bladers.

Scooters, skateboards and roller blades are all covered in the Road Safety Rules as "Wheeled Recreational Devices" (WRDs).

WRDs must not be used on the road at night (except for crossing at an intersection) and they must not be towed or be allowed to travel so close to a vehicle as to "slipstream". Scooter riders are required to wear an approved bicycle helmet.

Included in the Road Safety Rules there are rules that enhance road sharing with trams and cyclists as well as new rules for car drivers changing lanes on divided roads.

The new rules target mobile phone use and visual display units (including GPS and other

navigational devices) in vehicles, as well as ensuring safe travel for children by requiring the use of age appropriate child restraints and booster seats.

In relation to child safety, infants under six months of age need to be restrained in an approved, properly fastened and adjusted rear facing child restraint.

Children between six months and under four years need to be similarly restrained or restrained in a forward facing child restraint with in-built harness, and children between four and seven years of age should be similarly restrained or restrained in an approved booster seat that is properly positioned and fastened.

The new rules specify where children should be seated in the car. Notably, children under four years must not travel in the front seat of a vehicle that has two or more rows of seats. Similarly, children between four and six years of age can only travel in the front seat if they are properly restrained and the other seats are all being used by children under seven.

A child under the age of eight is not allowed to be a pillion passenger on a motorbike, but can be a passenger in a side car. Similarly, animals are not permitted to travel between the rider and the handlebars of a motorbike.

The new Road Safety Rules contribute to the Victorian government's road safety strategy *Arrive Alive 2008-2017* that aims to reduce serious road injuries and deaths by 30 per cent by 2017.

Visit the VicRoads website (www.vicroads.vic.gov.au/Home/) to find out more about these new Road Safety Rules.

More information

From the LIV Bookshop, *Traffic Offences and Accidents* (edn 4), by Douglas Brown, \$138.

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GREENING THE WORKPLACE



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Carbon footprints and the economics of mitigating climate change are predicted to become as important for business as balance sheets and the bottom line, as world leaders discuss introducing laws to force companies to become more environmentally friendly.

Australian Prime Minister Kevin Rudd said he expected a raft of changes to climate change policy in the short-term, after the upcoming United Nations Climate Change Conference, to be held in Copenhagen in December this year. He said, with this in

mind, that companies of every size need to start considering what they can do to improve their carbon footprint.

In September, a medium-sized organisation, the Law Institute of Victoria, launched the *Green Practice Guide* which outlines steps firms and practitioners can take to improve environmental outcomes. *Guide* spokesperson Melanie Szydzik said the advice could be applied to any workplace.

Tips include switching computers and lights off when not in use and installing fluorescent and halogen lights, saving water by reducing use of dishwashers, purchasing sustainable office products, reusing paper, printing double-sided, recycling and reducing catering to minimise waste.

Embracing technology is another way to reduce environmental impact. For example, car pooling, cycling to work and using teleconferencing and video-conferencing instead of travelling to meetings all help to reduce the size of our carbon footprint.

A recent study by the UK-based Managing Partners' Forum found travel accounted for 90 per cent of the carbon output of some

professional firms, primarily due to air travel.

Many companies already offer employees incentives to improve their personal carbon footprint which, in turn, improves the companies'.

Larger projects undertaken by some businesses include retrofitting offices to achieve green ratings and installing solar panels and water saving devices.

A simple audit of your workplace will identify areas of waste and areas of potential change.

Deakin University workplace and company law lecturer Victoria Lambropoulos predicts collective bargaining agreements will soon encourage the inclusion of clauses that require employees to participate in recycling strategies and other green practices in the workplace.

For more information, see www.epa.vic.gov.au/bus or to conduct your own audit, see www.epa.vic.gov.au/ecologicalfootprint/calculators.

More information

From the LIV Bookshop: *Guide to Environmental Performance Clauses and Greening Make Good Australia*, RICS Oceania, \$35 each

BREAKING UP IS HARDER TO DO

A family law expert has warned separating couples they may be caught out by recent legislative changes.

Law Institute of Victoria Family Law Section chair Stephen Winspear said the changes had particular ramifications for de facto and same sex couples as they altered approaches to the division of assets, including superannuation and maintenance arrangements.

Mr Winspear said changes to the *Family Law Act 1975* (Cth) had revised traditional thinking and now allowed for the property of de facto and same-sex couples to be divided in the same way as if the parties had been married. He said couples who separated after two years, or had a child together, were now basically treated as if they had married.

These rights were further solidified in Victoria when the *Relationships Act 2008* (Vic) established a Relationships Register for the registration of domestic relationships, irrespective of gender.

"I am not sure that Parliament appreciated the sort of philosophical ramifications of passing the new *Family Law Act* provisions," Mr Winspear said. "You could now question the reasons for marriage because you have got the protection of the law for a de



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facto relationship which is exactly the same protection that you get once you are married. In practice, the person who is in a financially weaker position will very likely do better under the new legislation."

The amendments also allow for superannuation of de facto couples to be split, spousal maintenance and property adjustments between domestic partners.

Recent changes to the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) allows for judges to order that former partners remain living within range of each other should they have a shared custody agreement.

In addition, an important legislative change to the *Family Violence Protection Act 2008* allows police to issue on-the-spot family violence safety notices.

In coming months, the merger of the Family Court of Australia and the Federal Magistrates Court is expected to simplify the procedures for parents in family law cases.

Mr Winspear has advised those in the midst of a relationship breakdown to seek the advice of an accredited family law specialist with a greater understanding of the new laws and their implications.

More information

From the LIV Bookshop: *Mediating with Families*, by L Fisher and M Brandon, 2009, \$90 and *Australian Master Family Law Guide*, 2009, \$150

SUCCESSFUL SUCCESSION PLANNING



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Many family and small business owners only begin thinking seriously about succession planning when on the verge of retirement.

However, the Monash University Family and Small Business Research Unit says that this is often too late.

The unit says poor succession planning is commonplace and has in the past led some family and small businesses to suffer lowered

morale, reduced output and a decline in profits or even closure.

Experts have warned that planning should not be a snap decision but rather a methodical process over years or decades to successfully navigate what can be a financial, legal and emotional minefield.

So, if you are yet to decide whether your business will go to a family member, current employee or be sold, the best place to start can be gaining information from federal and state government websites.

The federal government's website **business.gov.au** recommends planning an exit well in advance to maximise the business's value and enable a smooth transition with less likelihood of disruption to operations.

According to the Business Victoria website, "a family succession plan can incorporate business trusts, gifting, sale or part sale to family members . . . while a non-family succession plan can involve full or part-sale to minority or employee owners or alternatively be an open market sale".

According to Business Victoria important questions to consider include:

- how long you will need to work and the

amount of income necessary to enjoy a comfortable retirement;

- whether you want an ongoing role in the business and if you have maximised its value;
- deciding when or if family members are ready to assume control and ensuring you communicate your direction and decision;
- considering how relationships between family, management and other employees may change on your departure; and
- in the absence of a suitably qualified family member, considering current employees or a new owner.

Lawyers can examine the legal implications of your plan and assist in both minimising potential conflicts between buyer and seller and maximising the interests of family members and existing business partners.

See www.business.gov.au for the federal government website or www.business.vic.gov.au/BUSVIC/STANDARD/1001/PC_62290.html for the Business Victoria website.

More information

From the LIV Bookshop: *Estate & Business: Succession planning* (edn 2), by B Evans, 2009, \$175

GUYLIAN CHOCOLATES – ALL AT SEA

Belgian chocolate manufacturer Guylian recently lost its appeal against the Registrar of Trade Marks to register and protect its seahorse shape in its selection of marine-shaped chocolates.

Guylian's chocolates are sold in more than 132 countries, including Australia, and its marine-shaped chocolates are its top confectionery brand.

Guylian had already secured an international registration for its seahorse shape and had hoped to extend trade mark protection to Australia. However, in *Chocolaterie Guylian NV v Registrar of Trade Marks* [2009] FCA 891 (18 August 2009), the Federal Court of Australia confirmed the decision of the Registrar of Trade Marks to refuse registration of Guylian's seahorse shape as a trade mark on the basis that the shape was not capable of distinguishing Guylian's goods.

Justice Sundberg of the Federal Court had to determine whether Guylian's seahorse shape was distinctive enough and able to distinguish its chocolates under the *Trade Marks Act 1995* (Cth) (*TMA*).

Guylian argued that its seahorse shape was a distinctive one with special "fanciful" features

and not just an ordinary seahorse shape. As such, it came within s41(3) of the *TMA* and should be registered.

It relied on a previously successful case where registration of a bug shape by candy manufacturers was upheld on the basis that the shape was a "concocted imaginary shape".

Justice Sundberg disagreed, deciding that the Guylian seahorse was a relatively ordinary one with no distinctive features and, given that other chocolate manufacturers might want to use the seahorse shape in a marine theme for their chocolates, refused to consider it distinctive enough to warrant registration.

Guylian then tried to argue that its seahorse shape was a distinguishing feature of Guylian's goods and should be registered under s41(5) of the *TMA*.

Guylian referred to its seahorse shaped boxes, widespread marketing and advertising of the seahorse shape, including consumer survey results showing shape and brand recognition, and even sponsorship of specific conservation research, Project Seahorse.

Justice Sundberg examined all of this evidence and concluded that, while it showed



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public recognition of the seahorse shape as part of Guylian's brand, Guylian had not established that the seahorse shape distinguished its chocolates from its competitors.

The case demonstrates how difficult it is to obtain trade mark registration for shapes, even when there is evidence of substantial use and consumer recognition of them within a particular brand.

LAND TAX AND OTHER HIDDEN NASTIES – BUYERS BEWARE



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Prospective purchasers are often so caught up in the excitement of purchasing their new home that they can fail to properly consider their liability for all hidden costs and adjustments. One of these hidden nasties is land tax.

Land tax is assessed as at 31 December each year. Liability is determined on the basis of who owns the land at the time. Nearly all contracts of sale provide that an adjustment of this liability will be made as at the date of settlement of the sale.

Ideally a land tax clearance certificate is attached to the s32 (vendor's statement) which shows not only the vendor's total liability for land tax in a given year but also the land tax liability on the basis of the property being the only property owned by the vendor. This latter assessment is usually the amount that is adjusted.

Quite frequently, however, the s32 does not include a land tax clearance certificate so that liability for land tax remains unclear.

The ability under the *Sale of Land Act 1962* to provide a statement to the effect that outgoings do not exceed a certain amount means that the land tax liability may not be specifically disclosed to a prospective purchaser. This can lead to significant problems.

One problem arises when the purchaser is purchasing the property as their principal place of residence. Usually there would be an exemption from land tax if the property is the owner's principal place of residence. Unless the property is tenanted, a purchaser usually assumes that the property is the vendor's principal place of residence. Often it is, but it is still prudent to check.

Similarly, there is an adjustment to be made if the owner is holding the property on trust. The State Revenue Office imposes a surcharge for property held in a trust and this surcharge is also adjustable.

Purchasing adjoining or multiple properties from a vendor under one contract can also trap the unwary. The land tax clearance certificate

provides for single ownership calculations. The contract of sale (LIV copyright version) provides that for adjustment purposes the land is treated as the only land of which the vendor is owner (as defined in the *Land Tax Act 2005*) which means that land tax is adjusted on the aggregate value of the total land purchased, not each individual lot, on the single ownership basis.

Timing also affects land tax liability. Contracts that are entered into before 31 December with settlement due in the new year can hide nasties at settlement time.

Quite often a vendor will hold the property as their place of principal residence and therefore it is not liable to land tax. However, after sale but before 31 December the vendor may acquire another property as their principal place of residence, thereby rendering the subject property liable to land tax assessment. If the property is a substantial one, a significant amount of land tax may apply.

Usually settlement will take place in the early part of the year, rendering the unsuspecting purchaser liable for the bulk of this tax.

As a final warning, remember that as purchaser you are not entitled to the benefit of any concessions to which the vendor may be eligible, even if you are also entitled to a concession.

The message is clear – always be aware of the full costs associated with buying your dream home. A lawyer can assist you in identifying any potential hidden costs and liabilities. Getting advice early may prove to be a wise investment. ●

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