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NEWSLETTER

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INSIDE THIS EDITION

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The Residential Tenancies Amendment Bill – A look at the changes for landlords and tenants

The Residential Tenancies Amendment Bill was introduced to Parliament on 3 December 2015, and with it came a number of interesting proposed changes to the Residential Tenancies Act 1986. Two of the main aims of the Bill are: to improve the safety of residential rental properties by requiring smoke alarms and insulation in all residential rental properties and to make the process around abandoned rental properties more efficient.

Smoke alarms and insulation requirements

The proposed Bill would require a landlord to ensure that their residential rental property has working smoke alarms while making the tenant responsible for changing the alarm batteries and notifying the landlord of any faulty alarms.

The proposed Bill would further require underfloor and ceiling insulation. The requirement in respect of insulation splits residential rental properties into two categories; income-related rent tenancies and all other tenancies. An income-related rent tenancy generally refers to a property where the rent is based on the tenant's income under the Housing Restructuring and Tenancy Matters Act 1992, but excludes boarding houses. For these income-related rent tenancies, insulation is required from 1 July 2016, while all other rental properties require insulation from 1 July 2019.

Under the proposed amendments a landlord is also required to provide information about

the insulation of the premises in the tenancy agreement for the property. This will include whether there is insulation and if so, the details of that insulation. The Bill proposes that a landlord commits an unlawful act if this information is omitted from the tenancy agreement or if the landlord knows the information is false or misleading.

Overall, the aim of these two requirements is to ensure the health and safety of the occupiers of a residential rental property without imposing excessive costs on a landlord.

The process around abandoned rental properties

A rental property is an "abandoned rental property" where the tenant is in arrears and has left the property with no obvious intention of returning to it.

The current process under the Residential Tenancies Act 1986 for abandoned rental property cases can take up to six weeks. The Bill proposes a process which will take ten working days after an application is filed with the Tenancy Tribunal. Reducing the time to confirm abandonment of a tenancy will enable a landlord to re-tenant their property, which reduces the loss of rental income.

The Bill also proposes giving a landlord the right to enter the rental premises where the rent is at least 14 days in arrears and where the landlord has reasonable cause to believe that the tenant has abandoned the property. Furthermore, the Bill proposes that a landlord may enter the premises to confirm abandonment if notice has been given to the tenant no less than 24 hours prior to entry.

The Social Services Committee report on the Bill is due on 8 June 2016 which will take into account public submissions about the proposed changes.

Gift vouchers – What happens if the company goes into receivership?

It is an unfortunate reality of business that Companies fail. When this happens, it can affect a wide range of different parties and their ability to recover money they are owed.

Any Company can be placed into receivership by one of its secured creditors if the Company has defaulted on its obligations to that secured creditor. This process involves a secured creditor appointing someone to act as a receiver. Often the secured creditor will be a bank which holds security over company assets, such as a mortgage or General Security Agreement.

The receiver's powers extend to the secured property. This means if there is a mortgage registered in favour of a bank (the bank being the secured party) over Company land, that land is the secured property which the receiver has power to deal with. The receiver acts for the benefit of the secured party which appointed the receiver, and exercises its powers in the secured party's best interests.

Once the receivership process has started, the operation of the Company is significantly altered, and a number of parties can be affected. While a receiver only deals with Company property over which the secured party holds security, in many cases it may be that the security extends to a large portion of, or even all of the Company's assets.

One potentially affected group are those people who hold gift vouchers. A gift voucher is essentially an unsecured loan, and the holder of a gift voucher is an unsecured creditor of the Company. While the receiver must exercise its powers with reasonable regard to the interests of unsecured creditors (among other parties), its first priority is to the secured creditor.

If the receiver thinks that paying back, or entering into some sort of arrangement with unsecured creditors will jeopardise the secured creditor's ability to be paid back, then the unsecured creditors may not be reimbursed.

The recent appointment of receivers of Dick Smith Holdings is a case in point. In this instance receivers were reportedly appointed by banks NAB and HSBC. The Company's receivers announced that outstanding gift vouchers will not be honoured and deposits will not be refunded, as those who hold gift vouchers and who have paid deposits for items are unsecured creditors for the purposes of the receivership.

As well as the appointment of receivers, the Company has also been placed into voluntary administration, which is a separate process aimed at deciding the future of the Company. Some companies "trade through" this difficult time and continue in one form or another after the voluntary administration period - a good example is Whitcoulls, which entered voluntary administration and put gift vouchers on hold in 2011. After administration was completed and the Company in an acceptable financial position, the company was able to honour outstanding gift vouchers.

The Health and Safety at Work Act 2015 – In force from 4 April 2016

In New Zealand, more than one in ten workers claim for a workplace injury each year. To address this, the new Health and Safety at Work Act 2015 ("the Act") aims to make New Zealand's work places safer, part of wide Health and Safety reforms ultimately hoping to reduce the workplace injury and death toll by 25 per cent by 2020.

What does it mean for workers?

The term "worker" is defined widely and includes, but is not limited to; employees, contractors and sub-contractors and their employees, labour hire company employees who have been assigned, students and volunteers.

Two key features affect workers:

1. Provisions in the Act protect workers against discrimination and negative actions if they feel the need to raise a health and safety concern.
2. The Act supports more effective engagement and participation with workers. This begins with consultations surrounding policies, and extends to practical, companywide obligations for every worker to abide by regulations and take reasonable care while in the work place.

What does it mean for business owners?

The Act introduces the term "person conducting a business or undertaking" ("PCBU"). This is another wide term which is intended to apply to a broad range of business arrangements.

Some key obligations of the PCBU are;

1. To take "reasonably practicable" steps to ensure the health and safety of workers. These steps include ensuring that risks are minimised throughout the business; including the work place itself, its fixtures, materials, workers and tasks.
2. To support and encourage worker participation in all aspects of the health and safety policies and their enforcement and – if requested by employees – appoint and train safety representatives. (The obligations surrounding representatives vary based on the size and nature of the business).

There will be a growing focus on enforcement, along with increased penalties for non-compliance. Any insurance that a company may hold against fines will also have no effect. No businesses, regardless of the size or level of risk are exempt from the obligations in the Act.

What does it mean for Officers of PCBU's?

An "Officer" includes, but is not limited to; directors of a company, partners of a partnership, and any person who is in a position to exercise significant influence over the management of the business.

Officers will now be personally liable for failing to exercise due diligence in ensuring that the business is complying with health and safety regulations even if they were not directly involved in making the decision which contravenes the Act.

Interestingly, Peter Jackson recently resigned as Director of Weta Workshop, apparently due to the level of director involvement that this new Act will encourage. The increased level of personal liability is daunting for those directors who do not, or cannot take a hands-on approach.

When do the changes come into force?

This Act takes effect on the 4th of April 2016. Work Safe New Zealand will provide information on the new legislation to businesses in an attempt to make the transition as seamless as possible. You may choose to consult a lawyer for more specific advice if you think any of these changes may affect you or your business.

How well do you know your lease?

The majority of lease arrangements are entered into using the Deed of Lease provided by the Auckland District Law Society. Whether you are a business owner and tenant, or a landlord, it is important that you understand your rights and obligations. How well do you know your lease?

Tenants right to quiet enjoyment

As a tenant, you will typically hold a right to quiet use and enjoyment of the property. Contrary to the wording, this right does not mean you can pursue the landlord for noisy neighbours, rather, it means that the landlord will not interfere with your possession and use of the property. If the landlord were to breach this term, this could give rise to a claim for damages or you could apply for an injunction to stop the interference.

Tenants' maintenance obligations

Tenants are often responsible for the maintenance and care of the property. Some of the responsibilities that you may not be aware of include:

- Replace and repair glass breakages;

- Re-paint and re-decorate the premises when reasonably required (some landlords will often require this near the end of the lease);
- Replace all worn or damaged floor coverings (carpet) with ones of equal or better quality;
- Maintain any garden and lawn areas to a tidy and cared for condition; and
- Make minor repairs to the roof where necessary.

Liability on assignment of your lease

There are a number of different reasons that tenants assign their leases, for example on sale of a business. An important part of selling your business is ensuring that it is attractive as possible to a potential purchaser. This means making sure that a new tenant can continue to stay in the business premises long term, either by way of a long lease or by providing several rights of renewal. What many people do not realise however, is that the original tenant's liability does not necessarily end when they assign the lease (and become an "assignor") to a new tenant.

If you enter into a lease you will typically still be liable for the full current term of that lease regardless of whether you assign to a new tenant. If the new tenant breaches any of the conditions of the lease, you could still be liable for that breach. For example: if the new tenant fails to pay rent, the landlord can often pursue you for the loss, as even after assignment of the lease you can still retain your original contractual obligation to the landlord.

When liability ends

Your liability as assignor will typically end at the expiry of the current lease term in place at the time of assignment. If the purchaser exercises a right to renew after that term has expired, this would effectively be a new lease and you will not be liable for a breach by the new tenant during the new term.

You can limit your risk when assigning your lease by asking the landlord to agree to limit your liability (although they do not have to agree). You could also require the new tenant to provide you with an indemnity; however this does not prevent the landlord recovering from you for any breach of the lease in the first instance.

Snippets

Updated agreement for sale and purchase of real estate

Recent changes to the widely used Agreement for Sale and Purchase of Real Estate prepared by the Auckland District Law Society and the Real Estate Institute of New Zealand include:

- When selling an apartment or other Unit Title property, the vendor warrants (promises) that the information provided in the pre-contract disclosure statement is correct.
- The vendor also warrants that all plant, equipment, systems or devices which provide any services or amenities to the property (such as security, heating, cooling, or air conditioning) will be delivered to the purchaser in reasonable working order.
- A breach of warranty can already give rise to compensation. The agreement now clarifies that a claim for compensation must be made on or before the last working day before settlement.
- The definition of a working day has been extended to allow an additional 10 days for a purchaser to approve a Land Information Memorandum (LIM) if the LIM condition would otherwise have fallen due over the Christmas/New Year period.

Buying a vehicle – is there money owing?

If you are in the process of purchasing a vehicle privately, it is very important to check that there is no money owing on it.

This can be done by conducting a search of the Personal Property Securities Register ("PPSR"), preferably on the day you are going to pay for the car. The PPSR will confirm whether a 'security interest' is registered against the vehicle.

If there is a security interest registered, another person or company could seize your vehicle to pay off any debt relating to that security interest. Even if this debt was incurred by a previous owner, you could still lose your vehicle if the previous owner has failed to repay the debt in full before selling to you.

If there is money owing on the vehicle, the PPSR will record the details of the creditor, and you should ensure the debt is cleared before you buy. That way you can be sure you are buying your vehicle outright.

If you have any questions about the newsletter items, please contact me, I am here to help.