

Legal Insights.



Georgiadis
Lawyers

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The enclosed information is of necessity a brief overview of legal principals and it is not intended that readers should rely wholly on the information contained herein. No warranty, express or implied, is given in respect of the information provided and accordingly no responsibility is taken by Georgiadis Lawyers or any member of the firm for any loss resulting from any error or omission within this brochure.

Our Vision

Success for every client.

Our Mission

To be an exceptional provider of legal advice and services using our combined experience, determination and integrity to cut through the complexities of the legal process.

Whist working with our clients, we will do everything in our power to deliver value and results.



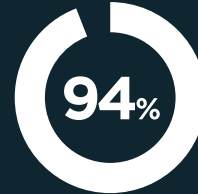
We get it done.



*We can fix the fees in
over 50% of matters*



*We speak in plain
language, just like you!*



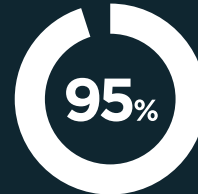
*94% Customer
Satisfaction Ratings*



*We take the stress out
of your legal matter*



*We have 5 easy to
reach locations*



*We have a 95% Success Rate
in our Personal Injury cases*

Welcome

Solving legal issues can be a stressful and anxious time for individuals and businesses alike.

We have created ***Legal Insights*** to give you an overview of the legal concerns people and businesses just like you seek to resolve on a daily basis.

We offer ***Legal Insights*** to you as a tool in assisting you to understand the ways in which your legal issues can be dealt with by our legal system. It is our aim that by providing you with this key information, we can help to demystify the provision of legal services in Australia.

I founded Georgiadis Lawyers over 30 years ago in 1985. Since that time I have seen the law and the legal landscape change in many vast ways. However, what has not changed is the fact that you, the client, must be at the centre of everything we do. The team at Georgiadis Lawyers and I have never lost sight of this fact. We understand that all clients want to achieve legal success, and that each client will have a different view of what constitutes this success. Our vision is, and has always been, success for every client.

We strive to achieve that through proper communication, genuine understanding, and a tailored approach that suits your expectations and goals.

Our mission at Georgiadis Lawyers is to be an exceptional provider of legal advice and services using our combined experience, determination and integrity to cut through the complexities of the legal process. Whilst working with you, we will do everything in our power to deliver value and results, in a stress-free and cost-efficient manner.

By providing you with clear guidance, practical resolution driven advice, and fixed fees where possible “we get it done”...

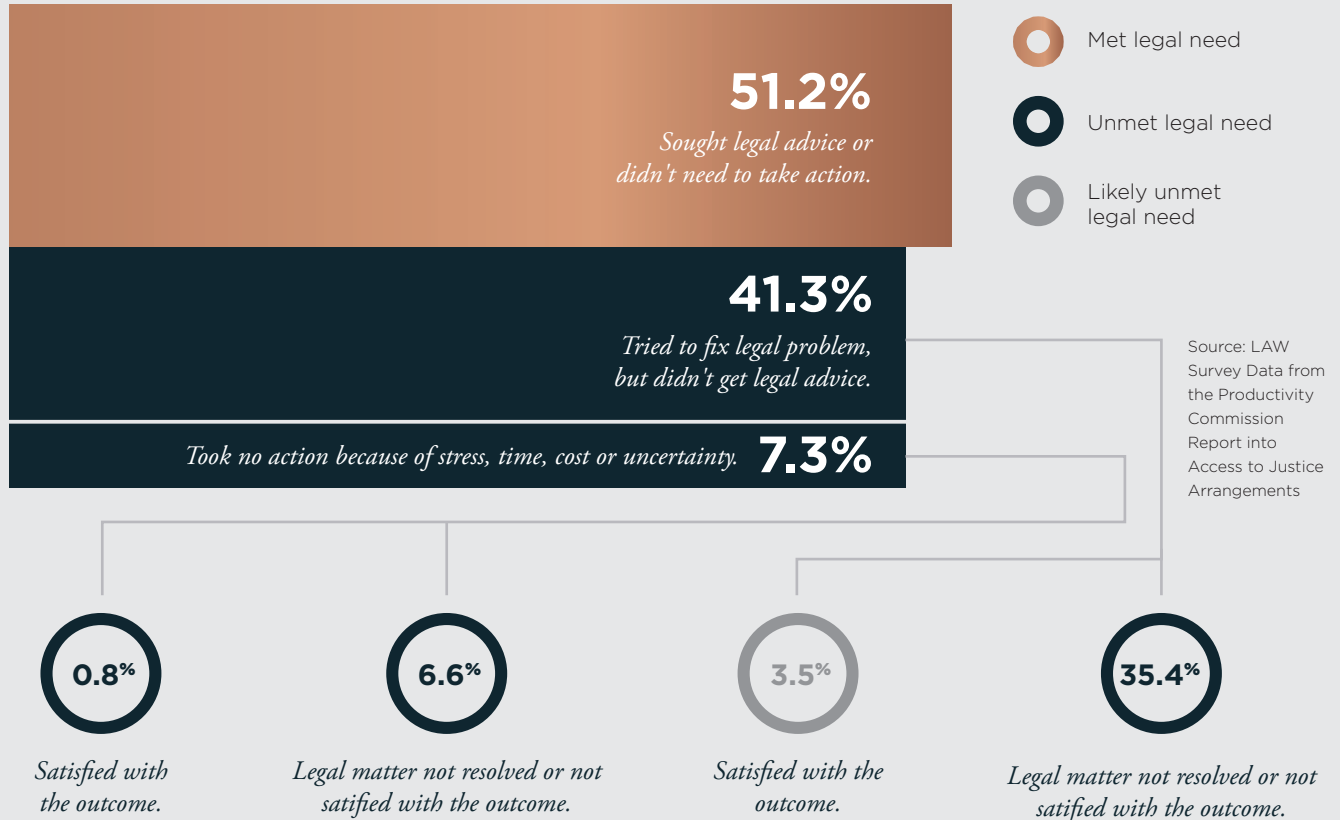
Dimitrios Georgiadis

Principal



Why people need legal Help?

People with 'moderate' or 'severe' legal problems.



Georgiadis Lawyers has a 94% Customer Satisfaction Rating

Georgiadis Lawyers was established in 1985 to provide legal services and advice to the South Australian community.

In the 30 years since Georgiadis Lawyers first began operating, we have been able to provide our client's with trusted advice in a diverse range of legal matters, and have grown to operate from five easy to reach locations across the Adelaide Metropolitan region.

We continue to provide our clients with a pragmatic approach to the practice of law that is resolution driven, efficient and cost effective. At the forefront of our service, is the aim to provide our clients with high quality legal advice in a timely and personalised manner at a competitive cost so as to help maximise business or personal goals. We aim to provide superior legal services based on personal service, professional excellence, confidentiality, integrity, reliability, and consistency.

Our lawyers specialise in the following practice areas:



Commercial & Business



Property



Wills & Estate Planning



Families & Separation



Criminal & Traffic



Injured Persons

We aim to provide transparency in relation to costs, and we actively seek to deliver fixed fees. Over 50% of work is currently delivered on a fixed fee basis. We work with our clients to ensure that there are no hidden surprises along the way, and are always willing to negotiate fixed fees to suit your circumstances.

Other key features of our service include:

- *Speaking with you in plain English;*
- *Taking the stress out of your legal matter;*
- *Valued, high quality work with a focus on attention to detail;*
- *Delivered when and where you need it;*
- *24/7, 365 days a year service;*
- *Out of hours availability; and*
- *Direct access to the firm Principal*

In the next section we provide some insights into areas of legal concern that could arise for individuals or businesses.

Through these scenarios, we hope to enable anyone that needs help with the law to have an understanding of the range of legal processes that Georgiadis Lawyers can help you deal with.

At Georgiadis Lawyers, our clients can vouch for the outcomes we achieve for them. In fact, we frequently exceed our client's expectations, so much so that we receive an average satisfaction score of 4.7 out of 5.



I would like to thank Georgiadis Lawyers for the help and taking the time to explain things so I can understand (in simple words) - it can be hard sometimes. Looking forward to working with you again...

Corey, March 2016



I thought Georgiadis Lawyers provided an excellent service from start to finish. I would definitely use them again and recommend them to others...

Andrew, October 2015



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Commercial & Business

In today's complex and competitive commercial environment, all businesses require access to lawyers who have passion, commercial insight, and experience within the industry. Navigating the commercial world presents the opportunity to fall into numerous pitfalls, and to encounter risks at every turn. Fortunately, most can be avoided with practical legal advice prior to the potential threat materialising.

We understand the hard work and dedication it takes to build and maintain a business and the legal support you require. We pride ourselves in finding innovative and pragmatic solutions to your commercial issues. Our Commercial Lawyers will proactively work with you to ensure your business continues to run smoothly.



Our areas of expertise include:

Agribusiness

Asset Protection

Bankruptcy

Business Agreements

Business Disputes

Business Structures

Business Succession Planning

Commercial Litigation

Confidentiality Agreements

Contractual Disputes

Corporate

Debt Collection

Debt Recovery

Defective Products

Dispute Resolution

Due Diligence

Employment

Guarantees

Insolvency

Loan Agreements

Migration

Personal Securities & Registration

Sale & Purchase Agreements

Sale & Transfer of Shares

Trusts

Buying a business

If you are considering buying a business there are many things you need to do from a legal, financial and general business perspective. Getting the right advice from the start is important. The structure of and issues involved in the sale are quite different if you are buying the business assets only, compared with the shares in the company that owns the business.

In this article we will highlight some of the key issues to be considered.

Making sure you follow the right process before signing any documents is a key component of a successful business purchase.

The main things to do before signing a contract are:

- *Research*
- *Get professional advice*
- *Review & understand all documentation*

Research

Proper research involves checking the records of the business and other information to ensure:

- *Sales are as good as the owner says they are*
- *The business systems are sound and documented*
- *The business does not have any problematic legal obligations or liabilities*
- *All necessary information, rights and assets will be included in the sale*
- *Cash flow is sustainable*
- *Employees will be happy with a new owner*
- *Customers will remain loyal once you take over*
- *You understand the operation of and opportunities in the market/industry*

Research should, where possible, be carried out before you sign any contracts.

Professional advice

You should always consider briefing and engaging legal and accounting advisers to assist you in conducting due diligence and documenting the transaction, to avoid legal and financial (including tax-related) “surprises” and arguments down the track.

You might also consider whether there are any industry specific experts that may be useful.

Review and understand the documentation

When purchasing a business there is a lot of documentation to be gathered, read and understood.

The seller may require you to sign a confidentiality agreement to stop you from using confidential information for any purpose other than buying the business. You should make sure you fully understand the agreement before you sign it.

Some of the information you should gather and review is outlined below.

You need to make sure you have done adequate research, understand the risks and have received the right advice.

Financial statements

It is sensible to obtain current and historical financial records for the business, including:

- *Profit & loss statements*
- *Balance sheets to identify assets and liabilities*
- *Lists of debtors and creditors*
- *Copies of any BAS's lodged by the business*

List of plant, equipment, assets and stock

You should obtain a list of all plant, equipment, assets (including fixtures and fittings) being sold along with current valuations, proof of ownership and information on applicable warranties and guarantees.

Details of any stock sold with the business and how it will be counted and valued at settlement should be discussed and agreed with the seller.

You should also undertake thorough searches of the Personal Property Securities Register to, for example, ensure that security interests necessary for the business have been registered (such as over sale equipment leased to third parties) and to check whether any relevant security interests are held by third parties.

Lists of customers and suppliers

Customer and supplier relationships form part of the goodwill of the business and a list of all available contact details should be supplied so that you can make contact and ensure an ongoing relationship.

Employees

If the business is being purchased as a going concern and the buyer is assuming liabilities for employees then a list should be provided – setting out the employees, their job descriptions, salaries, years of service, any disciplinary issues and accrued entitlements like holidays and long service leave.

Important Contracts

Any major contracts necessary for the operation of the business should be provided and reviewed, including copies of the lease of the premises and any plant & equipment leases. Term, assignment, change of control and termination provisions, in particular, should be checked.

If any of the sale assets are financed the financier's consent will be necessary.

If the business is a franchise the seller is required to provide a franchisor's disclosure statement.

Documenting the transaction

After completing your due diligence you will need to have the transaction documented with a legally binding contract. There are many issues to consider.

Structure

You will need to decide on the structure of the transaction and it is crucial to get advice on the legal, financial and taxation consequences of the structure you adopt.

The types of things that need to be considered include:

- *Whether you are buying the assets of the business or the shares in the company that owns the assets.*
- *The price to be paid and when it is to be paid.*
- *Who will the buyer be - an individual, company, trust or partnership?*

Deciding on whether to buy the assets or the company is a critical issue when buying a business. There is no simple or right or wrong answer to this question as it will usually depend on the business being purchased and the individual circumstances of both the buyer and the seller.

Things to consider when making a decision include:

- *The amount of flexibility and control you want over what you are buying.*
- *Do you require all of the assets of the business, or all of the employees?*
- *Do you want to be responsible for past liabilities (known and unknown) of the business which might relate to employees, suppliers or customers?*

Price and Terms of Payment

Once the price is agreed you will need to determine how and when the price will be paid.

For additional protection you may want a portion of the price to be held back for a certain period to ensure that information given by the seller is accurate or that profit projections are achieved.

You may not want to pay the price in a lump sum and may be able to negotiate to pay in monthly or annual instalments.

You will need to take into account that the business will probably be continuing right up to the sale date, which means stock, accounts receivable and other items will need to be finalised at a certain time and in an agreed manner.

Legal Contract

The main legal document is a contract for sale of business. The sale contract sets out the various terms agreed to by the parties, including for example:

- *the rights of the parties if things go wrong;*
- *the seller's representations and warranties, which are designed to ensure that:*
 - *the seller remains responsible for the information given to you about the business; and*
 - *you get what you pay for;*
- *a non-competition provision which prevents the seller from creating a competing business after the sale; and*
- *(if a lease or franchise is involved) the consent of the landlord or franchisor.*

Remember

Buying a business can be a complex transaction. You need to make sure you have done adequate research, understand the risks and have received the right advice.

Choosing a Business Structure

There are four main types of business structures for conducting business in Australia, each with their own advantages and disadvantages. A person can carry on business as a sole trader, partnership, trust or company.

The choice of business structure is an important decision to make at the start of a business venture, as the structure can have significant impacts on factors such as taxation, reporting requirements, and setting up costs.

When setting up a business, the following factors should be taken into consideration:

- *What is the initial cost of starting up the business?*
- *How many people are involved in the business?*
- *How much control would each business owner like to have over the business?*

- *What is the level of exposure to liability that each business owner is willing to take?*
- *What is the level of asset protection that each business owner requires?*
- *What is the level of regulatory burden that the business is willing to undertake?*
- *How flexible does the business need to be? Does the business require a structure that can be changed easily?*
- *What are the likely taxation consequences for each business structure?*

The advantages and disadvantages of each business structure is summarised in the following table to provide a quick guide to factors bearing on the selection of business structure.

Sole Trader Partnership Company Trust

Exposure to liability	Unlimited	Unlimited, as well as joint and several	Limited	Limited – subject to trust deed
Control over assets	Absolute	Joint	Separated	Uncertain
Control over the operation of the business	Absolute	Joint	Separated	Beneficiaries have no control
Ability to obtain finance	Might be limited	Might be limited	Good	Reasonable
Disclosure requirement	No	No	Yes	Yes
Compliance costs	Low	Low	Medium – high	Medium
Ability to restructure	Low	Low	Moderate	High
Exposure to family disharmony	Moderate to High	Moderate to High	Low	Moderate – Low
Accommodation to Succession planning	Low	Low	Moderate	Moderate – High
Income diversion and accumulation	Little opportunity	Moderate opportunity	Low to moderate opportunity	Moderate – High opportunity
Tax	Personal marginal tax rates	Personal marginal tax rates	Company flat rate	Beneficiary's rate
Incidence of tax losses	Personal	Partner level	Quarantined in company	Quarantined in trust
Ability to carry forward tax losses	Unlimited	Unlimited	Subject to complex carry forward rules	Subject to complex carry forward rules

Sole Trader

A person can own and operate a business on their own behalf. A sole trader is the simplest form of business structure, with low establishment costs and minimal legal and compliance requirements. An individual running a business as a sole trader also has absolute control over the business.

However, a down side of this structure is that the sole trader has unlimited exposure to liability. The individual is solely liable for all obligations incurred during the course of the business. This means that creditors can pursue any assets in the individual's own name. Moreover, as a sole trader, the business's access to finance might be limited to the individual's own resources.

In relation to taxation implications, the income earned as a sole trader is taxed at the same rate as individual tax payers. This means that there is limited ability to minimise income tax if the business earns significant profit.

Partnership

Two or more individuals or companies can carry on business in a partnership, where the business income is shared jointly by all partners. Partnerships can be formed by a written or verbal agreement, partnerships are thus relatively inexpensive to set up and operate.

The partnership itself is not taxable. Each partner pays tax on their share of the net income of the partnership.

Compared to a business run by a sole trader, one of the benefits of partnerships is the contribution of different assets by the partners (i.e skills and resources to the business).

Partnerships can be formed by a written or verbal agreement

A main disadvantage of this business type is that all partners are jointly and severally liable for the obligations of the partnership. This means one partner will be liable for decisions that other partner/s make. Similarly to a sole trader, the liability of the partners for the debts of the business is unlimited.

Company

A company is a separate legal entity created by being registered with ASIC. Commonly, the words "Proprietary Limited" (Pty Ltd) after a business name show that the business is a registered legal entity trading in its own right.

A company is owned by shareholders and managed by directors. The shareholders of a company receive company profits in the form of dividends. Any undistributed earnings are kept by the company and re-invested in it.

A major advantage of forming a company is the fact that shareholders can limit their personal liability and are not generally liable for the company debts. The financial liability of the company is limited to the company assets. Companies also have the ability to raise finance because a company is a recognised structure for both debt and equity funding.

As companies are governed by legislation, they are generally expensive to set up. Depending on the size of the company and the complexity of business transactions involved, companies will also incur various on-going costs for reporting and accounting. Further, there is a requirement to publicly disclose key information, such as the company's registered address for service.

Trust

A trust is formed when a person (the trustee) holds property for the benefit of someone else (the beneficiary). A trust is a legal relationship, and not a separate legal entity. As such, most legal dealings in relation to a trust rest with the trustee, which can be an individual or a company. The trustee has control over the assets and is entitled to deal with those assets in accordance with the terms of the trust deed and the applicable law.

A trust may be established by a document known as a trust deed (Express Trust) or by conduct (Resulting Trust) or by court order or legislation (Constructive Trust). Therefore, a trust can sometimes be costly and complicated to set up and be administered.

As the distributed income of the trust is taxable to the beneficiary, a benefit of a trust is therefore the flexibility of income distribution, as income can be distributed to the low income tax beneficiaries to take advantage of their low marginal tax rate.

Which Business Structure is for you?

Each business will vary and no business owners' circumstances will be the same. It is highly advisable to consult a solicitor and an accountant about the costs and risks of each business structure to make sure that the most appropriate one is used.

Debt recovery basics for business

Letter of Demand

If you are owed money for goods or services, the first step in attempting to recover it is generally to send a letter of demand (also called a "Final Notice") to the other party setting out the amount of money outstanding and giving them a defined period of time (at least 21 days) within which to settle the matter (by paying you the money owed). This letter also informs them that you intend to start legal action to recover your debt, if they do not repay it.

This letter is a very important step in the litigation process. Sending this letter has the effect of enabling you, the creditor, to recover a proportion of your legal costs from the debtor, if the matter ends up in court, and you are successful. The logic behind this is that you have given the debtor ample opportunity to settle the debt and they have not done so. Therefore, if you have had to incur legal expenses in recovering the debt, you should be reimbursed for those legal expenses (to an extent).

It is a good idea to contact a lawyer first to ascertain whether it is prudent to proceed with court proceedings and this will usually depend on the size of the debt. Naturally if the sum owed is small it may be uneconomic to pursue the debt by engaging a lawyer or even pursuing the debt at all. You must however ensure that in enforcing your rights to recover the debt you act within the law.

There are several criteria set out in the court rules, and your letter of demand must contain all of these criteria for it to be valid (and therefore, for you to be able to recover a proportion of your legal fees if you are successful). We can help you make sure that the correct process is being followed so as to maximise your chances of successfully recovering your debt.

Principles of debt collection fairness

When sending a letter of demand, you should be careful not to harass the debtor or send a letter which is designed to look like a court document.

You must not pursue a person for a debt unless you have reasonable grounds for believing the person is liable for the debt.

Time limits

A creditor has a limited period of time to sue for a debt. In most instances for debts owed this will be 6 years. In our experience, the longer you wait to pursue the debt, the higher the costs and longer it takes to recover the debt. So act quickly.

If the debtor has made no payments towards the debt or has not acknowledged in writing that they owe the debt for a period of 6 years from when the debt arose then the debt may no longer be recoverable.

Disputed debts

The debtor has the right to dispute a debt and may do so on the grounds that:

- *it is not their debt;*
- *they have already paid the money;*
- *they disagree with the amount of the debt;*
or
- *it is an old debt and they haven't made a payment for at least 6 years, no court judgment has been entered against them and they haven't admitted in writing that they owe the debt in that time.*

If the debt is disputed then you, as the creditor, may have no alternative but to commence legal proceedings or to seek to negotiate a compromise with the debtor.

When your lawyer becomes involved

If you, as the creditor, are not willing to negotiate or wait for payment, you may wish to contact a lawyer to assist with pursuing the debt.

If you know the debt is due and payable and you want to commence legal proceedings it is prudent to have a legal professional assist you and represent you in court to recover the debt. If the size of the debt does not warrant that, then a lawyer may still be able to help you to negotiate a payment plan that is manageable to the debtor and acceptable to you.

It is not in the debtors interest to ignore your claim and risk the additional costs of the legal fees and interest on top of the original debt .By following the correct process a lawyer can help bring the matter to a conclusion satisfactory to you.

New customer – credit application process

Before you take on a new customer you should have the correct systems in place to ensure that you are able to assess the customer's credit position.

Do you have a credit application process for your new customers?

Your credit application and terms of trade should provide you with security over the goods which you have sold to the customer and, if the customer is a corporate entity, ensure that the directors of the company provide you with a personal guarantee. You must however ensure that you register any security over goods on the Personal Property Securities Register and we recommend that you speak with a legal professional to assist you with this process to ensure that the registration is not void.

Conclusion

You should contact a lawyer to discuss your legal rights and obligations if you are owed money or even if you owe money to someone else who is threatening court action.



Property

Purchasing or leasing a property can be an exciting and sometimes daunting process. It is important that you obtain expert advice when entering into property transactions to ensure that you do not fall into the numerous pitfalls that others commonly do.

We can support and guide you through the complexities involved in property transactions

so that you are fully aware of your rights, obligations, and any issues that need to be addressed. We are experienced in the challenges involved with leasing, purchasing and selling commercial property, property development and strata disputes, having advised national retail property owners, developers and landlords alike.

Our areas of expertise include:

Caveats

Conveyancing

Developments

Leasing

Mortgages

Personal Securities & Registration

PPSR

Retail & Commercial

Sale & Purchase Agreements

Stamp Duty

Sub Divisions

Understanding a Commercial Lease

When renting business related property, it is important for both Landlords and Tenants to understand the relationship they are entering into and the rights and obligations that they each have. The document that governs this relationship is usually a Commercial Lease.

So what is a Commercial Lease?

A lease is a legally binding contract that gives you certain rights to a property for a set term. A commercial lease is used when leasing property used primarily for a business.

You should never sign a lease without understanding all of its terms and conditions. If you don't understand what you are agreeing to, you could experience serious financial and legal problems.

It is important to properly investigate the property and lease document before you sign. It is a good idea to ask a lawyer to explain the main clauses of the lease to you. A lawyer give you legal advice, draft new clauses and help you negotiate the terms and conditions to suit you.

Important issues to consider when entering into a lease.

A commercial lease will usually contain terms dealing with items such as:

Rent: How much is the rent and when is it due? The amount of the rent will usually be calculated based on the area of the premises. This may not always be as simple as it sounds if the shape of the property is irregular or the area includes a lift, more than one floor, outdoor area or interior walls.

Rent Increases: Rent will usually increase annually during the term of the lease, with increases determined by a fixed percentage, be market based or tied to the CPI. It is common for CPI or fixed reviews to occur during the term of a lease and for a market review to occur at the expiry of the initial term and at the start of each option period.

Security Deposit: The landlord will usually ask for some form of security from the tenant in case the tenant defaults on their obligations (eg. not paying rent).

The security is usually for an amount equal to 3-6 months rent and is often by way of bank guarantee. If the tenant is a company, then personal guarantees from the company's directors may also be required. The lease should also specify the terms regarding return of security deposit. In terms of the security, a lot depends on the prior experience and business experience of the tenant, as well as their financial position. If the tenant has limited financial experience in the proposed endeavour, then the landlord will usually ask for a longer security of up to 6 months. If the lease is being transferred, the landlord could seek an alteration to the security deposit if the incoming tenant does not have strong prior business experience in the proposed venture, or if their financial situation is fairly weak.

The security is usually for an amount equal to 3-6 months rent and is often by way of bank guarantee.

Term of the lease: The lease should set out the length of the lease, any options to renew the lease and any terms relating to the renewal. A landlord will generally want a longer initial lease term (typically 3, 5 or 10 years) whereas the tenant is likely to want a shorter period (1-3 years).

Option to Renew: An option allows the tenant to continue leasing the property on similar terms at the end of the initial period of the lease for a further defined period and rent (subject to any review). An option gives the landlord potential greater security of income, and gives the tenant the ability to make longer term plans for their business.

Knowing the procedure for exercising the option, especially when the option can be exercised, is critically important.

Improvements: A lease should address what improvements or modifications can be made to the property, who will pay for the improvements, and whether the tenant is responsible for returning the property to its original condition at the end of the lease.

Description of the property: The lease should clearly describe all of the property being leased, including bathrooms, common areas, kitchen area and parking areas. A plan of the property could also be included.

Signage: Any restrictions on putting up signs, say that are visible from the street, will be included in the lease. Also, local zoning regulations need to be checked to determine what other limitations may apply.

Use of the property: Most leases will include a clause defining what the tenant can do on the property (eg. what type of business can be conducted at the premises).

A tenant should ask for a broad usage clause just in case the business expands into other activities. Ask your local council if your business can operate in your desired location. Also consider the council's development plans for the area.

Outgoings. The lease will set out who is responsible for costs such as utilities, property rates & taxes, insurance, and repairs.

Insurance. You should contact your insurance company and discuss the clauses in the lease referring to insurance so you fully understand what is required by the lease.

Exclusivity clause: This is an important clause for retail businesses renting space in a commercial complex. An exclusivity clause will prevent a landlord from renting neighbouring space to a competitor.

Assignment and subletting: A tenant should maintain the right to assign the lease or sublet the space to another tenant. Usually the tenant is still ultimately responsible for paying the rent if the business fails or relocates, but with an assignment or sublet clause in place, the business can find someone else to cover the rent (subject of course to the landlords approval.).

Maintenance & Repair: The lease should clearly set out who is responsible for maintaining or repairing the property and the fixtures and fittings during the term of the lease.

Make Good: A tenant should carefully review the make good obligations in the lease. Often these can be onerous and involve considerable expense on the tenant having to reinstate the premises to their original condition when the lease commenced.

Termination: The circumstances under which the lease will be terminated should be set out in detail in the lease.

Costs: The landlord may want the tenant to pay the costs of preparing the lease. In Retail Leases the landlord cannot pass more than half of the preparatory costs of the lease on to the tenant. In relation to transfers of leases, even in a retail lease situation, the landlord will seek the legal costs of their lawyers in relation to the securing of consent to the transfer. This cost is passed on to the vendor/outgoing tenant.

Retail lease or general commercial lease?

The Retail and Commercial Leases Act 1995 has specific legislation relating to retail leases over business premises at which goods or services are sold or provided to the public where the rent is below \$400,000 a year. This legislation is designed to provide additional protections to retail tenants and imposes a range of obligations on commercial landlords, when compared to non-retail commercial leases.

For a new or renewed retail lease covered by the Act, the landlord is legally required to give the tenant a copy of the pro forma lease and a written disclosure statement, which outlines important information about the premises and the lease, such as:

- *the permitted uses of the shop,*
- *the lettable area,*
- *access arrangements*
- *the basis of the rent, contribution to outgoings and other services; and*
- *a range of other items*

Further specific information must be provided for shopping centre leases.

Conclusion

Although many of the terms of a commercial lease are fairly standard, it is important that you fully understand your rights and obligations, especially the provisions which relate to retail leasing.

It is a good idea to ask a lawyer to explain what clauses in the lease mean and to get our assistance in checking the terms and conditions so that they suit you.

E-conveyancing the way of the future

For the past 150 years when completing a property settlement it has been necessary for lawyers and banks to meet up to check and swap documents and bank cheques.

The party that ended up with the documents then had to lodge them at the Land Registry and notify government authorities about the transaction.

Many of our readers would have been involved in a settlement where they were selling one property and buying another and the settlements had to occur simultaneously or where multiple simultaneous settlements had to be finalised before you were able to get the keys to your new home.

There are a lot of things that can go wrong with a manual process involving the physical signing and handling of documents.

The new e-conveyancing system changes this and brings the whole conveyancing process into the 21st century filling it with much needed speed, efficiency and accuracy.

What is e-conveyancing?

e-Conveyancing provides an electronic online business environment for completing property transactions including electronic lodgement with Land Registries and the electronic settlement of payment of funds.

This process is facilitated via a secure online environment to:

- *Lodge the Land Title documents needed to register changes in property ownership and interests;*
- *Allow the various parties involved in the transaction to view and complete the documents online to conclude the property exchange or transaction; and*
- *Allow for the electronic settlement of all financial transactions at a nominated date including settlement monies, duties, taxes and any other disbursements.*

The Benefits:

- *Tangible time and cost efficiencies*
- *No requirement for physical documentation at settlement;*
- *No requirement to physically attend settlements*
- *Use of technology to reduce human error and settlement failure*
- *Aims to replace legacy paper-based approach.*

This is a huge shift in the industry, similar to how share trading in the late 90s went from paper share certificates to online, revolutionising the stock broking industry and share trading generally.

Who provides the secure online environment?

An online property exchange known as PEXA has been established nationally to provide a standardised platform for the completion of online property transaction.

The PEXA platform has been rolled out gradually since December 2013 under an initiative lead by the Government backed National Electronic Conveyancing Development Limited.

The platform - developed by Accenture and hosted by Telstra - uses elements of electronic conveyancing systems developed in individual States.

PEXA removes the need to physically attend settlement. Basically, Land Registries, Financial Institutions and lawyers can access the platform and transact together online, performing lodgement right through to settlement from the comfort of their desk.

Through PEXA, the following transactions can be completed (subject to conditions):

- *Mortgage*
- *Discharge Mortgage*
- *Caveat*
- *Withdrawal of Caveat*
- *Transfer Title*
- *Nomination*
- *Withdrawal of Nomination*
- *Consent*
- *Notice of Acquisition*
- *Notice of Sale*

How does it work?

Lawyers open an online workspace where the Land Registry documents and settlement schedule are created and information is shared with all parties to the transaction.

Once preparation is complete and the settlement date and time is reached, PEXA will automatically:

- *Lodge documents with the Land Registry;*
- *Exchange loan funds and pay stamp duty and other third party beneficiaries;*
- *Remove the need for bank cheques and the wait that goes with them; and*
- *Remove the need to physically attend settlement.*

How does this improve the system?

It dramatically improves the situation where lawyers representing the buyer and seller as well as the incoming and outgoing Bank are required to meet up and exchange printed documents and bank cheques before a property is able to settle.

Simple errors like a misspelt or missing names, names that don't match across documents or wrong cheque details can cause the settlement to fail.

Using PEXA the information is pre-populated in the system and verified against the land registry system, so it reduces error and gives certainty that the purchase will settle.

Retirement Living Life beyond bingo and bowls!

Not surprisingly people talk about buying their first home as being a life changing event and it is. However, in the past it has been rare for people to talk so excitedly about moving into some form of retirement living.

Given that sooner or later most of us are likely to have to deal with this issue either because we are assisting our parents, another family member or friend in making the transition from their home to a retirement community or because we are considering such a move for ourselves, it is important to know what your options are and to understand the legal and financial implications that come with this type of move.

A world of options

In days gone by the very notion of a retirement home was enough to send a shiver down many people's spines. Thoughts of early dinners and endless games of bingo did little to encourage our more mature citizens to view this as a desirable life stage.

The good news is that things on the aged care front have changed considerably in the last decade and there is now a wider choice of accommodation options available than ever before.

Choices range from luxurious apartment complexes for the "Over 55" community through to multi-functional retirement communities where a variety of accommodation and services are provided on the one site ranging from independent living right through to around the clock nursing care of the more traditional nursing home variety.

Things to think about

The key to any successful life change usually starts with learning about the options available and understanding the legal and financial obligations that come with each option, so get out and start looking at what is available in the area where you or the person you are assisting would like to live.

Then once you have an idea what is available in the area and price range you are looking for start considering the legal and financial issues that go hand in hand with the more emotional part of the process.

Remember not all retirement communities are created equal

First up ask “Is this the right retirement community for me?” If you are helping someone else it might not be right for you personally but is it what they are looking for?

Now this may sound like an obvious question, but it is important not to be dazzled by a new fancy fit out if on closer inspection the retirement community does not offer the range of services needed or if it is so far from family and friends that visitors will be few and far between and social isolation is likely to occur.

Just as every suburb and neighbourhood has its own quirks every retirement community is different and this is definitely not a case of one size fits all.

The Wish List

Make a wish list of what you are looking for.

At the top of the list put the “must haves” and at the bottom of the list add the “would be nice but not essential” things.

Things to consider including might be:

- *being close to public transport,*
- *a range of on-site activities,*
- *nursing assistance being available if needed,*
- *a one-stop shop with different care levels all catered for in the one complex, or*
- *proximity to current neighbourhood and family and friends.*

Each person will have a different set of priorities.

The more you are able to focus on what is most important the easier it should be to eliminate options that are not the best for you and also the easier it will be to avoid getting side tracked by things that really don't matter quite as much.

The more you are able to focus on what is most important the easier it should be to eliminate options that are not the best for you

Some important things to think about

Making a move into a retirement community is a significant life change and there are emotional, financial and legal issues that will come up along the way.

Some things to consider before signing any paperwork and making a commitment of this kind include:

- *Do I need to sell my home first before I can afford to move?*
- *If I buy into a retirement community what exactly am I buying?*
- *Is the property strata or community titled or does some other form of ownership apply?*
- *Does the property I am buying form part of my estate after I die or does ownership revert to some other entity (such as the company that operates the retirement community)?*
- *Exactly what does the contract say – what are my rights and responsibilities under the contract?*
- *Are there any ongoing fees and charges in addition to the purchase price?*
- *What other costs do I need to factor in when I move? Don't forget to include moving costs and possibly storage costs if you won't be able to take all your possessions with you and are not yet ready to part with things you cannot fit into your new home.*
- *Do I have to pay the whole price upfront or can you pay a portion of the cost and then pay the balance in ongoing instalments? Are there any other payment options such as pension sacrifice available?*
- *Will the move into a retirement community affect any pension or rent assistance currently received?*
- *Is the facility able to provide a higher level of care later on if your needs change or would you need to move to a different facility if your care needs increased?*
- *What costs are associated with any care provided?*

Ask for help

This type of move can prove to be a challenging one for both the person involved and anyone assisting them and it is important to understand exactly what is involved legally and financially before entering into any contracts.



Wills & Estate Planning

Having a valid Will or Succession plan is the best way to safeguard your intentions for the distribution of your assets and personal effects after your death or upon your retirement.

Planning for the distribution of your estate, the continuity of your business assets once you retire, or for the loss of your mental capacity can be a stressful and often confronting time. We will help alleviate that stress by guiding you through the process and providing you with

practical and pragmatic advice to ensure that your estate or business assets are protected, well-structured and organised in a tax effective manner when the time comes.

Our Wills, Estate and Business Succession Planning team will work with you to draft a Will, Succession Plan, Advance Care Directive or Power of Attorney, finalise an estate dispute, or administer the estate of a loved one.

Our areas of expertise include:

Advanced Care Directive

Aged Care Advice

Business Structuring for the future

Disability Care Advice

Estate Administration

Family Inheritance claims
Mortgages

Powers of Attorney

Probate Applications

Succession Planning

Wills

Testamentary Trusts

Testamentary trusts can be very effective estate planning tools to assist in providing for spouses, children and grandchildren, and are becoming increasingly popular as more people become aware of their advantages.

A Testamentary Trust is any trust established under a will, but the term is usually used in the context of a discretionary family trust established under a will.

Why are they becoming more popular?

Their increasing popularity arises from the very considerable benefits that can flow from their establishment and use, including the fact that although assets of the trust may be controlled by the intended beneficiary, they do not form part of that beneficiary's estate. Major benefits of a testamentary trust include the ability to protect assets and to possibly reduce tax paid by the beneficiaries from income earned from their inheritance - providing a greater level of flexibility and control over the distribution of assets to beneficiaries.

Reasons why you should consider a testamentary trust include:

CGT benefits

Assets owned by the deceased that would have been subject to capital gains tax (CGT) had the deceased sold them before their death, can pass through their estate to a testamentary trust without a CGT event occurring.

If an asset was a pre-CGT asset, the trust will receive a cost base equivalent to the market value of the asset at the date of death. If the asset is a post CGT asset, then the trust will inherit the deceased's cost base. This is particularly important where the assets have significant unrealised capital gains. This also provides a good opportunity to "reset" the ownership of assets subject to CGT.

If for example, mum and dad own the shares in a company that is the corporate beneficiary of their family trust. The shares may have a nominal cost base but because of trust distributions made over a number of years (and often not paid in cash) the company may have become very valuable.

All of that increased value is potentially subject to CGT if mum or dad changed the ownership of these shares during their lifetime. However, after their death the shares can be moved to a testamentary trust and dividends from the company can then be distributed by the trust to a range of beneficiaries, tax effectively.

In addition, trust assets may be transferred to beneficiaries without incurring CGT (but only in respect of assets of the trust that were owned by the deceased when they died).

Income Tax advantages

Income can be distributed from a testamentary trust to infant beneficiaries (under the age of 18) and taxed in those children's hands at adult marginal tax rates (instead of at the top marginal tax rate as would otherwise be the case). Testamentary trusts may, over time, sell and replace the original assets received from the estate and the distributions to infant beneficiaries will continue to be taxed at (more beneficial) adult rates.

With the tax free threshold of \$18,200 since 2013/14, testamentary trusts are even better vehicles for clients because children and grandchildren under the age of 18 years who receive income from a testamentary trust are taxed on that income at adult rates, and enjoy a tax free threshold of \$18,200

(or \$20,542 if the low income tax offset applies) and the marginal tax rates which apply to adults.

Without this special provision trust distributions to minors may only access a tax free threshold of \$416 and thereafter the effective tax rate applied to the minor's income is 66% of income up to \$1,307 and 45% after \$1,308, on the entire amount of income received.

Flexibility to the Trustee

The trustee can buy and sell underlying assets of the trust (and thereby enhance the value of the trust) without losing or endangering any tax advantage.

We suggest it is desirable that clients provide the trustee with some guidelines about the administration of the trust, but they should be carefully framed in order to avoid any confusion or legal or accounting complications.

Protection of assets

Testamentary trusts provide a level of protection to the assets held in the trust, including against creditors of the beneficiaries who may want to recover from the trust assets an amount owing to them by a beneficiary, and in the Family Law Court in the case of the divorce of a trust beneficiary.

It is quite common for a wife to guarantee her husband's business venture and vice versa, to some extent we can all be at risk whether in high risk occupations or not. However, if a bankrupt has received an inheritance through a testamentary trust it will be protected from creditors.

In the Family Court, an inheritance held within a testamentary trust is unlikely to be the subject of a Family Court order in the case of a marriage break-up.

Protecting 'at risk' beneficiaries

It is not uncommon for people suffering a variety of disabilities to be unable to properly manage their financial affairs.

At the same time, families may wish to ensure that an adequate fund is set up to meet the beneficiaries' reasonable needs, and so as not to affect any pension rights they may have.

These people can be described as being 'at risk', a description that may for example include people who are drug or gambling addicted, mentally or physically disabled or simply spendthrifts who are not capable of looking after any wealth that is left to them. For these people a testamentary trust can be managed by a trustee (who should be) a responsible and capable person (or people) who take action for the benefit of the 'at risk' person.

Summary

It is becoming much more common to steer away from the traditional husband and wife will, which provides for a husband and wife giving everything to each other and then to the children, and to replace this with one or more testamentary trusts controlled by the surviving spouse and/or children under which the spouse and children are potential beneficiaries.

If the funds in the estate justify it (and remember this may include the proceeds of life insurance policies, or superannuation), wills providing for testamentary trusts can provide that on the death of the spouse, sub-trusts come into existence for the benefit of each child and that child's family - controlled by the child concerned.

It is becoming much more common to steer away from the traditional husband and wife will.

Testamentary trusts are a very powerful and useful estate planning tool. The flexibility of such trusts, especially if combined with a memorandum of wishes as to how the trust should be administered, can be an appropriate arrangement as well as providing a highly advantageous tax mechanism, for many years into the future.

Why it's a bad idea to write your own Will

It is relatively easy to find a free Will template on the internet and fairly cheap to buy a Will “kit” from a newsagent or online. There are also websites that have “data collectors” that take your information and create a Will for you seemingly without any legal expertise required.

So, is it really a good idea to write your own Will?

Why you need a valid Will

The sole purpose of writing a Will is that you can direct where your assets go when you pass away.

If you have a valid Will your executor applies through the probate process and distributes your estate in accordance with what you have written in your Will. If you hold joint property with your spouse probate is not usually required unless substantial assets are held in your own name.

There are many common situations however where a valid Will is required to properly distribute your estate and look after your family and loved ones.

If you have a Will that is deemed not valid by the probate court then your estate will most likely be exposed to delay in distributing your estate, increased legal and court costs and perhaps resulting in financial hardship and emotional anguish for your family.

Most people think that their situation is simple and that a DIY Will is enough but consider the following situations and whether they may apply to you or someone you know.

Your home-made Will is lost or cannot be found

When a lawyer prepares a Will for you they usually hold the Will after signing in their safe custody and provide you with copies.

Even if you take the original Will the lawyer will keep properly certified copies of the original Will. If you subsequently lose the original Will your family can ask the court to look at the copy of the Will and allow the wishes in that Will to stand.

If there are no copies the family is put to the expensive task of applying to the probate court for a grant of administration which is a more lengthy and costly method of dealing with an estate than the usual grant of probate.

Your hand-written Will is not signed correctly

There are very strict requirements for the signing and witnessing of Wills, if your Will is not signed correctly or is not witnessed properly it may be invalid.

If your Will does not deal with all of the assets and liabilities that you leave when you die your Will may be ineffective in dealing with those assets.

Once your Will is made even writing on it later or making any changes will invalidate that Will and may render it ineffective, either partly or fully, in dealing with your assets.

You own a business

It is likely that the business will continue to run after you die. You will need a validly appointed executor to run the business until it is either sold or dissolved. You can achieve this in a valid Will.

Consider that the business may have ongoing expenses such as rent and staff costs that still have to be paid and may cause the family hardship until the business can be liquidated if there is no one validly appointed to run the business.

You and your partner are not married

When you purchased the property together it was bought in equal (or unequal) shares as you both have children from a previous relationship.

Again the property may not get transferred to either your de facto partner or your children as a matter of course. If you do not have a valid Will your property cannot be dealt with in a simple and cost-effective way.

Previously made Wills are not automatically revoked when you make a new Will

If you have a Will that you made when you were younger, perhaps leaving all of your estate to your parents, and then move residence and commence a relationship and have children.

If your new Will is invalid your estate may go to your parents not to your new family as you intended and if it does it will be a costly and longer process.

You are married but hold property solely in your name

You may have bought the property when you were single or owned the property from a previous marriage or inherited it from your parents.

If you have no valid Will and no executor to put into effect what you have written in your Will, the property cannot be transferred until the Court appoints an administrator after delay and costs have been incurred.

If you leave your superannuation in your DIY Will

Superannuation may form part of your estate and be dealt with in accordance with the terms of your Will, but in most cases superannuation will be paid directly to a beneficiary nominated in your superannuation policy without any reference to the terms of your Will.

Whilst you can provide in your Will that your estate be given to whoever you would like there is only a small eligible group of beneficiaries who can directly receive superannuation benefits on your death.

Superannuation funds have particular rules for releasing funds to an estate and an invalid Will makes this process more difficult to navigate.

Again the release of funds is not automatic to your family and your loved ones may suffer hardship if the release of funds is delayed.

Lawyers are trained to write valid Wills

Your lawyer will always do these two things when drafting your Will:

- *they take into account the strict law requirements for a Will to be considered valid by the state probate court; and*
- *they also consider your particular situation and the specific individualised elements you need included in your Will.*

Your lawyer will also consider whether you need a guardian for your children, a trustee to run your business, whether an elderly relative needs to remain in your home after you are gone and a myriad of life circumstances that are particular to you.

A lot of people have heard of a Power of Attorney however most do not fully appreciate the extent of its power, the benefits it delivers or the types of Powers of Attorney that exist.

Power of Attorney

A Power of Attorney is a useful legal document used to allow someone to handle your affairs in a variety of circumstances. It is often used if you are planning to go overseas, taking an extended holiday, suffer from poor health, have an accident or reach a stage in your life when you need greater assistance managing your affairs.

In this article we examine why appointing a Power of Attorney is so strongly recommended by lawyers and explain the difference between a General Power of Attorney and an Enduring Power of Attorney.

Selecting a person to act in your place

The appointment of your Attorney enables that person (or people) to act in your place, and do the things you would normally do yourself. Such as signing documents, paying the bills and doing the banking. The person you choose, your Attorney, has the right to stand in your shoes when you wish them to look after your affairs. In reality they can enter into agreements in your name and on your behalf.

Therefore as a result of the power of the appointment it is critical that you select the right person to act in that capacity. The person does not have to be a lawyer. In fact it is important for the person to know you well and for you to trust them. It is often a trusted family member but whoever it is must be over 18.

The difference between a General and an Enduring Power of Attorney

Not all Powers of Attorney are the same.

A General Power of Attorney is a legal document that gives the Attorney the authority to make decisions about financial and legal matters on behalf of the person who appoints them. This power lasts only for as long as the person who appoints them has mental capacity. The general power ceases to operate if the person that has made the Power of Attorney loses capacity to make decisions. A General Power of Attorney is often used as a tool of convenience.

For example, a person might appoint a General Power of Attorney to look after their **financial** and **legal** affairs in Australia while they travel overseas.

An Enduring Power of Attorney is similar to a General Power of Attorney except that the powers continue, or endure, in the event the donor loses mental capacity.

An Enduring Power of Attorney, unlike the General Power of Attorney, must be explained to you by a prescribed witness, that is, a lawyer.

It is important to be aware that an Enduring Power of Attorney becomes void when you die.

What happens if you lose capacity without having a Power of Attorney?

The probability that someone can lose capacity is often not properly considered by people. However if you do not have an Enduring Power of Attorney and develop a mental incapacity you are therefore unable to manage your financial affairs.

It is too late then to have a lawyer prepare such a document as you do not have capacity to sign it.

The difficulty is that no person automatically has the right to manage your assets. Not even if they are your husband or wife.

This therefore has a colossal effect on all the financial decision making thereafter with your bank accounts, your jointly owned home, shares or other jointly owned assets or liabilities.

To have decisions made in these circumstances would then involve an application to the South Australian Civil and Administrative Tribunal (SACAT).

The applicant, usually a family member, would apply to become your financial administrator. However this is subject to that person being deemed fit (as in 'fit and proper'). Failing this finding of being 'fit', the Tribunal may appoint the Public Trustee to manage your affairs.

If the Public Trustee is appointed, your spouse may need to consult with a government department to deal with your ongoing financial decision making until your death.

It is important to be aware that an Enduring Power of Attorney becomes void when you die.

When does the Attorney's power begin?

You may nominate when your Attorney's power is to begin. If you do not name a date or an occasion, it begins immediately.

On the other hand, if you lose the capacity to make such decisions before the date or occasion you name, the power begins at that point.

It is important to note that even if you give your Attorney power immediately, you may also continue to make decisions yourself while you are able to do so. By providing a Power of Attorney you do not restrict or give up the right to make financial decisions as you do today.

You may nominate when your Attorney's power is to begin. If you do not name a date or an occasion, it begins immediately.

Summary

Today, Powers of Attorney are used as a precautionary step by sensible adults rather than as a stop gap measure for an overseas trip. Professional groups such as accountants and financial planners, along with lawyers all strongly recommend that their clients of all ages and walks of life, make a Power of Attorney so their assets are not locked up if a person loses legal capacity to sign documents and their loved ones are put through avoidable stress



Families & Separation

Separating from your partner and negotiating arrangements relating to property and children can be stressful and highly distressing. Often, it is your children who are most profoundly affected by the breakdown of the family unit and the impending legal consequences.

We understand that every relationship and situation is different, and accordingly, every approach requires a tailored process.

We consider practical solutions and always work with you to minimise conflict in order to maintain healthy relationships between you, your ex-partner and your children.

Our areas of expertise include:

Caveats

Children's Matters

De Facto Relationship Disputes

Dispute Resolution

Divorce

Financial Agreements

Injunctions

Mediation

Prenuptial Agreements

Property Settlements

Same-Sex Relationships

Superannuation Splitting

What is meant by separation?

Separation in Family Law is defined as the bringing to an end of a marriage or de facto relationship (which also includes same sex couples). There is no need or ability to register a separation under Australian Family Law. Separation is a fact which must be proven if it is disputed by the other party at a later time.

In the case of a divorce, the date of separation is recorded on the Application for Divorce and is sworn or affirmed to be true and correct by the Applicant. If you cannot prove you had separated from your spouse at least 12 months before you file your Application for Divorce, the Court will not grant your divorce.

Therefore, it is a good idea to confirm the separation in writing, even if this is via text message that can be saved, at or shortly after the time of separation. Often divorce cases and cases for property settlement in de facto relationships can turn upon whether or not a party can prove that separation occurred on a particular date.

What about de facto relationships?

In the case of a de facto relationship, particularly where the relationship ends on or about the two year anniversary, whether or not a property settlement is available can depend on whether the separation took place before or after the two year anniversary. If the de facto relationship was less than two years long the Court may have no jurisdiction under the Family Court Act to provide a property settlement. There may be alternate remedies available or another basis other than the two year requirement to show that a de facto relationship existed.

In addition, there is also a two year limitation period in which to commence the Application, from the time of separation. In such cases, again, the date of separation can be significant.

What about if you still live together?

Separation can take place even though the parties live under the one roof and it can also be a gradual process.

In these cases, the Court will need to examine a number of factors to determine when and if a separation has taken place. Those factors can include whether the parties:

- *Slept in separate rooms or together after the alleged date of separation;*
- *Performed domestic duties such as cooking and washing for each other after the alleged date of separation;*
- *Separated their financial affairs to any extent after the date of separation;*
- *Lodged or signed any documents informing government agencies of the separation, such as Applications for Centrelink or ATO documents as a single person, as opposed to a person in a relationship;*
- *Continued to be intimate after the date of alleged separation; and*
- *Made it publicly known (such as by telling friends and family), that they had separated.*

Ten things to consider if a person has just separated:

1. *Contact your bank or financial institution in writing (by fax or email- with your signature appearing) to stop joint funds being removed or liabilities increased.*
2. *If you have a Power of Attorney, ensure it is revoked, and have a new one drafted.*
3. *Consider whether your nominated death beneficiary for your superannuation entitlements is appropriate.*
4. *Photocopy all of your and your ex's financial documents and put them in a secure location (this should not be your home or motor vehicle).*
5. *Look at your Will and consider if it is still what is appropriate and if you do not have a Will have one drafted.*
6. *If you have children, contact the Child Support Agency and find out how much is to be paid or is payable.*
7. *Do title searches on your properties. If your home is not in your name or is in joint names ensure you place caveats over the properties. If your property is held as a joint tenant, ensure you sever the joint tenancy.*

8. *If there has been family violence in the relationship you may need to seek a Restraining Order.*
9. *Start a diary which keeps track of time your partner has with the children and any adverse behaviour he/she displays.*
10. *Seek advice from an experienced Family Lawyer.*

Is a 50/50 split the starting point?

Given that all parenting orders, whether consent orders or otherwise, are made taking into account the children's best interests, both parents would be better advised to comply with the orders, rather than litigate about an alleged breach of them, as such compliance ought to promote the children's best interests.

Following the breakdown of a marriage or de facto relationship, it is common for separated parties to be unsure and therefore anxious about their entitlements in a property settlement and the assets they are likely to retain. This is only natural given that Family Law is a complicated and emotional area of law which is often poorly understood.

Unfortunately this is reflected in a great quantity of inaccurate statements often regarded as fact by those in the community.

Automatic entitlement – a popular myth

Contrary to popular belief, there is no presumption that assets should be divided 50/50, 60/40 or in any other subjective proportion. The Family Court always has full discretion.

People often receive "advice" from well-meaning friends or family as a result of their own experiences. This advice is often misleading and can be unhelpful when it creates a false expectation.

Each person's situation is different and should be carefully assessed by a Family Lawyer qualified to give proper advice.

No two cases are decided the same and there is no presumption of any kind in relation to a financial settlement when it comes to percentage entitlements. It is important to realise that one person's settlement will probably be different from yours and others you may have heard about.

Factors to be taken into account

The factors which must be taken into account when the Family Law Courts consider how property is to be divided are set out in the Family Law Act.

A lawyer practicing in Family Law will know exactly what is taken into consideration by the Court when providing detailed and specific advice to clients. There is no universal equation applied.

Property settlement is based on all of the information provided and the discretion Court in deciding the matter.

To decide how to distribute the assets the Family Court will normally take into account factors including:-

- *The current value of the assets and liabilities. The Court will require all assets and liabilities to be identified to establish a 'net asset pool'. This can include superannuation entitlements, as well as assets held personally, in partnership or by trusts, or companies.*
- *The direct financial contributions made by each person to the acquisition of assets or the preservation improvement or maintenance of those asset, this will include assets owned at the commencement of the relationship.*
- *The indirect financial contributions made by each person in the relationship, for example, the giving up of a career to allow the other person to further their own career.*
- *The non-financial contributions by each person, like caring for children, being the homemaker and maintaining or improving the assets by personal exertion such as individual efforts in renovations that increase the value of an asset.*

- *Identifying the future needs of the parties, for example, age, health, financial resources, superannuation, care of children and income earning capacity.*

After considering all of the above the Court will consider whether any proposed property settlement is 'just and equitable' in the circumstances.

No particular factor is given priority over another, meaning that someone who is the sole income earner will not necessarily be entitled to a greater financial settlement than the other person who was a stay at home parent to the children of the relationship.

Summary

It is important to remember that there is no presumption of equality (like a 50/50 split) as a starting point in respect of contributions and that each matter will be decided upon the particular circumstances of that case.

The Family Court has broad powers to make Orders for a just and equitable division of assets.

It is important for anyone considering separating from their spouse, or who has already separated, to obtain independent legal advice from experienced Family Law Solicitors about their likely property settlement entitlements.

Obligations and consequences of parenting orders

A separating couple with children will need to work out the parenting arrangements for those children - where the children are to live and who may make decisions about the children.

If the couple can agree, their agreement can be formalised as Consent Orders (ie Orders made by the Court by consent). If not, the Court can decide the parenting arrangements for them.

In either case, the Court will only make orders that it considers are in the children's best interests.

Structure of parenting orders

Parenting orders, whether made by consent or otherwise, will cover topics such as with whom the children are to live and spend time, and which parent may make decisions in relation to the children's day to day and long term care, welfare and development.

Theoretically, each aspect of a parenting order, whether made by consent or after a contested hearing, is as binding and enforceable as a Court order about the parties' finances.

Enforceability

Unfortunately, that theory is not always borne out in practice.

It can sometimes be difficult to prove a breach of parenting orders. How does one demonstrate to the Court that one's former partner breached the order requiring him to communicate with you in relation to decisions regarding the children's long term welfare?

Even if your former partner is completely unwilling to compromise, the fact that she attempted to "discuss" the issue with you may satisfy the Court that your right to consultation was respected.

Surely it would be easier to prove a breach of a parenting order relating to time with the children? It is likely to be obvious whether the children spent the ordered time with you.

However, before the Court will treat a parenting order as having been breached, it must first consider whether the "guilty" parent had a reasonable excuse for failing to comply with the orders. For example, was it reasonable for the "guilty" parent not to facilitate the other parent's time with the children on the basis that the children allegedly don't want to go and "I can't make them".

Whether or not that constitutes a reasonable excuse depends on the facts of each case, including the age of the children and the steps that the parent did take to try to encourage the children to spend time with the other parent.

Consequences of breach

If a Court is satisfied that a parenting order has been breached, it has a range of penalties available to it to either punish the "guilty" parent, to "compensate" the innocent parent or to enforce the parenting orders.

Those options include:

- *requiring one or both parents to attend a parenting after separation course*
- *ordering that the children spend additional "make up time" with the innocent parent*
- *changing the parenting orders. This could mean that the children ultimately regularly spend more time or even live with the "innocent" parent*
- *placing the "guilty" parent on a bond or sentencing him or her to imprisonment.*

In relation to the last three of those options, the Court's overriding consideration is still the children's best interests. There have been a number of cases where, despite proven and repeated breaches of parenting orders by the parent with whom the children live, the Court has not drastically changed the earlier parenting orders, nor was the "guilty" parent put in gaol because the Court was concerned that the imposition of such consequences would not be in the children's best interests.

Unfortunately, the practical outcome in those cases was that the "guilty" parent's breach of the parenting orders went unpunished.

In such cases, the Judge must reconcile her desire to uphold the Court's orders and punish any breach of them with the Court's overriding obligation to only make parenting orders that it considers to be in the children's best interests.

Consequences for taking children overseas

One type of breach of parenting orders which deserves special mention is where a parent breaches and tries to avoid the operation of Australian parenting orders by taking the children overseas. Such a situation is treated very seriously by the Family Court, the Federal Police and relevant international authorities.

The Court will only make orders that it considers are in the children's best interests.

Conclusion

Parenting orders can be made by consent or as a result of a contested hearing before a Judge. The enforceability and consequences for breach of parenting orders is the same, regardless of how those orders were made. Unfortunately, proving a breach of parenting orders and obtaining what the "innocent" parent might consider to be adequate redress can sometimes be difficult.



Criminal & Traffic Law

Criminal allegations generally carry serious consequences, which may have lasting impacts on you and your family. It is therefore crucial that you contact an experienced Criminal Lawyer to provide you with sound and sensitive advice as soon as possible.

We understand your concern over how potential penalties can impact your personal

life and accordingly we actively minimise the impact that such criminal allegations may have for you. Our experienced Criminal Lawyers will fight for you to achieve the best possible outcome for each individual situation. In doing so, they pride themselves on providing a confidential and discreet service in all forms of criminal law activity.

Our areas of expertise include:

Bail Applications

Drink Driving Offences

Drug related offences

Fraud

Guilty Pleas

Homicide

Intervention Orders

Police Station Attendances

Restraining Orders

Serious Sexual Assault Offences

Traffic Offences

White Collar Crime

What are my legal rights? Most people do not know!

This might seem a basic question but so many people simply do not know what their legal rights are. If you have teenage or adult children it is prudent to check their understanding. For some in the community, particularly if they are young or unworldly this can unexpectedly land them in trouble with the law. Unfortunately this can have consequences later in life.

The following information is for general information and is not legal advice. You should always contact and consult a lawyer for advice specific to your circumstances and before deciding on a course of action. It's best to have a lawyer in mind rather than to be handed the Yellow Pages by a Policeman.

The following information is for general information and is not legal advice. You should always contact and consult a lawyer for advice specific to your circumstances and before deciding on a course of action.

What then are my legal rights?

Generally if a policeman asks, you don't have to tell him your name and address. However there are cases when you are required to, for example, when you are the driver of a motor vehicle. There are other cases as well and rather than expect you to remember them should we list them, our advice is, avoid confrontation. You do not need to go further though, by telling them anything else or answering any other questions subject to them telling you why you are being asked. Generally in cases where you must answer questions you will be told that if you refuse to answer you may be liable to be charged.

What if you are being arrested?

If you are being arrested the arresting office should tell you that you are being arrested and why you are under arrest.

If this happens remember that it is an offence to resist arrest, pulling your arm away or resisting in the **slightest** way, can result in another offence.

It is fundamentally important to know that you have the right to silence.

You do not need to say anything (after giving your name and address) and often admissions are freely made by people when otherwise the offence could not be proven if they had remained silent.

You **are** entitled to contact your lawyer.

If you have been arrested and need medical help, you have the right to that.

You also have the right to contact a friend or relative and notify them of your whereabouts.

If you cannot understand English you have the right to be provided with an interpreter, or other qualified person.

It is fundamentally important to know that you have the right to silence.

Do I have to submit to a search?

Yes, if you have been arrested the police are allowed to search you and take your photograph, fingerprints and a DNA sample.

What do I do if the police want to search my home or car?

In some circumstance the police can search your home or car without a warrant. Some (but not all) of those occasions are:

- *If the owner, occupier or operator consents; or*
- *If the police enter the property to make an arrest; or*
- *If you, or an occupant, are under arrest, or*
- *If the police have reasonable suspicion a crime is being committed or has been committed or will be committed; or*
- *If they suspect terror related activities.*

What do I do if the police want to interview me?

The Police may request you attend, or accompany them to, a police station to answer questions however you are **not** required to go with them **unless** you have been arrested in relation to an offence.

You do not have to answer any questions (other than to provide police with your personal details) and you are not required by law to participate in a video record of interview.

We recommend at this point, if you have not already done so, that you contact a lawyer. We would advise you in this sort of case not to consent to an interview and under current laws it would be unwise for a solicitor to be present when that advice is given.

If a solicitor is present then your refusal to participate in an interview and depending on the charges your refusal could be used against you in a later trial.

If you proceed and take part in a police interview anything you say on or off camera can be used against you in court.

It is also worth remembering, even if the police are proceeding, with proper legal representation you may have the ability to minimize the penalty by having competent representation in court, applying for bail or possibly even negotiating with the Police to have them proceed with a less serious charge or to submit a set of facts to the court that you find more accurate.

If you proceed and take part in a police interview anything you say on or off camera can be used against you in court.

Shining a light on drink driving in South Australia

Drink driving continues to be one of the main causes of road fatalities and injuries, responsible for 30% of fatalities and 9% of serious road injuries in Australia. If you consider the statistics it is clear why successive Governments and the Police support it and why the Courts impose tough penalties.

In this article we take a step back and examine why we have the laws we do today. This may be of interest for parents of young drivers or a reminder for those who need to know more.

Random Breath Testing

Random Breath Testing was introduced at different times around Australia as a major drink driving deterrent. There have been numerous evaluations of RBT as a road safety measure and these have largely produced positive outcomes. For example,

in NSW the introduction of RBT in 1982 led to an initial (and massive) 48% reduction in fatal crashes over a four and a half month period and an average 15% reduction in fatal crashes over a subsequent 10 year period. In Queensland, RBT led to a reduction in fatal crashes of 35% and 28% in Western Australia over a four year period.

Police officers can require a driver to take a breath test. If the driver refuses to take the test, or, if the test is positive, that person will be arrested and taken to a police station for breath testing within two hours of the first test or refusal.

The cost to the community

The statistics are staggering and it is little wonder all Governments are keen to minimise the costs to the community.

In 2006, the cost of each fatality crash to the Australian community was estimated at approximately \$2.6m, while the cost of each hospitalisation crash was estimated at approximately \$266,000!

What happens in Court?

The matter must be dealt with in a Court and the paperwork received by a driver will set out the day and time of that court appearance. As you can imagine the Court process can be confronting and worrying and of course there will be penalties imposed.

If the charged person is found guilty or convicted, they can receive a fine, a period of disqualification of their licence, a jail sentence or a combination of these penalties. The range of penalties which the Court can impose depends on the blood alcohol reading and the person's prior record for similar offences.

Court appearances should not be taken lightly and for anyone it is wise to first seek legal help well ahead of the intended court date so their details can be properly discussed. Fundamentally the first issue to consider is if the person should plead guilty to the charge/s and review what the police assert the facts to be.

It may be appropriate to adjourn the matter so there is more time to prepare, or because the person's lawyer may not be available on the first date. Essentially the person needs to get legal help in order to plan for the process properly.

If there is to be a guilty plea then the person needs to know what the likely penalties are and if they need to do anything that might assist in reducing that penalty such as enrolling in a driving or alcohol education course or seeking character references or seeking other relevant evidence in support of that guilty plea.

The cost of each fatality crash to the Australian community was estimated at approximately \$2.6m, while the cost of each hospitalisation crash was estimated at approximately \$266,000!

Penalties in SA

A driver providing a reading of between .05 and .079 for a first time offence may receive an expiation notice with no loss of licence. A fine and demerit points will be imposed. In this instance the driver will not be charged with PCA and will not be summoned to appear before the court.

Drivers who do not pay the expiation notice (and therefore elect to be prosecuted) or are charged with exceeding the Prescribed Concentration of Alcohol face a number of different consequences. Penalties have been increasing significantly. If the driver is a first offender on a full licence and has a reading greater than .05%, then he or she will face a mandatory loss of licence of at least 3 months.

For a reading that is greater than .08% then the driver is liable to be disqualified from holding or obtaining a drivers licence for at least 6 months. And for a reading greater than .15% then the driver faces a loss of licence of at least 12 months.

These are minimum penalties only. The driver is likely to receive an immediate notice of disqualification from the police. Later, that driver will receive a summons from the police to go to court. The court can impose a loss of licence far greater than the minimum stated in the notice.

If the offence is combined with other offences, or aggravated by other means, (ie an accident or high speed) then the driver should expect an increase from the minimum. Likewise, if the reading is toward the higher end of a category then there may receive an increase in penalty.

Will the media be at Court?

It is extremely unlikely the media will be interested. Having your case reported in the media does not help you. Having to go to Court is stressful enough without having your peers, your work colleagues or your local community hearing about it through the media.

Summary

The Courts treat traffic offences seriously, particularly drink driving offences. Therefore, for anyone confronting this issue it is important to get competent legal advice as early as possible and certainly before they need to attend Court.

The importance of character references in a Court case

If you know someone who is being sentenced in Court and they ask you for a character reference do you know what to do?

The purpose of a character reference for a person who has pleaded guilty to a criminal or traffic matter is to bring to the Courts attention details of good character about the accused. Lawyers will acknowledge that in many cases the character reference will not make any difference to the penalty imposed, however all lawyers would agree that a poorly framed character reference will not help at all.

Address the reference to the Court

References that are not addressed to the Court are basically unusable. An unaddressed reference is likely to be met with a comment from the Judge or Magistrate that it could be a job application or some club membership with the implication being that it will be ignored.

So it is best to see the Court papers so you can address it to the relevant Court. You do not need to address it to a particular Judge or Magistrate, “The Presiding Magistrate (insert district) Court” will do.

This immediately indicates it is for the person who is before the Court. For the same reason it needs to have a date and preferably be kept clean, businesslike and typewritten. Overall the reference should not exceed one page. Often the best ones are succinct.

Specify the time you have known the person

It should include details stating how long the person writing the reference has known the person they are writing about and set out the details about how that happened, for example through work or a sporting team.

The person writing the reference should say in their own words and (hopefully) make relevant and positive comments about the character of the subject.

Acknowledge the offence

You need to put yourself in the shoes of the judicial officer. A reference will carry more weight if the person writing the reference has been told by the accused about the offence (not just some of the offences but the lot). If the writer can make the point that the accused person has discussed it with him/her the writer can then say, if applicable, that it is out of character. It is advisable that a person writing a character reference include note this in the opening of the reference so the judicial office is made aware early on and can read with that in mind as in addition, that notwithstanding the offence, the writer is still prepared to write such a reference.

The purpose of a character reference for a person who has pleaded guilty to a criminal or traffic matter is to bring to the Courts attention details of good character about the accused.

Discuss the offence with the person

For the same reason it can be helpful for the person writing the reference to actually discuss the offence with the person they are writing about. They might then be able to say that they are aware that the person is sorry or remorseful for what they have done or cite examples of why it is out of character.

Family or Community involvement

If you know the accused through a family or community association then you can cite examples of your observations about family commitments or involvement with community activities that the offender may have undertaken that you know about.

Summary

Sometimes references won't help at all but in other circumstances they can have a positive effect in the sentencing process. Nevertheless it is better to be in a position to provide them than not. You don't want to provide too many but if you ask say three people you may want to use the best two.

If you are ever in need of one or of having to write one it is useful to have these tips in mind.



Injured Persons Law

Accidents can happen at any time, in circumstances that you least expect. Often it results in considerable pain, distress, anxiety and uncertainty, not only for yourself, but for your family and loved ones too. Financially, you may be required to pay mounting medical expenses and could be under substantial financial pressure due to your inability to continue work. We are here for you, to provide

you with a safety net to ensure that you have the competent and practical advice to claim your right to compensation.

Our Compensation lawyers can act on your behalf to protect your interests and maximise your entitlement.

Our areas of expertise include:

Medical Negligence

Public Liability

Total & Permanent Disability

Motor Vehicle Accidents

Slip and Fall

Workers Compensation

Are you entitled to claim for TPD under your Super Policy?

If you are unable to work or return to full time employment due to injury or illness you may have an entitlement to claim for a total or partial disability benefit provided under the insurance often taken out by your Superannuation fund.

What are the benefits available?

The benefits available will depend on what your Super Fund has agreed with its insurer, but the type of insurance generally provided for is a lump sum payment in circumstances of a member's Total and Permanent Disability (TPD)

Sometimes there may also be a benefit for partial payment when a member becomes partially disabled which may be in the form of a pension or monthly payments paid for a set period. Here we answer some frequently asked questions to help you.

What if I had my disability before I joined the Super fund?

Importantly, because the insurance policy is not taken out by you but by your Super fund, the Super fund's insurer will not usually require you to complete an application form at the time of becoming a member.

In this case, the TPD cover will operate to provide automatic cover to you on becoming a member of the Super fund rather than having to apply and be accepted.

What this means, is that in some cases, you may still be covered for a pre-existing disability or illness where the disability or illness which causes you to stop work occurs while you are a member.

Does my disability have to be caused by work?

Entitlement to extra benefits under a Super fund has nothing to do with whether your disability is related to your employment or the work you were doing when you became injured. For example, the disability may be due to terminal illness, heart problems or mental stresses unrelated to work. If the disability was due to your work, a benefit entitlement may still exist.

What if I am receiving a pension or workers compensation payments?

Under a Super Fund the entitlement to benefits or right to keep benefits will usually be unaffected by whether you have received compensation or damages from a court case or whether you are on a disability payment from Centrelink or Veteran Affairs.

If the disability was due to your work, a benefit entitlement may still exist.

Are there time limits?

While every Super fund has different rules about claiming and eligibility there is no time limit specified by any law for the making of a claim.

However, delay or a failing to act in a timely manner and for no good reason will always be a factor for a decision maker and so you should do something about making a claim as soon as possible.

Seek legal advice

Claims for benefits under insurance policies taken out by Super funds involves knowledge and experience in a number of areas of the law, it is not work undertaken by most solicitors and for that reason you need the specialist skills

Making a workplace injury claim

If you have been injured at work, an experienced lawyer can help you to claim a fair and sustainable outcome that has affected your life.

In this article we answer some key questions arising from workplace injuries.

Claiming Compensation for Injury in the Workplace

Compensation is usually payable for workplace injuries even if there is no fault on the part of the employer as long as the injury is work-related.

If you suffer a workplace injury it is essential you complete and lodge a workers compensation claim form with your employer, no matter how minor the injury may seem at the time. Before lodging your claim form however, you must first report your injury to your employer.

How do I report my injury?

The South Australian workers compensation legislation requires workplace injuries to be reported as soon as possible (within 24 hours if you can) after the injury and before any voluntary resignation from employment. We recommend you speak to us first, before making any decision about voluntary resignation.

A workplace injury can be reported verbally, by completing an injury notification form or by making an entry in the injury register book held by your employer. The report of the injury must contain your name and address, the date on which your injury occurred and the nature and cause of your injury.

Failure to notify your employer of your injury may compromise your claim.

How do I lodge my workers compensation claim form?

Following any injury, your employer must provide you with details of their workers compensation insurer and provide a compensation claim form when a request is made.

This form should be completed by you together with your employer. This provides an opportunity to discuss any support you might need to help you remain at or return to work as soon as possible. Where the employer and worker are unable to complete the form together, the form can be completed separately by you and lodged with your employer.

If medical treatment is required for your injury, you have the right to consult your own doctor. Whilst some employers may insist you consult their “company doctor”, you are under no obligation to do this. You should have your doctor complete a Workcover Medical Certificate even if you initially do not require time away from work. This certificate should be submitted to your employer along with your claim form.

We recommend you retain copies of the claim form and all certificates.

Is there a time limit for making a claim for compensation?

Yes a claim for workers compensation should be made within six months of your injury. You should not assume you can get an extension. If in doubt you should speak to your lawyer immediately.

What are my employer’s obligations?

Within five business days of receiving your claim form, your employer must complete their relevant sections on the form and forward it to their claims agent.

If you are unable to perform your normal work, following your injury, but are fit to perform selected or suitable duties; your employer is obligated to provide you with those duties if they are available.

If medical treatment is required for your injury, you have the right to consult your own doctor. Whilst some employers may insist you consult their “company doctor”, you are under no obligation to do this.

If you believe your employer has failed to make reasonable efforts to identify and offer you suitable employment in your workplace you can:

- *apply to your employer in writing seeking suitable employment; or if that fails*
- *apply to the South Australian Employment Tribunal for an order that your employer provide suitable employment , and/or*
- *submit an employer investigation request to ReturnToWorkSA.*

The employer has limited ability to terminate your employment following a work injury. You should always seek legal advice if your employer purports to terminate your employment or attempts to have you resign.

What are the insurer's obligations?

When the claims agent receives the completed claim form they:

- *will contact you and employer*
- *may request additional information such as information to assist in determining the rate of weekly payments*
- *will assess and determine the claim for income support and/or medical services*
- *will arrange services to help you to recover and return to work. This may include visiting you and the employer if you are likely to be away from work.*

Other compensation benefits which may also be payable are travelling expenses and lump sum payment for permanent injury. You may also have the right to make a claim for damages if you sustain injury as a result of the negligence of your employer.

Injury caused by a dog attack

Where does the liability lie when your dog injures another person or animal? This is an interesting question with a complex answer.

The owner of a dog is liable if the dog causes bodily injury to a person when that injury is caused by wounding or attacking. Likewise the owner is liable for damage to the personal property of a person caused by a dog in the course of attacking that person.

So what can be done to try to limit the liability as a dog owner?

When keeping a dog on your premises the premises should be properly fenced and the dog secured within the premises. There should be no holes in the fence where the dog can escape nor should the dog be able to dig their way out from the property.

Similarly if the dog is kept within the house it is the responsibility of the owner to ensure that the house is secure and the dog cannot escape from the premises through an open door or window.

Strict liability

It is important to remember that liability for a dog attack is usually strict liability.

That is, if your dog attacks or bites a person you will be considered liable. The only circumstances under which a Court will not consider you liable is if you can establish that the attack occurred as the result of the dog being provoked by the victim or if the attack occurs on your premises and the person being attacked was not lawfully on the property.

Restraining your dog in public

If you take your dog for a walk in a public place, the dog must be under the effective control of a competent person by means of a chain, cord or leash attached to the dog.

By way of interest, remember that you may be committing an offence even if the dog is leashed if it is taken into certain places, including a children's play area, school or child care centre, without the express permission of the person controlling the school or centre.

If you are taking your dog for a walk on a leash in a public area and let your dog off the leash to chase a ball and in doing so your dog bites a person, you will be held to be liable for the attack as you have failed to restrain and keep your dog under control.

If you and/or your dog is attacked whilst you are walking in a public place and your dog retaliates to the attack you may not be liable for the injury your dog has caused as you would be able, in these circumstances, to establish provocation.

What happens in the case of an accident?

What happens when your dog escapes from your property and attacks a person causing injury? What happens when your dog breaks away from its leash?

If it can be established that your dog was provoked into attacking another animal or person or the attack occurred on your premises and the victim was not lawfully on the premises then you can use this as a defence.

It is important to exercise due care. Try to ensure that your premises are secure when keeping a dog in the yard or house. This is very important as failure to do so could result in a finding of negligence.

What can you do to try to protect yourself from liability in such cases?

Some Home & Contents Insurance policies actually provide cover for certain circumstances when your dog causes injury to people or damage to property.

This can also be in circumstances where the injury or damage has occurred away from the insured premises.

It is important to check whether such coverage is included in your home & contents policy as not all policies offer this coverage.

Dangerous breeds

Every dog owner should be aware that a higher liability is attached to owners of a dangerous dog, menacing dog or restricted dog. Contact your local council to get a list of breeds of dogs which have been restricted.

If you take your dog for a walk in a public place, the dog must be under the effective control of a competent person by means of a chain, cord or leash attached to the dog.



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