Esplins
SOLICITORS

Esplins Law Report

MAY 2014

Happy 25th Birthday!

Esplins Solicitors has come a long way since founders, Phillip Esplin and Stephen Rush, first hung up their own firm shingle at Martin Place in February 1989. Over the ensuing and very enjoyable 25 years Esplins Solicitors has prided itself on giving sound legal and commercial advice with that personal touch to its many and varied loyal clients.

During that quarter century Esplins Solicitors has had many hard working and talented solicitors come and go as well as secretaries and administrators who all helped build Esplins' reputation for solving complex legal and commercial problems for its clients. The success of Esplins owes much to the relationship between founders, Phillip Esplin and Stephen Rush, with Phillip allegedly being the "thinker" and Stephen the "worker" as highlighted by this anecdote:-

"In the early nineties with interest rates very high and Phillip and Stephen discussed arranging a "cap" and "floor" on Esplins' interest rate commitments. Some months later Phillip said to Stephen 'Rushy did you organise that "cap" and "floor" on our interest rates?' to which Stephen replied 'No'. Phillip started berating everyone so Stephen said to him 'If it was so critical why didn't you do it yourself?' to which Phillip replied 'Mate, I am the ideas man it is up to you to get everything organised.'"

That kindred spirit continues today with Phillip's son, Hamish, enjoying a similar partnership with Stephen (albeit without the same "ideas" as his father). Esplins Solicitors looks forward to continuing its association with its many and varied clients of the last 25 years.

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WARNING – Trustees of SMSFs

The last 10 years have seen a significant increase in the number of self-managed superannuation funds ("SMSFs"). There are numerous regulatory requirements which must be observed by trustees of SMSFs to ensure that they are complying funds which are entitled to the benefit of the favourable taxation treatment. The majority of these rules and regulations are set out in the Superannuation Industry (Supervision) Act 1993 ("the SIS Act").

Originally, the Australian Taxation Office ("ATO") had limited and disproportionate powers for dealing with breaches of the SIS Act by trustees. The ATO could make the SMSF non-complying (thereby denying its favourable tax treatment), could disqualify the trustee (or directors of the corporate trustee) from acting as a trustee or could seek Court orders.

These powers were not often utilised by the ATO due to the severe consequences for the SMSF or the cost and time of obtaining Court orders.

From 31 March 2014 the ATO received new powers to make:-
(a) rectification directions;
(b) education directions; and/or
(c) administrative penalties.

If a trustee of a SMSF is in breach of its/his obligations under the SIS Act the ATO can require the trustees or directors of the trustee company to rectify the non-compliances and/or to undertake specific courses of education within a specific timeframe. Failure to do so can result in a financial penalty (currently $1,700.00). Any such penalty must be paid by the trustee or director personally and must not be paid or reimbursed out of the SMSF.

In addition, the ATO has been given the power to impose administrative penalties (ranging from $850.00 to $10,200.00) for specific nominated contraventions of the SIS Act. Again these penalties are imposed on the trustee or directors of corporate trustees personally and cannot be paid or reimbursed out of the SMSF.

These new measures increase the ATO's powers and trustees of SMSF should take notice. Contraventions of the superannuation laws will be met with one or more of the ATO's new powers which will hit the pockets of the trustees or directors of the corporate trustees.

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Project DO IT

On 27 March 2014 the Commissioner of Taxation announced initiative Project DO IT – a clever acronym for "disclose offshore income today". The purpose of the initiative is to entice taxpayers to participate in the initiative and disclose any foreign interests before a global crackdown on people using international tax havens.

"Now is the time for individuals with offshore income to get their affairs in order and avoid steep penalties and the risk of criminal prosecution for tax avoidance", said Commissioner Chris Jordan.

Project DO IT covers amounts not reported or incorrectly reported in tax returns including:

- foreign income or a transaction with an offshore structure;
- deductions relating to foreign income which taxpayers have claimed incorrectly;
- capital gains in respect of foreign assets or Australian assets transferred offshore; and
- income from an offshore entity that is taxable in a taxpayer's hands.

The ATO offers a number of benefits to eligible taxpayers who disclose under Project DO IT, including;

- the ATO will only assess tax for the years where the time limit for amending returns has not expired (generally the last four income years for taxpayers with offshore financial affairs);
- the ATO will remit the tax shortfall penalty to 10% for annual income over $20,000 and fully remit the shortfall penalty for income of $20,000 or less;
- the ATO will not form an opinion that the taxpayer has committed fraud or tax evasion;
- the ATO will not investigate your disclosure for the purposes of criminal prosecution;
- the ATO will not refer you to another law enforcement agency for criminal investigation; and
- the ATO can provide assurance and certainty as to the tax effects of winding up offshore structures or transferring offshore assets to Australian entities.

As a condition of participation the ATO requires that the taxpayer's offshore structure is brought within the Australian tax system. To participate in Project DO IT the taxpayer must lodge a truthful disclosure statement with the ATO by 19 December 2014.

Considering that the ATO has unlimited time to review tax affairs if a taxpayer's conduct amounts to evasion or fraud the "amnesty" might be of interest to nervous or unsure taxpayers.

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Swimming Pool Certifications

Since 29 October 2013, swimming pool owners were required to register their swimming pools with the NSW Register of Swimming Pools. A swimming pool owner will be required to assess and state in the register that, to the best of their knowledge, their swimming pool complies with the safety requirements of the Swimming Pools Act 1999 ("the Act").

You can register your swimming pool with your local council or online at www.swimmingpoolregister.nsw.gov.au

There is no fee to register your swimming pool online. Failure to register your swimming pool may incur a fine of $220.

Inspection and Certificates of Compliance

Local Councils are now required to develop, in consultation with the communities, a swimming pool inspection program. Council officers or an accredited certifier under the Building Professional Act 2005 may also conduct an inspection of your swimming pool to make sure it complies with the requirements of the Act and can issue you with a certificate of compliance. A certificate of compliance will remain valid for 3 years.

Your local council may direct you to take specific measures to ensure that your swimming pool or your premises complies with the Act ("Direction"). You can be fined up to $5,500 if you fail to comply with a Direction.

Only tourist, visitor and multi-occupancy developments are required to have a current compliance certificate. However, you can still organise for your local council or an accredited certifier to inspect your swimming pool for a fee.

Selling or Leasing Property

From 29 April 2015, a current compliance certificate will be required to sell a house or unit with a swimming pool or spa bath. A compliance certificate must be included in a contract for the sale of land. Strata owners will need to contact their body corporate or strata manager for a copy of a current compliance certificate. Failure to attach a current compliance certificate may entitle a purchaser to rescind the contract.

If you wish to lease your house or unit and it has a swimming pool you will also need to attach a current compliance certificate to the residential tenancy agreement or provide a copy of the certificate to your tenant.

We will be happy to advise should you require any assistance or have any further questions in relation to the registration of, or obtaining a compliance certificate for, your swimming pool.

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Bullying in the workplace

On 1 January 2014 new provisions of the Fair Work Act 2009 ("the Act") in relation to anti-bullying commenced. These new provisions allow a worker who thinks that he/she is bullied at work to apply to the Fair Work Commission ("FWC") for an order that the employer stops bullying or for an order requiring the employer to introduce anti-bullying policy or training.

Bullying in accordance with the Act is repeated unreasonable behaviour by an individual or group that creates a risk to another worker's health and safety. The following actions may be considered bullying: insulting or abusive comments, unjustified criticism or comments, unreasonable or constantly changing deadlines, spreading malicious rumours, changing rosters or leave to deliberately inconvenience workers. However, reasonable management action carried out in a reasonable manner will not constitute bullying behaviour.

The new provisions apply to employees, contractors, labour hire personnel and workers engaged under other workplace arrangements. Further, to be entitled to apply to FWC for an order, a worker must be working in or for a proprietary or public company registered in Australia, federal government or authorities, incorporated volunteer associations that have at least one employee or other entities which are covered by the Act. Workers engaged in State public sector or in unincorporated partnerships are not covered by the anti-bullying provisions of the Act. Such workers can resort to the State work health and safety legislation and authorities.

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The Australian Privacy Principles

The new Australian Privacy Principles ("APPs") took effect in March 2014. The APPs provide a uniform set of privacy principles and replaces the Information Privacy Principles and the National Privacy Principles which previously governed the public and private sectors, respectively.

Government agencies and organisations, including companies and individuals, must comply with the APPs when collecting, using or disclosing personal information. Personal information is broadly defined in the Privacy Act 1988 as, *"information or an opinion about an individual whose identity is apparent or can be reasonably ascertained from the information or opinion"*.

The APPs consists of 13 new principles grouped into 5 parts. Part 1 deals with managing personal information in an open and transparent way (APP 1 and 2). Organisations are required to review or implement their practices, procedures and systems to ensure that they comply with the APPs, and are able to deal with inquiries or complaints from individuals about their compliance with the APPs.

Part 2 deals with the lawful and fair means of collecting personal information including unsolicited personal information (APP 3, 4 and 5). Personal information can only be collected if it is reasonably necessary for one or more of the organisation's functions or activities. Sensitive information can only be collected with the consent of the individual to whom that information relates. If the organisation is in receipt of unsolicited personal information which is not reasonably necessary for its functions or activities, it must lawfully destroy the information or ensure that the information is de-identified.

Part 3 deals with the use and disclosure of personal information and government related identifiers (APP 6, 7, 8 and 9). Personal information can generally only be used for the particular purpose for which it was collected. Strict rules apply for organisations that wishes to use personal information for direct marketing and imposes greater accountability to record the sources of the personal information used. Organisations must also take reasonable steps to ensure that overseas recipients of personal information comply with the APPs.

Part 4 deals with the integrity, quality and security of personal information (APP 10 and 11). Organisations must ensure personal information collected is accurate, up-to-date and complete and protected from unauthorised access, modification, disclosure or loss.

Finally, Part 5 deals with requests for access to, and the correction of, personal information (APP 12 and 13). Unless an exception applies, organisations must provide access to individuals to their personal information. Where an organisation is either satisfied that the personal information is inaccurate, irrelevant or misleading, or at the request of the individual to whom the personal information relates, the organisation must take reasonable steps (if any) to correct personal information it holds.

This article provides a brief overview of the APPs. A careful review of the APPs together with the organisation's privacy policies and information systems will be required to ensure ongoing compliance.

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Super-tribunal NCAT has commenced

On 1 January 2014 the NSW Civil and Administrative Tribunal ("NCAT") opened for business. NCAT is NSW's "super-tribunal" as it has taken control of the jurisdiction of 22 state tribunals including the Administrative Decisions Tribunal, the Consumer Trader and Tenancy Tribunal, the Medical Tribunal and the Guardianship Tribunal. NCAT has four separate divisions;

- the Administrative and Equal Opportunity Division;
- the Consumer and Commercial Division;
- the Occupation Division; and
- the Guardianship Division.

The NSW Government's creation of a super-tribunal follows other states' precedent: Victoria led the way with its creation of the VCAT in 1998. NSW Attorney-General Greg Smith stated that he hoped that amalgamating 22 tribunals into NCAT will minimise the community's frustration in choosing the correct tribunal and that NCAT will provide simple quick cost-effective and transparent ways of resolving disputes.

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