



New Revenue Benefits And Detriments

The Australian Government reduced the taxation impost on small taxpayers. However, the NSW Government has increased the land tax and stamp duty imposts on land own by some family trusts.

Some of the benefits are:-

1. A lower company tax rate for small businesses for the 2016-17 tax year – the company tax rate for small businesses has reduced from 30% to 27.5%. The maximum turnover a small business can have to get the benefit of this lower tax rate is \$10 million (it was formerly \$2 million and will be \$25 million in the 2017-2018 financial year).
2. Immediate tax write-off for small businesses - a small business, namely a business with turnover of less than \$10 million, can immediately deduct the full purchase price of an asset acquired for less \$20,000. Previously the cost of such an asset had to be written off over a number of years approximately equal to the expected life of the asset. This instant write-off was extended by the 2017 Federal Budget so as to apply up to the 30 June 2018.

One of the detriments is:-

1. Foreign persons are required to pay a higher rate of stamp duty

on property acquisitions in NSW and a higher rate of land tax on land owned in NSW than the already high rates paid by Australian residents. However, typical family trusts utilised by many of our clients could be unwittingly caught by the higher rates of stamp duty and land tax on property acquired by or held in their family trusts. Generally, family trusts have a wide class of potential beneficiaries who can benefit under the family trust. If one of these beneficiaries is a foreign person then the family trust could be deemed to be a foreign person and be liable to higher rates of stamp duty and land tax.

So if your family trust allows income or assets of the family trust to be distributed to members of your extended family who live overseas then you need to take action now to avoid surcharge rates of stamp duty and land tax. If these members of your extended family are still Australian citizens (even if they are not ordinarily resident in Australia) you should not have any issue.

With all revenue issues there are always “pluses” and “minuses”.

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Personal Property Security Act Amendments Reduce Administrative Burden

Under new Personal Property Security Act (PPSA) amendments hirers or bailors are only required to register a security interest if the initial period, or the equipment is held, for two years or more.

The Personal Property Securities Amendment (PPS Lease) Act 2017 came into effect on 20 May 2017 and is aimed at reducing technicalities associated with short-term and indefinite period loans.

These transactions may be employed where property is used to secure a loan or in a hire arrangement. This allows the owner to retain an interest while the lessee or bailee holds the property. This is particularly important where a lessee or bailee becomes insolvent while holding property as it allows the owner to retain their interest in the property.

In the case of indefinite term loans, registration can be effected when it is believed that the term of the loan will exceed two years. This can be done either prior to the loan or when it becomes apparent to the lender. This allows greater flexibility as a hirer can both accommodate an unfixed hire period with the option to register the asset once it falls within the bounds of the legislation.

When addressing the changes the Minister for Justice, Michael Keenan, argued that the former system imposed a costly and administrative burden on small businesses who were at the same time at risk of losing assets if the lessee were to become insolvent. It is felt that that the new arrangement balances the rights of creditors, lenders and purchasers while allowing small hiring businesses to operate safely and effectively.

Not all leasing arrangements are captured by the PPSA. For example, the PPSA generally does not apply where an owner is not engaged in the business of leasing or lending goods. You should always seek our advice regarding your specific leasing arrangements because there are exceptions to this general rule, such as the leasing of a vehicle.

The new PPSA amendments will not apply to arrangements entered into prior to 20 May 2017.

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Airbnb Under Scrutiny

The NSW Government recently released a public paper as a way to provide better regulation of the use of accommodation services like Airbnb and Stayz, which can be viewed here:

www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiries.aspx

Currently a large amount of the regulation of short-term letting arrangements is dealt with on an ad hoc basis by local councils and their views regarding short-term letting can change considerably across NSW.

Property rights in relation to short-term letting has been a considerable public issue for some time as both landlords and guests have grappled with the legal consequences of short-term accommodation. Case in point, in *Swan v Uecker* [2016] VSC 313, the Supreme Court of Victoria handed down a decision that found that a tenant who had listed an apartment on Airbnb as being available for short stays had unlawfully and without the consent of the owner sublet the property in breach of its lease with the landlord.

In that decision the Supreme Court found that the Airbnb agreement entered into by the tenant inviting guests to occupy the whole of the property was properly characterised as a lease and as such was in breach of their own tenancy agreement as they had not obtained written authorisation from the landlord.

The NSW Government's public paper comes after a lengthy inquiry

entitled the "Adequacy of the regulation of short-term letting in NSW" and includes a number of recommendations such as planning instruments should be amended to require short-term occupants to obtain a licence and pay a levy.

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Don't Underestimate Your Director's Duties

The *Corporations Act 2001* (Cth) ("the Act") imposes strict statutory and fiduciary duties on directors and officers of companies. The majority of the director's duties create civil obligations and when breached a civil penalty is imposed. It is often overlooked that section 184 of the Act creates a criminal offence if a director recklessly or intentionally fails to exercise their directorial powers in good faith or for a proper purpose. The maximum penalty for contravening section 184 of the Act is 5 years imprisonment or a fine of \$360,000 or both. Criminal proceedings against directors are not as uncommon as people believe, ASIC's six-monthly report covering July to December 2016 discloses that as at 1 January 2017 there are 9 criminal actions (and 22 civil actions) against directors and officers which are pending before the court.

In the recent decision in *R v Sigalla* [2017] NSWSC 52, Andrew Sigalla was sentenced to 10 years imprisonment with a non-parole period of 6 years after being convicted of 24 counts of dishonestly using his position as a director to gain a benefit for himself or a third party contrary to section 184 of the Act. Mr Sigalla was a

director of TZ Ltd and used his position as director to transfer over \$8.6 million of company funds and shares to himself and personal creditors such as his bookmaker.

When determining Mr Sigalla's sentence, Justice Adamson took into account Mr Siggalla's lack of remorse (and "significant hubris" at [86]), that only \$250,000 of the \$8.6 million taken from the company was recovered by ASIC, and that sentence must be a general deterrent to other directors because it is "notoriously difficult to detect and prosecute" directors who misuse their position. His Honour noted that the court needed to impose a strict criminal sentence when a director contravenes section 184 of the Act to safeguard investors from directors of public companies misusing their position and to restore investor confidence in the ASX.

If you are unsure of any of your duties as a director or an officer of a corporation, please contact us.

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Casual Employees Entitled To Annual Leave

In November 2016 the Federal Circuit Court handed down a decision in *Skene v Workpac Pty Ltd* [2016] FCCA 3035. The Court found that an employer must compensate its casual employee for annual leave to which the employee was entitled despite his casual status and additional hourly payments made in lieu of that leave.

Mr Skene was employed as a truck driver in a Rio Tinto coal mine in Queensland for a continuous period of over a year and regular working hours during seven days' shifts which were set 12 months in advance. Mr Skene lived in accommodation provided free of charge by his employer and used fly in, fly out arrangements also provided by the employer. According to the Court, all these were characteristics of a permanent employee. However, Mr Skene's employment contract (the Contract) referred to him as a casual employee and both parties considered the employment as casual, he was paid by the hour through his weekly timesheets and his employment was terminable on one hour's notice.

The Court had to decide if Mr Skene was entitled to paid annual leave, meaning the Court had to consider if he was in fact a permanent or casual employee. The terms of the enterprise agreement and the Contract stated that only a permanent employee was entitled to paid annual leave. Neither the enterprise agreement nor the Contract defined or sufficiently defined a permanent or casual employee. The Judge looked into the contractual terms and

subjective intentions of the parties, and concluded that Mr Skene was a casual employee, and therefore, was not entitled to annual leave.

The next question considered by the Court was whether Mr Skene was entitled to annual leave under the *Fair Work Act 2009* (Cth) (the Act). The Act does not define a casual employee. The Judge did not take into account the casual status of the employment under the enterprise agreement and the Contract, but took guidance from several court cases and concluded that Mr Skene was not a casual, but rather a permanent employee under the Act and was entitled to annual leave. It is understood that the employer is seeking to appeal the decision.

When employers intend to provide work or employ staff on a casual basis, it is important to ensure that terms of an employment contract and all communications between the employer and the employee sufficiently describe a casual status of employment. Nevertheless, on the basis of this recent court decision casual roles which have characteristics of permanent employment may be considered permanent under the Act, and employee entitlements like annual leave may arise.

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UPDATE!!! Withholding Tax On Property

Esplins Law Report in July 2016 contained an article by Stephen Rush regarding the new non-resident withholding tax regime. The regime, in short, provided that whenever a purchaser buys property in Australia for a price of \$2 million or more the purchaser must withhold 10% of the purchase price on settlement and immediately pay it to the Australian Taxation Office unless the vendor produces a clearance certificate. The amount of \$2 million was set in place by the Australian Government so that the majority of transactions would be excluded from the regime (i.e. everyday Australians buying property in Australia). However, from 1 July 2017 the amount of \$2 million will reduce to \$750,000 which means that the majority transactions, especially in New South Wales, will be subject to the regime. Additionally, the percentage to be withheld by a purchaser has increased from 10% to 12.5%.

In addition to the non-resident withholding tax regime, clients should be aware that from 1 July 2018 purchasers of newly constructed residential properties or new subdivisions will be required to remit the GST payable as part of the purchase price directly to the ATO at the time of settlement rather than to the vendor/developer. Currently, GST is included in the purchase price and it is the vendor/developer who remits GST to the ATO. However, some developers are failing to remit the GST (despite having claimed GST credits on their construction costs).

Once the legislation has been drafted we will be able to advise what exactly this means for our developer clients and our clients purchasing property off the plan.

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NSW Government's Housing Affordability Package

The NSW Government recently announced a number of measures in an attempt to improve housing affordability for first home buyers across the state. At present, first home buyers receive a stamp duty exemption on new homes valued up to \$550,000 and vacant land up to \$350,000 and concessions for new properties valued between \$550,000 and \$650,000 and vacant land costing between \$350,000 and \$450,000.

The Government's changes commencing on 1 July 2017 include:

- abolishing all stamp duty for first home buyers on existing and new properties valued up to \$650,000;
- stamp duty concessions for first home buyers of properties valued up to \$800,000;
- abolishing stamp duty on lenders' mortgage insurance (which banks often require when a purchaser has a limited deposit);
- increasing the foreign investor surcharges on stamp duty from 4% to 8% and on land tax to 0.75% to 2%; and
- removing stamp duty concessions for investors purchasing off-the-plan properties.

To expedite the delivery of new housing the Government has also announced changes to Local Councils' planning processes and committed \$3 billion to infrastructure.

Please contact us if you are buying or developing properties in NSW and would like further information on how the above affects you or your business.

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Congratulations

to Emma Mancini and her husband, Dean, on the arrival of their new daughter, Claudia, on 25 July 2017. Mother and daughter are thriving.

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