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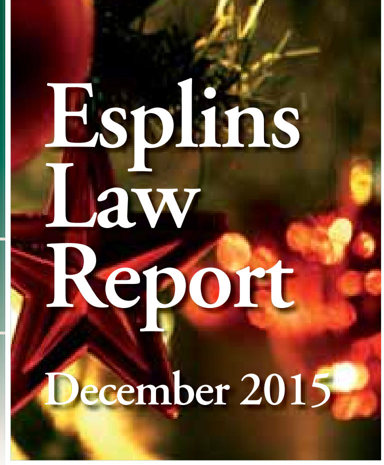

ATO on the Warpath – Rental Property Deductions

If you own a rental property and the expenses you claim exceed the rental income watch out. If your rental property is in a popular holiday destination you need to be extra careful – you are on the Tax Office radar!!

The Australian Taxation Office (ATO) is increasing its focus on rental property deductions, particularly rental properties that are negatively geared, that is, where the deductions exceed the rental income and the excess deductions are offset against other income. The ATO is sending letters to taxpayers who own properties in approximately 500 postcodes across Australia – primarily in holiday destinations – reminding taxpayers that they can only claim deductions they are entitled to, for periods the holiday home is rented out or genuinely available for rent.

Taxpayers need to keep accurate records of their property income and expenses and evidence to support the amount of deductions they claim.

Typical practices that are being targeted include where:

(a) Taxpayers only rent out their holiday home for a couple of weeks a year during peak periods at very high rentals to help defray the annual expenses of owning a holiday home; and

(b) The rental property is not genuinely available for rental at market rates. It is rented out to family and friends at less than market rates or is advertised for rent or placed for rent with real estate agents on conditions that mean, in reality, that the property will not be rented.

In these circumstances only a proportion of the expenses of owning a rental property or holiday home including interest on funds borrowed to purchase the holiday home, property insurance, agent's commission, council rates, decline in value of depreciating assets and capital works deductions can be claimed as deductions against income received. If the holiday rental home is only genuinely available for rent for 10 weeks of a year then the taxpayer must only claim 10/52ths of the expenses of owning the rental home.

One reason it is important to maintain detailed and accurate records is that the proportion of expenses for which you cannot claim a deduction against rental and other income (in this example 42/52ths) can be taken into account when you sell the property and make a capital gain.

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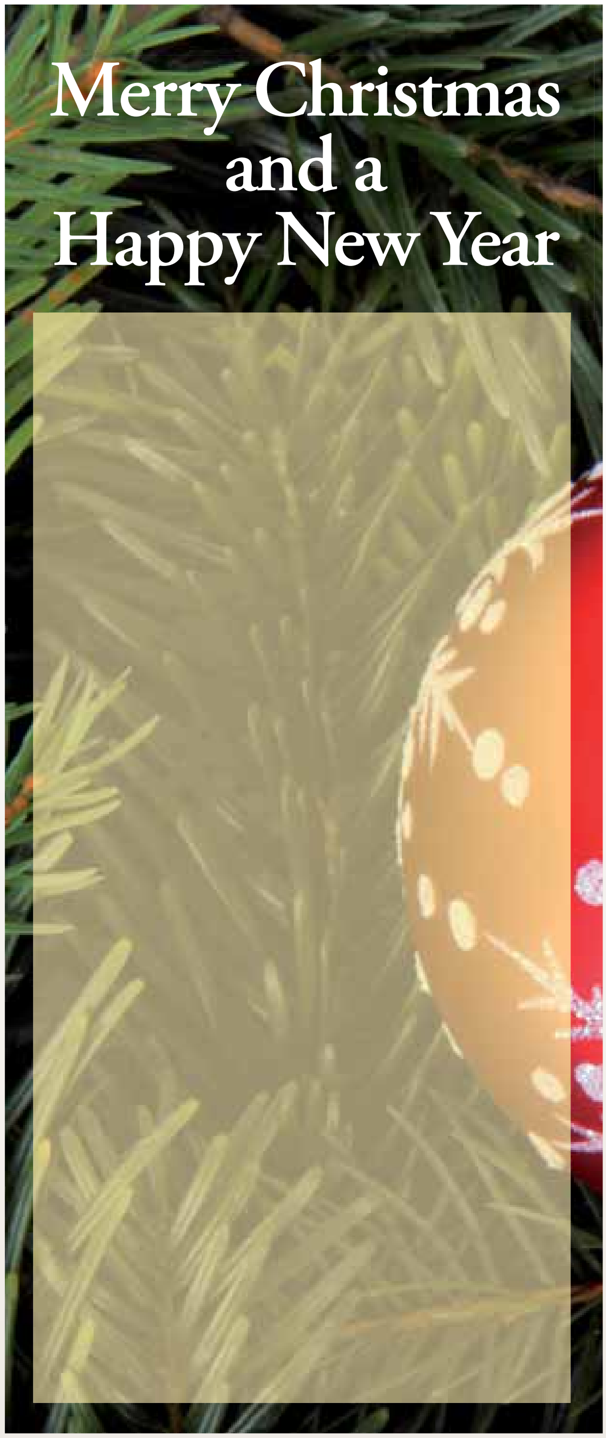

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Why Binding Death Benefit Nominations are important

In our last newsletter we discussed what are Binding Death Benefit Nominations ("BDB Nomination") and the tax implications when nominating the beneficiary of your death benefits payable under your superannuation fund.

In this edition we discuss the importance of having a BDB Nomination in light of the Federal Court's decision in *Stock (as Executor of the Will of Mandie, Deceased) v N.M. Superannuation Proprietary Limited* [2015] FCA 612 ("*Mandie's Case*"). In this decision the Court upheld the decision of the Superannuation Complaints Tribunal ("SCT") that in the absence of a BDB Nomination, the trustee of the superannuation fund was under no obligation to consider the deceased member's Will or any other agreement. The trustee of the superannuation fund was only bound by the laws governing superannuation funds and the terms and conditions of the superannuation fund trust deed. The Court also affirmed that the trustee had discretion to make the payment and the decision only needs to be made on grounds that were fair and reasonable in the circumstances.

As you may recall:

- a BDB Nomination is a written direction to a superannuation fund's trustee as to how and to whom the trustee should pay the member's death benefits at the time of the member's death. If the BDB Nomination is valid and in effect following the member's death, then the trustee must comply with the nomination and pay the benefit to the nominated beneficiaries.

- Under the Superannuation Industry (Supervision) Act 1993 and the Superannuation Industry (Supervision) Regulations 1994, a member may nominate either his or her dependants or legal representative to receive the member's death benefits. Such beneficiaries include the member's spouse, children or a person with whom the member had an interdependency relationship at the time of the member's death, or the executor or trustee named in the member's Will.

Mandie died in 2011. Before his death, Mandie was a member of the BRW Rich 200 List and his wealth was estimated at $289 million. He was predeceased by his wife but was survived by two sons and a daughter. When Mandie died he had in place a life insurance policy in a regulated superannuation fund and a Will under which his daughter was one of the executors. Although the superfund allowed members to make a BDB Nomination, Mandie had not made one.

In 1995, Mandie and his sons entered into a formal settlement agreement to resolve a dispute between them in relation to their respective contributions to the family business. The settlement agreement limited Mandie's sons from receiving any future entitlements from his estate.

The dispute in the Federal Court was between Mandie's daughter and the trustee of Mandie's superannuation fund relating to the trustee's decision to equally divide Mandie's death benefits between his three surviving dependants, his two sons and daughter. Mandie's daughter argued that the 1995 settlement agreement between Mandie and his sons expressly limited them from deriving any benefit from Mandie's estate and, in the absence of a BDB Nomination, the death benefits should be paid to her father's estate.

However, the trustee maintained that the usual practice when no BDB Nomination is made is to firstly pay the death benefits to the member's dependants as a priority. If there are no dependants, then the death benefits are to be paid to the member's legal personal representatives.

The Federal Court upheld the SCT and the trustee's decision and held:

- That the trustee had the discretion to make the payment, which only needed to be exercised on grounds that were fair and reasonable in the circumstances.

- Superannuation is not an asset of the estate and the trustee is not bound to follow the directions of a Will even if superannuation is specifically mentioned in the Will.

- In general, a trustee only pays the death benefits to the legal personal representative if there are no dependants or if there was such a direction in a BDB Nomination.

- Since there was no evidence to support a greater claim on the benefit by any of the adult children it was fair for the trustee to decide to pay the benefit to Mandie's children in equal shares.

Mandie's Case is a reminder that superannuation benefits do not form part of your estate. Accordingly, if you wish to direct the specific payments of your death benefits under your superannuation fund then you must have a BDB Nomination in place to ensure that your wishes are fulfilled.

Please contact our office if you have any further questions or require any assistance in making a BDB Nomination.

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Is defriending an employee on Facebook bullying?

A recent decision by the Fair Work Commission highlights the obligations and responsibilities of employers to ensure that the workplace is free from bullying and the importance of employers having an anti-bullying policy.

In Mrs Rachel Roberts v VIEW Launceston Pty Ltd Mrs Roberts, an employee who had worked for a real estate agency in Tasmania for 5 years, claimed that she had been bullied.

Mrs Roberts alleged the principal of the agency and his wife had belittled and humiliated her, called her a "naughty little school girl running to the teacher" and "unfriended" her profile on Facebook – all of which amounted to bullying under the Fair Work Act.

Section 789FD(1) of the Fair Work Act defines bullying as when a worker is at work and they are subjected to, by one or more people, repeated and unreasonable behaviour which creates a risk to their health and safety. Unfortunately the Fair Work Act does not specifically set out what behaviour constitutes bullying however this recent case shed some light on what conduct may amount to bullying. The Fair Work Commission found that Mrs Roberts had been subjected to bullying behaviour on more than one occasion and that it was repeated over an extended period of time. The Commission found that the sales administrator and wife of the principal excluded Mrs Roberts from receiving staff materials, ignored her and treated her differently to other employees. In addition, the Commission found that the "unfriending" of Mrs Robert's Facebook profile *"evinces a lack of emotional maturity and is indicative of unreasonable behaviour"*.

Curiously, once the Commission found that Mrs Roberts was bullied it requested that the parties confer with a view to coming up with a form of order to stop the bullying – that would have been an interesting meeting!

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New Laws to Protect against Unscrupulous Developers

Off-the-plan contracts are usually conditional upon either a deposited plan or strata plan being registered at Land & Property Information by a specific date – commonly called a 'sunset date'. The vendor and/or the purchaser usually have a right to rescind the contract in the event that said plan is not registered on or before the sunset date.

Due to the increasing value of residential property in New South Wales, especially Sydney, this has opened a door for unscrupulous developers to delay completion of projects and registration of plans in order to rescind contracts under the sunset clause. This enables the developer to re-sell the property at a higher price. Until now purchasers have been left with nothing but the return of their deposits.

On 17 November 2015 the NSW Government passed the *Conveyancing Amendment (Sunset Clauses) Act 2015* in order to close that door. The Act commenced on 2 November 2015 and now prevents a vendor rescinding a residential off-the-plan sale contract due to delays in completing the development and registering a plan by a sunset date unless the purchaser consents in writing to the vendor's rescission or the vendor obtains a Court order allowing the vendor to rescind. It will be interesting to see what case law evolves if vendors are unable to rescind an off-the-plan residential contract under a sunset clause … only time will tell!

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The Ownership of an Employee's LinkedIn Connections

LinkedIn claims it has over seven million users in Australia. The power of LinkedIn is primarily in person-to-person connections and it is a powerful tool for businesses that rely on connections with clients – a prime example being recruiters. So what happens to an employee's LinkedIn connections when that employee leaves the organisation? Employers seldom consider this question at the outset of the employment so employment contracts rarely stipulate who owns the employee's LinkedIn connections. This question has yet to be authoritatively decided in Australia but has been considered overseas.

The High Court of England and Wales 2008 case *Hays Recruitment (Holdings) Ltd & Anor v Ions & Anor* the Court found that the employer had encouraged the former employee, a recruitment consultant, to use LinkedIn as a tool in undertaking his job. As a result, his LinkedIn connections were confidential information belonging to the employer and the Court ordered the former employee to hand over to his employer all of his LinkedIn connections and messages sent or received from LinkedIn.

Five years later in *Whitmar Publications Limited v Gamage & Ors* (2013) the same Court did not specifically decide whether the former employee's LinkedIn connections and groups were the employer's property. The Court held, however, that the connections and groups have the same status as other confidential information, meaning that a former employee is prohibited from exploiting the LinkedIn connections.

LinkedIn's User Agreement confuses the question of ownership by stating *"You agree that … you are entering into a legally binding agreement (even if you are using our Services on behalf of a company)"*. In the 2013 US case of Eagle v Edcomm & Ors LinkedIn was unwilling to intervene where the employer took control of the former employee's LinkedIn account and changed the password and account to reflect the name, photograph, education and experience of the new employee. After the former employee lodged a complaint with LinkedIn it gave access to the account back to the former employee. The US District Court found that the employer's behaviour was an invasion of privacy, a misappropriation of identity and an unauthorised use of a name.

An option available to employers is to pay for Premium LinkedIn accounts for its employees. The User Agreement states that "the party paying for the Premium Service controls such an account (which is different from your personal account) and may terminate your access to it".

Employers should consider addressing the above issues in their employment contracts. If your employment contracts need an update we would be happy to help.

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