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Purchasers of property beware – new withholding tax on property

The sale and purchase of property is about to become more complicated.

The Australian Government is endeavouring to ensure that non-residents comply with their taxation obligations when they buy and sell Australian property and make a profit. However, in doing so the Government has imposed significant compliance obligations on vendors and purchasers and, in the process, will collect detailed information about vendors and their affairs.

In summary, from 1 July 2016 whenever a purchaser buys a 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 tax clearance certificate. In effect the tax clearance certificate will confirm that the vendor is a resident of Australia who is complying with his or her Australian taxation obligations. If a vendor does not produce a tax clearance certificate on or before settlement the purchaser must remit 10% of the purchase price to the Australian Taxation Office on or before settlement and then pay the remaining 90% to the vendor.

If the purchaser fails to pay the withholding tax to the Australian Taxation office he or she will remain liable for the 10% withholding tax and a penalty equal to 100% of the withholding tax that should have been remitted.

This new withholding tax regime applies in respect of all sale contracts with a price of $2 million or more entered into on or after 1 July 2016 including sale contracts entered into on or after 1 July 2016 as a consequence of an exercise of an option entered into at an earlier time.

As a practical matter all vendors of real estate for a price of $2 million or more on or after 1 July 2016 must apply to the Australian Taxation Office for a tax clearance certificate well before the scheduled date of settlement so that the vendor can produce the tax clearance certificate to the purchaser on settlement to ensure the vendor receives 100% of the sale proceeds. The vendor will have to disclose significant information to the Australian Taxation Office to obtain a tax clearance certificate and presumably will have to be up-to-date with his or her tax compliance. Only time will tell what strategies the Australian Taxation Office will adopt.

The withholding tax regime also applies to sales and purchases of indirect interests in Australian real property via the acquisition of more than 10% of the shares in a company or units in a trust whose majority assets are real estate. It does not apply to the acquisition of shares or units listed on the stock exchange.

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A new opportunity for small business restructures

From 1 July 2016 small business owners will be allowed to restructure their affairs and take advantage of new concessions introduced by Parliament to allow greater flexibility which may lead to substantial costs savings. Under the "Small Business Restructure Roll-over Bill" owners of a small business entity, ie. an entity whose annual turnover does not exceed $2 million, will be able to change their legal structure in which they operate their business without incurring a tax liability on that transfer. One way this new measure can be used is for small business owners to move the ownership of the business assets into a family discretionary trust structure which can provide ongoing and substantial tax savings.

There are a number of conditions which must apply in order to take the benefit of the restructuring including that both the transferor and transferee of the business assets must be small business entities and Australian tax residents; the roll-over cannot include as a party a complying superannuation entity; the assets being rolled-over must pass the active asset test; the roll-over must form part of a "genuine restructure" of an ongoing business; and finally, and most importantly, there must be no material change in the "ultimate economic ownership of the assets".

If, for example, an individual or several individuals of the same family group own assets of a small business in their own name then they will be able to take the benefit of these provisions to roll-over those assets into a family discretionary trust which can be then used to benefit members of that family in a more tax effective way.

We'd be happy to assist you if you wish to know more.

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Legislative change to off the plan contracts

In our December 2015 newsletter we wrote about the November 2015 amendments to the *Conveyancing Act 1919* (NSW) regarding developers rescinding "off the plan contracts" under "sunset clauses" (as defined in that Act).

The new section 66ZL of the Conveyancing Act allows the Court, on the application of a vendor, to make an order permitting the vendor to rescind an off the plan contract under a sunset clause only if the vendor satisfies the Court that making the order is "just and equitable in all the circumstances". The Court is to consider:

(a) the terms of the off the plan contract;

(b) whether the vendor has acted unreasonably or in bad faith;

(c) the reason for the delay in creating the subject lot;

(d) the likely date on which the subject lot will be created;

(e) whether the subject lot has increased in value;

(f) the effect of the rescission on each purchaser;

(g) any other matter the Court considers to be relevant; and

(h) any other matter prescribed by the regulations.

In January 2016 the Supreme Court decided *Jobema Developments Pty Limited v Zhu & Ors* [2016] NSWSC 3 which is the first case to consider the new section 66ZL. The developer in Jobema Developments was unsuccessful as it failed to provide sufficient evidence to the Court that it was just and equitable in all the circumstances for the Court to make an order permitting the developer to rescind the contract.

Jobema Developments makes it clear that section 66ZL operates retrospectively to all off the plan contracts (as defined in that section) whether they were entered into before or after the commencement of the section in November 2015. Justice Black noted in his judgment that *"the legislative regime has expressly not excluded existing projects from its operation"*.

The developer asserted that the *"current legislative regime … was unforeseeable at [the] point"* that it purchased the site together with the off the plan contracts and that the developer had proceeded on advice that it was entitled to rescind the contracts.

Justice Black was unpersuaded by this argument and said, *"I am not convinced that the particular possibility that the legislature might intervene, to protect the interest of off the plan purchasers of strata plan units, was unforeseeable, but in any event it seems to me that legislative change generally is a foreseeable risk of business activity"*.

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Work, health and safety in the workplace - penalties under the new Act

The Commonwealth Government's *Work Health & Safety Act 2011* ("WHS Act") commenced in 2012, replacing the old occupational health and safety laws in New South Wales. In our December 2013 newsletter we introduced the new legislation and informed you of the new duties under the WHS Act and to whom they applied.

The WHS Act also created new and broad statutory enforcement powers, including the imposition of criminal offences for breach of statutory duties under the WHS Act.

The criminal offences are divided into three categories:-

Category 1 Where the director or officer, without reasonable excuse, recklessly exposes an individual to a risk of death, serious injury or illness. The maximum penalty is $600,000, 5 years imprisonment or both

Category 2 Where the director fails to comply with a duty and exposes an individual to a risk of death, serious injury or illness. The maximum penalty is $300,000.

Category 3 Where the director fails to comply with a duty. The maximum penalty is $100,000.

Actual death, serious injury or illness is not required to be found guilty of a criminal offence under the WHS Act.

Contraventions of the WHS Act will generally be prosecuted as criminal offences. Although civil penalties may be imposed instead of a criminal charge or civil penalties may be imposed after a person is found not guilty of a criminal offence under the WHS Act.

An inspector or regulator has the power to issue an improvement notice if they believe a person is contravening the WHS Act or reasonably believe a person has already contravened the WHS Act and it is likely the contravention will be repeated. Failure to comply with an improvement notice has a maximum penalty of $50,000.

An inspector or regulator under the WHS Act has the power to also issue a prohibition notice if they believe an activity in the workplace is occurring that involves a serious risk to the health or safety of a person. The prohibition notice will remain in-force until the inspector is satisfied that the risk has been remedied. An inspector may take any remedial action they believe is reasonable to make the workplace safe if a prohibition notice is not being complied with. The costs of the remedial action taken by the inspector must be paid by the person to whom the notice was issued. Failure to comply with prohibition notice incurs a maximum penalty of $100,000.

Non-compliance with an improvement notice or prohibition notice may also be used as evidence of recklessness under category 1 of the criminal offence provisions.

It is important to understand your duties and obligations under the WHS Act because there are serious penalties imposed for non-compliance. You can seek our assistance if you need further advice in your particular circumstances.

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LEGAL UPDATE

Swimming Pool Compliance deadline has finally arrived

In our previous newsletter we informed you of the pending introduction of new rules to ensure compliance with swimming pool regulations. Well they are finally here with some changes. The new rules commenced on 29 April 2016.

The new rules apply to the sale or lease of any property that contains a swimming pool or spa pool other than a strata property with more than two (2) lots. The new rules are designed to ensure that all swimming pools and spa pools have compliant child-restraint barriers.

When selling a property the vendor is required to attach to the sale contract a number of vendor disclosure documents including title searches, zoning certificates and drainage diagrams. From 29 April 2016 in respect of any property with a swimming pool or spa pool the vendor must also attach to the sale contract, as an additional vendor disclosure document:

- a certificate of compliance issued by a local council inspector or an accredited certifier certifying that the pool is compliant; or
- a certificate of non-compliance certifying that the pool is not compliant; or
- an occupation certificate and a certificate of registration in relation to a recently constructed pool.

If the certificate of non-compliance is attached to the sale contract the purchaser has ninety (90) days from the date of settlement of the sale of the property to make the pool compliant. However, vendors should be aware that in relation to delayed settlements the local council could issue the vendor with a notice requiring the vendor to rectify the non-compliant pool. It is important that this is adequately addressed in the sale contract.

Vendor's wanting to sell their properties with a swimming pool or spa pool should start preparing early and apply for a compliance certificate from the local council inspectors or accredited certifiers – there may be significant delays in obtaining these certificates until there are a sufficient number of certifiers who are accredited.

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Be careful when negotiating by email – you may find yourself bound by contract

When negotiating a deal by email or telephone you may find that you have entered unexpectedly into a legally binding contract.

In *Stellard Pty Ltd v North Queensland Pty Ltd* [2015] QSC 119, the Queensland Supreme Court decided that a vendor and a purchaser of a petrol station business and the land concluded a legally binding contract for sale by exchanging emails and telephone calls, including via a selling agent.

The purchaser expressed interest in buying the business and the land. The vendor sent an email to the purchaser containing terms of the proposed sale and requesting personal guarantees from directors of the purchaser's entity. The email attached a draft contract for the purchaser's review. On the following day the purchaser had telephone discussions with the vendor that a contract would generally be on the terms of the vendor's email. The purchaser then sent an email to the vendor confirming the purchaser's offer to buy for certain price and that the offer was subject to a contract which could be exchanged shortly and the offer was open for immediate acceptance. Shortly after the vendor accepted the offer by email and stated the acceptance was subject to execution of the contract which was to be amended by the purchaser as agreed and returned to the vendor. Lawyers for the purchaser then forwarded to the vendor the amended contract with deleted personal guarantees condition. Soon the selling agent informed the purchaser that the vendor would not be selling to the purchaser as the amended contract was not accepted due to deletion of the personal guarantees, and that the vendor contracted to sell to another person.

The purchaser sued the vendor for specific performance claiming that a binding contract was concluded by exchange of emails and telephone calls.

The Court handed down judgment for the purchaser and found that the binding and enforceable contract existed on basis of the circulated emails although they were expressed to be subject to execution of the contract. The Court reasoned that the context of and expressions used in the emails strongly suggested that the parties wished to be bound immediately and exclusively on the agreed terms and expected to make a further contract in substitution for the first contract and that the further contract would contain additional terms. Further, the Court held that the absence of agreement on personal guarantees did not affect existence of the contract as provision of personal guarantees was not a condition for the contract formation.

The Vendor argued that even if the contract existed it was unenforceable as it was not signed. The Court established that despite absence of formal signatures, the signature requirements were satisfied pursuant to *Electronic Transactions (Qld) Act 2001* because identification of persons and their intention to sign could be established.

When negotiating by email or telephone it is important to make it clear to the other parties that there will be no legally binding concluded agreement until a formal written contract is agreed and signed.

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