



## Underpay your staff? It might get personal

Executives of companies may now be held personally liable if they have failed to back-pay employees their workplace entitlements. In the recent Federal Circuit Court decision of *FWO v Step Ahead Security Services Pty Ltd* the Court provided its interpretation of section 550 of the Fair Work Act ("FWA") which allows a Court to make orders against "a person who is involved in a contravention of the FWA" including in relation to underpaid employee entitlements. As a result of this decision, "accessories" to a company such as directors, managers and possibly external advisors cannot be shielded behind the corporate veil to avoid personal liability for underpaid employees of a business. Moreover, the practice of winding up an employing entity to avoid paying those liabilities may mean that directors or managers will have to pay them plus penalties.

In the *Step Ahead* decision, a sole director of a company which employed eight security guards in the Gold Coast and Tweed Coast areas admitted to underpaying his staff but did not make those payments. Upon an application by the Fair Work Ombudsman the Court held that the sole director should be jointly and severally liable with the company for repaying the employees' entitlements. The Court relied on several grounds including that the company had been wound up and therefore could not repay the entitlements itself, the director was responsible for ensuring the company complied with its legal obligations and interestingly that "public policy also requires the prevention of people retaining a benefit resulting from the misconduct".

This decision should act as a warning to directors and others connected to businesses, such as managers, that using corporate structures to escape responsibilities for paying employees their legal entitlements will not be accepted.

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## Merry Christmas and a Happy New Year



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## ACCC Bans Excessive Credit Card Surcharges

A 2015 study conducted by Mastercard found that Australians pay approximately \$1.6 billion annually in credit card surcharges. In response to this study and a high number of consumer complaints, the *Competition and Consumer Act 2010* (Cth) (“the Act”) has recently been amended to prohibit businesses from imposing excessive credit card surcharges on consumers.

The ban on excessive surcharges took effect for large merchants from 1 September 2016 and will apply to all businesses from 1 September 2017. A large merchant is defined as a business which satisfies at least two of the following requirements:

1. the business has a consolidated gross revenue of \$25 million or more;
2. the value of the business’s consolidated assets is \$12.5 million or more; or

3. the business employs 50 people or more employees.

Businesses may still impose a surcharge for using credit cards, debit cards and electronic payments, however, customers must be charged no more than the true amount of a business’s costs in accepting payment by particular methods. The Reserve Bank of Australia (“RBA”) will regularly review and set the standards for what level of surcharge is allowable under the Act.

The first standard by the RBA defined the ‘permitted surcharge’ for each type of card based on the merchant’s average cost of accepting that type of card excluding costs involved in risk of fraud or IT infrastructure. The RBA published a guidance note stating that the average cost of accepting a type of card is as follows:

1. 0.5% for a debit card;
2. 1.0 to 1.5% for a Visa or MasterCard; and
3. 2-3% for American Express cards issued by Australian banks.

The Act does not apply to BPAY, Diners Club cards, American Express cards issued directly by American Express, PayPal, cheques and cash. American Express and Diners Club have voluntarily agreed not to charge merchants more than the RBA standards on surcharging.

The Australian Competition and Consumer Council (“ACCC”) will enforce the standards set by the RBA and impose penalties on businesses in breach of the standards. If a business is found to be charging an excessive surcharge they could be fined up to \$108,000. The ACCC also has the power to act on behalf of a group of consumers who have been charged excessively and bring the matter to Court where pecuniary penalties of \$1,164,780 can be enforced.

If you have been charged an excessive credit card surcharge or need assistance understanding your compliance obligations under the Act we would be happy to assist.

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## Annual Leave Changes in Modern Awards

The Fair Work Commission (“FWC”) has amended the annual leave provisions in the majority of the Modern Awards. The changes fall into the four following categories:

### Cashing out annual leave

Employees under certain Awards can now cash out less than two weeks of annual leave each year if they have a signed written agreement with their employer and will have at least four weeks annual leave left after the cash out.

### Annual leave in advance

Some Awards now allow an employer and employee to agree that an employee can take paid annual leave before he/she accrues it. That agreement needs to be in writing

and signed by both the employer and the employee and state the amount and timing of leave to be taken in advance.

### Excessive annual leave balances

“Excessive leave accrual” is when an employee has accrued more than eight weeks of paid annual leave (or ten weeks for a shift worker). If an employee has an excessive leave accrual and is unable to agree with his/her employer on when to take annual leave then:

1. the employer can direct the employee to take one or more periods of annual leave; or,
2. the employee can request one or more periods of paid annual leave and the employer must grant this request (this provision applies from 29 July 2017).

Each notice must be in writing and meet certain requirements including giving the other party between eight weeks’ and 12 months’ notice of when the leave will begin.

### Payment for annual leave

Previously under many of the Modern Awards an employer had to pay an employee’s annual leave entitlements immediately before the commencement of the employee’s annual leave meaning the employer had to make arrangements for calculating and paying the annual leave outside of the normal payroll cycle. The FWC has amended 51 Awards by allowing employers who pay employees by EFT to pay employees’ annual leave in accordance with their usual pay cycle. This only applies to employees paid by EFT and does not extend to employees paid by cash or cheque.

The FWC has amended 114 of the 122 Modern Awards and most of the changes apply from 29 July 2016 but only some of the above changes apply to some awards. We would be happy to help if you are unsure which award covers your employees or the effect of the above on your business.

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## Changes in Management of Strata Schemes

Majority of changes to the strata management legislation commenced on 30 November 2016, remaining changes are anticipated to start on 1 July 2017. Some changes concern how an owner's corporation ("OC") will function and how strata properties will be managed. These changes will affect persons who own or rent strata units and developers of strata properties.

Some of the more relevant changes can be summarised as follows:-

- Tenants will be entitled to participate in management of an OC if at least 50% of strata lots are leased and notice of tenancy was provided to the OC. Tenants may be present at the OC's meetings but have no voting rights unless they hold a proxy from an owner. Tenants will have to elect their representative to the strata committee. However, the representative's decision making rights will be restricted: they will

have no right to vote or make a motion, and may need to leave a committee meeting when finances or levies are being discussed.

- Voting at the OC or committee meetings will be able to proceed by way of a tele or video conference, email or other electronic means or by arranging pre-meeting voting. An OC resolution will be required to implement this procedure.
- Use of proxies at the OC meetings will be restricted. For example, strata and building managers will not be able to use a proxy vote if it would assist or allow them to obtain a pecuniary interest or a monetary benefit. Developers will also be restricted from using a proxy vote if the proxy or power of attorney has been granted in a sale contract.
- Prior to a first annual general meeting of the OC, a developer will be required to supply to the OC an initial maintenance and inspection schedule for any item on common property where maintenance and inspections are required to avoid damage or ensure proper functioning. Such schedule will need to be provided with manufacturer's warranties, manuals and contact details with

respect to equipment listed in the schedule.

- Other documentation required to be provided by a developer prior to the first AGM includes copies of building valuations, building contracts, service agreements and the most recent BASIX certificate.
- The OC is given the right to dispose of abandoned goods and personal property, including cars, left on common property without resorting to the procedures under the uncollected goods legislation.
- New model by-laws are provided by the legislation and will apply to new schemes and current schemes if adopted by a special resolution of the OC. By-laws restricting number of occupants per a strata unit will not apply to immediate family members and carers residing in the unit.

Time will show how these new changes will practically operate and the extent of improvements to strata living they will facilitate.

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## Abolished Duties

On 1 July 2016 several duties were abolished in New South Wales.

### Mortgage Duty

All mortgages executed on or after 1 July 2016 will not be liable to stamp duty. Further money advanced under a mortgage on or after 1 July 2016 will not be liable for mortgage duty, irrespective of the date the mortgage was executed.

As a result of the above, mortgages entered into on or after 1 July 2016 do not need to be stamped at the Office of State Revenue.

### Business Asset Duty

The following types of property are no longer dutiable:

1. The following business assets:
  - a. the goodwill of the business if the business supplies goods or services in NSW; or

- b. intellectual property which has been used or exploited in NSW; or
- c. a statutory licence or permission under a Commonwealth law provided that the rights can be exercised in NSW.

2. A statutory licence or permission issued under NSW law.
3. A gaming machine entitlement as defined in the *Gaming Machines Act 2001*.

Stamp duty is not payable on the value of the above types of property which are included in a dutiable transaction entered into on or after 1 July 2016.

### Market Securities (shares and units) Duty

From 1 July 2016 the following types of property ceased to be dutiable property:

1. Shares in a company which is incorporated in Australia.
2. Shares in a corporation which is incorporated outside of Australia but are

registered on an Australian register.

3. Units in a unit trust scheme which is registered on a NSW registry.
4. Units in a unit trust scheme which are not registered on a NSW registry, but the manager or trustee of the unit trust is a NSW company or is a natural person who resides in NSW.

Although the market security duty has been abolished, if the unit trust or company has land holdings in NSW which are valued over \$2,000,000 then transactions could attract landholder duty.

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## Alison's Admission



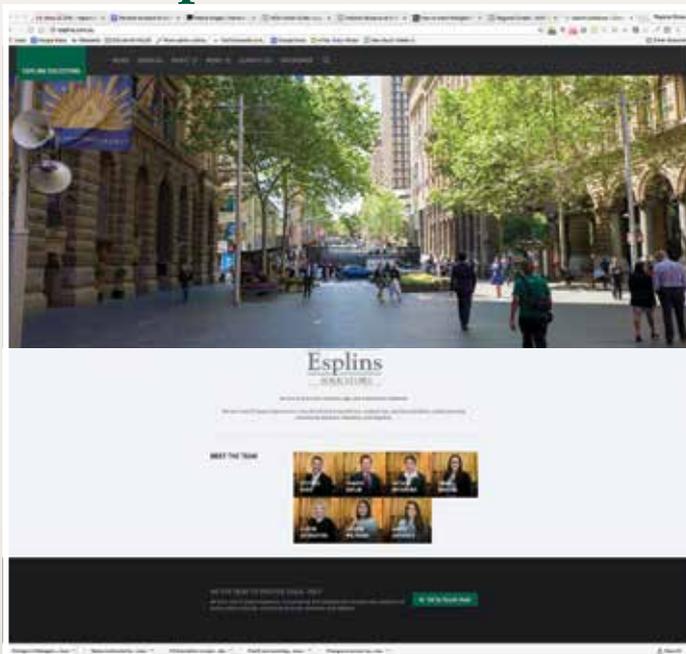
*In November 2016 Stephen moved Alison's admission to the Supreme Court of NSW*

## Melbourne Cup 2016



*Esplins celebrated Melbourne Cup at Luna Park.  
Left to Right: Mandy, Emma, Natalya, Alison and Lauren*

## New Esplins Website



*Esplins celebrated Melbourne Cup at Luna Park.  
Left to Right: Stephen, Hamish, Warren*

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