



The firm went to lunch with Nicole who worked at Esplins for over 19 years. Left to right: Hamish, Nicole, Stephen, Lauren

DON'T HATE WHEN A CUSTOMER IS LATE (IN PAYING YOUR INVOICE)

If you have a customer who is tardy with paying your invoices then you'll need to be careful you don't SHOUT when demanding that they pay. The recent decision of *Trenfield v HAG Import Corporation (Australia) Pty Limited (No. 2)* in the Queensland District Court involved the question of whether a creditor reasonably suspected that a debtor was insolvent. The creditor wrote in an email to the debtor that they were unable to pay their debts and in a follow up email the creditor demanded payment “*in a much larger font, which I suspect is the email equivalent of shouting*”, so said Justice McGill in his judgment. In this case the shouting email worked against the creditor.

One of the most common ways for a creditor to defeat an unfair preference payment claim by a liquidator is to show that when you received payment from the debtor you “had no reasonable grounds for suspecting that the company was insolvent at that time

or would become insolvent”. The risk for creditors when making demands for repayment is that they inadvertently reveal that they think the debtor is insolvent by either saying as much in an email or questioning their ability to pay.

The lesson to be learnt is that when a customer is having trouble paying your invoice you need to be careful about the manner in which you demand repayment and avoid prompting a liquidator to use it against you at a later date. It is always difficult to bite your tongue when a customer is late in paying your invoices but sometimes it is in your best interests to communicate calmly and simply.

Esplins Solicitors is always willing to help in this regard.

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YOU MAY BE LIABLE FOR SURCHARGE PURCHASER DUTY AND LAND TAX SURCHARGE

Surcharge purchaser duty and land tax surcharge (“the surcharges”) is currently operating in respect of a foreign person purchasing and owning a residential land in NSW.

Determining who is a foreign person is less straightforward than it might seem, particularly with respect to discretionary trusts.

Surcharge purchaser duty is payable by a foreign person who acquires residential land in NSW at a rate of 8% on top of the usual duty. Additionally, surcharge land tax at a rate of 2% of the land value on top of the ordinary land tax rate is also payable by a foreign person who owns residential land in NSW. A land value threshold does not apply to this surcharge.

The legislation defines a “foreign person” as:

- an individual who is *not* an Australian citizen or ordinarily resident in Australia. To be ordinarily resident in Australia, an individual must (a) have actually been in Australia for 200 or more days in the 12 months prior to incurring the tax liability and (b) not be subject to any limitation as to the time they can continue to live in Australia (such as permanent visa holders or New Zealand citizens);
- a company, a trustee of a trust or a general partner of a limited partnership where an individual who is not ordinarily resident in Australia holds a substantial interest of 20% or more; and

- two or more persons each of whom are not ordinarily resident in Australia or a foreign corporation hold an aggregate interest of at least 40%.

Many discretionary trusts will be considered to be a “foreign person” under the legislation because most trusts have a very broad class of beneficiaries.

An Australian trustee of a trust will be deemed a “foreign person” if one of the potential beneficiaries of the trust holds a 20% beneficial interest in the trust. In a discretionary trust if there is at least one foreign person within the class of possible beneficiaries then the legislation deems the foreign person to have a 100% beneficial interest in the income and property of the trust. As such, the discretionary trust will be deemed a “foreign person” and liable to pay surcharge purchaser duty and surcharge land tax. It is irrelevant that no distribution was, or will be, made to the “foreign” beneficiary.

To avoid the surcharges, the Trust Deed may be amended to exclude any foreign person from the classes of possible beneficiaries; and such amendment must be irrevocable and normally be made before relevant surcharges apply.

We are happy to assist you in amending the Trust Deed of your family trust to avoid the surcharges.

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YOUR EMPLOYMENT CONTRACT MIGHT BE MORE THAN YOU BARGAINED FOR

Employers and employees need to be aware that an employment contract can include “implied” terms which are not expressly written or spoken about between the parties. Two recent cases have addressed implied terms regarding suspension and “gardening” leave.

In *Avenia v Railway & Transport Health Fund* [2017] FCA 859 the Federal Court of Australia held that an employer has a right at common law to suspend an employee on full pay for as long as it is necessary to undertake and conclude an “investigation”. This includes where an employer is investigating alleged employee misconduct or trying to determine facts relevant to such allegations.

“Gardening” leave is the practice where an employee has either resigned or been terminated and the employer requires the employee to stay away from the workplace during his or her paid notice period. In *Grace Worldwide (Australia) Pty Limited v Steve Alves* [2017] NSWSC 1296 a senior employee announced his resignation to

join a competitor and the employer placed him on three months of gardening leave. The NSW Supreme Court found that the employer had an implied right to require the employee to take gardening leave because implying that term to the employment contract was “reasonable and equitable and necessary to give business efficacy to an employment contract so as to avoid contact between an employee and a competitor”.

It is crucial for both employers and employees to understand the rights and obligations in their employment contracts, whether they are express or implied by law.

Please contact our office if you require any help in reviewing your employment contracts, either as an employer or an employee, or to discuss your rights and obligations.

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NSW RENTAL LAW SHAKE UP

New legislation has been introduced to NSW Parliament which proposes to amend residential rental laws. The proposed amendments are the most significant changes to rental laws in recent times and are likely in response to the growing number of renters in NSW.

The most significant proposed changes to the *Residential Tenancies Act 2010* are:

- rents paid in a periodic agreement are not allowed to be raised more than once a year;
- tenants or co-tenants can give a domestic violence termination notice without penalty if they are the victim of domestic violence;
- all properties must meet new minimum standards, including:
 - o basic access to electricity and gas;
 - o structurally sound buildings;
 - o adequate natural or artificial lighting as well as ventilation; and
 - o adequate outlets for lighting, heating and appliances,
- landlords must repair smoke alarms with a maximum penalty of \$2,200 for failing to repair;

- tenants who require urgent repairs can apply to the Department of Fair Trading rather than the NSW Civil and Administrative Tribunal;
- landlords cannot unreasonably refuse minor alterations, such as picture hooks; and
- landlords must provide tenants with at least 2 copies of the completed condition report after signing a residential tenancy agreement, with a maximum penalty of \$2,200.

Minister for Better Regulation Matt Kean, who introduced the reforms, said that *“under these common-sense changes, renting families will be able to make minor alternations, such as installing a picture hook to hang their family photos, and will benefit from a new set of minimum standards to ensure properties are in a liveable condition”*.

If you are unsure of your responsibilities as a landlord or you need advice in relation to your rights as a tenant, please do not hesitate to contact us.

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Esplins celebrated Stephen's 60th birthday earlier this year. Left to right: Hamish, Stephen, Lauren, Mandy, Alison, Natalya