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GIFT CARDS KEEP ON GIVING

Christmas is always a time for giving and receiving gift cards or vouchers. How many times have you received gift cards and then when you get around to using them they have expired?

The NSW Government has recently made new laws governing gift cards and vouchers. In NSW the Fair Trading Act has been amended so that gift cards and vouchers sold to consumers in NSW must have a minimum expiry period of three (3) years. Additionally, post-purchase administration fees associated with redeeming the gift card/voucher cannot be charged if they would have the effect of reducing the value of the gift card/voucher. There are some limited exceptions to these new rules.

Now all consumers will have 3 years to redeem gift cards or vouchers they receive this Christmas so make sure you don't lose them.

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SHORT-TERM LETTING

This Christmas might be the last one before new short-term letting rules apply.

The NSW Government has announced its policy on short-term lettings and has asked for feedback from the public and industry participants by 16 November 2018.

The new Policy involves amendments to the Fair Trading Act to establish a code of conduct for participants in the short-term rental accommodation industry. The proposed code of conduct applies to all occupants of residential premises for 3 months or less and applies to all participants in that industry including Airbnb and the like, hosts of residential premises and people who book short-term accommodation. A breach of the code of conduct by any participants will be an offence and a fine can apply.

The Strata Schemes Management Act is also going to be amended to allow an owners corporation with a 75% majority to make by-laws prohibiting short-term rental accommodation where the lot in question is not the lot owners' principal place of residence.

We await the details of the Code of Conduct.

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SUPERANNUATION NOMINATIONS AND ENDURING POWERS OF ATTORNEY

An interesting question has recently appeared in estate planning. Can an attorney under an enduring power of attorney make, alter or revoke a superannuation binding death benefit nomination ("BDBN") for their principal if the principal lacks mental capacity? By analogy to wills some people may think that an attorney cannot do such acts. While it is settled in law that a principal cannot delegate to their attorney a power to make, alter or revoke a will, a recent Supreme Court of Queensland decision shows that in some circumstances an attorney may make or alter a BDBN.

In 2013 Mr Giles, who was a member of a self managed superannuation fund, made a BDBN nominating his wife a beneficiary for 47.5% of his death benefits, his son for another 47.5% of his death benefits and his sister for the remaining 5% ("the 2013 BDBN") . Importantly, the 2013 BDBN stated it would expire three years after it was made. Some time after signing the 2013 BDBN, Mr Giles lost capacity to make financial decisions. His wife and sister started managing Mr Giles' financial affairs as his attorneys under an enduring power of attorney. Mr Giles' attorneys extended the 2013 BDBN for another three years while otherwise confirming it and later they made a new BDBN excluding Mr Giles' sister and leaving 5% of the death benefits which would go to her to Mr Giles' wife and son equally. The Court found that because the superannuation deed and superannuation laws do not expressly prohibit an attorney making a BDBN, there was no reason to conclude that making a BDBN is an act that must be personally performed by a member of a superfund. The Court decided that Mr Giles' attorneys could extend the 2013 BDBN as this act was to ensure continuity of Mr Giles' wishes in the 2013 BDBN. But Mr Giles' wife and sister were not authorised to make the new BDBN under the enduring power of attorney as it represented a conflict transaction that was not authorised by Mr Giles (without an express authority attorneys cannot make gifts of the principal's property to themselves or others).

The practical implication of the above decision is that, subject to a superannuation deed and superannuation laws, an attorney under an enduring power of attorney may be able to make a new BDBN for the principal if there is an express authority in the power of attorney document authorising conferral of benefits on the attorney or others. If the Court decision is adopted in NSW an attorney may be able to extend a BDBN to prevent it lapsing even if a power or attorney document is completely silent on it.

You may wish to consider what you would like your attorney to do with respect to your BDBN and seek a legal advice whether to expressly include in your enduring power of attorney an authority for your attorney to confirm, extend, revoke or make a BDBN, or expressly exclude such an authority, or leave your current enduring power of attorney as is.

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Esplins celebrated Melbourne Cup at Ms G's this year

BE CAREFUL WHAT YOUR WILL DOES - AND DOES NOT - CONTEMPLATE

Section 12 of the Succession Act 2006 (NSW) provides that a will is revoked by marriage unless that will was made in contemplation of marriage. Practically, a will made in contemplation of marriage usually contains an express statement to that effect. This was not the case in the recent Supreme Court case, Re Estate Grant, deceased [2018] NSWSC 1031 and the Court needed to determine whether the testator had made his will in contemplation of marriage.

In October 1989 the deceased married his first wife (who had two sons from a previous relationship) and they had twin sons. The deceased had an extramarital relationship with a co-worker (who became his second wife) and they commenced a de facto relationship in 2012. The deceased's divorce from his first wife was finalised in late 2013. The deceased made a will on about 3 January 2014 that provided for his estate to be split equally between his two biological sons and one of his stepsons, Max (he was estranged from his other stepson). The deceased was diagnosed with brain cancer in February 2015. The deceased and his second wife married on 19 September 2015 and he passed away on 14 December 2015 aged 55. The deceased and his second wife had no children together.

The second wife claimed the deceased's will was not made in contemplation of marriage and that their September 2015 marriage revoked his January 2014 will. If successful, that would mean that the deceased died intestate and his second wife would receive his personal effects, a statutory legacy of approximately $450,000 and one half of the remainder of his estate with the other half to be divided between the deceased's two biological sons. Max would receive nothing as a stepson of an intestate.

The deceased's biological sons and Max claimed that the will was made in contemplation of marriage so that if the Court upheld the will they would receive the estate in equal thirds. The second wife would then receive nothing from the deceased estate.

The second wife and Max each made a family provision claim in the event that their respective claims regarding the will's validity failed and they received nothing from the estate as a result.

After examining the facts of the deceased's relationship with his second wife and the law regarding the phrase "in contemplation of marriage", the Court held that the will was not made in contemplation of marriage and the deceased's marriage to his second wife revoked his will. As a result, the deceased died intestate and his estate was to be divided in accordance with the intestacy rules between the deceased's second wife and biological sons. As Max received nothing on an intestacy the Court ordered provision of $750,0000 be made for him from the deceased's superannuation which the Court designated as part of the deceased's notional estate.

Although this case had a very particular set of circumstances, it highlights the importance of periodically reassessing your will, particularly where multiple marriages and blended families are at play. Please contact our office if you wish to discuss anything arising out of this article or wish to review your estate planning.

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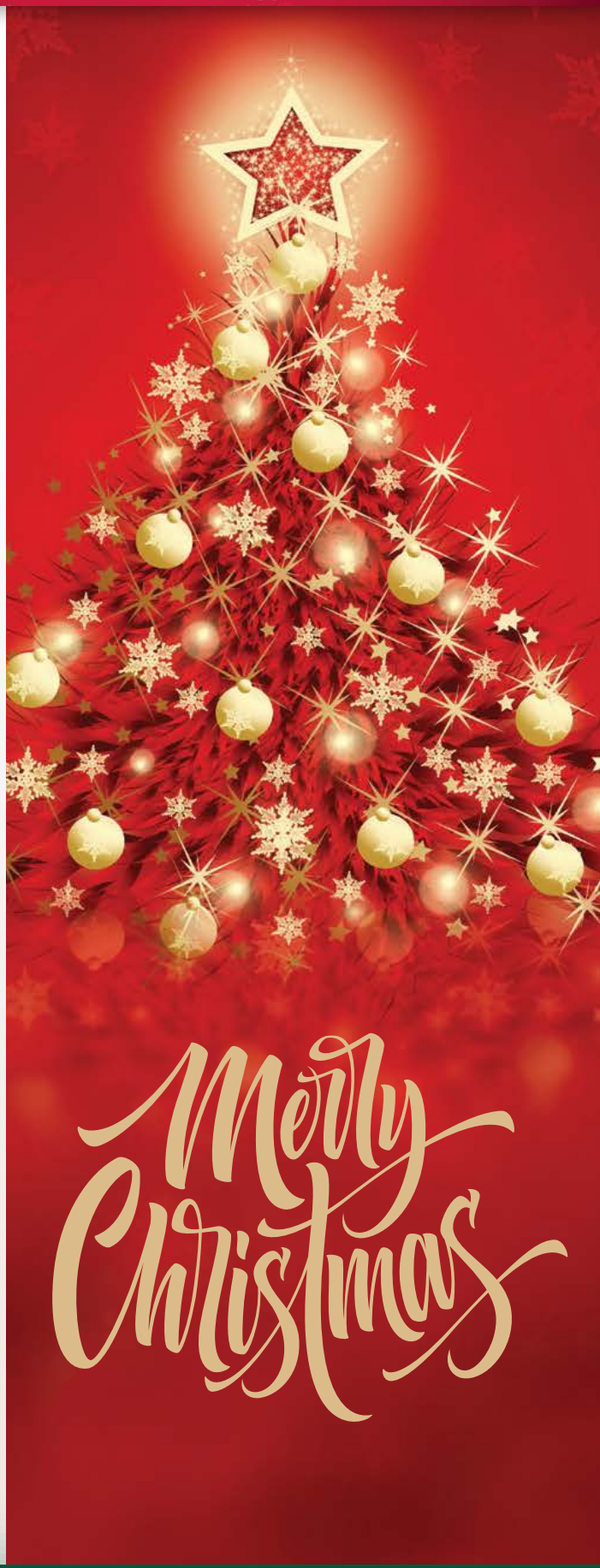

ACCC PENALISING EXCESSIVE CREDIT CARD SURCHARGES

As advised in our December 2016 Newsletter the Competition and Consumer Act 2010 (Cth) ("the Act") has been amended to prohibit businesses from imposing excessive credit charge surcharges on consumers. These amendments came into effect for all businesses on 1 September 2017.

Credit card surcharges are deemed excessive if they exceed the actual costs incurred by the business by accepting a payment by card. The Reserve Bank of Australia ("RBA") has set standards outlining the standard charges in relation to certain payment methods. The current rates set by the RBA are 0.5% for a debit cards, 1-1.5% for a Visa or Mastercard credit cards and 2-3% for American Express cards. The Act covers booking fees, transaction fees or convenience fees as long as the charge is in addition to the price of the goods or services and is a fee for processing payment regardless of the fee's description. The ban applies to all businesses that are based in Australia or who use an Australian Bank.

Recently the ACCC has issued numerous penalty notices to various companies for breaching the excessive credit card surcharge ban. On 17 October 2018 the ACCC issued a penalty notice to Lloyds Auctioneers in relation to a 2.25% flat surcharge to customers who made payments online using credit cards or debit cards. In a press release, the ACCC stated that these surcharges were higher than Lloyds cost of processing the payments by up to 1.43% and that customers were excessively charged between $30 and $350.

Similarly, the ACCC imposed a penalty on Fitness First on 26 September 2018 in relation to a 50-cent flat fee charged by Fitness First on the $46 fortnightly membership payments when customers paid by credit cards or debit cards. This amount was around 1.09% higher than Fitness First's costs of processing. There have been at least four (4) other ACCC media releases in relation to penalty notices issued by ACCC in relation to excessive credit card surcharging.

If you have any questions in relation to your obligations regarding credit card surcharges, please do not hesitate to contact our office.

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